Texas Review of Entertainment & Sports Law

Volume 17 **Fall 2015** **Number 1**

Published by The University of Texas School of Law

Texas Review of Entertainment & Sports Law

Volume 17
Issue 1
Fall 2015

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Cite as: TEX. REV. ENT. & SPORTS L.

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Texas Review of Entertainment & Sports Law

Volume 17
Issue 1
Fall 2015

VOLUME 16 EDITORIAL BOARD & STAFF EDITORS

Texas Review of Entertainment & Sports Law

Volume 17
Issue 1
Fall 2015

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The Rise and Fall of *Bad Judge*: Lady Justice is No Tramp

Taylor Simpson-Wood *

"The court is not the post office. It is the common thread that holds the social fabric of this country together."

—-Justice Sandra Day O'Connor[1]

I. INTRODUCTION: THE POPULAR LEGAL CULTURE TWO-STEP

"[T]here is no gainsaying that the medium [of television] has permeated every corner of public and private space, shaping consciousness, defining our reality, drawing us together and pulling us apart, in ways that will uniquely enshrine this historical period as The Age of Television."[2]

Much of the fabric of the modern world is woven on the loom of popular culture. While scholars have defined pop culture differently,[3] there is a general consensus as to its strong influence on modern society.[4] Broadly, it has been described as consisting of "the aspects of attitudes, behaviors, beliefs, customs, and tastes that define the people of any society."[5] It has also been described more narrowly as "the body of cultural commodities and experiences" commercially produced by the "culture industries" to be consumed by the average person.[6]

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1. Judge Linda Palmieri, *How Courts Work: The Human Side of Being a Judge*, *available at* http://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/humanelement.html, (last visited Oct. 18, 2015).

2. JAMES SHANAHAN AND MICHAEL MORGAN, TELEVISION AND ITS VIEWERS: CULTIVATION THEORY AND RESEARCH (1999).

3. JOHN STOREY, CULTURAL THEORY AND POPULAR CULTURE 1-10 (3d ed. 2001).

4. Richard K. Sherwin, *Picturing Justice: Images of Law and Lawyers in the Visual Media*, 30 U.S.F. L. REV. 891, 897 (1996); James R. Elkins, *Popular Culture, Legal Films, and Legal Film Critics*, 40 LOY. L.A. L. REV. 745, 746 (setting forth a set of "basic propositions" which are "uncontested" and include "[t]he popularity thesis: 'television shows, movies, and books about the law are widely popular in America.' The effects thesis: popular culture (film, TV, dramas, novels, and traditional and non-traditional new sources) 'teach Americans about the civil justice system.'" And "[t]he reality thesis: the depictions of law and lawyers we find in popular culture are sometimes at a variance with and at other times faithful representations of lawyers we find in the 'real world.'"; Victoria S. Salzmann, *Here's Hulu: How Popular Culture Helps Teach the New Generation of Lawyers*, 42 MCGEORGE L. REV. 297, 301 (2011) (noting that "[l]egal scholars are starting to recognize the positive impact of using popular-culture references as a mechanism of communication in legal discourse" and that "popular culture has become a powerful force in many lawyers' practices.").

5. Ray B. Brown, *Folklore to Populore*, *in* POPULAR CULTURE STUDIES ACROSS THE CURRICULUM 24, 25 (Ray B. Brown ed., 2004).

6. David Ray Papke, *From Flat To Round: Changing Portrayals of the Judge in American Popular Culture*, 31 J. LEGAL

Combining these definitions, it would follow that the term "legal popular culture" refers to society's perception of the legal profession and the judicial process formed after partaking of cultural commodities such as film, literature, song lyrics, lawyer advertising, and television.[7] In other words, legal popular culture is everything people know, or think they know, about the law from their consumption of popular culture.[8] Of all the mediums disseminating cultural commodities, television is certainly the most pervasive,[9] persuasive,[10] and, depending on the content of a particular legal show, the most pernicious.

As television has become our society's principal means of storytelling,[11] its offerings concerning the world of lawyers have become a staple of the popular culture consumed by Americans.[12] According to a "Cross-Platform Report" released by the Nielsen media ratings company in March of 2014, the average American watches more than five hours of television every day.[13] Although this number may vary according to ethnicity, television-viewing time increases steadily as people get older irrespective of their ethnic background.[14] In the aggregate, the average person watched about 141 hours of live television per month in the third quarter of 2014.[15] While television viewing may eventually decline, that doesn't mean that the public consumption of TV and film will decrease.[16] As viewers move away from watching traditional television, they are moving to streaming services. According to a 2014 Nielsen in-depth report,

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PROF. 127, 128 (2007). *See also*, Kimberlianne Podlas, *The Tales Television Tells: Understanding the Nomos Through Television*, 13 TEX. WESLEYAN L. REV. 31, 37 (2006) (defining popular culture as "any product such as television shows, movies, and popular music that is commercially made for the consumption of ordinary people.").

7. Michael Asimow, *Embodiment of Evil: Law Firms in the Movies*, 48 UCLA L. REV. 1339, 1341 (2001).

8. Shea Esterling, *Indiana Jones and the Illicit Trafficking and Repatriation of Cultural Objects*, *in* COURTING THE MEDIA: CONTEMPORARY PERSPECTIVES ON MEDIA AND LAW 149, 164 (Geoffrey Sykes ed., Nova Science Publishers, Inc.) (2010); MICHAEL ASIMOW & SHANNON MADER, LAW AND POPULAR CULTURE 8 (2d ed. 2013).

9. Kimberlianne Podlas, *Guilty on All Accounts: Law & Order's Impact on Public Perception of Law and Order*, 18 SETON HALL J. SPORTS & ENT. L. 1, 8-9 (2008) ("Because of its centrality in American Life, television is both our mainstream or popular culture and our primary storyteller."); Michael Pfau, Lawrence J. Mullen, Tracy Deidrich, and Kirsten Garrow, *Television Viewing and the Public Perception of Attorneys*, 21(3) HUMAN COMMUNICATIONS RESEARCH, 307 (1995) ("Because network prime-time programming is so pervasive, it constitutes a potentially powerful source of shared images . . . ."); JEFF GREENFIELD, TELEVISION: THE FIRST FIFTY YEARS 11 (Lory Frankel ed. 1977).

> With the single exception of the workplace, television is the dominant force in American life today. It is our marketplace, our political forum, our playground, and our school; it is our theater, our recreation, our link to reality, and our escape from it. It is the device through which our assumptions are reflected and a means of assaulting those assumptions.

10. Cynthia R. Cohen, *Media Effects from Television Shows - Reality or Myth* 27, 31 in LAWYERS IN YOUR LIVING ROOM! LAW ON TELEVISION 15, 23 (Michael Asimow ed., 2009) ("[L]aw-themed movies do not produce the same contrast effect on lawyers' image as a . . . character in a weekly series. While both movies and television have extreme characters, the weekly series has a stronger influence, because character development comes over time.").

11. Roger Silverstone, *Television, Rhetoric, and Return of the Unconscious in Secondary Oral Culture*, in MEDIA, CONSCIOUSNESS, AND CULTURE 147-159 (Bruce E. Gronbeck et al., eds. 1991). It has been maintained that this storytelling phenomenon has fundamentally changed American culture. MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN (1964).

12. L.J. Shrum, *Effects of Television Portrayals of Crime and Violence on Viewers' Perceptions of Reality: A Psychological Process Perspective*, 22 LEGAL STUD. F. 257 (1998) ("noting that "[f]ew would argue that television is not a powerful medium" with "its ability to capture both our attention and our imagination. Empirical evidence of this power is demonstrated not only by the sheer frequency with which Americans view television . . . but also by its centrality in American Life.").

13. David Hinkley, *Average American Watches 5 Hours of TV Per Day, Report Shows*, NY DAILY NEWS (Mar. 5, 2014, 5:27 PM), http://www.nydailynews.com/life-style/average-american-watches-5-hours-tv-day-article-1.1711954.

14. *Id.*

15. Victor Luckerson, *Fewer People than Ever Are Watching TV*, TIME Dec. 3, 2014, *available at* http://time.com/3615387/tv-viewership-declining-nielsen/.

16. *Id.*

"forty percent of households now subscribe to a subscription video on demand such as Netflix or Amazon Prime Instant Video," and viewing of online videos on the computer has increased "to 10 hours and 42 minutes" per month.[17] Clearly, whatever medium may be used for viewing, television series constitute one of the most significant disseminators of legal popular culture in America.[18]

This rampant dissemination raises two important issues for the legal profession. First, how much of "the law" to which the viewing public is exposed while watching legal television shows constitutes a true reflection of reality? And, second, does verisimilitude really matter? If viewers of a fictional, legal television series can discern pure entertainment from reality, then it would be irrelevant whether the networks and studios are accurate in their portrayals of the legal profession. This, however, is infrequently the case.[19] There is a legitimate concern that a correlation exists between what viewers see and what they believe about the law and about lawyers. That content of legal television shows affects the perceptions of audience members.[20]

Arguably, one of the reasons that legal television shows are so popular is because there is an aura of mystery about the practice of law for the virginal viewer. Much of what lawyers do occurs outside of public purview. The wall of confidentiality, which necessarily surrounds a lawsuit, in conjunction with the inherent nature of legal practice requiring that most of an attorney's work be conducted in private places such as the lawyer's office or a firm conference room,[21] creates an enigma and perpetuates a legal mystique.[22] When a layperson does enter the legal realm, it is usually only for a brief encounter as a litigant, a witness, or perhaps a juror.[23] Consequently, the "legally virginal" viewer, whose exposure to the justice system may rely

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17. *Id.*

18. *See* Podlas, *supra* note 9, at 1 (noting that television "is American culture's most persuasive medium").

19. Robin P. Malloy, *Introduction to the Symposium,* 53 SYRACUSE L. REV. 1161, 1162 (2003); Angelique M. Paul, *Turning the Camera on Court TV: Does Televising Trials Teach Us Anything About the Real Law?*, 58 OHIO ST. L.J. 655, 655 (1997)

> ("So what influences the public's perception of justice? Television. For the majority of Americans, television is the most important source of information, and for many it is the only source of information. This is particularly true when it comes to gathering information about the law. Because the majority of Americans have had no personal experience with the legal system, and because the majority of Americans get their information about the world solely from television, the portrayal of justice on television is extremely important not only to the continued viability of the legal system, but also to the individual's understanding of that system."

(citations omitted)); *see also* Kimberlianne Podlas, *Please Adjust Your Signal: How Television's Syndicated Courtrooms Bias Our Juror Citizenry,* 39 AM. BUS. L.J. 1, 2-3 (2001) ("Most individuals, however, have little direct contact with the justice system and its rules. Consequently, they learn about the law and courts through the media, such as portrayals in film, newspaper coverage, and television broadcasts of trials." (citations omitted)).

20. *See,* e.g. Asimow, *supra* note, at 1341; Lawrence M. Friedman, *Law, Lawyers, and Popular Culture,* 98 YALE L.J. 1579, 1579 (1989) (discussing the ways in which legal culture and societal norms intersect with one another); Brent Kitei, *The Mass Appeal of The Practice and Ally McBeal: An In-depth Analysis of the Impact of These Television Shows on the Public's Perception of Attorneys,* 7 UCLA ENT. L. REV. 169, 170 (1999).

21. *See* Malloy, *supra* note 19, at 1162 (noting that "the law operates in places and spaces that are partially hidden from public view.").

22. *Id.* ("For many, if not most lay people the law appears visible in fragmented ways that are abstract and to a certain extent incomprehensible.").

23. *Id.*; Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture,* 28 COLUM. J. L. & ARTS 91, 95 (2005) (Except "for occasionally scripted appearances on the legal stage, individuals generally remain isolated and intermittent participants in the legal system.").

heavily, if not exclusively, on television, is extremely susceptible to equating the legal system portrayed by prime-time television to that of the real world.[24]

It is also important to consider the symbiotic relationship that exists between popular legal culture and the legal system. An inaccurate portrayal of the legal system on television may result not only in misconceptions by much of the viewing public but might affect the legal process itself.[25] Not only does television shape the viewers' perceptions of attorneys and the legal process, the law and members of the profession will eventually be transformed to conform with the viewers' expectations.[26] Just as the impact of waves on the sand will ultimately change the shape of the beach, so too will the force of legal popular culture mold the world of law.[27]

Ultimately, the "feedback loop"[28] between law and popular culture is self-perpetuating. Popular culture influences the viewing public's perception of the law, which in turn affects the public's expectations, which are reinforced by the misconduct of actual members of the legal profession, which affects what the networks will portray as popular legal culture.[29] This cause

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24. *See* Jessica M. Silbey, *What We Do When We Do Law and Popular Culture*, 27 Law and Soc. Inquiry 139, 142 (2002) (reviewing RICHARD K. SHERWIN, WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE (2000)); Michael Pfau, Lawrence J. Mullen, Tracy Deidrich, and Kirsten Garrow, *Television Viewing and Public Perception of Attorneys*, 21 (3) HUMAN COMMUNICATIONS RESEARCH 307, 310 ("In other words, television programming's depictions are influential mainly in those circumstances in which people have limited opportunity to confirm or deny television's symbolic images firsthand."); Victoria S. Salzmann, *The Film Law Abiding Citizen: How Popular Culture Is Poisoning People's Perceptions Of Pleas*, 41 SW. L. REV. 119, 121 (2011).

> Of course, not only virginal viewers are susceptible to the influence of television. In a seminal article about the effects of violence in television, the authors beautifully illustrate this point with an entertaining anecdote concerning an exchange between a lawyer and the judge during a trial in a California state court:
>
> During an overly heated cross-examination of a witness, the defense counsel jumped to his feet, shouting his objection, 'Your Honor, Prosecution is badgering the witness!!' The judge calmly replied that he also had in fact seen that objection raised often on *Perry Mason*, but unfortunately, such an objection was not included in the California code.

See Shrum, *supra* note 12, at 267 (citing George Gerbner & Larry Gross, *Living with Television: The Violence Profile*, 26 J. COMM. 178 (1976)).

25. Kimberlianne Podlas, *Funny or No Laughing Matter?: How Television Viewers Interpret Satires of Legal Themes*, 21 SETON HALL J. SPORTS & ENT. L. 289, 290 ("Research demonstrates that television plays a part in both cultivating public opinion about the law and constructing legal culture."); *See* Asimow, *supra* note 7, at 1341 (noting that those who write in the area of law and popular culture "believe that the public learns most of what it thinks about law, lawyers and the legal system from works of popular legal culture.")

26. Naomi Mezey, *Law As Culture*, 13 YALE J. L. & HUMAN. 35, 37 (2001) (noting that it is intuitive and common sense to recognize that the relationship of law to culture is one where law partakes of culture—by reflecting it as well as by reacting against it—and where that culture refracts law).

27. David M. Spitz, *Heroes or Villains? Moral Struggles vs. Ethical Dilemmas: An Examination of Dramatic Portrayal of Lawyers and the Legal Profession in Popular Culture*, 24 NOVA L. REV. 725, 734 (2000) ("The interplay between television and culture has been analogized to waves on the beach, where over time, the beach clearly changes shape under the impact of the waves.").

28. Susan Bandes, *We lost it at the Movies: The Rule of Law Goes from Washington to Hollywood and Back Again*, 40 LOY. L.A. L. REV. 621, 626 (2006-2007) ("Popular notions of what law is and ought to be, in turn, 'contribute[] to the production of law' in manifold ways.") (citations omitted); Susan Bandes and Jack Beerman, *Lawyering Up*, 2 Green Bag 2d 5, 6 (1998) (discussing how the American public is educated about its *Miranda* rights and that "television has become . . . our culture's principal storyteller, educator, and shaper of the popular imagination. It not only transmits legal norms, but also has a role in creating them. Media images of law enforcement are, in the minds of many viewers, synonymous with reality." *Id.* The result of this feedback loop is that "the continual repetition of certain stock characters, certain story lines, certain messages, has the ability to shape [viewer] expectations about the ways in which real cops, real suspects and real citizens act - and ought to act - in the real world." *Id.* (citations omitted).

29. Susan Bandes, *We lost it at the Movies: The Rule of Law Goes from Washington to Hollywood and Back Again*, 40 LOY. L.A. L. REV. 621 (2006-2007).

and effect scenario is the result of what might be referred to in dance parlance as the "Popular Legal Culture Two-Step."

First, television's version of legal popular culture influences the lay public's perceptions about the legal profession.[30] This influence is most effectively exercised in situations where viewers have little opportunity to learn first-hand whether their perceptions are accurate and where the assumptions being made are not grounded in preconceived notions or entrenched convictions.[31] Of course, every viewing experience or interpretation will differ from person to person depending upon individual experiences, including a viewer's social status and economic background.[32] While legal popular culture does not impose "a monolithic view of law," a number of characters and plots do emerge out of the multitude of legal images portrayed by television, which seem familiar to a majority of viewers.[33] These almost universal symbols are then absorbed, construed, and assimilated to varying degrees by viewers as they form their own perspective of the legal profession.[34]

After the assimilated, legal popular culture perceptions have taken root, perceptions cultivated from television portrayals are usually amplified and solidified by the cultivation process known as resonance.[35] This process is triggered by viewers learning by direct experience, or from what they consider to be a reputable source, that actual members of the legal profession or the judiciary have comparable negative traits and/or engage in unethical actions that are the mirror image of those they consistently view on legal television series.[36]

When such reverberation and reinforcement occurs, the repercussion for the legal profession is that it will have no choice but to at least partially adapt to the version of the legal world now held by the Two-Stepping viewers.[37] For example, attorneys need to be aware that what a jury will ultimately determine is true will be the result not only of their version of the case presented at trial, but by similar cases with which the jurors are familiar.[38] A majority of

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30. *See* Podlas, *supra* note 9, at 1

> ("Sometimes television's narratives supplement understandings gleaned from other sources, but oftentimes they substitute for direct experience. The later is true with regard to law. Although most individuals have little direct experience with the legal system, legal themes pervade television. Consequently, research has shown that the public relies on television as its primary source of information about the legal system.")

(citations omitted). *See also*, Connie L. McNeely, *Perceptions of the Criminal Justice System*, 3 J. CRIM. JUST. & POPULAR CULTURE 1 (1995); Eugene D. Tate and Larry F. Trach, *The Effects of United States Television Programs upon Canadian Beliefs about Legal Procedure,* CANADIAN JOURNAL OF COMMUNICATION, *available at* http://www.cjc-online.ca/index.php/journal/article/viewFile/238/144..To the extent then that television programming content is the only information available to the individual about courtroom activity, to the extent that these beliefs are new or tentatively held, or to the extent that television information is similar to information received from other r interpersonal sources and mass media source, television programming content will be influential in establishing beliefs, attitudes, and values about the legal system. *Id.*

31. G. Gerber & L. Gross, *Living with Television: The Violence Profile*, 26 J. OF COMMC'N. 173, 191 (1976).

32. Cynthia D. Bond, *"We the Judges": The Legalized Subject and Narratives of Adjudication in Reality Television*, 81 UMKC L. REV. 1, 54 (2012).

33. *See* Bandes, *supra* note 28, at 626; *See also* Bond, *supra* note 32 at 4-5 (examining "embedded narratives of legality in reality TV" to analyze what type of legal community is "constructed or suggests" and noting that the images of law in reality TV shows is not "unitary or monolithic." Rather, "the fragmentation of adjudicatory narratives across different show scenarios . . . suggests a multiplicity of visions of adjudicatory process.").

34. *Id.*

35. *See infra* notes 82 - 84 and accompanying text discussing the process of resonance in greater detail.

36. *See infra* notes 85 -90 and accompanying text discussing how syndi-court judges may be viewed as a reputable source or even a direct experience.

37. *Id.* ("Popular notions of what law is and ought to be, in turn, 'contribute[] to the production of law' in manifold ways.") (citations omitted).

38. Kimberlianne Podlas, *Impact of Television on Cross-Examination and Juror "Truth"*, 14 WIDNER L. REV. 479, 506 (2009).

these narratives are the brainchild of the television industry.[39] Whether or not such stories are accurate or propaganda is immaterial.[40] The key is understanding their potential for influencing jury deliberations and verdicts.[41] Prime-time portrayals become the standard by which viewers will compare actual attorneys, and their instruction manual as to how attorneys, litigants, and members of the judiciary should behave.[42]

In terms of the judiciary, the populist portrait resulting from the Legal Popular Culture Two-Step illustrating proper judicial behavior, speech, and dress not only affects the attitudes and conduct of viewers who eventually participate in the legal system.[43] Such perceptions will also influence the voting choices made by prime-time viewers in judicial elections, their positions when discussing the pros and cons of judicial candidates, or perhaps even the extent to which they feel bound to abide by a new law resulting from a particular judicial ruling.[44] Ultimately, the popular notions of viewers about the bench will influence "who becomes a judge, who stays a judge, and the [permissible] scope of judicial power."[45] Viewer perceptions of the judiciary formed by dancing the Two-Step may even impact judicial conduct on the bench, the manner in which judicial opinions are received, and perhaps even the content of opinions themselves.[46] Clearly, the Legal Popular Culture Two-Step can have significant negative ramifications for the legal profession by affecting public opinion, positively or negatively, of not only attorneys and the justice system, but also of members of the judiciary.[47]

Finally, the perceptions and beliefs engendered by the Two-Step will be perpetuated by the airing of legal shows which mirror the now entrenched, skewed perceptions of the lay "virginal" viewer about the legal profession because audiences are more comfortable watching shows which comport with and reaffirm their version of reality.[48]

In light of the self-perpetuating nature of the Popular Legal Culture Two-Step, the burning inquiry must be whether there is any way to interrupt or ameliorate the ramifications of the relationship between law and televised legal popular culture in instances where what is broadcast defaces the law as an honorable profession.

The urgency of addressing this query was highlighted with the airing of a new series during the fall of 2014, *Bad Judge*.[49] The starring character in the show, Rebecca Wright, is a tire slashing, hard-drinking, unapologetic, and eccentric wild-child. She also happens to be a judge

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39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *See* Bandes, *supra* note 28 (add comma) at 626 ("[p]opular notions of how a judge looks and acts and sounds - will affect not only those who find themselves in the courtroom as litigants, witnesses or jurors.").
44. *Id.*
45. *Id.*
46. *Id.* (citation omitted) (noting that viewer perceptions may "affect the way judges conduct themselves on the bench, and, in ways both salutary and unfortunate, the reception and even the content of their opinions.").
47. Charles B. Rosenberg, *27 Years as a Television Legal Advisor and Counting* . . . in LAWYERS IN YOUR LIVING ROOM! LAW ON TELEVISION 15, 22 (Michael Asimow ed., 2009).
48. Support for this proposition is found in the scholarship of one the leading authors in the area of Law & Popular Culture, Michael Asimow. According to Professor Asimow: (move the full citation to bottom of the block quote,

> Those who write in this field believe that the public learns most of what it thinks about law, lawyers and the legal system from the works of popular legal culture. They believe that information or misinformation gleaned from popular culture has a significant impact on "law" in the legal realist sense: what judges, jurors, attorneys, legislators, voters, and ordinary consumers or producers actually do in their contracting, fact-finding, law-applying, and law-making functions. They are convinced that popular culture mirrors, often in an exaggerated and caricatured form, actual popular attitudes and beliefs about the institutions and characters that it describes.

49. *Bad Judge* (NBC 2014).

at the fictitious Van Nuys Municipal Court in California.[50] According to the byline of the series, Rebecca upholds the rules by day and breaks them by night.[51] A more honest byline would have been "justice is a never-ending joke" or "all is fun at the Van Nuys' Municipal Criminal Court."

Bad Judge serves as a prototype for the type of legal shows which television should not be broadcasting and is a perfect platform to illustrate the harm, which may results from the cultivation effect. To delve a bit deeper into the underpinnings of the Popular Legal Culture Two-Step put forth in this piece, Part II of this essay will discuss the "cultivation theory,"[52] "heuristic processing,"[53] and the cultivation process known as "resonancee three lynchpins for the premise that television viewing does affect the viewer's perception of reality. To demonstrate the influence of "resonance" the process will be specifically examined in the context of "syndi-court" shows and actual incidents of judicial misconduct. Part III will critique a number of episodes of *Bad Judge* and evaluate the actions and conduct of Judge Rebecca Wright in light of various cannons of judicial ethics.[54] It will also focus upon a written entreaty to NBC made by the Miami-Dade chapter of the Florida Association for Women Lawyers requesting cancellation of the show.[55] Finally, the paper will explore possible responses to the demeaning portrayal of the judicial system and female judges and attorneys conveyed in *Bad Judge* in order to ameliorate the influence of television's cultivation of viewer perceptions of the legal world and to prevent such perceptions from becoming viewer reality.[56]

II. THE SYMBIOTIC RELATIONSHIP BETWEEN THE LAW & TELEVISION (MOVE HEADING TO THE TOP OF THE NEXT PAGE)

"Almost everywhere we look, right now in the popular culture, there is an almost complete merger of fiction and reality when it comes to the law. Law has become entertainment, and entertainment law."[57]

A. THE CULTIVATION THEORY & HEURISTIC REASONING

In modern society, almost from the moment they are born, people are thrust into a milieu dominated by mediums and devices that disseminate popular culture.[58] The first of these is usually television. Even children who cannot yet talk, let alone read, begin watching television.[59] The medium is a force that can shape, define, and support certain attitudes and chosen ways of life.[60] It serves as a link between the individual and an expansive, if fabricated,

50. Comedy Series airing on Thursday's on NBC.
51. *Bad Judge's* Promotional tag line.
52. *See infra* notes 59 – 65 and accompanying text.
53. *See infra* notes 66-81 and accompanying text.
54. *See infra* notes 162 - 227 and accompanying text.
55. *See infra* notes 141 -152 and accompanying text.
56. *See infra* notes 237-264and accompanying text.
57. Lisa Scottoline, *Get Off the Screen,* 24 NOVA L. REV. 655, 656 (2000).
58. George G. Gerbner, Larry Loss, Michael Morgan, and Nancy Signorielli, *Living with Television: The Dynamics of the Cultivation Process, in* PERSPECTIVES ON MEDIA EFFECTS 23 (Jennings Bryant ed. 1986), *available at* http://postjournalist.org/wp/wp-content/uploads/2014/06/LivingWithTelevision_TheDynamicsoftheCultivationProcess.pdf, (last visited Oct. 18, 2015).
59. *Id.*
60. *Id.*

world that is the brainchild of the television industry.[61] Certain viewers, who find their own lives mundane or prosaic, especially in comparison to the captivating and seductive world of television, come to rely on the medium as their primary source for cultural interaction.[62] When it also becomes their primary source of information, "continued exposure to its messages is likely to reiterate, confirm, and nourish (i.e. cultivate) their values and perspectives."[63] This process is described as the "cultivation theory."[64]

The mental process underlying the cultivation theory is the heuristic reasoning model.[65] Heuristic reasoning occurs when a viewer makes a social judgment relying upon "rules of thumb" instead of engaging in an in-depth memory search to make a decision or form a judgment.[66] Examples of using such simple decision rules to make judgments would be "'experts can be trusted,' 'attractive people are sociable' or 'consensus implies correctness,' etc."[67] Application of the cultivation and heuristic processing effects theories results in prime-time television legal series serving as the prisms through which individual viewers learn to craft or conceive the ability to parse out or distinguish what is fact from what is fiction. In its most basic form, the cultivation/heuristic reasoning theory suggests that exposure to television, over time, subtly "cultivates" or influences the viewer's perceptions of reality.[68] Essentially, the more the general population watches legal-based television shows, the more likely it is to hold out to be true what is seen on the screen.[69] Consequently, popular culture's impact on the lives of its

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61. *Id.*

62. *Id.* (noting that viewers "with certain social and psychological characteristics, dispositions, and world views-and fewer alternatives as attractive and compelling as television-use it as their major vehicle of cultural participation.").

63. *Id.* at 23-24.

64. Various scholars as the "cultivation effect" or the "cultivation hypothesis" also sometimes refer to the "cultivation theory". *See, e.g.*, David Ray Papke, *The Impact of Popular Culture on American Perceptions of the Courts*, 82 IND. L.J. 1225, 1227 (2007) (using the terminology "cultivation effect"); W. James Potter & Ik Chin Chang, *Television Exposure Measures and the Cultivation Hypothesis,* 34 J. BROAD. & ELEC. MEDIA 313 (1990). While scholars have advanced a number of theories to explain the influence of television on a viewer's perceptions, beliefs, and attitudes, the "cultivation theory" or "cultivation effect" has established itself as most prominent. *See* Steven Eggermont, *Television Viewing, Perceived Similarity, and Adolescents' Expectations of a Romantic Partner*, 48 J. BROAD. & ELEC. MEDIA 244, 248 (2004). Paul Devendorf, *Yada, Yada, Yada: Seinfeld, the Law and Mediation*, 11 CARDOZO J. CONFLICT RESOL. 197, 204 (2009). One alternative approach to the cultivation theory to determine how viewers process legal popular culture is the Elaborative Likelihood Model. For an excellent discussion of this method s*ee* Richard E. Petty and John C. Cacioppo, *The Elaborative Likelihood Model of Persuasion in* 11 ADVANCES IN CONSUMER RESEARCH 673-675 (Thomas C. Kinnear & Association for Consumer Research Communication, eds. 1984) (discussing the central and peripheral routes to persuasion to explain how attitudes are shaped, formed, and reinforced by persuasive arguments to determine the effectiveness of persuasive communication), *available at* http://acrwebsite.org/volumes/6329/volumes/v11/NA-11; *See* Podlas, *supra* note 25, at 312-14.

65. *See* Shrum, *supra* note 12, at 262 (Heuristic reasoning or the heuristic process model "refers to a limited mode of processing that is relatively effortless and expends few cognitive resources.") (citation omitted).

66. *Id.* When viewers make "an exhaustive search of memory for information pertaining to a particular decision," they are engaging in "systematic processing" in order to "scrutinize a great deal of information in an effort to form a judgment." *Id.* (citing Shelley Chaiken et al., *Heuristic and Systematic Processing Within and Beyond the Persuasion Context*, in UNINTENDED THOUGHT 212-252 (James S. Uleman & John A. Bargh eds. 1987).

67. *Id.* (citing ALICE H. EAGLY & SHELLY CHAIKEN, THE PSYCHOLOGY OF ATTITUDES (1993)).

68. *See* Papke, *supra* note 65, at 1227

> ("Cultivation theorists argue that regular viewers of television programming or avid consumers of other varieties of popular culture come to see social reality differently. The argument is not so much that popular culture creates views of social reality but rather that popular culture prompts, encourages, and refines views of social reality.")

; *See* George Gerbner, Larry Gross, Michael Morgan, Nancy Signorielli, & James Shanahan, *Growing Up With Television: The Cultivation Processes, in* MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH 43, 46-47 (Jennings Bryant & Dolf Zillman eds., 2d ed. 2002) and JAMES SHANAHAN & MICHAEL MORGAN, TELEVISION AND ITS VIEWERS: CULTIVATION THEORY AND RESEARCH (1999).

69. Potter & Chang, *supra* note 65, at 5 (discussing "that within mass media studies, [the] social construction of reality perspective has been called the cultivation hypothesis" and that "[i]ts proponents argue that the more

consumers is directly correlated to the amount of the person's exposure to television programming.[70]

Where viewers repeatedly absorb a particular television portrayal, their perceptions of social reality are "cultivated" and ultimately the viewer will presume that the television depiction is not a product of someone's imagination but a reflection of the truth.[71] When viewers also engage in heuristic reasoning by employing "rules of thumb" as mental short-cuts to come up with quick answers, they will rely upon what is most readily available to them in their minds.[72] Often, the easily accessible information stored in their memories comes from television viewing.[73] Depending on how recently a legal TV show was seen, how often it is watched, and the extent of its "dramatic nature" and the "vividness" of particular television depictions, the more accessible this popular culture information is to the viewer when forming an opinion or making a judgment.[74] Of key importance to this process is the omission by viewers to consistently store the information learned as fact or fiction.[75] This failure to "source discount" means that the viewer may not recall that the information being accessed to make a judgment came from a fictional television legal series. Instead, viewers tend to treat the information as truth.[76] The greater the amount of legal television consumed, the more viewers will adopt the simulated "values, attitudes, beliefs, and perceptions" portrayed on television as their own.[77]

The ramification of this "internalization" of the legal images and messages of a television series is that viewers now see this information as fact.[78] Ultimately, the result is that the realities of the judiciary and the practice of law must then align themselves and mirror the viewer's perceptions or be found false.[79] Consequently, if the writers of a show portray a judge in a negative and undermining way, it can profoundly affect society's perceptions of members of the judiciary and courtroom conduct. The public is receptive of such negative viewpoints because they validate ideas already held by the viewers.[80]

B. RESONANCE AND AN INTENSIFIED EFFECT ON VIEWER PERCEPTION

There are three primary ways that the population may gain knowledge about lawyers, judges, and the practice of law. First is by direct experience. Second, if first-hand knowledge is

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people are exposed to the mass media, especially television, the more they will come to believe that the real world reflects media content.").

70. Michael Asimow, *Law and Popular Culture: Bad Lawyers in the Movies*, 24 NOVA L. REV. 533, 553-554 (2000); *See* Devendorf, *supra* note 65, at 204.

71. *Id.*

72. *See* Shrum, *supra* note 12, at 263.

73. *Id.*

74. *Id.*

75. *See* Asimow & Mader, *supra* note 8, at 56.

76. *Id.*

77. L.J. Shrum, James E. Burroughs and Aric Rindfleisch, *A Process Model of Consumer Cultivation: The Role of T.V. is a Function of Type of Judgment, in* THE PSYCHOLOGY OF ENTERTAINMENT MEDIA: BLURRING THE LINES BETWEEN ENTERTAINMENT AND PERSUASION 179 (L. J. Shrum, Mahwah, NJ: Erlbaum eds. 2004).

78. *Id.*

79. *See* Shrum, *supra* note 12, at 263.

80. Dolores Albarracín, William Hurt, Inge Brechan, Lisa Merrill, Alice H. Eagly, and Matthew J. Lindberg, *Feeling Validated Versus Being Correct: A Meta-Analysis of Selective Exposure to Information*, 135 (4) Psychological Bulletin (2009) (The researchers found that people are about twice as likely to select information that supports their own point of view (67 percent) as to consider an opposing idea (33 percent). Certain individuals, those with close-minded personalities, are even more reluctant to expose themselves to differing perspectives . . . . They will opt for the information that corresponds to their views nearly 75 percent of the time.), *available at* http://www.apa.org/news/press/releases/2009/07/like-minded.aspx.

unavailable, it may be acquired through television viewing.[81] As previously discussed, over time, heavy consumption of popular legal culture by a viewer with little or no direct experience with the legal profession results in long-term effects, which, while small, gradual, and indirect, are cumulative and significant. Ultimately, viewer "beliefs, feelings, and attitudes" about those in the legal profession are produced.[82]

Finally, certain audience members will gain their knowledge about the legal profession from a combination of direct experience and television. When viewer perceptions formed by the consumption of popular legal culture are reinforced by actual incidents of judicial misconduct, the result is another facet of the cultivation process known as "resonance."

In essence, resonance refers to an intensified effect on viewers when what they see on television confirms what they have already experienced in real life.[83] This confirmation by television's depictions and images amplifies the cultivation effect. While viewers may not have directly witnessed the misconduct of a judge arriving to court in an inebriated state, when such factual information is learned from a reliable news source, arguably it is basically synonymous to a viewer gaining first-hand knowledge. Consequently, when popular culture's fictional portrayal of inappropriate judicial behavior is reinforced by knowledge of actual judicial misconduct learned from the news media, the fictional portrayal will be amplified and solidified. The fact that only a few actual judges engage in misconduct will be ignored. Instead, television will cultivate viewer perception that most, if not all, judges engage in some sort of unethical behavior.

C. RESONANCE AND THE SYNDI-COURT

A valid area of concern in terms of resonance is the effect upon audience members who consistently view reality court television, often referred to as "syndi-court" shows.[84] Such shows not only have an entertainment value, their "impact . . . on viewer's perceptions of the legal system, including attitudes about the judiciary, should not be underestimated."[85]

In light of the almost burlesque nature of reality court TV, it might be thought that viewers would recognize that the often crude, crass, and demeaning behavior of the syndi-court judges is simply entertainment and does not represent acceptable judicial demeanor.[86] Unfortunately, however, this may not be the case. As Leah Ward Sears, the former Georgia Supreme Court Chief Justice, warned, "because the sets are dressed to look like courts of law

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81. *See* Michael Pfau, Lawrence J.Mullen, Tracy Deidrich & Kirsten Garrow, *Television Viewing and Public Perception of Attorneys*, 21(3) HUMAN COMMUNICATION RESEARCH 307, 310 (1995).

82. *Id.*

83. *Id.* ("[W]hen experiences and television images are consonant, people's experiences 'resonate and amplify' cultivation patterns. This involves the cultivation process termed 'resonance,' and explains the way that direct experience and TV play off of each other, thus reinforcing the social order and the power structure.") (citations omitted).

84. *See, e.g.*, Steven A. Kohm, The *People's Law versus Judge Judy Justice: Two Models of Law in American Reality-Based Courtroom TV*, 40 LAW & SOC'Y REV. 693, 694 (2006) (noting that "American television programming focusing on the law forms a significant part of the cultural legal landscape for many Americans . . . . The result of this can be unrealistic expectations about the nature of future careers in law and a more simplistic outlook on legal ethics."); Erika Lane, *The Reality of Courtroom Television Shows: Should the Model Code of Judicial Conduct Apply to T.V. Judges?*, 20 GEO. J. LEGAL ETHICS 779, 780-85 (2007) (noting that while such shows have entertainment value, syndi-court reality TV creates a risk of misleading viewers into believing that the shows are an accurate portrayal of judges, the U.S. judicial system, and even an individual's legal rights); Kimberlianne Podlas, *Please Adjust Your Signal: How Television's Syndicated Courtrooms Bias Our Juror Citizenry*, 39 AM. BUS. L.J. 1 (2001) (discussing how juror attitudes may be impacted by syndi-courts).

85. Taunya Lovell Banks, *Here Comes the Judge! Gender Distortion on TV Reality Court Shows*, 39 U. BALT. L.F. 38, 42 (2008) (offering a feminist critique that focuses on the changing gender and racial make-up of reality TV court judges).

86. *Id.* at 41 ("Some people dismiss the influence of reality court shows by labeling them low-brow and assume that most people do not take them seriously.").

and are presided over by lawyers in black robes who at least used to be judges, and involve people who have agreed by contract to have their real court cases settled on television, [viewers] tend to take these shows very seriously."[87] This is extremely problematical considering that "there are too many Americans who can get a lasting impression of the law and the courts from what they see on television."[88]

It is hard to blame viewers for forming such impressions. In light of the cultivation theory, it is unrealistic to expect heavy television viewers who have little or no direct experience with actual members of the judiciary to discern that the personae of syndi-court judges seen on daytime television bear little resemblance to acceptable judicial behavior in an actual court of law.[89] When syndi-court judges are perceived to be actual members of the judiciary, they can serve as resonators just as direct experience with a member of the judiciary can resonate for viewers when it matches a fictional portrayal from a television series. Viewers substitute and equate their viewing experience to actually meeting and watching a real judge in court. This is perhaps the greatest harm resulting from syndi-court viewing: the creation resonance. Ultimately, the syndi-court judge serves to intensify matching fictional television portrayals as would an actual, direct experience.

D. RESONANCE AND RECENT EXAMPLES OF ACTUAL JUDICIAL MISCONDUCT

Unfortunately, judicial misconduct, which may undermine "public confidence in the integrity and impartiality of the judiciary,"[90] is a reality within the American legal system.[91]

For example, during 2014, the media had a field day with a number of incidents of judicial misconduct. First, it had the pleasure of describing in detail the altercation between Brevard County Judge John C. Murphy and assistant public defender Andrew Weinstock, which resulted in fisticuffs taking place just outside a courtroom in Viera, Florida.[92] The Florida Supreme Court eventually suspended the judge.[93]

Then there was a Nevada Family Court judge, Steven Jones, who pled guilty to one count of conspiracy to commit federal wire fraud.[94] In addition to disbarment and losing his seat on

87. Leah Ward Sears, *Those Low-Brow TV Court Shows*, CHRISTIAN SCIENCE MONITOR, July 10, 2001, *available at* http://www.csmonitor.com/2001/0710/p11s1.html (last visited June 18, 2015).

88. *Id.*

89. David Zurawik, *Beware—Reality TV Has Escaped From the Set*, BALT. SUN, Dec. 14, 2003, at 8F, *available at* http://articles.baltimoresun.com/2003-12-14/entertainment/0312140209_1_reality-tv-reality-shows-green-acres. ("Television is supposed to help viewers get the kind of information they need to act as responsible citizens in a democracy—not confuse them. But how are we to expect clarity in a genre that is built on making the artificial seem real?").

90. Canons of Judicial Conduct For the State of Virginia Canon 2 (2015), *available at* http://www.courts.state.va.us/agencies/jirc/canons_of_judicial_conduct.pdf.

91. Arguably, however, the extent of such misconduct by actual members of the judiciary is greatly over-emphasized by the love of the media for sensationalism. A judge who faithfully carries out the duties of her office is not news. *But c.f.* JONATHAN SOEHARNO, THE INTEGRITY OF THE JUDGE: A PHILOSOPHICAL INQUIRY 6, 18 (Ashgate 2008) (expressing that the "independent media are a powerful check in a democratic society and their influence on public scrutiny from open internet sources, televised broadcasts of trials or investigative journalism is indisputable." As such "[t]he media promote the awareness of adjudication: they may force judges to formulate clearly and to treat litigants respectfully. In developing democracies it is often the media that expose corrupt judges.").

92. Stacey Barchenger and Andrew Ford, *Brevard judge will take leave after courtroom scuffle,* FLORIDA TODAY 9:06 AM EDT June 6, 2014, *available at* http://www.floridatoday.com/story/news/local/2014/06/02/judge-lawyer-tussle-in-brevard-courtroom/9886361/.

93. *Id.*

94. Ken Ritter, *Judge Steven Jones Pleads Guilty to Federal conspiracy Charges*, Las Vegas Sun (Sept. 17, 2014, 5:34 PM), *available at* http://lasvegassun.com/news/2014/sep/17/indicted-las-vegas-area-judge-enter-federal-plea/; Martha Neil, *Ex-judge Likely Headed to Prison Is Expected to Get Pension of UP to $150K,* ABA JOURNAL (Sept. 25, 2014 01:25 PM CDT), *available at*

the bench, Jones was sentenced to serve twenty-six months in prison and to pay $2.9 million in restitution damages to the victims of the fraudulent investments scheme.[95] Ironically, Jones will retain his annual pension of up to $150,000 while serving his prison sentence because Nevada state law has no provision for forfeiture.[96]

And who could forget the "Facebooking judge," Florida Circuit Judge Linda Schoonover who resigned prior to facing the Judicial Qualifications Commission, the state agency that polices judges.[97] In doing so, she avoided having to answer over a dozen charges of unethical and incompetent professional conduct ranging from the improper use of Facebook to communicate with a party whose divorce case she would soon rule upon to disruptive and frequent paranoid behavior.[98]

After failing to attend her own legal ethics trial,[99] Detroit District Judge Brenda Sanders resigned from the bench after being suspended without pay for the third time.[100] After also failing to keep appointments with the psychiatrist set by the Michigan Judicial Tenure Commission, she "complained to the Detroit News in an email that 'the psychiatrist that made findings that I was delusional and mentally impaired, has never interviewed me or evaluated me for mental disability in any way.'"[101]

One of the most egregious incidents of judicial misconduct was that of Maryland Court of Appeals Judge Robert Nalley, who "ordered a deputy to shock a rude and non-responsive pro se defendant who wouldn't stop talking."[102] Apparently, as jury selection began in the defendant's gun possession case, he was talking over the judge and paid no attention to the judge's instructions to "shut up."[103] The judge then ordered a sheriff's deputy "to activate an electronic Stun-Cuff" that the defendant wore on his ankle.[104] Such a device is designed "to control violent defendants and prevent escape."[105] When the defendant was shocked by the

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http://www.abajournal.com/news/article/ex_judge_likely_headed_to_prison_is_expected_to_get_pension_of_up_to_150k_a.

95. Associated Press, Ex-Family Court Judge Steven Jones Sentenced to Prison, Las Vegas Sun (Feb. 25, 2015, 6:00 PM), *available at* http://lasvegassun.com/news/2015/feb/25/ex-family-court-judge-jones-sentenced-prison-fraud/.

96. Martha Neil, *Ex-judge Likely Headed to Prison Is Expected to Get Pension of UP to $150K,* ABA JOURNAL (Sept. 25, 2014 01:25 PM CDT), *available at* http://www.abajournal.com/news/article/ex_judge_likely_headed_to_prison_is_expected_to_get_pension_of_up_to_150k_a.

97. Rene Stutzman, *'Facebooking' Judge Linda Schoonover Resigns Amid Inquiry*, Orlando Sentinel (May 27, 2015, 9:56 AM), *available at* http://www.orlandosentinel.com/news/breaking-news/os-judge-linda-schoonover-facebook-resigns-20150526-story.html.

98. Rene Stutzman, *Facebooking Judge Asks State To Toss Out Ethics Charges Against Her* (Aug. 31, 2014, 7:53 PM), *available at* http://www.orlandosentinel.com/news/breaking-news/os-judge-linda-schoonover-facebook-resigns-20150526-story.html.

99. Martha Neil, *Judge Is a No-show at Legal Ethics Trial Over Claims She Has Psychotic Delusions*, ABA JOURNAL (Dec. 08, 2014 01:44 PM CST), *available at* http://www.abajournal.com/news/article/judge_is_no_show_at_hearing_about_her_claimed_psychotic_delusions/.

100. Martha Neil, *Ethics Trial Continues for Judge Claimed to Be Delusional, Even After She Announces Her Retirement,* (Dec. 11, 2014 05:50 PM CST), *available at* http://www.abajournal.com/news/article/ethics_trial_continues_for_judge_claimed_to_be_delusional_even_after_she_an.

101. *Id.*

102. Martha Neil, *Judge Who Ordered Deputy to Shock 'Rude' Pro Se Defendant Has Been Taken Off the Bench*, ABA JOURNAL, *available at* http://www.abajournal.com/news/article/public_defender_seeks_removal_of_judge_who_ordered_deputy_to_shock_rude_pro, (last visited Sept. 10, 2014).

103. *Id.*

104. *Id.*

105. *Id.*

Stun-Cuff, "he screamed and fell to the floor writhing."[106] The Maryland Court of Appeals found there was "good cause" to "remove" Judge Nally's "authority to hear cases."[107]

Moving into the first half of 2015, the most appalling example of judicial misconduct may have been by an apparently racist Mississippi judge, William "Bill" Wiesenberger, who was suspended with pay after he allegedly slapped an African-American man who was mentally disabled and when the victim fled, yelled "Run, [N-word], run." The judge faces another lawsuit alleging "he arrested and charged an African American man on the nonexistent charge of roaming livestock."[108]

Regrettably, there are frequent reports about members of the judiciary who have run-ins with the law due to substance abuse problems. 2015 started out with the sad report of a Florida judge, who had been sober for 20 years, relapsing and taking the bench while intoxicated.[109] Despite Judge Gisele Pollack's request that "her alcoholism be treated as a disability," the Judicial Qualifications Commission recommended her permanent removal from the bench. While admiring the judge's resolve and "her apparent commitment to recovery", the Commission ruled that it owed its "allegiance . . . to the people of Florida, not any individual judge . . . [and that] Judge Pollack is being disciplined for her public conduct on and off the bench, not for being an alcoholic."[110]

The public was next apprised of a former Arkansas judge admitting to taking a bribe in the form of campaign contributions to reduce a verdict from $5.2 to $1 million in a lawsuit against a nursing home for the death of a patient.[111] Michael A. Maggio had previously been removed from the bench in 2014 after using a pseudonym to make online comments on a Louisiana State University fan website which included discussing details about actress Charlize Theron's private adoption of a child.[112]

Judicial misconduct was even the focus of a recent U.S. Supreme Court decision, *Williams-Yulee v. The Florida Bar*.[113] The case stemmed from the 2009 actions of Lanell Williams-Yulee ("Yulee") who, to announce her candidacy for County Judge in Hillsborough County, wrote a letter which also solicited contributions to help launch her campaign.[114] The

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106. *Id.*

107. *Id.*

108. Debra Cassens Weiss, *Judge Accused of Hitting Man and Yelling N-Word Gets to Keep HIs Pay While on Interim Suspension*, ABA JOURNAL, *available at* http://www.abajournal.com/news/article/judge_accused_of_hitting_man_and_yelling_n_word_gets_to_keep_his_pay_while, (last visited June 5, 2015).

109. Martha Neil, *Removal From Bench Is Recommended for Judge Who Went to Work at Drug Court While Intoxicated, available at* http://www.abajournal.com/news/article/removal_is_recommended_for_judge_who_went_to_work_at_drug_court_while_intox, (last visited Jan. 6, 2015).

110. *Id.* It will be up to the Florida Supreme Court to decide whether or not to follow the recommendation of the Judicial Qualifications Commission that the judge be removed from her job. *Id. See also* Mirelsa Modestti Gonzalez, *Judges in Distress: When To Seek Help*, THE JUDICIAL FAMILY INSTITUTE (2010), *available at* http://www.judicialfamilyinstitute.org/judges-in-distress.html. *See also* Isaiah M. Zimmerman, *Helping Judges in Distress*, 90 JUDICATURE 10 (2006) (discussing how judges are plagued by a number of emotional and physical problems and stresses, including alcohol and substance abuse, for which they rarely seek the assistance they need).

111. *Martha Neil, Former Judge Pleads Guilty, Admits Taking Bribe to Cut Jury Verdict from $5.2M to $1M, available at* http://www.abajournal.com/news/article/former_judge_pleads_guilty_admits_taking_bribe_to_reduce_verdict_from_5.2m, (last visited Jan. 12, 2015).

112. Associated Press, *Ex-Judge Who Posts Details of Charlize Theron's Adoption Loses License, available at* http://www.foxnews.com/entertainment/2015/04/17/ex-judge-who-posted-details-charlize-theron-adoption-loses-license/, (last visited Apr. 17, 2015).

113. Williams-Yulee v. The Florida Bar, 135 S. Ct. 1656 (2015).

114. *Id.*

correspondence with her signature was both posted on Yulee's website and mailed to local constituents.[115] After losing the primary, she was charged by the Florida Bar for violating a barrule which "requires judicial candidates to comply with the applicable provisions of Florida's Code of Judicial Conduct," [116] which includes Canon 7C(1) that prohibits the "personal solicitation of campaign funds."[117]

Yulee contended that she was not subject to disciplinary actions by the Bar because her actions in signing and sending the campaign funds solicitation letter as a judicial candidate were protected by the First Amendment. The Florida Supreme Court disagreed, finding that Yulee had violated Canon 7C(1).[118] The ruling stated that in order for Canon 7C(1) to be constitutional and not infringe upon Yulee's First Amendment rights, the Canon had to be "narrowly tailored to serve a compelling state interest."[119] However, in light of Florida's "compelling state interest in preserving the integrity of [its] judiciary and maintaining the public's confidence in an impartial judiciary,"[120] and the fact that the judicial ethics Canon did not completely bar Yulee "from soliciting campaign funds," it merely required the utilization of "a separate campaign committee to engage in the task of fundraising."[121] The Florida Supreme Court held that the Canon satisfied the demanding First Amendment inquiry.[122] Yulee was publicly reprimanded by the publication of the Florida decision and was required to pay the Florida Bar $1,860.30 to cover the costs of the suit.[123]

In a 5-4 decision, the U.S. Supreme Court agreed.[124] Writing for the majority, Chief Justice Roberts emphasized that even judges who are elected are not politicians.[125] Therefore, "a state's decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office."[126] Echoing the Florida Supreme Court, the Chief Justice reasoned that because the Canon's restrictions "were narrowly tailored to avoid unnecessarily abridging speech" and advanced "the State's compelling interest" in maintaining "public confidence in the integrity of the judiciary," the result was "one of the rare cases in which a speech restriction withstands strict scrutiny."[127]

As the *Williams-Yulee* decisions emphasize, it is of paramount importance to our society that the integrity of our judiciary be preserved. As John Marshall stated in his address to the Virginia State Convention of 1829-1830, judges are required to "'observe the utmost fairness,'" endeavoring to be "'perfectly and completely independent, with nothing to influence or control [them] but God and his conscience."[128] Consequently, repeated misconduct by members of the

115. *Id.*

116. *Id.* at 1663-64.

117. FL Code of Judicial Conduct Canon 7 (2006), *available at* www.floridabar.org/DIVEXE/GCBillReport.nsf/Attachments/FF49FE1F9FDF43BC8525721A005B8EBD/$FILE/01-05-2006_CodeJudicialConduct.pdf?OpenElement.

118. *The Florida Bar v. Williams-Yulee*, 138 So.3d 379, 381 (Fla. 2014).

119. *Id.* at 384.

120. *Id.*

121. *Id.* at 387.

122. *Id.* ("We conclude that Canon 7C(1) promotes the State's compelling interests in preserving the integrity of the judiciary and maintaining the public's confidence in an impartial judiciary, and that it is narrowly tailored to effectuate those interests.").

123. *Id.*

124. *Williams-Yulee*, 135 S. Ct. at 1666 ("Here, Canon 7C(1) advances the State's compelling state interest in preserving public confidence in the integrity of the judiciary, and it does so through means narrowly tailored to avoid unnecessarily abridging speech. This is therefore one of the rare cases in which speech restriction withstands strict scrutiny.").

125. *Id.* ("Judges are not politicians, even when they come to the bench by way of the ballot.").

126. *Id.*

127. *Id.* at 1666.

128. *Id.* at 1667 (quoting Address of John Marshall, in Proceedings and Debates of the Virginia State Convention of 1829-1830, p. 616 (1830)).

judiciary, ranging from exhibiting uncontrolled anger[129] to accepting bribes[130] to taking the bench while intoxicated[131] are slowly eroding public confidence in our judicial system. When such judicial and unprofessional misconduct is replicated or reflected by fictitious depictions on television, such as that of Judge Rebecca Wright in *Bad Judge*, the real and the fictitious cavort with each other to the tune of the Legal Popular Culture Two-Step, thereby imbedding a negative judicial image into the memory of virginal viewers who will access that memory as a belief about the character of judges in the United States justice system. This result is nothing short of noxious.

III. THE PENULTIMATE OXYMORON: THE HONORABLE REBECCA WRIGHT

"Everywhere you look on television today, you see them: Lawyers. TV's lousy with them . . . What's most disturbing . . . is not that TV is trying to make lawyers look sympathetic; it's that TV is trying to make them look sexy."[132]

The extraordinary power the legal system places in the hands of members of the judiciary demands the highest standards of behavior. While the specific language may vary, the various state and federal codes governing the ethical conduct for judges uniformly require that judges must ensure that the "integrity and independence of the judiciary" is upheld[133] and "avoid impropriety...[or] the appearance of impropriety in all their activities."[134] The admonishment against impropriety is applicable to both the professional and personal conduct of the judge.[135]

Enter the character of Rebecca Wright, a fiery redhead who drives a worthless van with a Native American mural painted on the side, a bumper sticker which reads, "If you are rich, I am single," and who has a penchant for breaking the rules and causing a scene wherever she goes. A sexually unapologetic party gal, she also happens to be a fictitious judge at a California Municipal Criminal Court and the lead character in the sitcom *Bad Judge*.[136] According to the show's tagline, Rebecca will be seen "upholding the rules by day. Breaking them at night."[137] In the pilot, Rebecca aptly describes herself, explaining:

> I am not a suitable anything, okay? I'm a workaholic freak show. I eat crap all day, I drink until I drop, you know? I might binge-watch Lockup, 'cause I put half of those guys in there. I mean, sometimes I have to tie a rope from my ankle to the bed 'cause I don't even know what I do at night.[138]

The premise of the show is that her "wild child" ways are to be forgiven because of her exceptional ability on the bench. The NBC website devoted to the series describes the show as:

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129. *See, e.g., supra* notes 93-94 and accompanying text.

130. *See, e.g., supra* notes _112-113 and accompanying text.

131. *See, e.g., supra* notes 110-111 and accompanying text.

132. J. Jarvis, *Lawyers Get Out of Their Briefs and Into Our Homes,* ROLLING STONE 79-80 (May 30, 1991).

133. Canons of Judicial Conduct for the State of Virginia Canon 1 (2015), *available at* http://www.courts.state.va.us/agencies/jirc/canons_of_judicial_conduct.pdf, (last visited Oct. 18, 2015).

134. GA Code of Judicial Conduct Canon 2 (2008), *available at* http://www.gabar.org/handbook/georgia_code_of_judicial_conduct/ (1 sur 14), (last visited Oct. 2, 2015).

135. *Id.*

136. *Bad Judge* aired for an additional excruciating 12 episodes after the pilot premiered on October 2, 2014. *Bad Judge* (NBC Oct. 2 – Jan. 22, 2015).

137. *Bad Judge* Taglines, *available at* http://www.imdb.com/title/tt2769470/taglines.

138. *Bad Judge* Episodes Scripts, *available at* http://www.springfieldspringfield.co.uk/view_episode_scripts.php?tv-show=bad-judge-2014&episode=s01e01, (last visited Oct. 18, 2015).

> No excuses, no apologies, no compromises. Wild child Rebecca Wright ... knows how to have a good time, but she also happens to be one of LA's toughest and most respected criminal court judges. She has a reputation for unorthodox behavior in the courtroom, including creative rulings and saying exactly what's on her mind. Her private life, on the other hand, is anything but innocent. While there's no shortage of male admirers who would love to spend time with her, she's not ready to settle down.[139]

While some viewers may have found the show to be entertaining,[140] the Miami-Dade chapter of the Florida Association for Women Lawyers ("FAWL") did not. After only two episodes had aired, FAWL sent a letter to the network CEO, Steve Burke, urging NBC to remove the show from its fall prime-time line-up.[141] The author of the letter, Chapter President Deborah Baker, described the show as "a step in the wrong direction" in light of FAWL's mission to advance the position of women lawyers and jurists.[142] Even though the show was intended as hyperbole, its depiction of "a female judge as unethical, lazy, crude, hyper-sexualized, and unfit to hold such an esteemed position of power" was nonetheless "damaging to women in the legal profession."[143]

Noting that FAWL recognized that the show was meant to be a comedy, Baker admonished that the series was still "not only offensive to the many women judges who serve with the highest levels of integrity" but also posed a danger.[144] When viewing the show, audience members who "hold preconceived notions about women judges will find their sexist beliefs reaffirmed.[145] A misogynist who believes that women in power cannot control their sexuality, their bodies and their professional or personal conduct would have their views endorsed by this show."[146]

While the letter did not address the cultivation theory or resonance, the theory of the Legal Popular Culture Two-Step underlies and supports Ms. Baker's concerns. In her missive, Ms. Baker compared the potential effects *Bad Judge* may have on viewers to studies, which focused on viewer perceptions after exposure to the "Archie Bunker Show."[147] This 1970s series was intended to make fun of bigotry by including jokes and racist language, such as 'coon' and 'n***ger.'[148] According to study results, "the program reaffirmed bigoted viewers' racist opinions about Black Americans."[149] For a viewer who was already a racist, the show was not seen as mocking or ridiculing bigotry. Rather, the show was perceived as "funny and

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139. *About the Show*, *available at* http://www.nbc.com/bad-judge.

140. According to The Hollywood Reporter, while the "freshman comedy *Bad Judge*" opened "to a respectable 4.8 million (viewers) in its Oct. 2 debut, the half-hour series [has] since seen its ratings drop week over week. Its most recent episode on Oct. 30 averaged just over 2.5 million and a 0.7 rating in adults 18-to-49 — the lowest-rated program in its time slot among the Big 4."
Philiana Ng, *NBC to End 'A to Z', 'Bad Judge'*, *available at* http://www.hollywoodreporter.com/live-feed/nbcs-a-z-bad-judge-745470, (last visited Oct. 31, 2014).

141. Deborah Baker ESQ., Letter from Miami-Dade FAWL Chapter, *available at* http://ncwba.org/wp-content/uploads/2014/10/Miami-Dade_FAWL_letter_to_NBC.pdf, (last visited Oct. 16, 2014).

142. *Id.* ("Over the past 35 years, the mission of Miami-Dade FAWL has been to promote the advancement of women in the legal profession; unfortunately, Bad Judge is a step in the wrong direction.").

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. The name of the show was actually *All in the Family* (CBS Jan. 12, 1971-Apr. 8, 1979). It starred Carroll O'Connor in the main role of Archie Bunker, a loudmouthed, uneducated bigot who believed in every stereotype he ever heard.

148. *Bad Judge* Taglines *supra,* note 138.

149. *Id.*

speaking truths."[150] In the same vein, comedy shows, such as *Bad Judge*, which "depict...women in such a negative light, even in the name of 'humor,' have no proper place."[151]

Despite the promise of the network, the series' crude portrayal of Judge Rebecca Wright's freewheeling attitude towards swearing, drinking, drugs, and promiscuity was not tempered by the fact that she was one of the "most respected criminal court judges" in LA.[152] Instead, an examination of several of the show's episodes reveals that her unrestrained attitude also encompassed the duties of her office. Traditionally, popular culture has presented the female attorney as either being good at her profession but having a terrible personal life, or good at relationships but terrible at her job.[153] As the 2014 poster child for female members of the judiciary, Judge Wright failed to even rise to the pathetic level of the traditional popular culture female attorney stereotype.

The most problematic aspect of the show is that between Judge Wright's conduct on and off the bench, she manages to contravene almost every Judicial Canon and ethical rule ever written. While each episode of *Bad Judge* contains numerous ethical violations, here are a few examples that stand out as particularly egregious. Because the series is set in Van Nuys, California, the first three Canons of that state's Code of Judicial Ethics will be relied upon in highlighting Judge Wright's inappropriate behavior.[154]

In *The Pilot*, the viewer is first introduced to Rebecca Wright as a prone figure, passed out on her bed in a fetal position, in her underwear, and still wearing some of the clothing she must have worn the night before, including her jewelry and boots.[155] Clearly she was partying hard the night before. Her cell phone goes off, she wakes, looks at her phone, and panics as she realizes she is late. She checks her medicine cabinet for headache medicine for her massive hangover and realizes she is out. She throws on cut-off shorts and a flannel shirt, spits some mouthwash into a cup, and is out the door.[156] She screeches into the parking lot of a pharmacy in a beat up van with a Native American mural on it, goes inside, and buys a pregnancy test and headache medicine. She continues to the courthouse and illegally uses a handicapped pass to

150. *Id.*

151. *Id.*

152. *About the Show*, *available at* http://www.nbc.com/bad-judge.

153. Because of the popularity of the courtroom drama, the character of the judge is not new to American legal popular culture. While the judge may have had a presence in early television series or films, rarely was the character fully developed or central to the storyline. *See* Papke, *supra* note 6, at 131. Rather, the role of the judge was usually peripheral to the main action. He was usually a "faceless" person, "sitting behind the bench who occasionally nodded sagely when an attorney would ask to approach a witness or introduce a piece of evidence." Judge J. Howard Sunderman, Jr., *Judges in Film*, Picturing Justice (Mar. 13, 2002). He rarely showed emotion of any kind. Beginning in the 1970's, the portrayal of judges began to change. Unfortunately, this new portrayal was generally not positive. While judges are now often found in starring or featured roles, they are often "portrayed as lazy, corrupt, biased and arrogant." *Id. See, e.g., And Justice For All* (Columbia Pictures 1979) (where two judges are key figures in the film; one is basically portrayed as crazy and suicidal, while the other is a thoroughly despicable egomaniac guilty of rape) or *The Verdict* (Twentieth Century Fox 1982) (where the judge is portrayed not only as lazy, but heavily biased against the plaintiff and in collusion with the defense). In contrast to the almost stoic male judge found in early works of popular culture, the earliest portrayals of female judges highlighted details of the judge's personal life and played to emotion and passion. Since the woman judge first debuted on screen in 1939 until today, the recurring theme surrounding the female jurist has been one which pits the ability of a woman to exercise judicial authority against her attaining a successful personal life. Laura Krugman Ray, *From the Bench to The Screen: The Woman Judge in Film*, 60 CLEV. ST. L. REV. 681, 682 (2012) (tracing the emergence of the woman judge in film and the conflict which between reconciling "professional and personal identities"). Christine Alice Corcos, *"We Don't WANT Advantages": The Woman Lawyer Hero and Her Quest for Power in Popular Culture,* 53 SYR. L. REV. 1225, 1227-28 (2003).

154. California Code of Judicial Ethics (2015), *available at* http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf, (last visited Oct. 18, 2015).

155. *Bad Judge*: *Pilot* (NBC television broadcast Oct. 2, 2014).

156. *Id.*

park in front of the building. She pretends she has a limp when a man in a wheelchair goes by.[157] We next see her in a bathroom administering the pregnancy test. She then throws on an item of clothing and pulls her hair into a ponytail.[158] The following dialogue exchange and actions then take place:

Bailiff: Superior Court is now in session. The Honorable Rebecca Wright, Judge presiding.

(Judge Wright enters and takes her place on the bench. Note: It is at this point that the viewer becomes aware that she is the "Bad Judge.")

Rebecca: (looking at pregnancy test results) Yes! Ahem. (Holds out used test to her Bailiff)

Bailiff: Oh, come on. Are you serious?

Rebecca: Go on, take it.

Bailiff: What am I supposed to do with that?

Rebecca: I don't know. Be glad that it's negative - I am. Come on.

Bailiff: Oh, God. (Bailiff takes the test)

Rebecca: (To the bailiff) Go. (To the court) Please be seated. Do it quietly. I've got a headache. Can somebody get me some Gatorade?[159]

In just this brief portion of *The Pilot*, which occurs before the title of the series even flashes on the screen, the character of "the Honorable Rebecca Wright, Judge" has already contravened[160] the first Canon of the California Code of Judicial Ethics.[161]

According to Canon 1, "A Judge Shall Uphold the Integrity and Independence of the Judiciary."[162] Judge Wright fails to participate in establishing, maintaining, and enforcing high standards of conduct and also fails to personally observe those standards as dictated by Canon 1. Passing a used pregnancy test to her bailiff in open court is not exactly the kind of conduct that will encourage public confidence in the integrity of the court, one of the primary goals of Canon 1. The Advisory Committee Commentary to Canon 1 also discusses how judges are required to comply with the law.[163] Clearly, this would prohibit Rebecca from having an illegal rearview hang tag and from parking in a handicapped spot. An honorable member of the judiciary should not be faking a handicap in an effort to fool a man who is genuinely physically challenged. It would also mean that she should serve on a jury if summoned. However, in Episode 5, *Judge and Jury*, Judge Wright does everything in her power to avoid jury duty, including faking illness, passing out pickled eggs and sardines, and pandering to the judge in order not to miss the annual games at her favorite bar, Serpicos.[164]

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157. *Id.*

158. *Id.*

159. Bad Judge (2014) Episode Scripts - Pilot, *available at* http://www.springfieldspringfield.co.uk/view_episode_scripts.php?tv-show=bad-judge-2014&episode=s01e01.

160. Canon 1 California Code of Judicial Ethics (2015), *available at* http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf, (last visited Oct. 18, 2015).

161. California Code of Judicial Ethics (2015), *available at* http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf, (last visited Oct. 18, 2015).

162. *Id.*

163. *Id.* ("Although judges should be independent, they must comply with the law and the provisions of this code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility.").

164. *Bad Judge: Judge and Jury* (NBC television broadcast Oct. 30, 2014).

Canon 1 would also prohibit her conduct in the final episode of the series, *Case Closed*.[165] During a court recess, Rebecca meets her best friend, Michelle, for lunch at a restaurant where they spot an old high-school friend who has been dating Michelle's ex- husband.[166] The two confront the old high school chum, who responds by dumping a margarita into Michelle's lap.[167] Rebecca then proceeds to deliver a strong right hook into the old friend's face.[168] As a result, Rebecca finds herself in handcuffs and charged with assault. Once again, Judge Wright fails to follow the Judicial Canons and does little for the judiciary in terms of viewers perceiving judges as persons of honor and integrity.

Canon 2 instructs "A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities."[169] The Advisory Committee Commentary to Canon 2 makes it clear that "[t]he prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge."[170]

In *The Pilot*, after hearing her first case, Judge Wright informs an expert witness who just testified, Dr. Gary Boyd, that she would like a word with him in her chambers. Once alone, Rebecca and Gary proceed to have a sexual encounter which the viewer learns is their third sexual encounter on the desk in her chambers that month. When Tedward, her bailiff, walks in on them with the judge still in her underwear, this is his response:

> Tedward: Hey, Your Honor oh, damn! - Hey.
>
> Rebecca: DA-ha-ha-Mn.
>
> Tedward: Not bad, Your Honor. Not bad at all. And, Dr. Boyd, hey, you been in the gym? Two-a-days? You look good, man.
>
> Gary: We were just reenacting a case scenario.
>
> Rebecca: Yeah.
>
> Gary: Mm-hmm, yeah, a case.
>
> Tedward: I know that case. I've seen it late-night on Cinemax.
>
> Gary: Oh, which one? Witness For The Sexecution or Sequester Sister - wait, no, I remember. Juror's Box.[171]

Once again, the judge fails to meet the high standards that come with her office. According to the Advisory Committee Commentary to Canon 2,[172] members of the judiciary are required to "avoid all impropriety or appearance of impropriety."[173] Further, judges "must expect to be the subject of public scrutiny. Therefore, a judge must accept restrictions on the judge's conduct that might be viewed as burdensome by other members of the community and should do so freely and willingly."[174] The message the character of Judge Rebecca Wright sends

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165. *Bad Judge: Case Closed* (NBC television broadcast Jan. 22, 2015).
166. *Id.*
167. *Id.*
168. *Id.*
169. California Code of Judicial Ethics (2015), *available at* http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf, (last visited Oct. 18, 2015).
170. *Id.*
171. Bad Judge (2014) Episode Scripts - Pilot, *available at* http://www.springfieldspringfield.co.uk/view_episode_scripts.php?tv-show=bad-judge-2014&episode=s01e0, (last visited Oct. 18, 2015).
172. California Code of Judicial Ethics, Canon 2, Advisory Committee Commentary (2015), *available at* http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf, (last visited Oct. 18, 2015).
173. *Id.*
174. *Id.*

to the viewer is that she believes there are no restrictions on her personal life. The best defensive spin that can be put on the sex scene with Gary is that it took place in the privacy of the judge's chambers and was only witnessed by her bailiff. The same cannot be said about her unseemly conduct in Episode 11, *Naked and Afraid.*[175]

One evening after work, Rebecca is bored and so decides to entice Gary to come over for the night by texting him a "selfie" of herself totally nude. A hacker Rebecca previously convicted and sent to jail gains access to her phone and uploads her naked picture onto the court's website.[176] Due to the serious nature of the event, the situation has to be evaluated by the Judicial Review Board.[177] At her hearing before the board, Rebecca expresses that she is not sorry for taking and sending the naked "selfie."[178] She argues that she was the one victimized by the hacker and takes the position that anyone who is over the age of forty and can still pull off a naked "selfie" should receive the key to the city.[179] Ultimately, the judicial board issues her a warning and she is allowed to return to her courtroom.[180] Clearly, Judge Wright's indiscretion and complete impropriety contravene both the spirit and the law of Canon 2.

The tenets of Canon 2 are repeatedly flaunted as the judge is portrayed as a serious party girl in the majority of the episodes. Her "fun" includes a lot of drinking and even some illegal drug use. For example, in Episode 2 of the season, *Meteor Shower,* after Gary Boyd turns down her offer of a date night of "special brownies" and a 3-D movie, she eats both brownies herself and ends up having to call 911 after a bit of a "freak out."[181] In Episode 7, *Communication Breakdown*, she wakes up on the lawn after a crazy night of partying, celebrating her friend Michelle's recent divorce,[182] and in Episode 10, *The Fixer*, to help the same friend get over "her ex," Rebecca gets them invited to a pool party with a lot of hot dudes that are half their age and lots of drinking games.[183]

It is true that some of Judge Wright's sentences are creative, often unconventional, and focus on deterrence. For example, after the two wives of a convicted bigamist read statements asking Judge Wright to drop the charges against their husband and show mercy, Rebecca rules that rather than jail, the defendant must attend a course on feminism while wearing a T-shirt (which she designed) with the word "I'm a Convicted Bigamist" printed on the front.[184] In a case involving a young, female pop star who breaks the law to gain public attention, the sentence was four weeks of community service at a convent outside of cell phone reach. The

175. *Bad Judge: Naked and Afraid* (NBC television broadcast Jan. 8, 2015).
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Bad Judge: Meteor Shower* (NBC television broadcast Oct. 9, 2014).
182. *Bad Judge: The Fixer* (NBC television broadcast Jan. 1, 2015).
183. *Id.* Throughout the thirteen episodes of *Bad Judge*, liquor plays an inordinately prominent role in both the judge's personal and professional life. Judge Wright even has a penchant for her "special brownies" while watching 3-D movies. *See, e.g., Bad Judge: Pilot* (NBC television broadcast Oct. 2, 2014) (where the judge wakes up with a terrible hang-over, barely makes it to court on time, and has to ask for Gatorade from the bench due to cotton mouth); *Bad Judge: Communication Breakdown* (NBC television broadcast Nov. 13, 2014) (where the judge wakes up with a terrible hang-over, sprawled with a friend on her front lawn); *Bad Judge: Meteor Shower* (NBC television broadcast Oct. 9, 2014) (where "the judge" eats two "special brownies" and ends up having to call 911 due to delusions). The choice of the network to highlight drinking & drugs is particularly disturbing due to the number of lawyers and judges who have a serious problem with alcohol and substance abuse. *See, e.g.* Alexander O. Rovzar, *Putting the Plug in the Jug: The Malady of Alcoholism and Substance Addiction in the Legal Profession and a Proposal for Reform,* 10 U. MASS. L. REV. 426 (2015); Anonymous, *A View From the Bench,* Florida Lawyers Assistance Program (2009) (in which a circuit judge discusses what it is like to be an alcoholic while serving on the bench and offers advice as to how to help alcoholic attorneys and judges), *available at* http://fla-lap.org/literature/1299-bar-journal/a-view-from-the-bench/, (last visited Oct. 18, 2015).
184. *Bad Judge: The Pilot* (NBC television broadcast Oct. 2, 2014).

goal was to force the young woman to figure out who she is and what is really important to her.[185] And in Episode 7, *Communication Breakdown*, Rebecca uncovers the truth about a deaf defendant, Mr. Lin, who has been charged with loitering and who can only communicate via Mandarin sign language.[186] After requiring that an interpreter be brought in, it is discovered that the defendant was not loitering but attempting to start a shoe-shine business.[187] Judge Wright provided Mr. Lin with a sign, so that his customers would not think he was trying to steal their shoes, and a designated space for the enterprise.[188]

Perhaps the best example of Judge Wright's unique rulings is illustrated in Episode 9, *Face Mask Mom*, when a woman, whose husband recently left her and who is having a hard time spending her first family Christmas without him, is sentenced to undergo six months of counseling and a court-ordered Beach Christmas.[189] On Christmas day, Judge Wright picks up the woman and takes her to the beach, where the judge proceeds to also "order" the prior defendant to join her in drinking shots of tequila and skinny-dipping in the cold ocean water.[190] Clearly, Judge Wright's motives in these instances establish that she is a caring person. However, her considerate rulings cannot compensate for her conduct and comments in each episode, which greatly sully the reputation of the judiciary.

As in *The Pilot*, when the used pregnancy test is handed to Tedward in open court,[191] three of the episodes of *Bad Judge* are particularly problematic, not only in terms of inappropriate and unseemly conduct, but for actual ethical violations occurring in the courtroom. A prime example is Episode 6, *What is Best in Life?*, where the atmosphere of Judge Wright's courtroom is closer to that of a three-ring circus than a place of order and decorum.[192] The courtroom itself is not a place where justice will be dispensed. It is simply the setting for a personal "cat fight" between Rebecca and her old law school nemesis, Dana McCoy.[193] Dana is appearing before Judge Wright as defense counsel for a Mr. Latardo, a college jock who allegedly mooned a woman, Ms. Mayhew,who is now claiming $3 million in psychological damage.[194] After Ms. Mayhew testifies that there were no distinguishing marks on the defendant's buttocks, Dana presents photographic evidence that one of the defendant's buttocks has a prominent tattoo of Alec Baldwin's face.[195] The next day in court, Rebecca notices the defendant's sensitivity to his buttocks and comes up with her own theory of the case:[196]

> Rebecca: I have a theory, Mr. Latardo. Yeah, I think your Alec Baldwin's new. I think you got it for your defense, and I think Alec Baldwin's infected.
>
> Latardo: Nope, next witness.
>
> Rebecca: No, I call the next witness, and I call Alec Baldwin to the stand. Mr. Latardo, come on. Come on.

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185. *Bad Judge: Meteor Shower* (NBC television broadcast Oct. 9, 2014).
186. *Bad Judge: Communication Breakdown* (NBC television broadcast Nov. 13, 2014).
187. *Id.*
188. *Id.*
189. *Bad Judge: Face Mask Mom* (NBC television broadcast Dec. 11, 2014).
190. *Id.*
191. *See supra* notes 156 - 58 and accompanying text.
192. *Bad Judge: What is Best in Life?* (NBC television broadcast Nov. 6, 2014). *See* Sears, *supra* note 88 ("Courtrooms must be places of order and decorum, places where justice is meted out. Judges must preserve this environment, lest the public comes to see the courts as an uncaring and ineffectual circus, not to mention an entertainment bonanza.").
193. *Bad Judge: What is Best in Life?* (NBC television broadcast Nov. 6, 2014).
194. *Id.*
195. *Id.*
196. *Id.*

Latardo: [Shuddering] Okay, yeah, it's a new tattoo, and it's pretty frickin' infected.

Rebecca: Okay, so just to be clear, you got this new tattoo during these court proceedings, you put something on it to make it look old for the evidence photos, and whatever that was, probably talcum powder, I'm guessing, caused the infection?

Latardo: How did you know?

Rebecca: Because I got a tattoo myself. Upper right thigh.

Dana: Objection relevance and nauseousness, Your Honor.

Rebecca: Overruled, Counselor. Anyway, I changed my mind halfway through, so I got yin but no yang. So I know a little something about infections in bad places.

Dana: Yes, we're all very aware of that.

Rebecca: All right, Counselor, approach.

Dana: Oh. Yes?

Rebecca: One more comment like that, and I will find you in contempt.

Dana: [Gasps] Well, I find it contemptible that you bring your sordid little personal life into the courtroom. And just so you know, I will be filing a formal complaint with the judicial board of review.[197]

Ultimately, Rebecca throws the case out and confirms her authority by holding Dana in contempt after she lets loose another "zinger:"[198]

(To the plaintiff)

Rebecca: Ms. Mayhew, you saw an ass. I'm sorry you fell into a bush, but you don't get three million dollars for it. You don't even get one. People have been showing one another their asses since the dawn of time. We do it because it's hilarious.

(To the court)

All right? I'm throwing the case out. I'm not finished.

(To the defendant)

Mr. Latardo, you took a small thing and made it worse by getting that tattoo. You tampered with evidence, and you lied to a judge. Luckily for you, I have personal knowledge of how a terrible tattoo can be its own form of punishment, so I will sentence you to nothing more.

Dana: Glad you finally did your job, Rebecca.

Rebecca: Actually, Dana, if you were doing your job, you would have known that your client was lying to you, and I warned you about calling me Rebecca. I'm finding you in contempt. Tedward, cuff her and get her out of my courtroom.[199]

According to Canon 3 of the California Code of Judicial Ethics, "A Judge Shall Perform the Duties of Judicial Office Impartially, Competently, and Diligently."[200] The Advisory Committee Commentary (3) states that "[a] judge shall require order and decorum in

197. Bad Judge (2014) Episode Scripts - What Is Best in Life?, *available at* http://www.springfieldspringfield.co.uk/view_episode_scripts.php?tv-show=bad-judge-2014&episode=s01e01, (last visited Oct. 18, 2015).

198. *Id.*

199. *Id.*

200. California Code of Judicial Ethics Canon 3, *available at* http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf, (last visited Oct. 18, 2015).

proceedings before the judge,"[201] and Advisory Committee Commentary (4) explicitly requires that "[a] judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers and of all staff and court personnel under the judge's direction and control."[202] Obviously, Rebecca failed to uphold these judicial tenets.

The Advisory Committee Commentary (5) also instructs that

> "[a] judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (a) bias or prejudice, including but not limited to bias or prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, or (b) sexual harassment."[203]

In Episode 4, *Knife to a Gunfight*, while the defendant, Charlie Lewis, is guilty, he is also a sympathetic and dimwitted character.[204] Charlie is now facing his third offense and, as the district attorney points out to Judge Wright, her only decision is a "slam dunk."[205] Under the law, a third conviction or "third strike" carries a mandatory minimum sentence of twenty-five years to life.[206] Rebecca, however, does not believe that the defendant's crimes warrant such a steep sentence.[207] His first strike was for Grand Theft Auto after he stole a man's lawnmower and rode it down the road.[208] His second strike was Grand Larceny after he opened and ate a $300 can of caviar in a grocery.[209] The current charge against the defendant was for attempting to steal a knife from a shop which predominately sold guns.[210] After entering the shop and asking to see a mother of pearl handled knife on display, he announced to the owner and other patrons of the shop that he was "taking the pretty knife" and warned them not to "do anything stupid."[211] In response, they all proceeded to pull out their various guns of choice and aim them at Charlie, creating a standoff.[212] As Judge Wright aptly noted, "[t]he guy literally brought a knife to a gun fight. I mean, the only person he endangered was himself."[213]

After Charlie informs the judge that he intends to defend himself, she attempts to help him by advising him of his right to waive a jury trial:

Rebecca: Mr. Lewis, please approach the bench.
Charlie: That's a great color on you.

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201. California Code of Judicial Ethics, Canon 3, Advisory Committee Commentary (3) (2015), *available at* http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf, (last visited Oct. 18, 2015).
202. California Code of Judicial Ethics, Canon 3, Advisory Committee Commentary (4) (2015), *available at* http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf, (last visited Oct. 18, 2015).
203. California Code of Judicial Ethics, Canon 3, Advisory Committee Commentary (2015), *available at* http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf, (last visited Oct. 18, 2015).
204. *Bad Judge: Knife to a Gunfight* (NBC television broadcast Oct. 23, 2014).
205. *Bad Judge (2014) Episode Scripts- Knife to a Gun Fight, available at* http://www.springfieldspringfield.co.uk/view_episode_scripts.php?tv-show=bad-judge-2014&episode=s01e04, (last visited Oct. 18, 2015).
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Bad Judge (2014) Episode Scripts- Knife to a Gun Fight, available at* http://www.springfieldspringfield.co.uk/view_episode_scripts.php?tv-show=bad-judge-2014&episode=s01e04, (last visited Oct. 18, 2015).
212. *Id.*
213. *Id.*

> Rebecca: Thank you. . .You are aware of your right to waive a jury trial. I mean, one very reasonable judge versus twelve unpredictable jurors.[214]

Of course, Charlie fails to pick up on her "suggestion" and, because he believes in the strength of his case, stands firm with his desire for a jury trial and with his decision to represent himself.[215] At trial, the judge engages in several instances where she inappropriately engages in conduct that would reasonably be perceived as pro-defendant bias.[216] In his opening statement, Charlie promises that "[t]he defense will illustrate that there is no possible way that the defendant could have attempted to steal this knife."[217] He then attempts to support his assertion with an embarrassing demonstration to the jury reminiscent of the O. J. Simpson Trial defense.[218]

> Charlie: [Knife clattering] It doesn't fit. The handle is too small for my hand. If the knife doesn't fit, you must acquit."[219]

Seeing that the defense will be a complete failure, Judge Wright tries to subtly help him out.[220] Asking Charlie to approach the bench, she reminds him that they do have witnesses and a video of him holding the knife.[221] She then provides more blatant assistance in leading him to raise the question of criminal intent and in helping him cite to the correct section of the California Penal Code by coughing out the numbers four and five, taking a drink of water, and then saying "nine" with an explanation to the jury that she just loves the German language.[222]

> Rebecca: You know, you seem to be an avid student of film and television. Perhaps you've seen the, uh, Law & Order show (with emphasis) *Criminal Intent.* Okay.
>
> Charlie: Huh? Ladies and gentlemen of the jury, I will show that my client had no Law & Order: Criminal Intent of stealing said knife until after he entered the gun store. And in accordance with California penal code, uh Ooh.
>
> Rebecca - [Coughs] 45. . . - [High-pitched voice] - 9 (nine/nein). I love the German language, don't you?
>
> Charlie: Uh, code 459 without prior criminal intent, an act of theft shall not be considered felony burglary.[223]

Clearly, Judge Wright contravened the Canon by "engag[ing] in speech, gestures, or other conduct that would reasonably be perceived" as indicating pro-defendant bias.

Perhaps the most egregious example of ethical misconduct in the show occurs in Episode 3, *One Brave Waitress,* when Rebecca Wright engages in ex parte communications.[224] Rebecca is in her chambers talking with Tedward, her bailiff, when Tom, the District Attorney comes in:

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214. *Bad Judge (2014) Episode Scripts- Knife to a Gun Fight, available at* http://www.springfieldspringfield.co.uk/view_episode_scripts.php?tv-show=bad-judge-2014&episode=s01e04, (last visited Oct. 18, 2015).

215. *Bad Judge: Knife to a Gunfight* (NBC television broadcast Oct. 23, 2014).

217. *Id.*

217. *Id.*

218. Linda Deutsch, *The OJ Simpson Case 20 Years Later - OJ Simpson Murder Trial: "If It Doesn't Fit, You Must Acquit"*, NBC SOUTHERN CALIFORNIA, *available at* http://www.nbclosangeles.com/news/local/OJ-Simpson-20-Years-Later-Glove-Fit-Darden-Dunne-Murder-Trial-of-the-Century-262534821.html, (last visited Nov. 7, 2014).

219. *Id.*

221. *Id.*

221. *Bad Judge: Knife to a Gunfight* (NBC television broadcast Oct. 23, 2014).

222. *Id.*

223. *Bad Judge (2014) Episode Scripts- Knife to a Gun Fight, available at* http://www.springfieldspringfield.co.uk/view_episode_scripts.php?tv-show=bad-judge-2014&episode=s01e04, (last visited Oct. 18, 2015).

224. *Bad Judge: One Brave Waitress* (NBC television broadcast Oct. 16, 2014).

Tom: Rebecca. Your Honor, I was wondering if maybe we could have a little tête-à-tête, off the record, about a woman who might have been a waitress at BJ Knockers.

Rebecca: That you would ask a judge to discuss a case right before trial is highly unethical, and you know it, Tom.

Tedward: BJ Knockers? Man, halter tops, short skirts. Even the white girls have long brown legs. - [Laughing] - It is crazy. But, yeah. Nah, like, that's a rough job.

Tom: I just want to make sure that we're all up to speed here about this.

Tedward: She cannot talk to you, Tom.

Rebecca: - [Snaps fingers] - Tedward travel with me, if you will, to a parallel universe. [Imitates Sci-Fi music] We're on a plane. I'm a stranger. You find out that I'm a judge. I'm sitting right next to you. You can tell me anything you want. What do you tell me?

Tedward: I would say that I do not want to be stuck on a plane next to a chatterbox.

Tom: Not me. Total opposite. Like, I might tell this judge on the plane that I have a star witness in a sexual-battery case who has a roommate that kept a very detailed diary.

Rebecca: Do you have the diary?

Tom: Yeah. But the witness has not responded to her summons.

Rebecca: Okay, well, you need that testimony.

Tom: I know, but I think the owner, Chad Forbes, is paying her not to talk.

(Looking at the file)

Rebecca: Mm, is the witness, Hannah, is she any good on the stand?

Tom: I don't know. I'm on a plane.

Rebecca: Well, from where I am sitting on the plane, which is in seat 4-A first class, warm towels, hot nuts, a hot stewardess, a nice stewardess. - Remember when they were nice?

Tedward: Yep.

Rebecca: From where I'm sitting, I would tell you that if you came into my courtroom, I would have your back.

Tom: So we're on the same side? You and me? The eagle flies at dawn.

Rebecca: Ca-caw! That's my best eagle.[225]

Advisory Committee Commentary (7) to Canon 3 specifically states "[a] judge shall not initiate, permit, or consider ex parte communications, that is, any communication to or from the judge outside the presence of the parties concerning a pending or impending proceeding, and shall make reasonable efforts to avoid such communications."[226] There is no question that the ensuing conversation concerning the waitress's diary, which the judge certainly permitted and even encouraged with her 'travel to a parallel universe' hypothetical and sci-fi musical accompaniment, is a flagrant breach of the prohibition against ex parte communications.

IV. CONCLUSION: WILL THE REAL JUDGE PLEASE STAND UP

225. *Id.*

226. California Code of Judicial Ethics Canon 3, Advisory Committee Commentary (7), *available at* http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf, (last visited Oct. 18, 2015).

"Justice does not depend upon legal dialectics so much as upon the atmosphere of the courtroom, and that in the end depends primarily upon the judge."[227]

—-Judge Learned Hand

A. THE IMPORTANCE OF DISCERNING THE DEMARCATION BETWEEN THE REAL AND THE CULTIVATED

With the dawn of each new pilot season, hope springs eternal that the networks may have repented their past false images of those in the legal profession and will have decided to invoke a new code of legal authenticity and ethics. The fall of 2014 was replete with new legal series showcasing female attorneys[228] and even a female law professor.[229] However, one show had the opportunity to provide the viewing public with the rare opportunity of learning about the legal profession from the perspective of a female judge.[230] Unfortunately, this opportunity was completely wasted with the prime-time comedy *Bad Judge* and its portrayal of Judge Rebecca Wright.[231] Arguably, the producers and writers of *Bad Judge* believed that a depiction of a female judge as a dishonorable, unrefined, and oversexed party animal, who was clearly unfit to serve as an esteemed member of the judiciary, would not be harmful. Rather, it would be perceived as merely humorous by discerning viewers. In light of the Popular Legal Culture Two-Step,[232] it is equally, if not more, probable that the show cultivated a false perception that the professional and personal conduct of the fictitious Rebecca Wright is an accurate representation of the life of an actual female member of the judiciary.[233] If after watching the show, the viewer were to learn about comparable, actual misconduct on the part of a real woman judge, the two images would resonate to move the viewer from simply having misguided perceptions about women judges, to holding actual false beliefs.[234] These false beliefs negatively influence the discussion about whether women are suitable candidates for the judiciary and affect the way female judges are treated at trial by lay witnesses and jurors. In situations where viewers already held preconceived ideas, watching any, let alone all, of the thirteen episodes of the show would

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227. Brown v. Walter, 62 F.2d 798, 799-800 (2d. Cir. 1933) (Hand, J.).

228. In the fall of 2014, ABC launched *Cristela*, the story of a young woman who is finishing her sixth and final year of law school who is on the brink of landing her first big internship at a prestigious firm while her Mexican-American parents find her lofty career aspirations more ambitious than they think appropriate. *Cristela* (ABC Oct. 10, 2014 - Apr. 17, 2015). USA brought the viewer *Benched*, which told the tale of Nina Whitley, a high-powered corporate lawyer who has a meltdown at a firm gathering when she learns that she will not be made a partner and ends up as a public defender in an office that is understaffed and underfunded. *Benched* (USA Oct. 28, 2014 - Dec. 30, 2014).

229. *How to Get Away with Murder* (ABC first aired Sept. 25, 2014). The show has been renewed for a second season that will commence September 24, 2015.

230. While there are certainly female judges to be found on daytime television, such as *Judge Judy* (Syndicated, Paramount Pictures, 1996 - present) or *People's Court* (Syndicated, Edwards/Billet, 1981-present), prior to *Bad Judge*, the only long-running T.V. series with a female judge in the starring role was *Judging Amy* (CBS 1999-2005). The show's star, Amy Brenneman, played Amy Gray, a New York attorney who found herself a single mother after a recent divorce. With her young daughter Lauren in tow, she moves back to Hartford, Connecticut and in with her very opinionated mother, a retired social worker, where she becomes a Juvenile Court judge. While portions of episodes did deal with the courtroom, the show was primarily a family drama where the family issues were plentiful. *See* Chris Jackson, *Judging "Judging Amy,"* Picturing Justice, *available at* http://usf.usfca.edu/pj//amy.htm (last visited May 1, 2015) ("Amy's professional world of the courthouse is only high school, and all these new people are just cliques in the cafeteria. For courtroom role models, better watch The Practice or Sam Waterston and Angie Harmon in Law and Order."); *But see* David Ray Papke, *From Flat to Round: Changing Portrayals of the Judge in American Popular Culture*, 31 J. Legal Prof. 127 (2007) (expressing that the show had a certain depth and that over time "Judge Gray became a more than competent and quite engaging jurist").

231. *Bad Judge* (NBC 2014).

232. *See supra* (delete Part I) (insert) notes 28 -42 and accompanying text.

233. *See supra* notes 43-48 and accompanying text.

234. *See supra* notes 35-36 and accompanying text.

certainly have reaffirmed their on-going misogynist views à la the "Archie Bunker syndrome" discussed in the FAWL letter.[235]

Further, over time, the Popular Legal Culture Two-Step will not only shape viewers perceptions of social reality, it will ultimately influence our culture as a whole. The way judges are portrayed in popular legal culture will affect the public's attitude toward members of the judiciary, which may then in turn affect the conduct of actual members of the judiciary. Therefore, producing, airing, and extending a bourgeois show like *Bad Judge* to thirteen episodes is nothing less than unconscionable. It is demeaning to female attorneys and undermines the judiciary as a cultural symbol of the rule of law.

B. POSSIBLE SOLUTIONS: CREATING A CLASH BETWEEN REALITY AND FICTION THROUGH EDUCATION.

If an attempt to change such television programming is to be successful, it is of paramount importance to never lose sight of the fact that a thirst for sharing legal truths or imparting knowledge about the legal profession or the desire to portray the judicial process as an art form is not what creates, drives, and fashions televised popular legal culture. The bottom line can be summed up in one word–profit. Market realities drive network(s) as to what shows will be renewed, cancelled, and slated for next year. What's important is what will sell. Viewers, however, are usually under the misconception that they are the buyers in the selling equation. They are not. So, in addition to recognizing the market realities of the television industry, it is of equal importance to educate viewers that, to a television executive, an audience is a source of income but only in terms of how it may be sold, not served.[236] "Selling the audience to advertisers is the network's sole source of revenue."[237] As Les Brown, a one-time television editor of *Variety*, so aptly stated, "People are the merchandise, not the shows. The shows are merely the bait. The consumer, whom the custodians of the medium are pledged to serve, is in fact served up."[238] A network's primary, if not sole goal, is to create programming that will "snare" the viewer's attention, which is then "sold to advertisers for a multibillion-dollar annual price tag."[239]

Consequently, the television industry will continue to create legal series, which portray the trials and tribulations of a female judge in whatever manner is needed to produce a product that will result in profit. The fact that it is imperative that members of the judiciary be held in the highest regard by members of our society in order for the American justice system to function properly is totally irrelevant to the aims of the industry.[240] Further, "[t]he unique profit

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235. *See supra* notes 145-152 and accompanying text.

236. JIB FOWLES, WHY VIEWERS WATCH-A REAPPRAISAL OF TELEVISION'S EFFECTS 6, (Sage Publications 1992) ("It doesn't make people feel more comfortable about the medium to learn that television executives think of the audience in callous and economic terms. Television is not so much in the business of audience-serving as it is in the business of audience-selling.").

237. *Id.*

238. LES BROWN, TELEVISION: THE BUSINESS BEHIND THE BOX 16 (Harcourt Brace 1971).

239. *See* FOWLES, *supra* note 237 at 6.

240. ABA Model Code of Judicial Conduct (2011), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct.html. The Preamble to the Code states:

> [1] An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. [J]udges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.

structure of network television" based almost entirely on corporate advertisers "helps account for the fairly narrow ideological range in its legal programming"[241] and may be the most logical answer as to why television's credos will continue to be often crass, if not downright offensive.

Despite sometimes comedic screenwriting, the character of Rebecca Wright is a product of this "narrow ideological range," which is why the show erodes the prestige, honor, and respect that is owed to members of the judiciary and to the rule of law. It turns lady justice into a tramp. The argument could be made that if viewers were to contrast Judge Wright with a real judge, it might boost the public trust in the judiciary and our legal system. Research psychologist and jury consultant, Dr. Cynthia Cohen, makes a comparable argument in terms of TV lawyers. In her opinion, extreme TV lawyers such as Denny Crane on *Boston Legal*[242] or Calista Flockhart's eccentric Ally McBeal[243] boost public confidence by serving as contrasts to actual attorneys.[244]

However, his theory does not comport with the Legal Popular Culture Two-Step. One of the key underpinnings for the theory is that it requires viewers who have had little or no direct contact with the judiciary. There is no actual judge to afford a comparison. But Dr. Cohen's contrast argument does have merit in terms of requiring a clash between fiction and reality.

If viewer perceptions cultivated by watching legal series were to be contrasted with a different actuality, there would be no resonance. There would be a clash. To resolve this dilemma, viewers would either have to abandon their beliefs cultivated by television's fictional portrayals of female judges and accept that the actual judge is the true representation or cling to their cultivated perceptions and perceive the actual judge as an anomaly. Knowledge is the key to enabling the clash between fiction and reality to result in the abandonment, or at least the amelioration, of cultivated, false perceptions. Knowledge is gained through education. Consequently, to prevent or diffuse the effect of the Popular Legal Culture Two-Step, virginal viewers need to be better educated about the reality of legal practice, the judiciary, and the courtroom. Members of the legal profession need to be pro-active and create such educational opportunities. Such efforts are already underway.

In 2004, a group of lawyers, business owners, and civic leaders in North Carolina got together and formed Justice Initiatives, Inc., a non-profit organization dedicated to educating the community "about the court system and to advocate, support and advance its needs and interests."[245] The organization supports and sponsors a variety of projects geared toward educating various groups about the judiciary. Two of the most intriguing are "Court Camp," which the group supports to educate high school students about one of the judicial districts,[246] and "Jury Appreciation Week."[247] The "hands-on" day camp runs for a week from 9 a.m. to 4 p.m. and instructs the students using a variety of method(s) to assist them with their learning,

241. Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM. J.L. & ARTS 91, 170 (2005).

242. *Boston Legal* (ABC television broadcast Oct. 3, 2004 - Dec. 8, 2008).

243. *Ally McBeal* (Fox television broadcast Sept. 8, 1997 - May 20, 2002).

244. Cynthia R. Cohen, *Media Effects from Television Shows - Reality or Myth? in* LAWYERS IN YOUR LIVING ROOM (Michael Asimow ed. 2009) ("Think Denny Crane hurts lawyers' image at trial? Think again. Series like *Boston Legal* and *Ally McBeal* improve public trust in real lawyers." Such "extreme characters . . . create a contrast effect when compared to a real lawyer" which "boost[s] competence perceptions."). *See also* Ronald M. Sandgrund, Esq., *Dialogue: Does Popular Culture Influence Lawyers, Judges, and Juries - Part I*, 44-JAN COLO LAW. 55 Jan. 2015 (exploring how popular culture may influence juror perceptions of trials, lawyers and judges).

245. *Justice Initiatives, Inc.- About Us*, *available at* http://www.justiceinitiatives.org/aboutus.php, (last visited Oct. 18, 2015).

246. *Justice Initiatives, Inc.- Court Camp, available at* http://www.justiceinitiatives.org/courtcamp.php, (last visited Oct. 18, 2015).

247. *Justice Initiatives, Inc.- Projects, available at* http://www.justiceinitiatives.org/projects.php. (last visited Oct. 18, 2015).

including "lecture, writing, artwork, group work, videos, mock trial, visiting speakers (judges, court officials, and deputies), research via the internet, observation of live trials, and a guided tour of the courthouse and jail."[248] The students also tour a law firm and a local law school, and there is even a graduation ceremony to which parents are invited.[249] The goals of "Juror Appreciation Week" are to assist with "educat[ing] the public about the judicial system, enhance public awareness of the importance of jury service, and appreciation to citizens who perform their civic duty."[250]

The State Bar of Georgia has started the "Cornerstones of Freedom program," which is committed to fostering "public understanding of the law and its role through a public education program about democracy, the rule of law, the legal profession, and the judicial system."[251] The program encourages judges and attorneys to participate by locating speaking opportunities at "schools, civic groups and local bars" and then providing the speaker with the necessary educational materials, such as "speeches, talking points, [and] Powerpoint presentations."[252]

Members of the judiciary are also being proactive in creating the clash between reality and fiction through education. The Maryland Judiciary offers numerous ways by which to help educate children, students, and teachers. These range from courtroom tours, where groups can "watch a trial unfold in person," to hosting mock trial competitions, to judges opening their courtroom to students as part of a "three-hour program designed to educate students about the legal system while warning them about the consequences of making wrong choices–namely drinking and driving, drug use, and other crimes."[253] The students then watch a "live, unscripted case" and have the opportunity to discuss the issues raised with leaders of the community, members of the judiciary, and "actual drunk driving offenders."[254]

Of course the best way to educate and diffuse popular culture's cultivation effect may be with other forms of popular culture. In April 2015, over 200 people joined Judge Alex Kozinski of the Ninth Circuit Court of Appeals for one of his movie nights.[255] These events, which happen three or four times a year, include not only refreshments and the screening and discussion of a particular film, but also a guided tour of the court's headquarters. Judge Kozinski started movie night after learning that a number of the law clerks had never seen the classic film "12 Angry Men."[256]

The importance of educating the lay public and of providing virginal viewers with direct experience with members of the legal profession to combat the cultivation effect cannot be overstated. Lawyers, law professors, and members of the judiciary must heed the call for action and never turn down an invitation to speak to a group of citizens to debunk television's

248. *Id.*

249. *Justice Initiatives, Inc.- Court Camp, available at* http://www.justiceinitiatives.org/courtcamp.php, (last visited Oct. 18, 2015).

250. *Justice Initiatives, Inc.- Projects, available at* http://www.justiceinitiatives.org/projects.php, (last visited Oct. 18, 2015).

251. *State Bar of Georgia, Committees, Programs & Sections: Cornerstones of Freedom Project, Cornerstones of Freedom, available at* http://www.gabar.org/committeesprogramssections/programs/, (last visited Oct. 18, 2015).

252. *Id.*

253. Maryland Courts: Education, *available at* http://www.courts.state.md.us/education/, (last visited Oct. 18, 2015).

254. *Id.*

255. Maura Dolan, *After Court Adjourns, 9th Circuit Judge's Movie Nights Are A Hit*, LA Times (Apr. 23, 2015 3:00 AM), *available at* http://www.latimes.com/local/great-reads/la-me-c1-kozinski-movie-night-20150423-story.html#page=1, (last visited Apr. 23, 2015).

256. *Id.*

cultivated perceptions about the law. We need to go into the schools on Career Day and Law Day to help educate the younger members of our society. We need to be available to speak with the press about high profile cases and to write op-ed pieces or letters to the network, as did the ladies of FAWL. Only the providing of competing views about the legal profession will give lay viewers a choice as to which version of the law they choose to subscribe–that of the impersonal world of television or the one stemming from human interaction with lawyers and judges.

Members of the television audiences also need to take much greater responsibility for the perceptions that they are cultivating by their viewing. As a culture, we need to "guard the avenues to our hearts and minds."[257] The forms and content of the entertainment we value is a reflection of who we are as a society.[258] When a television show such as *Bad Judge* becomes part of mainstream popular culture by its inclusion in the fall, prime-time line-up of a major network, it is time "to take a critical look at ourselves."[259] We need to demand not only higher quality entertainment from the networks, but more of ourselves as viewers. Extrapolating James Snead's advice to film-goers to those who thrive on TV:

> [W]e have to be ready, as [TV viewers], not only to [watch TV series], but to see through them; we have to be willing to figure out what the [show] is claiming to portray, and also scrutinize what the [series] is actually showing. Finally, we need to ask from whose social vantage point any [TV offering] becomes credible or comforting, and ask why.[260]

In real life, it would certainly be unreasonable to demand perfection from members of the judiciary. They, too, "are human beings with the attendant strengths and weaknesses. Judges should aspire to objectivity, but they cannot avoid being shaped by their background and life experiences."[261] Correspondingly, television does not need to paint the judge as perfect or create a fairy tale judiciary. However, viewers need to insist that Hollywood create shows with characters portraying judges who aspire to comply with the various Canons of Judicial Ethics as they objectively dispense justice and rule on challenging cases with wisdom and fairness.[262] All shows do not have to be serious dramas because the lead character is a judge. There is certainly room, and even a need, for the comic relief that humorous judicial characters can provide.[263] Occasionally, there should be a guest star role for a judge who contravenes the ethical rules and is sanctioned for her unethical actions. This highlights proper judicial conduct and helps educate lay viewers about judicial ethics. However, it is of paramount consequence that actions of fictional judges with recurring or starring roles do not flagrantly flaunt the ethical and professionalism standards demanded of actual members of the judiciary. This holds true for the scripting of both their private lives and their performances on the bench. Due to the direct correlation between the public's perception of judicial conduct and its confidence in the judicial system as the guardians of the rule of law, conscientious viewers should demand no less. Once

257. Leah Ward Sears, Those low-brow TV Court Shows, The Christian Science Monitor, *available at* http://www.csmonitor.com/2001/0710/p11s1.html, (last visited July 10, 2001).

258. *Id.*

259. *Id.*

260. JAMES A. SNEAD, WHITE SCREENS/BLANK IMAGES 142 (Blackwell 1994).

261. A. Wayne MacKay, *Judicial Ethics: Exploring Misconduct and Accountability for Judges* 4 (unpublished manuscript 1995) (copy on file with the Commonwealth Judicial Education Institute), *available at* http://cjei.org/publications/mackay.html, (last visited Oct. 18, 2015).

262. *Id.*

263. For example, the sitcom *Night Court* (Warner Bros. television broadcast 1984-1992) provided a humorous view of the judiciary with the character of Judge Harry T. Stone, played by Harry Anderson. During the 193 episodes of this satire, viewers met all sorts of crazy characters who came at night and ended up before a judge who was both a lawyer and a magician. While Judge Stone's rulings were often unconventional, his character did not flaunt the Canons of Judicial Ethics.

Hollywood recognizes that the only way to continue to sell its viewers to the highest possible bidder, thereby satisfying the golden god of profit, is to pander to viewers' desire for portrayals of an ethical judiciary, it will create shows that not only entertain, but also set a new standard of excellence for popular culture legal television offerings.

In closing, as the letter which FAWL sent to NBC illustrates, those who work to achieve gender diversity and increase the number of female members of the judiciary still have an arduous journey ahead of them.[264]

> In this country, (i) only four of the 112 Justices ever to serve on the Supreme Court have been women; (ii) less than 35% of the active judges sitting on the thirteen federal courts of appeal are women; (iii) only 32% of the active U.S. district court judges are women; and (iv) there are still nine federal district courts around the country where there has never been a female judge.[265]

The thirteen episodes of *Bad Judge* did nothing to assist women judges in their crusade for recognition. Instead, they confirm that things are not improving in Hollywood and that the devolution of the images of the female lawyers, even after they are appointed or elected to the bench, continues. If the networks choose not to assist female attorneys and judges in support of women in judicial roles, they should "not make it even harder for women to be taken seriously in leadership positions!"[266] The symbols of Lady Justice are not skimpy lingerie, a tequila bottle, and a used pregnancy test. They are the sword, the scales, and the blindfold. We need to restore them to her.

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264. National Women's Law Center, *Women in the Federal Judiciary: Still a Long Way to Go* (Oct. 22, 2015) *available at* http://www.nwlc.org/resource/women-federal-judiciary-still-long-way-go-1 ("Over the past three decades, an increasing number of women have joined the legal profession. Since 1992, women's representation in law school classes has approached 50%. Despite record numbers of female judicial nominees and confirmations, the percentage of female federal judges is far lower.").

265. Baker, *supra* note 142.

266. Bunny Cunningham, *Female Lawyers Group Asks NBC to Put Bad Judge Out of Its Misery*, Jezebel (emphasis in the original), *available at* http://jezebel.com/female-lawyers-group-asks-nbc-to-put-bad-judge-out-of-i-1650969671, (last visited Oct. 26, 2014).

Michael Sam: Upending NFL Heteronormativity With a Piece of Cake

Bryan Adamson*

Through the ensuing furor over ESPN and the NFL Network's coverage of Michael Sam's draft we heard so many people—even well-meaning people—say that there was nothing wrong with Sam being gay, but that ESPN should not have aired the kiss and celebration between Sam and his partner Vito Cammisano.[1] We can be quite certain that the St. Louis Rams' draft of Sam (7th Round, No. 249 overall) would have been a non-story had Sam kissed a woman and smeared cake on her face. But because Sam didn't, those of us who welcomed the revolution found ourselves having conversations about heterosexual privilege.

At the time of the Rams' announcement last May, there was a good deal of talk in the news about privilege—white privilege. For example, Princeton freshman-cum-right-wing sensation Tal Fortgang's adolescent tirade against the concept of white privilege—or rather, his rant against what he *thinks* it is.[2] Then there was former Los Angeles Clippers ex-owner Donald Sterling's bigoted babble about how he has done more for black folk than black folk have done for each other.[3] There was also rancher Cliven Bundy's far-reaching life experiences that apparently bestowed upon him the select ability to tell us "*one more thing*" he "*know[s]* about the Negro."[4] The vehement reactions to Sam's televised lip-lock with Cammisano were an odious variation on the privilege theme. Sam and Cammisano's affront to heteronormativity occurred in the cultural cauldron of hyper-masculinity and homophobia—the National Football League. The affront was staged on an electronic platform whose most devout audience externally recreates and reproduces that same heteronormativity. Now, there were many who persuasively argued that purely on the merits, Sam should not have been drafted at all. Considering Sam's release by the Rams, and subsequent release by the Dallas Cowboys[5], there may have been some merit to the claim. Nevertheless, on NFL Draft Day, Sam made history. Sports history. Media History. Human history.

The NFL Draft is one of the most anticipated televised sporting events of the year. On May 10, 2014, it was aired by ESPN and other networks,[6] on digital and mobile platforms,[7] and

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1. See, e.g., Matt Wilstein, *ESPN Host: I Respect Those Who Don't Want Michael Sam Kiss 'In Their Face,'* MEDIAITE, May 12, 2014, http://www.mediaite.com/tv/espn-host-i-respect-those-who-dont-want-michael-sam-kiss-in-their-face/; Sean Newell, *Ugly America Responds to Michael Sam Kissing a Man on ESPN*, DEADSPIN, May 10, 2014, http://deadspin.com/ugly-america-responds-to-michael-sam-kissing-a-man-on-e-1574591627.

2. Editorial, *Why I'll Never Apologize For My White Male Privilege*, TIME MAGAZINE, May 2, 2014, http://time.com/85933/why-ill-never-apologize-for-my-white-male-privilege/.

3. CNN Interview, *CNN Exclusive: Donald Sterling Insists He's No Racist, Still Slams Magic Johnson*, at http://www.cnn.com/2014/05/12/us/donald-sterling-interview/.

4. Ta-Nehisi Coates, *Cliven Bundy Wants to Tell You All About 'the Negro,'* THE ATLANTIC, April 24, 2014, http://www.theatlantic.com/politics/archive/2014/04/cliven-bundy-wants-to-tell-you-all-about-the-negro/361152/.

5. Ken Belson, *Rams Cut Michael Sam, First Openly Gay Player Drafted in N.F.L.*, NEW YORK TIMES, August 30, 2014, http://www.nytimes.com/2014/08/31/sports/football/rams-cut-michael-sam-first-openly-gay-nfl-draft-pick.html?_r=1

6. Draft Day coverage simultaneously aired on the NFL Network and ESPN2. Sara Bibel, *Record 45.7 Million Viewers for 2014 NFL Draft*, TV BY THE NUMBERS, May 12, 2014, http://tvbythenumbers.zap2it.com/2014/05/12/record-45-7-million-viewers-for-2014-nfl-draft/263063/.

watched by at least 45 million people.[8] Well before the announcement, ESPN producer Seth Markman and his television crew were outside Joe Barkett's San Diego home. Barkett, Sam's agent, was hosting a watch party with Sam and their closest friends, including Cammisano. The ESPN crew was inside, prepared to capture the moment if and when Sam got the news. When Sam did—around 6 p.m. Pacific Standard Time, the crew apparently had no compunction about keeping the cameras rolling.[9]

And this is what we saw:[10]

At the bottom of the television frame was a ticker of the draft's prior picks. Above the ticker was a strip of text overlay. The left portion of the strip identified the next two teams with upcoming picks, and the remainder identified ESPN draft analyst Mel Kiper's[11] "best available" prospects for the upcoming teams. Sam and Cammisano are in the center of the screen—the camera's subject. Cammisano stood next to Sam as Sam took Rams Coach Jeff Fisher's phone call.

It is not just *any* two men touching from mid-waist up. One is African-American and physically large. The other man, shorter, smaller, and white. Cammisano is wearing a bluish-gray, button-down shirt. Sam is wearing a fuscia-colored Izod short-sleeved shirt. He is holding a cellphone in his right hand, the ring finger of which sports a large, thick gold band—his University of Missouri 2013 Southeastern Conference East championship ring. On his wrist, Sam is wearing a multicolored wristband—a relatively ubiquitous symbol of gay identity.

As Sam's ear is to his cellphone, Cammisano strokes and caresses Sam's left arm. While we don't hear what Fisher is saying, over the course of two-minutes, we witness Sam voicing intermittent responses ("Yes . . . Yes, sir . . . Yes sir. . ."), audibly crying, and bending as if weak from overwhelming emotion. Cammisano rests his head at Sam's shoulder, caresses Sam's arm, and when the phone call is done, they engage in several brief kisses and embraces. As they continue their embrace, a text strip appears above "Mel's Picks." To the left of the Rams' logo are two pronouncements: "Michael Sam drafted in the 7th Round (249th overall)," and below that line "First openly gay athlete drafted into the NFL." The camera cuts to a wide shot of the room. We see several other celebrants cheer and applaud.[12] It might have been more than enough if all viewers had to do was get their heads around the notion that a man wearing a fuchsia colored shirt with a Gay Pride wristband on one arm and his male partner on the other had just joined the NFL. But the icing on the cake was, er, the cake.

Shortly after Fisher's phone call, Sam, Cammisano, and their friends continued their televised celebration. Based upon much responsive commentary, if the first series of pecks between Sam and Cammisano did not cause viewers to fume, they were sent into conniptions

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7. E.g., websites ESPN, WatchESPN.com and mobile application WebNFL simulcasted the Draft. Report: *All-Time High for First Round of the 2014 NFL Draft on ESPN*, TV MEDIA INSIGHT, May 9, 2014, http://www.tvmediainsights.com/tv-ratings/time-ratings-high-first-round-2014-nfl-draft-espn/.

8. Dina Gachman, *2014 NFL Draft Tops Neilsen Twitter TV Ratings*, FORBES, May 12, 2014, http://www.forbes.com/sites/dinagachman/2014/05/12/2014-nfl-draft-tops-nielsen-twitter-tv-ratings/.

9. ESPN however, in later posting the segment on its website ESPN.com, edited out the kisses. Josh Levin, *Watch as Michael Sam Gets Drafted, Kisses His Partner on ESPN*, SLATE., May 10, 2014, http://www.slate.com/blogs/the_slatest/2014/05/10/michael_sam_kiss_the_st_louis_rams_pick_the_openly_gay_missouri_star_in.html.

10. NFL.com, *Sam Reacts To Being Drafted*, May 10, 2014, http://www.nfl.com/videos/nfl-draft/0ap2000000349399/Sam-reacts-to-getting-drafted.

11. Mel Kiper is a highly regarded ESPN analyst. See Judy Battista, *A Mom-and-Pop Draft Empire*, New York Times, April 3, 2009, p. B10.

12. Associated Press, *ESPN Producer Shocked By The Uproar Of Michael Sam's Kiss As It Was 'Just Another Moment,'*, UK DAILY MAIL, May 12, 2014, http://www.dailymail.co.uk/news/article-2626144/No-hesitation-networks-airing-Sam-reaction.html.

when Sam smeared cake on Cammisano's face, licked some off, and then kissed him. At that very moment, legions of folk apparently lost their collective mind.[13] Sam's and Cammisano's clowning—thrillingly—shook heteronormative values, and those who hold fast to them, to the core.

The outrage over Sam's celebration wasn't because he cried—we've long been accepting of seeing men shed tears. Strictly speaking, the outrage wasn't about the male-to-male affection demonstrated. Again, we've seen it before as television history is rife with examples of men—as friends, brothers, fathers and sons, even lovers—kissing each other. The outrage also was not from learning that Sam is gay. Long before Draft Day, Sam had been living his life as an openly gay man while a defensive lineman for the Mizzou Tigers. Moreover, even the casual sports fan likely knew of his orientation, if for no other reason than the media—especially sports media—had made Sam's sexuality a narrative tease and click-bait headlines in the days leading to the draft.[14]

I contend that the outrage stemmed from seeing the kisses, spurring the inescapable reality that Sam was no longer gay in the abstract—but a living, breathing, gay, football-playing man who kissed men. On a deeper level, the centerpiece of their celebration—that cake play—triggered discomfort because Sam and Cammisano appropriated a ritual we are used to seeing performed by a man and a woman, and were being authentically playful and romantic while doing so.

Sam was now a concrete threat. In constructing a world of heteronormative hyper-masculinity, NFL culture simultaneously implies that is does not include women, and men "like" Sam. His presence in the NFL would squarely challenge the core tenets of masculine performance, discursive practices that serve to demark gender difference, and heterosexuality. For players and fans alike, Sam in the NFL would blur traditional constructs of sex and gender roles, calling into question masculinity itself. That fact made Sam's drafting just too much.

It was certainly too much for ESPN commentator Stephen A. Smith who, while admitting he had not yet seen the cake segment of the footage, nevertheless had an opinion about it. Smith said that while he was all right with the first kiss, the cake celebration was over the top, and his response to Sam and Cammisano at that point would have been to "get a room."[15] While Smith went on to qualify that his directive should in no way be interpreted to suggest he is homophobic,[16] it is unlikely he would have made such a comment if it had been a man and a woman engaged in such behavior, like Tom and Gisele.

A valid response to Smith's outrage is to call out the hypocrisy. Only those unwilling to engage in a true examination could dismiss the fact that the NFL Draft teems with homoeroticism anyhow. As one sociologist described, the draft is an occasion to witness an

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13. There were at least 20 complaints filed with the FCC decrying ESPN for showing such 'obscenity.' Lindsay Toler, *'Totally Disgusting:' 19 FCC Complaints About Michael Sam Kissing His Boyfriend on ESPN*, RIVERFRONT TIMES, June 23, 2014, http://blogs.riverfronttimes.com/dailyrft/2014/06/totally_disgusting_19_fcc_complaints_about_michael_sam_kissing_his_boyfriend_on_espn.php. See also, e.g., Levin, *supra* note 10.

14. See, e.g., Nate Silver, *The Odds Michael Sam Will Be Picked in the Draft*, FIVETHIRTYEIGHT.COM, May 6, 2014; Rick Cimini, *Jets keeping Tabs on Michael Sam*, ESPNGO.COM, April 16, 2014; Jason Reid, *Is the NFL Ready to Greet Sam?* WASHINGTON POST, Feb. 24, 2014, p. D1; Lorenzo Reyes, *Vincent: Gays Not New to the League*, USA TODAY, April 25, 2014, p. C5;

15. *First Take* (ESPN television broadcast May 12, 2014), http://m.nationalreview.com/article/377781/stephen-dont-force-everybody-celebrate-michael-sam-kiss-andrew-johnson/.

16. *Id.*

unabashed "male love affair with the male gender."[17] The day is full of talk about male physicality, male attributes, male attraction, men owning men, male power, and male desire.

The love affair begins months earlier in January at the Senior Bowl, or at the February pre-draft combines.[18] On those occasions, NFL scouts, managers, coaches, fan-boys and media members converge to *watch* and *assess* male bodies. At the Senior Bowl, for instance, NFL personnel are given dossiers listing players' weights and arm and hand measurements. Players are directed to strip to their shorts and line up where they are weighed, measured, and inspected. Evaluation sheets are given to men, and the prospects are graded on their physical qualities.[19] Men watch as team personnel evaluate prospects, and media sportscasters offer commentary to the unfolding visual narratives.[20] The NFL Draft has drawn parallels to how guys "check out" women in bars.[21] For former coach and current sports commentator, Jon Gruden, the draft process is about taking "one pretty girl off the board, then another. . .and you get the best looking girl that's left...."[22] NFL.com's former commentator Christine Stewart likened the draft's associated rituals to a "beauty pageant."[23] Thus, during the draft, the "love that dare not speak its name" is spoken fairly loudly and clearly. All day, the male body poses for the male gaze. And since the body itself is a discursive object, being interpreted in all manner of description,[24] during the draft, the male body is *all text*, and *all* the text.[25]

All the rites, rituals, and conversations associated with the whole enterprise are consciously designed to make the male body a legitimate object of the male gaze.[26] That's why the virulent homophobic responses to Sam and Cammisano were downright ironic.

Stewart's "pageant" metaphor is straightforwardly apt. It perfectly captures the masculine ideal the NFL creates for itself, because masculinity is not a state of being, but a *performance.* From the womb, we are all ontologically unstable.[27] We are assigned a sex, but are also assigned to search for our "authentic self."[28] Gender and its expressions, either masculine or feminine, are perhaps the most consequential aspects of that identity quest.[29] Through a host of

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17. Thomas P. Oates, *The Erotic Gaze in the NFL Draft*, COMM. AND CRITICAL/CULTURAL STUD., Vol.4, No.1 (March 2007), pp. 74-90, 81 (quoting Mariah Burton Nelson).

18. Oates, Thomas P. and Meenakshi Gigi Durham, *The Mismeasure Of Masculinity: The Male Body, 'Race' And Power In The Enumerative Discourses Of The NFL Draft*, PATTERNS OF PREJUDICE, Vol. 38, No. 3 (2004), pp. 301-320, 304-05 (post-modern sociologists envision the body as "text, as a sign, as a cultural construction, as a performance."); Oates, *supra* note 18 at 77-78.

19. At this juncture, space nor personal sanity will allow me to digress into the parallels of the NFL's acquisition processes to the auction blocks of slavery, the institutionalization of imposing inferior signifiers upon black bodies through science (e.g., phrenology), or historical examples of the genocidal outcomes from "'scientiz[ing]' and 'statisticiz[ing]' the body in ways that are intended to mark it, make it productive and otherwise colonize it." Oates and Durham, *supra* note 19 at 305.

20. Bryant, Jennings, Paul Comisky, and Dolf Zillmann, *Drama in Sports Commentary*, J. OF COMM. (Summer 1977), pp. 140-148 (discussing television and commentators as mediating text).

21. *Id.*

22. Oates, *supra* note 18 at 82.

23. *Id.* at 81.

24. Oates and Durham, *supra* note 19 at 305.

25. SUSAN BORDO, THE MALE BODY: A NEW LOOK AT MEN IN PUBLIC AND IN PRIVATE 186 (New York: Farrar, Straus and Giroux 2000) ("[T]he most compelling images are suffused with 'subjectivity'—they speak to us, they seduce us.")

26. *Id.*

27. Kiesling, Scott F., *Homosocial Desire in Men's Talk: Balancing and Re-Creating Cultural Discourses of Masculinity*, 34 LANGUAGE IN SOC'Y 695-726, 701 (2005).

28. *Id.*

29. Susan Alexander, *Stylish Hard Bodies: Branded Masculinity in Men's* Health *Magazine*, SOC. PERSP., Vol. 46, No. 4 (Winter 2003), 535, 539. See also, DONALD F. SABO, SPORT, MEN, AND THE GENDER ORDER (Michael A. Messner & Donald F. Sabo, eds. 1990).

socializing agents, we consciously and unconsciously read, then mimic marks of masculinity or femininity.[30] We assign masculine performances to men and privilege those performances vis-à-vis women.

In its idealized form, the masculine type we culturally construct is hegemonic.[31] To maintain that ideal, men are conditioned to incessantly engage in self-surveillance of their performance, and fiercely police the performance of others. As a result, gender practices are configured and re-created in a way that guarantees the masculine ideal's dominant position to women and anyone else along the continuum.

Sociologist Scott Kiesling has located four dominant performance sites of hegemonic masculinity: discourses which enable us to demark gender difference; those which allow for the demonstration of heterosexuality; discourses of hegemonic masculine dominance; and paradoxical at first blush—those performed in creating homo-social male solidarity.[32] Through formal and informal codes of appearance, behavior, and seeming (if not *being*), these performances are enacted and legitimated.

To be sure, Keisling's sites of masculine discourses define the NFL culture. Toughness, aggressiveness, physical and (let's be clear, *hetero-*) sexual prowess are all critical identity markers, institutionalized. On the gridiron, (displaying brute force, dominating opponents through physical strength), in the locker room (e.g., homo-social fraternity *in conjunction with hetero*sexism), and off the field (all four),[33] masculinity prevails.

At its apogee, demarking hegemonic masculinity breeds homophobia and misogyny. In knowing this, we evaluate the NFL's handling of Ray Rice's assault upon his then-fiancé Janay Palmer,[34] or the most venomous verbal attacks on Sam ruefully conclude with a "but of course." The type of masculinity endemic to professional football subordinates other "abnormal," "unnatural" bodies, such as Janay's and Sam's, *insisting* that it can bear *no* resemblance whatsoever to those bodies.[35]

Sadly, that same insistence is reinforced by legions of NFL fans. Fan reactions of outrage can only be explained by heterosexually privileged presumptions that are completely and utterly ingrained into our social system. Those presumptions are visible and invisible, conscious and unconscious, reflexive, and subsumed into our very being. For those most invested in preserving hegemonic masculinities in NFL fan culture, Sam was a personal affront to their sense of self as they live within the constructs of the heteronormative world they have helped create.[36]

Whether playing a video game, fantasy football, or in pick-up game fun in a park, football fans reify heteronormativity in their viewing and recreation habits. The NFL Draft is an occasion on which the male fan consummates *his* love affair with the male gender.[37] As the

30. Alexander, *supra* note 30 at 539; Richard Collier, *Masculinities, Law, and Personal Life: Towards a New Framework for Understanding Men, Law, and Gender*, 33 HARV. J.L. & GENDER 431, 435 (2010).

31. Connell, R.W., *An Iron Man: The Body and Some Contradictions Of Hegemonic Masculinity*, in Messner and Sabo, *supra* note 30, pp. 83-95; Collier, *supra* note 31 at 436.

32. Kiesling, *supra* note 28 at 701.

33. *Id.* at 702-703.

34. Katie McDonough, *NFL's Next 'Woman Problem': Why Domestic Abuse Is Only The Beginning*, SALON December 11, 2014, http://www.salon.com/2014/12/11/nfls_next_woman_problem_why_domestic_abuse_is_only_the_beginning/.

35. Sabo, *supra* note 30 at 39. *See also* Seymour Kleinberg, *The New Masculinity of Gay Men, and Beyond, in* BEYOND PATRIARCHY: ESSAYS BY MEN ON PLEASURE, POWER, AND CHANGE (Michael Kaufman, ed. 1987).

36. Connell, *supra* note 32 at 83.

37. Brummett, B., & M.C. Duncan, *Theorizing Without Totalizing: Specularity and Televised Sports*," THE Q. J. OF

overwhelming majority of draft viewers are men, it is also an event that allows male viewers to practice hegemonic forms of masculinity in—more or less—socially acceptable ways.[38]

The love-fest unfolds through social engagement and discursive performances with other men gathered around, and engaging with, a television screen. Draft Day is a mediated spectacle during which the visual and aural narratives put the audience in the owner's shoes.[39] The inveterate fan shows clear preferences for "his" team, its players, and how well his team is managed.[40] Fans talk, behave, and role-play as players, coaches, team owners, and even prospects.[41]

It is heard in the banter: fans develop their social identity around football teams and their in-groups.[42] A fan will talk about "his" players or select prospects as if he were the team owner. In social conversations with in-group members about opponents, ego involvement transforms the "I"s to "we"s, and football becomes a game not of "you v. me," but "us v. them."[43] Those same fans also exhibit coping behaviors with team decisions, team players, and prospects they don't like.[44]

The day of the draft is a particularly intense social event during which men, as spectators, recreate the hegemonic masculinity on display.[45] These spectators watch the draft together, in social milieus suffused with a "fem-phobic" (sexist) and homo-phobic cultural ethos.[46] Especially for those whom communication scholars and sociologists refer to as "highly identifying" (i.e. avid) fans,[47] self-esteem and self-identities are intricately linked to their preferred teams and performers.[48] Therefore, for highly identifying, highly offended fans—especially those proud, straight St. Louis Rams backers—there were negative psychoanalytic implications to watching Sam get the call.[49]

They had to watch—helplessly—as Sam was granted entry as (to borrow a phrase from gay culture) a "member of the team"—*their* team. This fact was inconsistent and incompatible with their attitudes not only about the game of football, but about their team and their heteronormative identity. The strike to one's masculine identity alone could explain much of the vitriol. However, viewing Sam's draft with others likely amplified the anger. For those spectators in a room reeking of hyper-masculine brio, conforming behaviors of signifying and face-saving likely took hold. Rams fans (even those happy that a gay man was selected) could

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SPEECH 76 (1990), pp. 227-246, 230.

38. Howie, Luke and Perri Campbell, *Fantasy Sports: Socialization and Gender Relations*, J. OF SPORTS AND 39(1) SOC. ISSUES 61, 65 (2015).

39. Oates and Durham, *supra* note 19 at 317.

40. Daniel L. Wann, Katrina Koch, Tasha Knoth, David Fox, Hesham Aljubaily, Christopher D. Lantz, *The Impact of Team Identification on Biased Predictions of Player Performance*, THE PSYCHOL. REC. 55 (2006); Howie and Campbell, *supra* note 39; Spinda, John S.W., *Perceptual Biases and Behavioral Effects Among NFL Fans: An Investigation of First-Person, Second-Person, and Third-Person Effects*, 5 INT'L J. OF SPORT COMM. 327, 330 (2012).

41. Oates and Durham, *supra* note 19 at 307-308; Brummett and Duncan, *supra* note 38 at 236.

42. Spinda, *supra* note 41 at 329.

43. Wann, et. al., *supra* note 41 at 61-62 (discussing the 'black sheep' effect in which fans maintain their loyalties to a team while rejecting a team member); cf. Michael A. Hogg, Scott A. Reid, *Social Identity, Self-Categorization, and the Communication of Group Norms*, 16(1) COMM. THEORY 7, (2006)..

44. Wann, et. al., *supra* note 41 at 60.

45. Kiesling, *supra* note 28 at 702; Marci D. Cottingham, *Interaction Ritual Theory and Sports Fans: Emotion, Symbols, and Solidarity*, 29(2) SOC. OF SPORT J. 168 (2012).

46. *Id.* at 64.

47. Wann, et.al., *supra* note 41 at 56.

48. Howie and Campbell, *supra* note 39 at 63.

49. Cottingham, *supra* note 46 at 171; Brummett and Duncan, *supra* note 38 at 234.

not cheer for Sam in that setting, even if they secretly wanted to because, of course, what would their friends think? ("You are who you pick, bro.").[50]

For other fans disgusted by the draft of Sam, their heteronormative ideals about the game were shattered as well, and where, and with whom, they watched also had doubtless influence. But as fans of other teams, at least they could declaim Sam and Fisher's decision from an ontological distance. Considering the fact that for all these spectators, Sam had just invaded the irredeemably heterosexual fan's hyper-masculine refuge, *in front of his hyper-masculine friends no less*, the fury over the kisses and the cake was as predictable as it was marked.

Particularly jarring was that the fury smothered any rational consideration of its underpinning, i.e., heterosexual privilege. A person enforcing, bearing, or unwittingly complicit in heterosexual privilege perhaps never considers how they benefit from it. The privilege demands that two men can never be seen to engage in behaviors we all take for granted when performed by a man and a woman: holding hands in public, having a picture of your wife/girlfriend (if you are a man) or husband/boyfriend (if you are a woman) on display at your work desk; being able to have an inane conversation in mixed company about how much fun your weekend was with you and your wife/girlfriend (if you are a man) or husband/boyfriend (if you are a woman). Those lacking self-awareness of the heterosexual privilege never consider how they can perform those acts in social situations without concern for others' violent reactions.

One benefitted by the privilege will never face the prospect of adverse physical, emotional, psychological or economic consequences when family or friends find out he is straight. Hell, he will never be asked why he "chose" to be straight. He will see people like him positively presented on nearly every television show, in every movie, in every commercial, on every live sporting event's "Kiss Cam," and he will never give the privilege of that spectacle a second thought. At worst, the spleen engendered by the privilege oppresses and even punishes difference through hazing, harassing, assault, and even murder.

In the context of this unyielding hyper-masculine culture within and around the NFL, and the associated physical and psychological risks, Sam's willingness to openly live his life is all the more inspiring. Sam's willingness is emboldening especially to young African-American boys who, like him, aspire for greatness in the sport of their choice. And in what Sam has experienced, his race cannot be ignored. His sexuality is intertwined with his race. Like all gay African-Americans, Sam's identity is shaped by both. One universal credo of the hegemonic masculine experience is the "unnaturalness" of homosexual desire. Heterosexual privilege and white privilege do not operate in silos, nor is homophobia the province of white heterosexuals.

I can personally testify to instances of managing my sexual identity not only out of concern for adverse consequences as a gay man, but as an *African-American* gay man. This was especially so in my early days as one of the few African-American lawyers in my law firm, and even as a law school professor. Experiencing what was more broadly perceived at the time as stigma within the corporate America (being black) and in my African-American communities (being gay), I was only aided by finding, and holding on to, those like me who supported my mind, body, and spirit, and those not like me who nonetheless supported me. Gay African-Americans must constantly negotiate their identity in spaces where privilege based on race, class, gender and sexual identity thrive in a repressive matrix. Sam's challenge was to do so in the context of the NFL's culture of masculine heterosexual privilege to which men of all races subscribe.

50. Cottingham, *supra* note 46 at 171; Hogg and Rèid, *supra* note 44 at 12-13.

Those livid by the sight of Sam's celebration would demand that he not be gay. Some would even wish that he were not African-American. Being only slightly more charitable, they would then say if Sam must be gay, then he has no business in the NFL. But if he must be in the NFL, then he must not be *openly* gay. If Sam *must* be openly gay, then he must remain an *abstraction*, gay in name only, untethered to signs, signifiers, and symbols of being gay. He must not have a partner, and certainly not a *white* partner. Sam's gayness must never—never, ever, ever—be on "display," or "in our face." What most offends is the subtext, the inference that Sam's detractors refuse to recognize how their own misguided, unexamined privilege informs these attitudes. Worse, those same detractors go on to insist without irony that they have the right to make such demands and have those demands enforced upon another human being.

Sam will not be the first openly gay NFL player. By all credible accounts (including his own)[51] there are, and have been, gay football players out to their teams. And, to be entirely fair, the strong outpouring of love and support for Sam by his past and future teammates, journalists, opinion-makers, fans and influential NFL leaders is a testament to how far we have come,[52] and how the NFL is striving to expand what it means to be masculine in sports culture. Consider the fact that it never occurred to the ESPN camera crew *not* to air the celebration, kiss and all, or the astounding backlash from all levels in response to the ignorant tweets by Dolphins player Don Jones and Mississippi basketball player Marshall Henderson.[53]

Some people are genuinely not comfortable with public displays of affection, of any kind, by any one, and that's fine. Even those who are gay or gay-supportive may have been discomforted by the affection demonstrated by Sam and Cammisano because of its utter newness in the NFL context. People legitimately in those camps get a pass. However, those who insist that those of us like Sam be who we are only in the abstract and only in private do not get a pass. They deserve no voice to demand something they would never demand for themselves.

Predictably, many objectors tethered their offense to their religious biases—that Leviticus stuff about man not lying with man, etc. Some of those objectors went as far as to decry the "liberal" media's double standard, claiming a "universal" outpouring of support for Sam's expression in contrast to derision foisted upon former Denver Broncos quarterback Tim Tebow for his ritualistic praying.[54] There are a few observations to be made about those fastening their homophobia to the Good Book.

First, if ESPN's looping of the Sam kisses and their subsequent reverb on other networks and in cyberspace, turned the personal into political and gave hope to those gay somebodies suffocating in their closets out of fear—the more the better. I'm with journalist LZ Granderson: I've not heard of anyone committing suicide because they were prevented from expressing their religious beliefs.[55] If incessant airing of the kiss helped move being homosexual into the world of professional football and our social fabric even a bit, we are better off for it.

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51. *Oprah Prime* (OWN Network television broadcast December 27, 2014).

52. Chase Goodbread, *NFL Commissioner Roger Goodell Welcomes Michael Sam*, NFL.COM, February 12, 2014, http://www.nfl.com/news/story/0ap2000000325478/article/nfl-commissioner-roger-goodell-welcomes-michael-sam; *Michael Sam's Teammate: "Proud of my Bro Mike for Finally Coming Out,"* SPORTS ILLUSTRATED, February 9, 2014, http://www.si.com/nfl/audibles/2014/02/09/teammate-proud-of-michael-sam.

53. Associated Press, *Dolphins Player Rebuked for Negative Tweet About Michael Sam*, HUFFINGTON POST, May 10, 2014, http://www.huffingtonpost.com/2014/05/10/dolphins-don-jones-sam-tweet_n_5303351.html; Laken Litman, *Marshall Henderson is "boycotting SportsCenter" Over Michael Sam Kiss*, May 12, 2014, *in* http://ftw.usatoday.com/2014/05/marshall-henderson-sportscenter-michael-sam-kiss.

54. Cal Thomas, *Cultural Double Standard: Michael Sam, Tim Tebow and Free Speech*, FOX NEWS, May 16, 2014, http://www.foxnews.com/opinion/2014/05/16/cultural-double-standard-michael-sam-tim-tebow-and-free-speech/.

55. *Granderson: Kiss a Sign of NFL Progress*, VIDEO AT CNN.COM, May 12, 2014, http://www.cnn.com/videos/bestoftv/2014/05/12/sot-ath-michael-sam-kiss-reax-lz-granderson.cnn.

Frankly, there are many things I'd prefer over watching Tim "Te-bowing" for even the most marginal happenstance ("I didn't get a hangnail taking that snap. Thank you Jesus.").

Second, it must be believed that those invoking Leviticus in their anti-Sam rants demonstrated consistency in their convictions. For example, they must have deluged the television networks, the NFL Commissioner, and even Mr. Tebow himself with irate phone calls or web posts when Mr. Tebow announced that he was celibate[56]—celibacy being, you know, abnormal, the doctrine of "demons." (1 Timothy 4:13). Certainly they must have penned strongly worded letters to NFL team owners, demanding that they institute a stoning policy for players who commit adultery. (Deut. 22:22).

But perhaps they did none of those things. They probably don't even watch professional football anyhow since learning that the NFL allows players to shave their beards, (contra Leviticus19:27), permits tattoos (contra Leviticus 19:28), and lets them get divorced (contra Mark 10:1-13; Matt. 19:9). Were *any* of those NFL transgressions the target of righteous indignation? I think not.

Despite, or perhaps as indicated by, the vociferous objections, ESPN's decision to air Sam's draft selection to the St. Louis Rams, and everything we saw, heard, and read during those moments, was groundbreaking. Markman thoughtfully noted that airing the kiss between Sam and Cammisano was entirely consonant with the sport's ritual.[57] "[F]or more than 30 years [ESPN] has shown plenty of players kissing their girlfriends" after learning they were selected by a team.[58] Touche. But going further, Markman added that ESPN was not there "to make a political statement."[59]

Yeah, whatever. I'm not mad at you. But whatever.

Images are *never* innocent. Perhaps above anyone, content creators know that. They know that the decision behind which images to capture, frame, or transmit is never apolitical. How the images Markman chose to show were interpreted by the spectators is, as well, imbued with ideological selectivity. We cannot escape a placement of the images such as that of Sam and Cammisanos' smeared cake into the context of their production, or especially into the social context in which they were seen.

Gays, lesbians, bisexuals and transgendered people have longed to see more of ourselves and our relationships reflected in places and contexts not only historically closed off to us, but downright hostile. Television continues to play an important, if not a vanguard role moving us forward. Yet, it is one thing to see LGBT representation in the fiction that is Modern Family, or Will and Grace, but to see an authentic male-to-male kiss on the news? At a live event *not* called the Tonys, Emmys, or Oscars? But a live *sports* event like the NFL draft? Well, how about that?

Non-fiction same-sex kisses, when they happen on television, break boundaries. As one significant example, the 2011 repeal of Don't Ask/Don't Tell was a moment for the television age as well. The repeal allowed us to finally articulate a real narrative from images of enlisted

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56. Eamon Brennan, *Tim Tebow Admits Virginity; Florida Quarterback Basically Perfect In Every Way*, NBC CHANNEL 5 NEWS, July 28, 2009, http://www.nbcchicago.com/news/sports/Tim-Tebow-Admits-Virginity.html. See also, Dan Barry, *He's a Quarterback, He's a Winner, He's a TV Draw, He's a Verb*, THE NEW YORK TIMES, January 14, 2012 Saturday, Late Edition – Final, p. A1.

57. Chuck Schilken, *Michael Sam Draft-Day Kiss Was Too Much For Some to Watch*, LOS ANGELES TIMES, May 12, 2014.

58. Associated Press, *Networks Don't Hesitate on Sam*, ESPNGO.COM, May 12, 2014, http://espn.go.com/nfl/story/_/id/10921644/michael-sam-coverage-networks-was-business-usual.

59. *Id.*

men and women as their whole selves: heroes coming home for the holidays and into the arms of their same-sex partners—just as we witnessed heterosexuals do for well over 50 Christmastimes. The image of that kiss and that cake was a moment for the ages as well. Gil Scott-Heron was right: the revolution will not be televised.[60] But finally, thanks to Mssrs. Sam and Cammisano, and ESPN, the revolution is finally being reflected.

That revolution is being reflected because of a piece of cake shattered the NFL's heteronormative constructs. Oh, that cake. It is great not to be gay in the abstract.

60. GIL-SCOTT HERON, *The Revolution Will Not Be Televised, on* SMALL TALK AT 125TH AND LENOX AVENUE (Flying Dutchman Records 1970).

Dropping the Ball: How the Commissioner's Exercise of His "Best Interests" Authority is Failing the NFL and What Can Be Done About It

Jeremy Cole*

The NFL Commissioner has had the authority to punish players for "conduct detrimental to the integrity of, or public confidence in, the game of football" since 1960. Yet, he first exercised this "best interests" disciplinary authority to punish a player for a non-gambling-related off-the-field offense in 2002. Since then, the NFL Commissioner has issued over fifty separate disciplinary decisions for players' off-the-field conduct. In the process, the NFL Commissioner's implementation of this broad power has come under fire, with critics claiming that the NFL Commissioner's decisions are inconsistent, unpredictable, and unfair to the players. In response to these criticisms, the current NFL Commissioner, Roger Goodell, passed a series of Personal Conduct Policies. This Article details the history of the NFL Commissioner's "best interests" power, including the recent Personal Conduct Policies. It then describes the NFL's three high-profile scandals of the 2014–15 season—Ray Rice's domestic violence case, Adrian Peterson's excessive child discipline, and the New England Patriots' DeflateGate controversy—in order to explore the problems with how the NFL Commissioner exercises his "best interests" power. This Article then offers a solution: the "Independent Adjudicatory Committee" system. Under this proposal, the NFL Commissioner would take on a prosecutorial role and leave disciplinary decision-making authority to an independent committee of former judges. These judges would adjudicate charges brought by the NFL Commissioner in the form of written opinions, determining the appropriate punishments for various violations and offering much-needed clarity with respect to what constitutes conduct detrimental to the game. This proposal would fix many of the issues with the current system by distancing the NFL Commissioner from the decision-makers and by creating a reliable common law for NFL discipline.

INTRODUCTION

The Collective Bargaining Agreement ("CBA") between the National Football League ("NFL") and the NFL Players Association ("NFLPA")[1] grants the NFL Commissioner unusually broad authority to discipline players for "conduct detrimental to the integrity of, or public confidence in, the game of professional football."[2] This is colloquially called the NFL

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1. The NFLPA is the union elected by the NFL players to represent them in collective negotiations with the NFL. *See About the NFLPA*, NFLPA.COM, https://www.nflpa.com/about (last visited Jan. 3, 2016).

2. NFL CONST. & BYLAWS, Art. VIII, § 8.13(A) (Feb. 1, 1970) (revised 2006), *available at* http://www.nfl.com/static/content/public/static/html/careers/pdf/co_.pdf; NFL COLLECTIVE BARGAINING AGREEMENT, Art. 46, § 1(a) (Aug. 4, 2011), *available at* https://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf [hereinafter NFL CBA].

Commissioner's "best interests" authority, named after the first clause to grant a sports commissioner that power.[3] The NFL Commissioner's "best interests" power is considerable—he is not only the prosecutor, but, if he so chooses, the judge and jury too. In fact, the CBA includes a separate appeals process specifically designed for "conduct detrimental to the game" disciplinary decisions that grants the Commissioner the sole authority to appoint hearing officers.[4] The Commissioner frequently appoints himself or a party partial to the NFL.[5]

The Commissioner has exercised this power at an increasing rate. The NFL has issued 263 separate suspensions since its inception in 1947, with all but two coming after the NFL adopted its "best interests" clause in 1960.[6] Sixty of those instances are categorized as "personal conduct," meaning off-the-field conduct.[7] Aside from gambling-related offenses, the first of these occurred in 2002, during which only one suspension was issued.[8] By comparison, in 2013, six players were suspended for personal conduct, with ten players similarly suspended the prior year.[9] As the NFL Commissioner exercises this power with increasing frequency, his ability to do so fairly and swiftly has come into question. Recently, three disciplinary decisions—Ray Rice's, Adrian Peterson's, and Tom Brady's for his involvement in the DeflateGate scandal—have been partially or entirely overturned,[10] and the NFLPA, the media, and even the fans criticized the NFL Commissioner for those decisions.[11] Some have called for his resignation,[12] and the Commissioner himself even acknowledged that he mishandled the Ray Rice case.[13]

In the wake of the Ray Rice and Adrian Peterson scandals, the NFL unveiled a new domestic violence policy and a new personal conduct policy.[14] Although these policies may help to bring some uniformity to the NFL Commissioner's exercise of his disciplinary authority, more is needed. In Part I of this Article, I discuss the history of the NFL Commissioner's "best interests" disciplinary authority, which is codified in the NFL's Constitution and Bylaws, the CBA, and the NFL's Personal Conduct Policies. In Part II, I

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3. *See infra* Part I.A.

4. NFL CBA, *supra* note 2, Art. 46, §1(b).

5. Michel O'Keeffe, *Ray Rice's Appeal of Indefinite Ban from NFL To Be Heard by ex-Manhattan Federal Judge Barbara S. Jones*, N.Y. DAILY NEWS (Oct. 2, 2014, 10:40 PM), http://www.nydailynews.com/sports/football/ray-rice-appeal-nfl-ban-heard-ex-manhattan-federal-judge-barbara-s-jones-article-1.1961075.

6. Allison McCann, *The NFL's Uneven History of Punishing Domestic Violence*, FIVETHIRTYEIGHT.COM (Aug. 28, 2014 8:13 PM), http://fivethirtyeight.com/features/nfl-domestic-violence-policy-suspensions/ (the report is current through September 22, 2014, and excludes, for instance, Adrian Peterson's suspension).

7. *Id.*

8. *Id.*

9. *Id.*

10. *See infra* Part II.

11. Thom Loverro, *Ray Rice Appeal Victory Magnifies Roger Goodell's Fumbling of Case*, THE WASH. TIMES (Nov. 30, 2014), http://www.washingtontimes.com/news/2014/nov/30/ray-rice-appeal-victory-magnifies-roger-goodells-f/?page=all; Michael Rosenberg, *Roger Goodell's Press Conference Proves the Public Has Lost Faith in Him*, SPORTS ILLUSTRATED (Jan. 30, 2015), http://www.si.com/nfl/2015/01/30/roger-goodell-press-conference-super-bowl-xlix.

12. CNN Wire, *Ray Rice Video: Critics Call for NFL Commissioner Roger Goodell's Firing Over Handling of Attack*, KTLA (Sept. 10, 2014, 4:57 AM), http://ktla.com/2014/09/10/ray-rice-video-critics-call-for-nfl-commissioner-roger-goodells-firing-over-handling-of-attack/.

13. Ken Belson, *N.F.L. Domestic Violence Policy Toughened in Wake of Ray Rice Case*, N.Y. TIMES (Aug. 28, 2014), http://www.nytimes.com/2014/08/29/sports/football/roger-goodell-admits-he-was-wrong-and-alters-nfl-policy-on-domestic-violence.html.

14. Steve Almasy & Rachel Nichols, *NFL Toughens Domestic Violence Policy with Six-Game Bans*, CNN (updated Aug. 28, 2014, 4:52 PM), http://www.cnn.com/2014/08/28/us/nfl-domestic-violence/; Rita Smith, *NFL's Personal Conduct Policy: A Step in the Right Direction*, HUFFINGTON POST (Dec. 15, 2014, 5:59 AM), http://www.huffingtonpost.com/rita-smith/nfls-personal-conduct-pol_1_b_6326480.html.

describe three scandals that rattled the NFL in 2014—Ray Rice, Adrian Peterson, and DeflateGate—to frame the problems with the NFL Commissioner's recent exercise of his "best interests" authority. In Part III, I offer a possible solution: the creation of an Independent Adjudicatory Committee responsible for determining player discipline, and the subordination of the NFL Commissioner to prosecutor in that process. In Part IV, I analyze how this solution will best solve the problems with the NFL Commissioner's current system. I conclude with some parting words on how and why the parties should adopt this approach.

I. COMMISSIONER POWER: PAST AND PRESENT

A. THE ORIGINS OF THE NFL COMMISSIONER'S "BEST INTERESTS" AUTHORITY

The position of omnipotent sports commissioner that we see in the NFL today has its roots in Major League Baseball ("MLB"). In 1919, the Chicago White Sox and Cincinnati Reds were set to face off in the World Series.[15] Despite the Chicago White Sox being favored, the Cincinnati Reds won the series five games to three.[16] Soon after, it was discovered that eight Chicago White Sox players took bribes from gamblers to throw the World Series.[17] Although many at that time thought gambling infractions occurred in the MLB, no one believed they could reach the sport's biggest stage.[18] This scandal, which eventually became known as the Black Sox Scandal, rattled the MLB and prompted swift, decisive action from the owners to save their sport.[19] The owners realized they needed a strong individual who had the confidence and respect of the public to oversee their league.[20] They settled on Judge Kenesaw Mountain Landis,[21] who accepted the commissioner position under the condition that he wield absolute power.[22] The owners agreed, and granted Landis the authority to punish anyone for conduct that he determined was "detrimental to the 'best interests' of baseball."[23]

The "best interests" clause was born. However, the NFL would not adopt a similar clause right away. In fact, the NFL's first two commissioners operated without this expansive authority.[24] The NFL finally granted "best interests" power to Commissioner Pete Rozelle in 1960, largely as a result of his financial successes with the league.[25] Specifically, the NFL's owners granted Rozelle "full, complete, and final jurisdiction and authority over any dispute involving a member or members in the League"[26] and the power to punish a player for conduct that he deemed was "detrimental to the integrity of, or public confidence in, the game of

15. Matthew J. Parlow, *Professional Sports League Commissioners' Authority and Collective Bargaining*, 11 TEX. REV. ENT. & SPORTS L. 179, 183 (2010).

16. *Id.* (citing Jonathan M. Reinsdorf, *The Powers of the Commissioner in Baseball*, 7 MARQ. SPORTS L.J. 211, 219 (1996)).

17. *Id.* (citing Robert I. Lockwood, Note, *The Best Interests of the League: Referee betting Scandal Brings Commissioner Authority and Collective Bargaining Back to the Forefront in the NBA*, 15 SPORTS L.J. 137, 141–44 (2008)).

18. *Id.* at 183–84 (citing Reinsdorf, *supra* note 16, at 219–20).

19. *Id.* at 184 (citing Reinsdorf, *supra* note 16, at 220).

20. *Id.* (citing Peter G. Neiman, *"Root, Root, Root for the Home Team": Peter Rose, Nominal Parties, and Diversity Jurisdiction*, 66 N.Y.U. L. REV. 148, 148 n.7 (1991)).

21. *Id.* (citing Craig F. Arcella, *Major League Baseball's Disempowered Commissioner: Judicial Ramifications of the 1994 Restructuring*, 97 COLUM. L. REV. 2420, 2430 (1997)).

22. *Id.* (citing Shayna M. Sigman, *The Jurisprudence of Judge Kenesaw Mountain Landis*, 15 MARQ. SPORTS L. REV. 277, 304 (2005)).

23. *Id.* at 184–85 (citing Reinsdorf, *supra* note16, at 221).

24. *Id.* at 187 (citing Lockwood, *supra* note 17, at 146).

25. *See id.*; *see also* Lockwood, *supra* note 17, at 146.

26. Parlow, *supra* note 15, at 187 (citing Lockwood, *supra* note 17, at 146 (citing NFL CONST. & BYLAWS, Art. VIII, § 8.3(a) (Feb. 1, 1970) (revised 1988)).

professional football."[27] While the NFL's clause never explicitly mentioned "best interests," it granted the NFL Commissioner substantially the same power as the MLB's "best interests" clause and, therefore, is referred to as such.

B. CURRENT NFL COMMISSIONER POWER

The NFL's "best interests" clause adopted in 1960 survives substantially in the same form today. The NFL Commissioner derives his "best interests" authority from the NFL's Constitution and Bylaws and the NFL's CBA with the NFLPA. The NFL's Constitution and Bylaws grant the NFL Commissioner the complete authority to punish individuals

> whenever the Commissioner, after notice and hearing, decides that an owner, shareholder, partner or holder of an interest in a member club, or any player, coach, officer, director, or employee thereof, or an officer, employee or official of the League has either violated the Constitution and Bylaws of the League or has been or is *guilty of conduct detrimental to the welfare of the League or professional football* . . . .[28]

Although the NFL and NFLPA's current CBA provides additional language for this authority, it offers little clarity. The CBA allows the NFL Commissioner to punish a player "for conduct detrimental to the integrity of, or public confidence in, the game of professional football."[29] Further, the CBA includes a form player contract in Appendix A, which states:

> Player recognizes the detriment to the League and professional football that would result from impairment of public confidence in the honest and orderly conduct of NFL games or the integrity and good character of NFL players. Player therefore acknowledges his awareness that if he . . . is guilty of any other form of conduct reasonably judged by the League Commissioner to be detrimental to the League or professional football, the Commissioner will have the right, but only after giving Player the opportunity for a hearing at which he may be represented by counsel of his choice, to fine Player in a reasonable amount; to suspend Player for a period certain or indefinitely; and/or to terminate this contract.[30]

Thus, the NFL Commissioner is granted substantially the same authority—to punish players for conduct detrimental to the game of football—three distinct times.

C. THE NFL'S PERSONAL CONDUCT POLICIES

While most of the major professional sports teams have agreed to limit (or eliminate) their commissioners' "best interests authority" in collective bargaining agreements or similar documents,[31] the NFL has not done so. Rather, the NFL Commissioner, with ownership approval, has sought to clarify his authority by passing a series of his Personal Conduct Policies. The NFL's first stab at such a policy was created entirely by the owners. In 1998, the owners instituted the Violent Crime Policy, which expressly allowed the NFL Commissioner to

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27. *Id.* (citing Lockwood, *supra* note 17, at 146 (citing NFL COLLECTIVE BARGAINING AGREEMENT, Art. XI, § 1(a) (1993))).

28. NFL CONST. & BYLAWS, *supra* note 2, Art. VIII, § 8.13(A) (emphasis added).

29. NFL CBA, *supra* note 2, Art. 46, § 1(a).

30. *Id.* at Appendix A, ¶ 15.

31. Adriano Pacifici, *Scope and Authority of Sports League Commissioner Disciplinary Power: Bounty and Beyond*, 3 BERKELEY J. ENT. & SPORTS L. 93, 105 (2014).

punish players who were charged with any violent crime.[32] In 2000, the owners, in response to public outrage over the Ray Lewis murder trial,[33] replaced the Violent Crime Policy with the NFL's first true Personal Conduct Policy.[34] This policy granted then-NFL Commissioner Paul Tagliabue virtually unlimited power to suspend, fine, and even banish players who had been convicted of a crime or admitted to engaging in any wrongdoing.[35] However, in Paul Tagliabue's eight-year reign following the Violent Crime Policy, he suspended only nine players, with most of those suspensions being for only one game.[36]

Current NFL Commissioner Roger Goodell succeeded Paul Tagliabue in 2006.[37] The following year, three NFL players—Chris Henry, Tank Johnson, and Adam "Pacman" Jones—had serious, repeated run-ins with the law.[38] Commissioner Goodell acted quickly because he felt that it was his, and the NFL's, responsibility to crack down on this sort of behavior.[39] Commissioner Goodell suspended Henry, Johnson, and Jones for eight, eight, and sixteen games, respectively, and announced a new Personal Conduct Policy,[40] which would be modified the following year after Commissioner Goodell consulted with NFLPA Executive Director Gene Upshaw.[41] These Policies significantly strengthened the NFL Commissioner's

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32. Sean Bukowski, *Flag on the Play: 25 to Life for the Offense of Murder*, 3 VAND. J. ENT. L. & PRAC. 106, 110 (2001) (citing the NFL VIOLENT CRIME POLICY, 1998 Rookie Symposium Tab 7: League Policies for Players (1998)).

33. For more information about Ray Lewis's murder trial, see Lenny DeFranco, *Did Ray Lewis Kill Someone? The Definitive Account of the Case That's Confused Football Fans for Over a Decade*, MIC.COM (Jan. 20, 2013), http://mic.com/articles/23665/did-ray-lewis-kill-someone-the-definitive-account-of-the-case-that-s-confused-football-fans-for-over-a-decade.

34. Marc Edelman, *Are Commissioner Suspensions Really Any Different From Illegal Group Boycotts? Analyzing Whether the NFL Personal Conduct Policy Illegally Restraints Trade*, 58 CATH. U.L. REV. 631, 636 (2009) (citing David Elfin, *NFL Owners Expand Rules on Player Crime*, WASH. TIMES, May 24, 2000, at B1; Memorandum from Legal Department to Pro Star Sports Agency on NFL's "Personal Conduct Policy" (June 22, 2000), *available at* http://prostaronline.com/nfl_conduct_policy.html (stating that the 2000 Personal Conduct Policy supercedes the NFL's earlier Violent Crime Policy)).

35. *Id.* at 637.

36. *Id.* All of Paul Tagliabue's suspensions were for one game, except for one two-game suspension, and one three-game suspension. *See* McCann, *supra* note 6.

37. Jim Corbett, *Tagliabue Hands Off to Goodell as NFL Commissioner*, USA TODAY (Aug. 9, 2006, 6:00 PM), http://usatoday30.usatoday.com/sports/football/nfl/2006-08-08-goodell-commissioner_x.htm.

38. *Goodell Strengthens NFL Personal Conduct Policy*, USA TODAY (updated Apr. 11, 2007, 8:28 AM), http://usatoday30.usatoday.com/sports/football/nfl/2007-04-10-new-conduct-policy_N.htm. Chris Henry had been arrested four times in a fourteen-month span for various offenses and had already been suspended for two games as a result. *Goodell Suspends Pacman, Henry for Multiple Arrests*, ESPN (May 17, 2007), http://sports.espn.go.com/nfl/news/story?id=2832015. Jones faced ten separate incidents in which he was interviewed by police. *Id.* Johnson, already on probation, had six unregistered firearms in his home that were found during a police raid. *Johnson Suspended for Eight Games; Can Be Reduced to Six*, ESPN (June 5, 2007), http://sports.espn.go.com/nfl/news/story?id=2892889.

39. *Goodell Strengthens NFL Personal Conduct Policy*, *supra* note 38. As Commissioner Goodell explained when announcing the suspensions and subsequent new Personal Conduct Policy:

> It is important that the NFL be represented consistently by outstanding people as well as great football players, coaches, and staff. We hold ourselves to higher standards of responsible conduct because of what it means to be part of the National Football League. We have long had policies and programs designed to encourage responsible behavior, and this policy is a further step in ensuring that everyone who is part of the NFL meets that standard.

40. *Id.*

41. 2008 NFL PERSONAL CONDUCT POLICY (2008), *available at* http://www.prostaronline.com/draftee/personal_conduct_policy.pdf. Executive Director Upshaw took considerable flack for allowing the NFL to implement a Personal Conduct Policy that gave the NFL Commissioner virtually unlimited power, with one commentator even exclaiming that President Upshaw "failed" the NFLPA's members. *See* Adam Marks, Note, *Personnel Foul on the National Football League Player's Association: How Union Executive Director Gene*

"best interests" authority. First, they clarified what constituted conduct detrimental to the league. The 2007 Policy included "engage[ment] in (or to aid, abet, or conspire to engage in or to incite) violent and/or criminal activity" and offered a list of examples.[42] The 2008 Policy went even further. It listed the following bullet points for which discipline may be imposed:

> Criminal offenses including, but not limited to, those involving: the use or threat of violence; domestic violence and other forms of partner abuse; theft and other property crimes; sex offenses; obstruction or resisting arrest; disorderly conduct; fraud; racketeering; and money laundering;
>
> Criminal offenses relating to steroids and prohibited substances, or substances of abuse;
>
> Violent or threatening behavior among employees, whether in or outside the workplace;
>
> Possession of a gun or other weapon in any workplace setting, including but not limited to stadiums, team facilities, . . . etc., or unlawful possession of a weapon outside of the workplace;
>
> Conduct that imposes inherent danger to the safety and well being of another person; and
>
> Conduct that undermines or puts at risk the integrity and reputation of the NFL, NFL clubs, or NFL players.[43]

The Policy also established that players need not be actually convicted of a crime for discipline to be imposed: "the standard of conduct for persons employed in the NFL is considerably higher."[44] Additionally, it provided that "[d]iscipline may take the form of fines, suspension, or banishment from the League" and granted the NFL Commissioner "full authority to impose discipline as warranted."[45] Further, both Policies reiterated the appeals procedure for "best interests" discipline. The 2007 Policy stated that "[a]ny person disciplined under this policy shall have a right of appeal, including a hearing, *before the Commissioner or his designee.*"[46] The 2008 Policy confirmed the players' right to appeal their punishments at a hearing, but that the hearing would "be conducted by the [NFL] Commissioner or his designee."[47]

D. CURRENT NFL PERSONAL CONDUCT POLICIES

The 2008 Policy survived in its current form for six years.[48] In 2014, in the midst of attempting to resolve the Ray Rice[49] and Adrian Peterson[50] scandals, the NFL replaced the

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Upshaw Failed the Union's Members By Not Fighting the Enactment of the Personal Conduct Policy, 40 CONN. L. REV. 1581 (2008).

42. 2007 NFL PERSONAL CONDUCT POLICY (Mar. 13, 2007), *available at* http://sports.espn.go.com/nfl/news/story?id=2798214.

43. 2008 NFL PERSONAL CONDUCT POLICY, *supra* note 41, at 1–2.

44. *Id.* at 1.

45. *Id.* at 2.

46. 2007 NFL PERSONAL CONDUCT POLICY, *supra* note 42 (emphasis added).

47. 2008 NFL PERSONAL CONDUCT POLICY, *supra* note 41, at 3.

48. Interestingly, the 2008 Personal Conduct Policy continued after the NFL and NFLPA negotiated a new CBA. The CBA was silent on the matter. Some question whether the 2008 Personal Conduct Policy, and its predecessors and successors for that matter, are valid. *See* Edelman, *supra* note 34; Doug Farrar, *NFLPA Executive: New Player Conduct Policy Could be A Violation of CBA*, SPORTS ILLUSTRATED (Dec. 11, 2014), http://www.si.com/nfl/2014/12/11/nfl-personal-conduct-policy-nflpa-george-atallah-cba-violation. *Cf.* Kelly M. Vaughan, Note, *First and Goal: How The NFL's Personal Conduct Policy Complies with Federal Antritrust Law*, 96 CORNELL L. REV. 609 (2011). Because the NFL treats them

2008 Policy with two new policies. First, facing considerable public outcry for his admitted mishandling of Ray Rice's discipline after Rice struck his then-fiancé, Commissioner Goodell announced the NFL's new Domestic Violence Policy in a letter to team owners.[51] Commissioner Goodell reiterated his Policy in a Memorandum to all NFL Personnel, in which he stated:

> Violations of the Personal Conduct Policy regarding assault, battery, domestic violence and sexual assault that involve physical force will be subject to enhanced discipline. A first offense will be subject to a suspension of six weeks without pay. Mitigating circumstances will be considered, and more severe discipline will be imposed if there are aggravating circumstances such as the presence or use of a weapon, choking, repeated striking, or when the act is committed against a pregnant woman or in the presence of a child. A second offense will result in banishment from the league; an offender may petition for reinstatement after one year but there is no assurance that the petition will be granted.[52]

This Policy merely created a punishment floor by mandating a six-game suspension for the listed offenses, which is much longer than previous NFL punishments for domestic violence.[53] The consideration of "mitigating circumstances" allows the NFL Commissioner to hand down more severe punishments if he wishes.[54] Furthermore, because the NFL Commissioner unilaterally adopted this Policy, he likely can repeal it whenever he chooses.

On December 10, 2014, Commissioner Goodell, with the owners' approval,[55] unveiled his new eight-page Personal Conduct Policy.[56] The NFL also released a one-page flowchart that highlights the most important new features of the 2014 Policy.[57] Similar to the NFL's past Personal Conduct Policies, this Policy evokes "the Commissioner's authority under the [NFL]

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as valid and follows them as such, this Article assumes their validity for purposes of its argument.

49. For a detailed explanation of the Ray Rice scandal, see *infra* Part II.A.

50. For a detailed account of the Adrian Peterson scandal, see *infra* Part II.B.

51. Almasy & Nichols, *supra* note 14.

52. Tom Pelissero, *NFL Toughens Its Stance on Domestic Violence*, USA TODAY (Aug. 28, 2014, 4:06 PM), http://www.usatoday.com/story/sports/nfl/2014/08/28/nfl-toughens-its-stance-on-domestic-violence/14746187/. Notably, Commissioner Goodell again consulted with the NFLPA while drafting this new Policy. *Id.*

53. Before the Domestic Violence Policy, the NFL's punishment for player off-the-field conduct violations was, on average, a three game suspension, while, for domestic violence specifically, was only 1.5 games. McCann, *supra* note 6.

54. Although the "mitigating circumstances" language may allow the NFL Commissioner to grant less severe punishments, this does not appear to be consistent with the Policy's spirit to establish a floor for domestic violence suspensions. *See* Pelissero, *supra* note 52. Yet, Commissioner Goodell showed his willingness to suspend players accused or convicted of domestic violence for more than six games when he suspended Greg Hardy for ten games. *See* Jane McManus, *How NFL's Roger Goodell Got It Right with Greg Hardy*, ESPN (Apr. 23, 2015), http://espn.go.com/espnw/news-commentary/article/12745022/how-nfl-roger-goodell-got-right-greg-hardy-suspension. However, Commissioner Goodell personally heard Hardy's appeal and reduced his suspension to four games. Josh Apler, *Greg Hardy Suspension Reduced to Four Games*, NBC SPORTS PRO FOOTBALL TALK (JULY 10, 2015, 2:31 PM), http://profootballtalk.nbcsports.com/2015/07/10/greg-hardy-suspension-reduced-to-four-games/.

55. Mark Maske, *NFL Owners Ratify New Personal Conduct Policy*, THE WASH. POST (Dec. 10, 2014), http://www.washingtonpost.com/news/sports/wp/2014/12/10/nfl-owners-ratify-new-personal-conduct-policy/.

56. Smith, *supra* note 14; 2014 NFL PERSONAL CONDUCT POLICY (Dec. 2014), *available at* http://static.nfl.com/static/content/public/photo/2014/12/10/0ap3000000441637.pdf.

57. 2014 NFL PERSONAL CONDUCT POLICY FLOWCHART (Dec. 10, 2014), *available at* http://static.nfl.com/static/content/public/photo/2014/12/10/0ap3000000441677.pdf.

Constitution and Bylaws to address and sanction conduct detrimental to the league and professional football."[58] The Policy further explains:

> If you are convicted of a crime or subject to a disposition of a criminal proceeding (as defined in this Policy), you are subject to discipline. But even if your conduct does not result in a criminal conviction, if the league finds that you have engaged in any of the following conduct, you will be subject to discipline.[59]

The Policy then offers a bulleted list of potentially-disciplinary conduct, ranging from "[a]ctual or threatened physical violence against another person" to possession of illegal substances or weapons.[60] The list culminates in a catchall provision prohibiting "[c]onduct that undermines or puts at risk the integrity of the NFL, NFL clubs, or NFL personnel."[61] This list undoubtedly adds some additional clarity to what constitutes conduct detrimental to the game, but this clarity is tempered by the inclusion of the final catchall provision.

The new Policy does change the 2008 Policy's procedure in important ways, at least facially. Probably the biggest change is the NFL Commissioner ceding initial disciplinary decision-making authority to a disciplinary officer, who is described as "a member of the league staff who will be a highly-qualified individual with a criminal justice background."[62] Notably, the NFL's flowchart depicting this Policy does not mention the creation of this new position.[63] It is important to note that the initial decision maker is still an employee of the NFL Commissioner and that the NFL Commissioner retains control over the appeals process.[64] The second noteworthy new feature of the 2014 Policy is that the NFL Commissioner expressly codified his apparent right to place players on paid leave during investigation. The Policy allows the NFL Commissioner to do this when a player is "formally charged with a crime of violence," "if an investigation leads the Commissioner [but not the disciplinary officer] to believe that [the player] may have violated this Policy . . . ." or "[i]n cases in which a violation relating to a crime of violence is suspected but further investigation is required . . . ."[65] A player placed on paid leave will generally remain as such until the final disposition of his case, including his appeal.[66] The NFL's flowchart summarizes the paid leave aspects of the Policy as follows:

> An individual may be put on paid leave if formally charged with a violent crime or sexual assault, or if the NFL investigation finds sufficient credible evidence that it appears a violation of the policy has occurred. Paid leave will

58. 2014 NFL PERSONAL CONDUCT POLICY, *supra* note 56, at 1.

59. *Id.* at 2.

60. *Id.*

61. *Id.*

62. *Id.* at 5. The NFL appointed Todd Jones, the former director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives, to "apply and administer the personal conduct policy that applies to NFL employees," and Lisa Friel, a former New York District Attorney's office sex crimes prosecutor, who "will professionalize the investigations process." Adam Schefter, *NFL to Hire ex-ATF Boss Todd Jones*, ESPN (updated Mar. 23, 2015, 1:47 PM), http://espn.go.com/nfl/story/_/id/12544015/todd-jones-former-atf-director-join-nfl-conduct-czar.

63. 2014 NFL PERSONAL CONDUCT POLICY FLOWCHART, *supra* note 57.

64. 2014 NFL PERSONAL CONDUCT POLICY, *supra* note 56, at 7 ("Appeals of any disciplinary decision will be processed pursuant to Article 46 of the Collective Bargaining Agreement for players or pursuant to the applicable league procedures for nonplayers.").

65. *Id.* at 4–5.

66. *Id.* at 5.

> last until the completion of the NFL investigation or disposition of a criminal charge.[67]

Last, if the player decides to exercise his right to appeal the disciplinary officer's decision, the appeal is first heard by the NFL's newly-created Expert Panel. As the flowchart explains, "[t]he appeal process will include a review panel of three outside experts to make recommendations to the Commissioner or his designee on an appeal ruling that will be decided by the Commissioner or his designee."[68] However, the NFL Commissioner or his designee retains final decision-making authority on appeal.[69] Thus, the NFL Commissioner remains integral to the disciplinary process and may have even expanded his power by expressly codifying his paid-leave authority. Needless to say, the NFLPA denounced this new Policy, decrying that Commissioner Goodell did not let them review the Policy before it was unveiled and did not grant their demand for neutral arbitration of appeals.[70] The NFLPA went so far as to claim that the Policy is invalid because it is inconsistent with the parties' 2011 CBA and was not bargained-for and mutually agreed to.[71]

In summary, the 2014 Personal Conduct Policy offered some clarity to what constitutes conduct detrimental to the league. More importantly, the Policy made substantial changes to the disciplinary process. The Policy delegates initial disciplinary authority to a disciplinary officer, rather than the NFL Commissioner. The Policy further institutes an appellate review by an Expert Panel, which makes recommendations to the NFL Commissioner or his designee. However, the NFL Commissioner retains ultimate control over the resolution of the appeal.

II. THE NFL'S 2014–15 SCANDALS

This past year, the NFL has been the subject to two scandals involving off-the-field conduct—those of Ray Rice and Adrian Peterson—and one involving on-the-field conduct: DeflateGate. Commissioner Goodell invoked his "best interests" disciplinary authority to investigate each of these matters and dole out punishments. The processes by which these scandals have, or have not, been adjudicated exemplify the issues the NFL currently faces as a result of Commissioner Goodell's exercise of his exceptionally broad disciplinary authority. In this Part, I will first describe these three scandals, and then use them to explain the problems with the NFL current disciplinary system.

A. RAY RICE

On February 15, 2014, Baltimore Ravens' star running back Ray Rice was arrested and charged with assault after an incident in which he allegedly struck his then-fiancé (now-wife), Janay Palmer (now-Janay Rice).[72] Rice resolved this arrest in a courtroom on May 20, 2014.[73]

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67. 2014 NFL PERSONAL CONDUCT POLICY FLOWCHART, *supra* note 57.

68. *Id.*

69. 2014 NFL PERSONAL CONDUCT POLICY, *supra* note 56, at 7; 2014 NFL PERSONAL CONDUCT POLICY FLOWCHART, *supra* note 57.

70. Jarrett Bell, *New Conduct Policy Only Fortifies Goodell's Position*, USA TODAY (Dec. 20, 20140, 8:54 PM), http://www.usatoday.com/story/sports/nfl/columnist/bell/2014/12/10/roger-goodell-personal-conduct-policy-fortifies-commissioner-power/20222569/,.

71. *See id.*; Farrar, *supra* note 48.

72. CNN Staff, *Key Events in the Ray Rice Story*, CNN (updated Sept. 16, 2014, 10:34 AM), http://www.cnn.com/2014/09/09/us/ray-rice-timeline/.

73. Louis Bien, *A Complete Timeline of the Ray Rice Assault Case*, SB NATION (Nov. 28, 2014, 2:08 PM), http://www.sbnation.com/nfl/2014/5/23/5744964/ray-rice-arrest-assault-statement-apology-ravens. Rice was

On June 16, 2014, Commissioner Goodell suspended Rice for the first two weeks of the 2014–15 NFL season.[74] On September 8, just after the first week of the 2014–15 NFL season, TMZ released a second video of the assault, which graphically showed Ray Rice punching his wife in the face.[75] As a result, the Ravens terminated Rice's contract, and the NFL suspended him indefinitely.[76]

Ray Rice appealed his indefinite suspension.[77] In the face of significant pressure from the public, NFLPA, and womens' rights organizations, Commissioner Goodell agreed to work with the NFLPA to appoint a neutral arbitrator to hear Ray Rice's appeal.[78] The parties settled on Judge Barbara Jones, who, on November 28, overturned Rice's indefinite suspension and ordered the NFL to reinstate him.[79] Judge Jones concluded that Rice had not lied to Commissioner Goodell at their June 16 meeting, and as a result, ruled that his second punishment was arbitrary, and thus, must be vacated.[80] However, by this point, the NFL had already begun week thirteen of its seventeen-week regular season.[81] Given Judge Jones's ruling that Rice's second punishment was improper, Rice should have been eligible to return after week two. But, because Rice was improperly ineligible for the first nine weeks of the NFL season, he ultimately never played a snap during the 2014–15 season.[82]

B. ADRIAN PETERSON

Meanwhile, on September 12, 2014, Minnesota Vikings' star running back Adrian Peterson was indicted for reckless or negligent injury of a child.[83] Specifically, Peterson allegedly whipped his child with a switch, which resulted in cuts and bruises on the child's back, legs, arms, and buttocks.[84] Initially, the Minnesota Vikings deactivated Peterson for one game.[85] On September 15, 2014, another allegation of child abuse against Peterson came to light, and the Vikings placed him on the exempt/commissioner's permission list,[86] which operated as an indefinite suspension with pay.[87] Peterson's sponsors also suspended their contracts with him.[88]

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accepted into a pretrial intervention program, in which his charge will be expunged if he completes a twelve-month program.

74. *Id.*

75. *Id.*; TMZ Staff, *Ray Rice Elevator Knockout: Fiancée Takes Crushing Punch,* TMZ (Sept. 8, 2014, 1:00 AM) http://www.tmz.com/2014/09/08/ray-rice-elevator-knockout-fiancee-takes-crushing-punch-video/.

76. *Id.*

77. *Id.*

78. O'Keeffe, *supra* note 5.

79. Bein, *supra* note 73.

80. In the Matter of Ray Rice, Arbitration Decision (Nov. 28, 2014) (Hon. Jones, Arb.), *available at* http://espn.go.com/pdf/2014/1128/141128_rice-summary.pdf. Rice also demanded $3.529 million from the Baltimore Ravens, which reflected the amount he would have earned for the fourteen games he should have been allowed to play. *Report: Ray Rice Gets $1.588 Million,* ESPN (updated Mar. 3, 2015, 10:56 AM), http://espn.go.com/nfl/story/_/id/12412931/ray-rice-baltimore-ravens-reach-settlement-1588-million. Rice finally settled with the Ravens for $1.588 million. *Id.*

81. *Schedules: NFL Week 13,* NFL.COM, http://www.nfl.com/schedules/2014/REG13.

82. *See Ray Rice,* PRO-FOOTBALLREFERENCE.COM, http://www.pro-football-reference.com/players/R/RiceRa00.htm (last visited Jan. 3, 2016) (The 2014 season is conspicuously absent from Rice's statistics.); Larry Hartstein, *Unsigned Ray Rice Seeks 'Second Chance' from NFL Team,* CBSSPORTS.COM, (Dec. 2, 2014, 5:57 AM) http://fantasynews.cbssports.com/fantasyfootball/update/24858957/unsigned-ray-rice-seeks-second-chance-from-nfl-team.

83. Steve DiMatteo, *A Timeline of The Adrian Peterson Child Abuse Case,* SBNATION.COM (Sept. 17, 2014, 12:22 PM), http://www.sbnation.com/2014/9/17/6334793/adrian-peterson-child-abuse-statement-vikings-timeline.

84. *Id.*

85. *Id.*

86. *Id.*

87. Jason La Canfora, *How the Exempt/Commissioner's Permission List Works,* CBSSPORTS.COM (Sept. 21, 2014, 9:05

On November 4, 2014, Peterson resolved his criminal charges by entering a no contest plea to a misdemeanor child injury charge.[89] However, on November 18, 2014, Commissioner Goodell suspended Peterson for the remainder of the 2014–15 NFL season.[90] Despite the fact that the underlying incident occurred before the NFL's Domestic Violence Policy became effective, Commissioner Goodell punished Peterson pursuant to it.[91] Similarly to Rice, Peterson appealed his suspension, and the NFLPA requested Commissioner Goodell appoint an independent arbitrator to hear Peterson's appeal.[92] This time, Commissioner Goodell ignored the NFLPA's request and appointed Harold Henderson, a former NFL executive who regularly handles appeals for the NFL, to handle Peterson's appeal. The NFLPA believed that Henderson, given his strong ties to the NFL and Commissioner Goodell, could not be neutral.[93] On December 12, 2014, Henderson denied Peterson's appeal of his suspension,[94] concluding that Commissioner Goodell's broad authority allowed him to retroactively apply the NFL's new Domestic Violence Policy against Peterson, and that Commissioner Goodell's disciplinary decision was consistent with the previous Policy.[95]

The NFLPA, on Peterson's behalf, challenged Henderson's arbitration award in the United States District Court of Minnesota.[96] On February 26, 2015, Judge David Doty, in a sixteen-page opinion, vacated Henderson's arbitration decision.[97] Judy Doty concluded that Henderson's decision to uphold Commissioner Goodell's retroactive application of the NFL's new Domestic Violence Policy violated the "established law of the shop," that is, the "industrial common law,"[98] and that Henderson exceeded his authority by considering the issue of whether Commissioner Goodell's disciplinary decision was consistent with the NFL's previous Personal Conduct Policy despite the NFLPA not asking Henderson to do so.[99]

AM) http://www.cbssports.com/nfl/writer/jason-la-canfora/24718626/breaking-down-the-exemptcommissioners-permission-list.

88. DiMatteo, *supra* note 83. Radisson, Nike and Castrol all suspended their sponsorships. *Id.*

89. *Chart: Adrian Peterson's Legal Timeline*, STAR TRIBUNE (updated Nov. 19, 2014, 12:16 AM), http://www.startribune.com/sports/vikings/283140961.html.

90. *Id.*; Will Brinson, *Roger Goodell Explains Details of Adrian Peterson Suspension in Letter*, CBSSPORTS.COM (Nov. 18, 2014, 9:02 AM), http://www.cbssports.com/nfl/eye-on-football/24818642/roger-goodell-explains-details-of-adrian-peterson-suspension-in-letter.

91. Order Vacating Arbitration Award, Nat'l Football League Players Ass'n v. NFL, Civ. No. 14-4990 (DSD/JSM), at 13 (D. Minn. Feb. 26, 2015), *available at* http://a.espncdn.com/pdf/2015/0226/DotyPetersonruling.pdf.

92. Mike Florio, *Goodell Delegates Peterson Appeal to Harold Henderson*, NBC SPORTS PRO FOOTBALL TALK (Nov. 21, 2014, 2:40 PM), http://profootballtalk.nbcsports.com/2014/11/21/goodell-delegates-peterson-appeal-to-harold-henderson/.

93. Mike Florio, *Union Questions Harold Henderson's Neutrality*, NBC SPORTS PRO FOOTBALL TALK (Nov. 21, 2014, 4:03 PM), http://profootballtalk.nbcsports.com/2014/11/21/union-questions-harold-hendersons-neutrality/. Some suggested that Commissioner Goodell's decision to choose Henderson was influenced by Judge Jones forcing Commissioner Goodell to testify at Ray Rice's hearing earlier that year.

94. *Adrian Peterson's Appeal Denied*, ESPN (Dec. 14, 2014), http://espn.go.com/nfl/story/_/id/12020801/adrian-peterson-appeal-suspension-denied.

95. Re: Adrian Peterson Appeal, Arbitration Decision (Dec. 12, 2014) (Henderson, Arb.), *available at* http://espn.go.com/pdf/2014/1212/1490963_1_AP.pdf.

96. Order Vacating Arbitration Award, Nat'l Football League Players Ass'n v. NFL, Civ. No. 14-4990 (DSD/JSM) (D. Minn. Feb. 26, 2015), *available at* http://a.espncdn.com/pdf/2015/0226/DotyPetersonruling.pdf [hereinafter Adrian Peterson's Order Vacating Arbitration Award].

97. *Id.* at 16.

98. *Id.* at 11–14 (citing Bureau of Engraving, Inc. v. Graphic Commc'ns Int'l Union, Local 1B, 164 F.3d 427, 429 (8th Cir. 1999); United Steelworkers of Am. V. Warrior & Gulf Navigation Co., 363 U.S. 574, 581–82 (1960)).

99. *Id.* at 14–16. (citing Local 238 Int'l Bhd. of Teamsters v. Cargill, Inc., 66 F.3d 988, 990–91 (8th Cir. 1995); John Morrell & Co. v. Local Union 304A of the United Food & Commercial Workers, 913 F.2d 544, 561 (8th Cir.

Notably, Judge Doty explicitly refused to determine "whether Henderson was evidently partial or whether the award violates fundamental fairness."[100] The NFL appealed to United States Court of Appeals for the Eighth Circuit,[101] but, Peterson's suspension ended and he was reinstated before they could hear the appeal, effectively rendering it moot.[102]

C. DEFLATEGATE

On January 18, 2015, the New England Patriots defeated the Indianapolis Colts 45–7 in the AFC Championship Game, thereby advancing to Super Bowl XLIX.[103] Shortly after the game, reports surfaced accusing the Patriots of deflating some of the footballs that they used in the game against the Colts.[104] Although most agree that the Patriots would have won the game regardless of how much air was in their footballs,[105] the NFL responded by hiring Ted Wells of the New York law firm Paul Weiss[106] to lead a full investigation alongside NFL Executive Vice President Jeff Pash.[107] Notably, both the NFL, in its press release announcing the investigation, and Commissioner Goodell, in statements regarding the investigation, repeatedly invoked the CBA Art. 46, §1(a) language that endows the NFL Commissioner with the power to protect the "integrity of the game" to justify the investigation.[108]

Ted Wells announced his findings on May 6, 2015, almost four months after the scandal broke, in a 243-page report.[109] Wells concluded that "it [was] more probable than not" that the

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100. *Id.* at 16.

101. *Judge Rules in Peterson's Favor*, ESPN (Mar. 1, 2015, 12:45 PM), http://espn.go.com/nfl/story/_/id/12387081/judge-david-doty-rules-favor-adrian-peterson-minnesota-vikings.

102. Ken Belson, *N.F.L. to Reinstate Vikings Adrian Peterson*, THE NEW YORK TIMES (Apr. 16, 2015), http://www.nytimes.com/2015/04/17/sports/football/nfl-reinstates-vikings-adrian-peterson.html?_r=0 (explaining that the NFL lifted Peterson's suspension and reinstated him on April 17, 2015).

103. *Patriots Advance to Super Bowl in AFC Championship Rout*, NFL.COM (2014), http://www.nfl.com/gamecenter/2015011801/2014/POST20/colts@patriots#menu=gameinfo%7CcontentId%3A0ap3000000460458&tab=recap.

104. *See, e.g., Report: Pick Let to NFL's Probe*, ESPN (updated Jan. 20, 2015, 3:14 PM), http://espn.go.com/boston/nfl/story/_/id/12198323/indianapolis-colts-interception-led-question-whether-new-england-patriots-deflated-balls; Mike Wells, *Deflated Balls Didn't beat Colts, Lack of Toughness Did*, ESPN (Jan. 21, 2015, 10:35 AM), http://espn.go.com/blog/indianapolis-colts/post/_/id/10574/deflated-balls-didnt-beat-colts-lack-of-toughness-did.

105. *See, e.g.,* Aileen Graef, *Dwayne Allen: Patriots Could Have Played with 'Soup for Balls and Beat Us'*, UPI.COM (Jan. 22, 2015, 5:02 PM), http://www.upi.com/Sports_News/2015/01/22/Dwayne-Allen-Patriots-could-have-played-with-soap-for-balls-and-beat-us/9381421963239/; Schuyler Valesco, *Obama on Deflategate: Patriots Would Have Won 'Regardless'*, THE CHRISTIAN SCI. MONITOR (Feb. 1, 2015), http://www.csmonitor.com/USA/Sports/2015/0201/Obama-on-Deflategate-Patriots-would-have-won-regardless-video.

106. Ted Wells investigated the NFL's bullying scandal from the prior season. *See* Gregg Rosenthal, *Summary of Ted Wells Report on Miami Dolphins*, NFL.COM (updated Feb. 14, 2015, 6:41 PM), http://www.nfl.com/news/story/0ap2000000325899/article/summary-of-ted-wells-report-on-miami-dolphins.

107. *NFL Investigation of Balls in AFC Title Game Led by Pash, Wells*, NFL.COM (updated Jan. 24, 2015, 9:02 PM), http://www.nfl.com/news/story/0ap3000000462476/article/nfl-investigation-of-balls-in-afc-title-game-led-by-pash-wells.

108. *Id.*; Tim Britton, *Commissioner Roger Goodell Addresses Deflategate, Emphasizes Integrity of Game*, PROVIDENCE JOURNAL (Jan. 20, 2015, 1:57 PM), http://www.providencejournal.com/article/20150130/Sports/301309938.

109. Samer Kalaf, *Wells Report: Patriots Likely Deflated Balls on Purpose*, DEADSPIN.COM (May 6, 2015, 1:23 PM), http://deadspin.com/wells-report-patriots-likely-deflated-balls-on-purpose-1702593820; THEODORE V. WELLS, JR. ET AL., PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, INVESTIGATIVE REPORT CONCERNING FOOTBALLS USED DURING THE AFC CHAMPIONSHIP GAME ON JANUARY 18, 2015 (May 6, 2015), *available at* https://nfllabor.files.wordpress.com/2015/05/investigative-and-expert-reports-re-footballs-used-during-afc-championsh.pdf [hereinafter TED WELLS REPORT].

New England Patriots personnel released air from game balls prior to the AFC Championship game in violation of NFL playing rules and "that Tom Brady was at least generally aware of the inappropriate activities of [the Patriots personnel] involving the release of air from Patriots game balls."[110] Based on Wells's findings, Commissioner Goodell fined the New England Patriots one million dollars, took away their 2016 first round draft pick and 2017 fourth round draft pick, and suspended Tom Brady for four games.[111]

The Patriots decided to accept their punishment and not appeal.[112] Tom Brady, on the other hand, had the NFLPA appeal his punishment.[113] Once again, the NFLPA requested Commissioner Goodell appoint a neutral arbitrator.[114] Similarly to Peterson's case, Commissioner Goodell rejected this request and appointed himself as arbitrator.[115] Acting as arbitrator, Commissioner Goodell upheld Brady's four-game suspension, relying in part on Brady having instructed his assistant to destroy the cell phone Brady had used during the AFC Championship game and shortly thereafter.[116]

Interestingly, shortly after Commissioner Goodell announced his decision to uphold Brady's suspension, the NFL preemptively filed a lawsuit demanding a declaratory judgment upholding Commissioner Goodell's decision in New York federal court.[117] This allowed the NFL to ensure this case would be heard by a New York judge, rather than a judge in Minnesota or Massachusetts who may be more favorable to Brady.[118] This ultimately backfired. Judge Richard Berman, who presided over this case, initially urged the parties to settle, which the parties failed to do.[119] On September 3, 2015, just one week before the New England Patriots' season opener, Judge Berman issued his 40-page opinion vacating not only Brady's arbitration award, but Brady's punishment as well.[120] Notably, Judge Berman's decision did not turn on

110. TED WELLS REPORT, *supra* note 110, at 121–22.

111. ESPN.com News Services, *NFL Suspends Tom Brady for 4 Games*, ESPN (May 12, 2015), http://espn.go.com/nfl/story/_/id/12867594/punishments-handed-tom-brady-new-england-patriots-deflategate.

112. Lindsay H. Jones, *Owner Robert Kraft Won't Appeal Patriots' Deflategate Penalties*, USA TODAY (May 19, 2015, 3:44 PM), http://www.usatoday.com/story/sports/nfl/patriots/2015/05/19/robert-kraft-deflategate-no-appeal-roger-goodell-fine-draft-picks-new-england/27583829/.

113. Around The NFL Staff, *Tom Brady Suspension Timeline*, NFL.COM (updated July 28, 2015, 7:31 PM), http://www.nfl.com/news/story/0ap3000000492189/article/tom-brady-suspension-timeline.

114. Jason Lisk, *Roger Goodell Rejects Request for Arbitrator in Tom Brady Appeal*, THEBIGLEAD.COM (May 14, 2015, 10:48 PM), http://thebiglead.com/2015/05/14/roger-goodell-rejects-request-for-neutral-arbitrator-in-tom-brady-appeal/.

115. Around The NFL Staff, *supra* note 113; Lisk, *supra* note 114.

116. Around The NFL Staff, *supra* note 113.

117. Lester Munson, *Brady, NFLPA Likely to Come Up Short in Federal Court Challenge*, ESPN (Jul. 29, 2015), http://espn.go.com/espn/otl/story/_/id/13332578/new-england-patriots-quarterback-tom-brady-nflpa-likely-come-short-court-challenge-roger-goodell-decision/.

118. *Id. See also* Mike Florio, *NFL Goes Forum-Shopping with Pre-Emptive Lawsuit*, NBC SPORTS PRO FOOTBALL TALK (July 28, 2015, 4:19 PM), http://profootballtalk.nbcsports.com/2015/07/28/nfl-goes-forum-shopping-with-pre-emptive-lawsuit/.

119. *See* Dave Hogg, *DeflateGate Judge Warns Brady, NFL Time is Running Out to Reach a Settlement*, SBNATION (Aug. 19, 2015, 3:16 PM), http://www.sbnation.com/nfl/2015/8/19/9178329/deflategate-judge-tom-brady-goodell-nfl-settlement.

120. Jarde Dubin, *Judge Nullifies Tom Brady's 4-Game Suspension in Deflategate Case*, CBS SPORTS (Sept. 3, 2015, 10:17 AM), http://www.cbssports.com/nfl/eye-on-football/25288935/report-judge-richard-m-berman-rules-for-brady-overturns-suspension.

whether Brady was actually involved in the scandal, or whether Roger Goodell was a fair arbiter.[121] Rather, Judge Berman based his decision on:

> (A) inadequate notice to Brady of both his potential discipline (four-game suspension) and his alleged misconduct; (B) denial of the opportunity for Brady to examine one of two lead investigators, namely NFL Executive Vice President and General Counsel Jeff Pash; and (C) denial of equal access to investigative files, including witness notes.[122]

The NFL appealed on that very day,[123] with the Second Circuit set to hear the case in February, 2016.[124]

III. PROBLEMS WITH THE NFL COMMISSIONER'S CURRENT EXERCISE OF HIS "BEST INTERESTS" AUTHORITY

These three scandals, which Commissioner Goodell publicly acknowledged made for a "tough year" and humbled him,[125] exemplify the myriad of problems with the NFL's current disciplinary system for conduct detrimental to the game. These issues are explained in detail below.

A. THE NFL COMMISSIONER'S PUBLIC PERCEPTION AND HIS CONTROL OVER THE DISCIPLINARY PROCESS ARE SUFFERING

Public confidence in the NFL Commissioner is at an all-time low.[126] The public perceives the process by which the NFL Commissioner punishes NFL players as political or social pandering and unjust. Commissioner Goodell has been harshly criticized for his recent punishment decisions and for his arbitrator decisions.[127]

The NFL Commissioner's primary problem is his "arbitrator dilemma." When a player appeals a "best interests" disciplinary suspension, the NFL Commissioner must decide whether to appoint a neutral or partial arbitrator. In making that decision, the NFL Commissioner ostensibly weighs two main goals: (1) maintaining the integrity of the NFL Commissioner and NFL, and (2) preserving his power over disciplinary decisions. Unfortunately, either choice has proven to be harmful. When the NFL Commissioner chooses a neutral arbitrator, he presumably values fairness and integrity over his control over the process. As the Ray Rice

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121. Order Vacating Arbitration Award, Nat'l Football League Players Ass'n v. Nat'l Football League Players Ass'n, 15 Civ. 5916 (RMB) (JCF) (S.D.N.Y. Sep. 23, 2015), *available at* http://www.scribd.com/doc/278110826/Decision-Order-NFL-vs-NFLPA.

122. *Id.*

123. Lorenzo Reyes and Rachel Axon, *NFL Files an Appeal of Deflategate Decision that Erased Tom Brady Suspension*, USA TODAY (Sept. 3, 2015, 4:03 PM), http://www.usatoday.com/story/sports/nfl/patriots/2015/09/03/deflategate-tom-brady-roger-goodell-judge-richard-overturned-berman-new-england/71504142/.

124. Joseph Ax, *NFL's 'Deflategate' Appeal to Be Heard in February: Court Order*, REUTERS (Sept. 29, 2015, 5:22 PM), http://www.reuters.com/article/2015/09/29/us-nfl-brady-idUSKCN0RT2LZ20150929.

125. *Id.*; Kevin Seifert, *Roger Goodell: No Judgments Yet*, ESPN (updated Jan. 30, 2015, 10:01 PM), http://espn.go.com/nfl/playoffs/2014/story/_/id/12254585/nfl-commissioner-roger-goodell-said-league-looking-why-new-england-patriots-used-footballs-compliance-was-deliberate.

126. *See* Rosenberg, *supra* note 11; Mike Lupica, *Judge's Takedown of Roger Goodell in Ray Rice Case Is What Commissioner Deserves*, N.Y. DAILY NEWS (Nov. 29, 2014, 12:24 AM), http://www.nydailynews.com/sports/football/lupica-judge-takedown-roger-goodell-deserved-article-1.2027389.

127. Michael McCann, *Examining Legal Fallout from Adrian Peterson Decision, Subsequent Appeal*, SPORTS ILLUSTRATED (Feb. 26, 2015), http://www.si.com/nfl/2015/02/26/adrian-peterson-appeal-roger-goodell-minnesota-vikings.

scandal demonstrated, the neutral arbitrator is the politically popular choice, the choice that the public views as fairer and better.[128] However, because a neutral arbitrator is more likely to overturn the NFL Commissioner's initial decision, the NFL Commissioner's public perception still suffers as a result.

Consequently, the NFL Commissioner has generally chosen a partial arbitrator. Although such a decision harms the NFL Commissioner's public perception, it protected his control over the disciplinary process because, as evidenced by the Adrian Peterson scandal, a partial arbitrator is more likely to rule in the NFL Commissioner's favor. However, the NFLPA's recent successes in federal court, coupled with the likelihood that, if challenged, the NFL Commissioner's appointment of a partial arbitrator would be overturned by a judge because of the arbiter's partiality, complicates the NFL Commissioner's calculus.

Courts have never directly ruled on whether an NFL Commissioner's choice of a partial arbitrator for a "best interests" disciplinary appeal proceeding violates the Federal Arbitration Act ("FAA"). In *Morris v. New York Football Giants, Inc.*,[129] the court removed the NFL Commissioner as arbitrator in an individual contract dispute between two players and their team after finding that the NFL Commissioner could not be neutral.[130] The court reasoned that the NFL Commissioner could not be a neutral arbitrator because he was a named defendant to the ensuing litigation and had advocated against the players' position in the past.[131] However, this was in the context of a contract issue, not a disciplinary proceeding. Further, although Judge Doty did vacate Adrian Peterson's arbitration award, he declined to rule on whether the choice of arbitrator justified vacatur.[132]

The NFLPA has challenged Commissioner Goodell on this practice in the past. Specifically, the NFLPA challenged Commissioner Goodell's practice of appointing partial arbitrators to overhear disciplinary appeals when it filed suit against Commissioner Goodell for appointing himself as arbitrator in the Bounty Scandal[133] punishment appeal hearing.[134] Although Commissioner Goodell ceded to the NFLPA's demands before the case was adjudicated,[135] the NFLPA's complaint is instructive. In its complaint, the NFLPA claimed that Commissioner Goodell's appointment of himself as arbitrator violated the FAA's "evident partiality" requirement.[136] Such a violation allows the judge to vacate an arbitrator's award.[137] As the NFLPA noted, the Fifth Circuit, the jurisdiction that presided over the NFLPA's claim in the Bounty Scandal proceedings, would find an arbitrator evidently partial "if 'a reasonable person would have to conclude that the arbitrator was partial to one party . . . .'"[138] The

128. *See supra* Part II.A.

129. Morris v. New York Football Giants, Inc., 575 N.Y.S.2d 1013 (Sup. Ct. N.Y. 1991).

130. *Id.* at 1016–17.

131. *Id.*

132. Order Vacating Arbitration Award, Nat'l Football League Players Ass'n v. NFL, Civ. No. 14-4990 (DSD/JSM), at 16 (D. Minn. Feb. 26, 2015), *available at* http://a.espncdn.com/pdf/2015/0226/DotyPetersonruling.pdf.

133. The Bounty Scandal involved the NFL finding that defensive coaches and players of the New Orleans Saints engaged in a program by which they pooled money and awarded payments to defensive players who injured opposing offensive players. For a discussion of the scandal, see Pacifici, *supra* note 31, at 105–12.

134. Complaint, National Football League Player Association v. National Football League Management Council, 2:12-cv-01744-SSV-SS, at 39–47 (E.D. La. July 7, 2012) [hereinafter NFLPA Complaint].

135. Pacifici, *supra* note 31, at 110.

136. *See* 9 U.S.C. § 10(a)(2) (2002); NFLPA Complaint, *supra* note 134, at 39–47.

137. 9 U.S.C. § 10(a)(2).

138. NFL Complaint, *supra* note 134, at 40 (quoting Weber v. Merrill Lynch Pierce Fenner & Smith, Inc., 455 F. Supp. 2d 545, 549 (N.D. Tex. 2006)).

NFLPA argued that Commissioner Goodell's repeated attacks on the players and presumption of their guilt in the media defeated his neutrality,[139] even though it explicitly stopped short of arguing that the NFL Commissioner is a *per se* partial arbitrator in violation of the FAA.[140] Nevertheless, the NFL Commissioner frequently holds press conferences about disciplinary decisions, especially for high-profile cases.[141] His unique position of making disciplinary decisions and arbitrator appointments casts doubt on his partiality as the arbitrator. This is equally true when the NFL Commissioner appoints one of his employees (*e.g.*, Harold Henderson in Adrian Peterson's case) as the arbitrator. Thus, the NFL Commissioner is at significant risk of having his hand-picked arbitrator's award vacated.

Prior to the Bounty Scandal, the NFL Commissioner generally appointed himself or an associate to hear appeals.[142] In the last few years, specifically in response to the filing of litigation during the Bounty Scandal appeal[143] and to public pressure in the Ray Rice case,[144] the NFL Commissioner tried appointing neutral arbitrators. When he did not, as in the Adrian Peterson and DeflateGate cases, he ultimately lost in federal court, albeit on other grounds.[145] As a result, the NFL Commissioner, who had already suffered a loss of public confidence by choosing a partial arbitrator, also saw his power over the disciplinary process diminish. Worse, this perhaps confirmed the public's opinion that his choice of partial arbitrators is unfair and harmful to the players. Worst of all, it indicated to future players that they may be able to find success in disciplinary proceedings in court. This likely contributed to the NFL pre-emptively filing for a declaratory judgment in regards to Brady's DeflateGate punishment.

This places the NFL Commissioner between the proverbial rock and a hard place. Either decision will likely lead to a loss in both public confidence and power over the disciplinary process. The NFL Commissioner seemingly experimented with both options last year in the Ray Rice and Adrian Peterson scandals; he came out on the losing end of both. Critics may argue that the NFL Commissioner can salvage both interests by getting the initial disciplinary decision correct in the eyes of the public, and the arbitrator. However, the NFL Commissioner has consistently been unable to do so, and likely cannot do so, given the general public's wide range of viewpoints on most topics. A better process, by which the NFL Commissioner relinquishes some of his or her power, is warranted.

B. THE NFL COMMISSIONER'S DISCIPLINARY PROCESS HURTS THE NFL AS A BUSINESS

The NFL Commissioner's disciplinary process hurts the NFL by undermining its product. The NFL's two main products are its games and its players. The fact that the NFL sells football games is self-evident,[146] but the NFL is also involved in the business of marketing and promoting the stars of the games, namely, the players. The NFL intentionally cultivates

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139. *Id.* at 40–47.

140. *Id.* at 47.

141. *See, e.g.*, Tony Manfred, *Roger Goodell Apologizes for Ray Rice Fiasco, Promises New Policies in Press Conference*, BUSINESS INSIDER (Sept. 19, 2014), http://www.businessinsider.com/live-roger-goodell-press-conference-2014-9.

142. *See* O'Keeffe, *supra* note 5.

143. Pacifici, *supra* note 31, at 110.

144. *See supra* Part II.A.

145. *See supra* Part II.B–C.

146. This is also codified in the NFL's Constitution, which explains, "the purpose and objects for which the League is organized are . . . [t]o promote and foster the primary business of League members, each member being an owner of a professional football club located in the United States." NFL CONST. & BYLAWS, *supra* note 2, Art. II, § 2.1(A). Given that each NFL team, as a football team, must have the purpose of having football games, the NFL's purpose is to "promote and foster" those games.

within its fans loyalty to, and admiration and respect for, its players. It accomplishes this by requiring widespread media availability of its star players,[147] popularizing the Pro Bowl,[148] the NFL Combine,[149] the NFL Draft,[150] and the Super Bowl,[151] as well as selling player-specific merchandise,[152] bargaining for protections for teams to retain specific players (e.g., the franchise tag),[153] and airing NFL Films specials about specific players.[154] As a result, the NFL bolsters its fans' loyalty and game-day experience, and profits considerably.[155]

By removing its players from the field for any reason, the NFL suffers a loss. When the NFL suspends a player for a disciplinary reason, the NFL effectively loses part of its product. As a result, the NFL loses a calculable amount of revenue because both the quality of the game that player's team plays and the popularity of the player into which the NFL has already invested suffer.[156] As a rational business actor, the NFL knows this and has concluded that the benefits from disciplining a player for certain conduct—which likely include avoidance of bad press and ill will from its fans—outweigh the lost revenue.[157] As a result, the NFL has decided

147. *See* NFL CBA, *supra* note 2, Art. 51, §4, Appendix A, ¶4. One way the NFL has advertised its players is through its "Hard Knocks" series produced in collaboration with HBO. *See* Jason Gallagher, *Guts, Glory and Goddamn Snacks: A History of 'Hard Knocks'*, THE ROLLING STONE (Aug. 5, 2014), http://www.rollingstone.com/culture/news/hbo-hard-knocks-history-guts-glory-and-goddamn-snacks-20140805.

148. The NFL recently updated the Pro Bowl in an attempt to make it more exciting and marketable. *See* Martin Pengelly, *NFL Announces New Format and Player Draft for 2014 Pro Bowl*, THE GUARDIAN (July 31, 2013, 3:56 PM), http://www.theguardian.com/sport/2013/jul/31/nfl-pro-bowl-draft-new-format.

149. The NFL has dedicated an entire section of its website to the NFL Combine. *See* NFL COMBINE, http://www.nfl.com/combine (last visited Jan. 3, 2016).

150. The NFL has changed its draft from a simple, one-day event held in a hotel, to a three-day, nationally-televised affair held in a major concert venue, such as Radio City Music Hall in New York City. *See NFL Draft Locations*, FOOTBALL GEOGRAPHY, http://www.footballgeography.com/nfl-draft-sites/, (last visited Jan. 3, 2016).

151. The NFL Super Bowl seemingly sets new ratings records every year. *See, e.g.*, Dominic Patten, *Touchdown! NBC's Super Bowl Scores Record-Smashing Viewership*, DEADLINE (Feb. 2, 2015, 1:30 PM), http://deadline.com/2015/02/super-bowl-ratings-patriots-seahawks-2015-superbowl-xlix-1201364688/.

152. *See, e.g.*, NFL SHOP: JERSEYS, http://www.nflshop.com/Jerseys?ab=bm-nflcms-TopNav-Jerseys-2.6.14 (last visited Jan. 3, 2016).

153. *See* Albert Breer, *Prison Tag? Franchise Tag Has Changed Over The Years*, NFL.COM (updated Aug. 3, 2012, 1:37 AM), http://www.nfl.com/news/story/09000d5d82aa478e/article/prison-tag-franchise-designation-has-changed-over-the-years.

154. *See* ABOUT NFL FILMS, http://www.nflfilms.com/about.html (last visited Jan. 3, 2016).

155. Despite its disciplinary struggles, the NFL earned record profits last year. *See* Chris Isidore, *NFL Earns Record Profits Despite Ugly Image*, CNNMONEY (Jan. 20, 2015, 6:24 AM), http://money.cnn.com/2015/01/20/news/companies/nfl-profits/.

156. Although the economic value of NFL players has not been studied rigorously, player value in terms of wins has. In one study, the value of each position to a team's ability to win was calculated by determining "positional wins above replacement," which "measures the value of players in the NFL, by position, in terms of generating wins." *See* Andrew Hughes, Cory Koedel & Joshua A. Price, *Positional WAR in the National Football League*, Department of Economics, University of Missouri-Columbia Working Paper Series 14, 10 (June 2014), *available at* http://economics.missouri.edu/working-papers/2014/WP1410_koedel.pdf. Websites, such as ProFootballFocus.com, purport to calculate the value of each player in comparison to others in his position. *See* PRO FOOTBALL FOCUS ABOUT, https://www.profootballfocus.com/about/ (last visited Jan. 3, 2016). The value a player adds in terms of wins sheds some light on the economic value that player adds to the NFL. The NFL's own marketing analytics would likely shed more light. Given that the data exists to calculate the value of each player to the NFL, and that the NFL likely has it, the NFL must have an estimate of what it gains to make or lose from each suspension. Commissioner Goodell may have taken this under consideration when he waited to punish anyone as a result of DeflateGate. Some have argued that Commissioner Goodell did not want DeflateGate punishments to tarnish one of the NFL's most profitable games, the Super Bowl. *See* Rosenberg, *supra* note 11.

157. This is further evidenced by the fact that, historically, the NFL strengthened its disciplinary process only after the public condemned the NFL for its disciplinary response to a player's conduct. *See supra* Part I.C–D.

to punish its players for their off-the-field misconduct.[158] When the NFL handles its discipline properly, the NFL likely minimizes its losses as it anticipated.[159] The problem for the NFL, though, is that this backfires when it mismanages its discipline process. Thus, from a business/financial perspective, the NFL has a stake in maintaining accuracy and fairness in its disciplinary process. As evidenced by the significant backlash Commissioner Goodell faced as a result of his handling of the Ray Rice, Adrian Peterson, and DeflateGate scandals,[160] the current process is not achieving those intended goals.

Further, when the NFL Commissioner mismanages his discipline, the NFL's integrity—which is exactly what the NFL Commissioner tries to protect when he doles out punishments for off-the-field misconduct—suffers. The NFL has determined that the integrity of its game and brand are valuable and that it has an interest in protecting them. It has entrusted the NFL Commissioner with the responsibility to do so.[161] When the NFL Commissioner imposes discipline that the public views as incorrect, as Commissioner Goodell did in the Ray Rice scandal, the NFL Commissioner loses the trust and faith of the fans. As a result, the NFL's integrity is undermined.

Commissioner Goodell attempted to solve some of these issues by passing the 2014 Domestic Violence and Personal Conduct Policies. While some have heralded these Policies as a step in the right direction, most have argued that they only serve to embolden the NFL Commissioner's already extraordinary power.[162] These Policies will likely do little to alleviate the NFL's current problems. Most crucially, the appointment of a disciplinary officer to make the initial disciplinary decision changes little when the NFL Commissioner has unbridled power to place players on paid leave, and the NFL Commissioner still retains final authority over choice of arbitrator and, therefore, final disposition of disciplinary decisions.[163] The Expert Panel, with the mere purpose of making recommendations to the NFL Commissioner,[164] adds little fairness to the process. Worse, both the disciplinary officer and the Expert Panel are chosen and paid by the NFL.[165] Thus, similarly to how in baseball disciplinary arbitrations each party's chosen arbitrator is partial to its side,[166] the disciplinary officer and Expert Panel members are likely to be biased to the wishes of their boss, the NFL Commissioner.

158. This economics argument has also been presented by Matthew Parlow, *supra* note 15, at 182 (citing Bukowski, *supra* note 32, at 106–08).

159. For instance, there appears to be some consensus that Commissioner Goodell suspending Donte Stallworth for one year after he pled guilty to DUI manslaughter was warranted. As a result, Commissioner Goodell and the NFL were actually praised for Commissioner Goodell's handling of that tragedy. *See, e.g.,* Erin McLaughlin, *Donte Stallworth's Sentence Was No Slap on The Wrist*, BLEACHER REPORT (Jun. 16, 2009), http://bleacherreport.com/articles/200684-donte-stallworths-sentence-was-no-slap-on-the-wrist.

160. *See supra* Part II.

161. *See* NFL CBA, *supra* note 2, Art. 46, §1(a).

162. *Compare* CNN Staff, *supra* note 72, *and* Mel Robbins, *NFL's Personal Conduct Policy Fail*, CNN (updated Dec. 13, 2014, 4:08 PM), http://www.cnn.com/2014/12/11/opinion/robbins-nfl-domestic-violence-rules/, *with* Smith, *supra* note 14.

163. 2014 NFL PERSONAL CONDUCT POLICY FLOWCHART, *supra* note 57.

164. *Id.*

165. *See Id.*; Schefter, *supra* note 62.

166. *See* Pacifici, *supra* note 31, at 114 (citing Jason M. Pollack, *Take My Arbitrator, Please: Commissioner "Best Interests" Disciplinary Authority in Professional Sports*, 47 FORDHAM L. REV. 1645, 1706 (1999)).

C. THE NFL COMMISSIONER'S DISCIPLINARY PROCESS IS UNFAIR TO THE NFL'S PLAYERS

The NFL Commissioner's disciplinary process takes significant time, is inconsistent and unpredictable, and often results in litigation; all of these attributes are detrimental to the players. First, the process is a lengthy one, as exemplified by Ray Rice's and Adrian Peterson's cases as well as DeflateGate. Rice's punishable misconduct occurred in February, 2014.[167] Rice was not initially punished until June of 2014, received his second punishment three months later, and had to wait another two-and-a-half months for his arbitration hearing.[168] Admittedly, Rice's case was unique due to his double-punishment. Nevertheless, Rice still had to wait two-and-a-half months for his arbitration hearing.[169] Similarly, Adrian Peterson experienced a one-month delay between his appeal of his suspension and his hearing.[170] DeflateGate lasted even longer, with Tom Brady's conduct occurring four months before his initial punishment and final resolution not expected until over a year after his alleged wrongdoing.[171] The NFL's 2014 Personal Conduct Policy will only drag out disciplinary proceedings. The 2014 Policy requires a player appealing his suspension to first have a hearing in front of the NFL's new Expert Panel, which then makes recommendations to the NFL Commissioner or his designee.[172] Presumably, the player then must endure a second hearing in front of the NFL Commissioner or his designee and then also wait for deliberation and a decision.[173] Thus, under the 2014 Policy's process, the player is required to prepare for, have, and wait for the outcome of two hearings before a decision is finally made. This will undoubtedly extend the time it takes for the player's appeal to finally be resolved. These delays, for which the players have no recourse beyond mere back pay,[174] unduly harm the players.

Being an NFL player is a unique occupation. The average NFL player's career is only 3.3 years,[175] and the season only lasts seventeen weeks, with sixteen games played per team.[176] There are always younger or amateur football players seeking to replace current NFL players.[177] Forcing a player to miss four to ten games while he waits for his appeal to be resolved harms that player's ability to practice his inevitably short career. Ray Rice never stepped foot on the game-day gridiron during the 2014 season, and Adrian Peterson only played in the season opener.[178] Both players lost considerable time practicing their trade as football players.

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167. *See supra* Part II.A.

168. *Id.*

169. *Id.*

170. *See supra* Part II.B.

171. *See supra* Part II.C.

172. 2014 NFL PERSONAL CONDUCT POLICY FLOWCHART, *supra* note 57.

173. This is required under the CBA. *See* NFL CBA, *supra* note 2, Art. 46.

174. The Back Pay Act allows for the recovery of back pay if an employee is found to "have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee." 5 U.S.C.A. § 5596(b)(1) (West 2014).

175. *Average Playing Career Length in the National Football League (in Years)*, STATISTA, http://www.statista.com/statistics/240102/average-player-career-length-in-the-national-football-league/ (last visited Jan. 3, 2016).

176. *See* NFL CBA, *supra* note 2, Art. 31.

177. Every season this turnover occurs on NFL rosters. *See, e.g.*, Albert Breer, *Colin Kaepernick Over Alex Smith: The Truth About a Bold Move*, NFL.COM (Jan. 30, 2013, 11:56 AM), http://www.nfl.com/superbowl/story/0ap1000000132169/article/colin-kaepernick-over-alex-smith-the-truth-about-a-bold-move.

178. *See supra* Part II.A–B.

This delay also affects the players financially. Despite back pay for weeks unfairly missed,[179] NFL players have little recourse for missing out on other pay-based incentives. Many NFL player contracts include performance-based escalator clauses, most of which are reached near the end of the season, if at all.[180] Missing four to ten games or more due to an unfair suspension essentially precludes them from attaining the on-field performance necessary to earn those incentives. NFL players are also paid for playoff, Super Bowl, and Pro Bowl games.[181] A player being forced to miss regular-season games hinders his ability to make the Pro Bowl and his team's ability to compete for the playoffs and Super Bowl. However, if that player's suspension is proven to be unfair, there is no way for that player to prove that he would have been elected for the Pro Bowl, or that his team would have made the playoffs or Super Bowl with him active. Thus, that player misses out on that potential income. Furthermore, NFL players frequently supplement their incomes with endorsement deals.[182] The players who get the most lucrative endorsement deals are the most successful and popular players.[183] However, players cannot be successful and popular if they are prohibited from the gridiron on game-day. Players who are wrongly punished lose endorsement opportunities, but the value of those opportunities is likely too uncertain to calculate for back pay awards. These problems are exacerbated when the NFL Commissioner exercises his newly-codified authority to place players on paid leave while the disciplinary officer conducts his investigation because the players miss out on more playing time, potentially unfairly if they turn out to not deserve any punishment.[184] This is worsened by the fact that this leave lasts until final disposition of the player's case.[185] Overall, NFL players stand to lose significant income as the result of the NFL Commissioner erroneously punishing them.

The NFL Commissioner's current disciplinary process is also inconsistent and unpredictable, further harming the players. The three scandals explained above are demonstrative of Commissioner Goodell's inconsistencies in applying his "best interests" authority. In Rice's case, Commissioner Goodell initially punished Rice well before the NFL season, and appointed a neutral arbitrator for his appeal.[186] In Peterson's case, Commissioner Goodell also punished him swiftly, but refused to appoint a neutral arbitrator for his appeal.[187] In the DeflateGate scandal, Commissioner Goodell waited a long time to punish Tom Brady and appointed himself, a clearly partial arbitrator, to hear Brady's appeal.[188] Notably, former Commissioner Paul Tagliabue weighed heavily in his opinion overturning Commissioner Goodell's player punishments for the Bounty Scandal the fact that Commissioner Goodell's

179. *See* accompanying text, *supra* note 174.

180. *See, e.g.*, Joel Corry, *Agent's Take: Notable Players who Cashed in on Performance Bonuses*, CBSSPORTS.COM (Dec. 30, 2014, 2:55 PM), http://www.cbssports.com/nfl/eye-on-football/24923980/agents-take-notable-players-who-cashed-in-on-performance-bonuses.

181. Joel Corry, *What Are Players Paid During The Playoffs?*, NATIONALFOOTBALLPOST.COM (Jan. 2, 2015), http://www.nationalfootballpost.com/what-are-players-paid-during-the-playoffs/; Teresa Ambord, *Super Bowl Money and Tax Facts You May Not Know*, ACCOUNTINGWEB.COM (Jan. 31, 2014), http://www.accountingweb.com/article/super-bowl-money-and-tax-facts-you-may-not-know/223009.

182. *See, e.g.*, Jordan Teicher, *How NFL Players Are Winning The Game for Micro Endorsements: On-Demand Merchandise*, ADWEEK.COM (Sept. 15, 2014, 11:38 PM), http://www.adweek.com/brandshare/how-nfl-players-are-winning-game-micro-endorsements-160065; Kurt Badenhausen, *The NFL's Highest-Paid Players 2014*, FORBES (Aug. 20, 2014, 9:56 AM), http://www.forbes.com/sites/kurtbadenhausen/2014/08/20/the-nfls-highest-paid-players-2014/.

183. Badenhausen, *supra* note 182.

184. 2014 NFL PERSONAL CONDUCT POLICY FLOWCHART, *supra* note 57.

185. *Id.*

186. *See supra* Part II.A.

187. *See supra* Part II.B.

188. *See supra* Part II.C.

suspensions of the players involved were inconsistent with how the league has generally treated such misconduct, and this was a dispositive issue in the DeflateGate scandal.[189]

The inconsistent nature of these decisions is inherently unfair to the NFL's players. The NFL has assumed the role of punishing its players for any conduct that the NFL Commissioner deems is detrimental to the league's image.[190] Players do not know if, when, or how severely they will be punished for their conduct. This lack of predictability hinders the deterrent effect of the punishments[191] because the players cannot make a reasoned decision weighing the punishable conduct against resultant punishment. Although the NFL recently took a step towards predictable punishments with the implementation of its 2014 Personal Conduct Policy, Commissioner Goodell still retains final discretion.[192] The inconsistencies of Commissioner Goodell's recent rulings have also alienated the players. Multiple high-profile players have spoken out against Commissioner Goodell or have engaged in known misconduct apparently as civil disobedience.[193] Alienating the players can only serve to cause further strife between the NFL's management and its players. The players will likely continue to distrust and challenge Commissioner Goodell even when he takes fair disciplinary action, and future collective bargaining will likely be more contentious than it would otherwise be.

The NFL Commissioner's current disciplinary process also leads to repeated and unnecessary litigation. Adrian Peterson and Tom Brady successfully sued the NFL,[194] and the players in the Bounty Scandal were able to use the filing of a lawsuit to persuade Commissioner Goodell to recuse himself and appoint former commissioner Paul Tagliabue as third-party arbitrator.[195] The NFL is apparently fearful enough of players taking unfavorable "best interests" arbitration awards to court that it preemptively filed against Tom Brady, and lost.[196] In each of these cases, Commissioner Goodell initially appointed a non-neutral arbitrator—for Peterson, a former NFL executive,[197] and for the Bounty Scandal players and Tom Brady in DeflateGate, Commissioner Goodell himself[198]—and ultimately saw his decisions overturned

189. In the Matter of New Orleans Saint Pay-for-Performance/"Bounty", Arbitration Decision, at 18 (Dec. 11, 2012) (Tagliabue, Arb.), *available at* http://espn.go.com/photo/preview/121211/espn_bountyruling.pdf; *supra* Part II.C.

190. NFL CBA, *supra* note 2, at Art. 46. For a discussion regarding whether the NFL should not discipline its players at all, see Josh Levin, *You're Fired, Roger Goodell*, SLATE (Sept. 23, 2014, 7:27 PM), http://www.slate.com/articles/sports/sports_nut/2014/09/nfl_personal_conduct_policy_the_commissioner_has_no_business_punishing_anyone.html.

191. One of the suggested reasons for a sports commissioner's exercise of his "best interests" disciplinary authority is to deter other players from engaging in similar conduct. *See* Parlow, *supra* note 15, at 182 (citing Bukowski, *supra* note 32, at 106–08).

192. *See supra* I.C.

193. *See, e.g.*, Nancy Armour, *Richard Sherman Sees Real Issue in DeflateGate*, USA TODAY (Jan. 25, 2015, 11:52 PM), http://www.usatoday.com/story/sports/nfl/2015/01/25/richard-sherman-super-bowl-xlix-seattle-seahawks/22326271/; Pat McManamon, *Joe Thomas Rips Deflategate Probe, Roger Goodell's 'Ridiculous Witch Hunts'*, ESPN (Aug. 23, 2015), http://espn.go.com/nfl/story/_/id/13494837/joe-thomas-cleveland-browns-backs-tom-brady-rips-nfl-witch-hunts; David Zirin, *Marshawn Lynch and Roger Goodell: Compare and Contrast*, THE NATION (Jan. 27, 2015, 9:43 PM), http://www.thenation.com/blog/196257/marshawn-lynch-and-roger-goodell-compare-and-contrast#; Kevin Patra, *Brees Backs Fujita's Criticism of NFL Commissioner Roger Goodell*, NFL.COM (Oct. 11, 2012), http://blogs.nfl.com/2012/10/11/brees-backs-fujitas-criticism-of-commissioner-goodell/; Ryan Parker, *Current, ex-NFL Players Criticize Roger Goodell Over Video Bombshell*, LA TIMES (Sept. 10, 2014, 5:34 PM), http://www.latimes.com/sports/sportsnow/la-sp-sn-nfl-players-criticize-goodell-20140910-htmlstory.html.

194. *See supra* Part II.B–C.

195. Pacifici, *supra* note 31, at 110.

196. *See supra* Part II.C.

197. *See supra* Part II.B.

198. Pacifici, *supra* note 31, at 105–12; *supra* Part II.C.

after litigation was filed. Given the success of these lawsuits, NFL players who receive what they view to be an unfair punishment and arbitration award are incentivized to sue. This litigation is expensive, usually takes several months, and, at best, should result in more arbitration proceedings,[199] thus further delaying the resolution that the suing players seek.

IV. PROPOSED SOLUTION: THE INDEPENDENT ADJUDICATORY COMMITTEE SYSTEM

A. OTHER PROPOSALS AND CRITIQUES

Given the institutional problems with the NFL Commissioner's current disciplinary process, the process must be updated. This is not a novel idea, as several scholars have addressed revamping the NFL Commissioner's discipline process. The current debate in this field has centered around how much power the NFL Commissioner should retain. At one end of the spectrum are those who argue that the NFL Commissioner's disciplinary decision should be final and binding and not subject to appeal.[200] Proponents of this theory contend that the NFL Commissioner is best situated to determine what is best for the sport as compared to arbitrators or judges.[201] However, this proposal would likely do more harm than good. Players who feel they have been unfairly treated would have only one avenue to challenge the disciplinary decision: litigation. The likely uptick in litigation, even if it provides a "fairly objective answer,"[202] is still less efficient than arbitration.[203] Moreover, NFL players would still be subject to unfair treatment and lengthy delays, and the NFL Commissioner would still receive the brunt of public outrage over disciplinary decisions that the public feels are unfair.

On the other end of the spectrum, some have called for the NFL Commissioner to relinquish all authority to punish players for off-the-field conduct. Some argue that such discipline should be left to players' teams, as their employers.[204] Others argue that the NFL and the country as a whole functioned well for decades without the NFL policing its players' off-the-field conduct and that, as an entertainment company rather than a policing agency, it should return to that policy.[205] Even accepting that the NFL is no more than an entertainment company, the NFL has a vested financial interest in policing its players' off-the-field activities. When Commissioner Goodell first punished Ray Rice, he encountered significant hostility from fans and members of the public for punishing Rice too lightly.[206] This undoubtedly cost the NFL revenue. More importantly, Ray Rice and Adrian Peterson lost sponsorship deals as a

199. For example, in Adrian Peterson's case, approximately two-and-a-half months passed between his initial arbitration ruling and Judge Doty's vacatur of his arbitration award. *See supra* Part II.B. Judge Doty's ruling merely vacated the award and remanded for further proceedings consistent with the CBA and the law, and the NFL plans to appeal. *Id.* Thus, Peterson will necessarily experience additional delays before his case is decided. Considering that his suspension was initially to be lifted on April 15, 2015, these delays may ultimately prove Peterson's long court battle to be of little value.

200. *See* Pollack, *supra* note 166.

201. *Id.* at 1649.

202. *Id.* at 1707.

203. This criticism is also made by Pacifici. *See* Pacifici, *supra* note 31, at 113. Arbitration is generally considered more efficient than litigation, especially in the labor context. *See, e.g.*, United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960).

204. *See, e.g.,* Levin, *supra* note 190.

205. Tim Marchman, *The NFL's Useful Idiots Want Roger Goodell to Get Tough; They're Wrong*, DEADSPIN.COM (Sept. 17, 2014, 5:06 PM), http://deadspin.com/the-nfls-useful-idiots-want-roger-goodell-to-get-tough-1635948177.

206. *See supra* Part II.A.

result of their off-the-field misconduct.[207] If the NFL had not taken action against these players, the NFL presumably would have risked losing its sponsorship deals as well.[208] In fact, in the aftermath of the Ray Rice and Adrian Peterson scandals, multiple NFL sponsors requested their ads not be shown at games involving the Baltimore Ravens or Minnesota Vikings.[209] Further, leaving punishment to the players' teams is insufficient. Teams are incentivized more so than the NFL to discipline players lightly or not at all because the teams have the most to lose (that player's services) and the least to gain (sponsorships and such are generally league business).[210] The public understands this and expects the NFL to take on the role of disciplinarian. This is evidenced by fan outrage in response to Commissioner Goodell's initial punishment of Ray Rice not meeting their standards.[211] The NFL has much to lose by not conforming to this expectation. Finally, given the recent uptick in off-the-field misconduct discipline and the adoption of the new Personal Conduct Policy, the NFL has made it very clear that it plans to continue punishing players for off-the-field misconduct. Thus, it should strive to do so in the fairest, most efficient way possible.

The most promising proposal commentators have offered thus far is the hybrid system, explained by Adriano Pacifici. The hybrid approach allows the NFL Commissioner to retain initial disciplinary authority but places appeals decisions in the hands of a tripartite panel of independent arbitrators to determine the "reasonableness" of the discipline.[212] This is close to what the NFLPA has demanded.[213] Pacifici specifies that the arbitrators should come from the American Arbitration Association and be bound by its procedural rules.[214] For each appeal, nine arbitrators would be presented to the parties, who would then choose three, similar to *voir dire* in jury trials.[215] Pacifici believes that this arbitrator selection process would avoid problems of arbitrator bias.[216]

Pacifici's hybrid system deserves considerable praise as it creates a much fairer process for NFL players to appeal their suspensions, eliminates potential abuses by the NFL Commissioner, and greatly reduces the likelihood that players would challenge the arbitration decisions in court (thereby protecting the NFL Commissioner's credibility and saving both parties money). However, this system is not without its flaws, the worst of which being how long these arbitrations would take. Because the NFL Commissioner retains initial disciplinary authority, his punishment decision remains in effect until the arbitrators rule to overturn it, if they choose to do so. By having what amounts to a full-blown jury trial, presumably requiring

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207. *See* Daniel Roberts & Benjamin Snyder, *Ray Rice and 11 Other Athletes Who Lost Their Endorsements*, FORTUNE (Sept. 20, 2014, 9:00 AM), http://fortune.com/2014/09/20/ray-rice-adrian-peterson-tiger-woods-athletes-dropped-endorsements/.

208. *See* Ike Ejoichi, *How the NFL Makes the Most Money of Any Pro Sport*, CNBC (Sept. 4, 2014, 9:32 AM), http://www.cnbc.com/id/101884818 ("[T]he National Football League and its 32 teams raked in a record-setting $1.07 billion in sponsorship revenue for the 2013 season, an increase of 5.7 percent over the 2012 season.").

209. Jason B. Hirschhorn, *NFL Sponsors Avoid Ravens, Vikings Due to Off-The-Field Incidents, per Report*, SBNATION.COM (Sept. 24, 2014, 9:45 PM), http://ww.sbnation.com/nfl/2014/9/24/6841787/nfl-sponsors-ravens-vikings-ray-rice-adrian-peterson.

210. *Cf.* David Berri, *America's Socialist Sports League: The NFL*, THE ATLANTIC (Mar. 26, 2015), http://www.theatlantic.com/business/archive/2015/03/americas-socialist-sports-league-the-nfl/388330/ (reporting on a paper that found that NFL owners share revenues than the National Basketball Association or Major League Baseball). Even so, NFL owners remain committed to fielding the most competitive team possible. *Id.*

211. *See supra* Part II.A.

212. Pacifici, *supra* note 31, at 113–14.

213. *See* Bell, *supra* note 70.

214. *Id.* at 114.

215. *Id.* at 114–15.

216. *Id.* at 115.

considerable preparation and trial time and likely additional time for motions and oral argument,[217] the length of time between the NFL Commissioner punishing the player and the player's arbitral resolution will be long—likely much longer than the one-and-a-half to two months that it already takes.[218] Given that the NFL regular season is only seventeen weeks long and the unique harms to NFL players who miss games,[219] any new system for the NFL must have as a goal concluding disciplinary disputes as quickly as possible. Pacifici's hybrid system fails to further that goal.

B. PROPOSED INDEPENDENT ADJUDICATORY COMMITTEE SYSTEM TO IMPROVE THE NFL'S OFF-THE-FIELD DISCIPLINE

The NFL and NFLPA should mutually agree to implement a system that roughly mirrors the United States criminal court system, minus juries. Under this "Independent Adjudicatory Committee" approach, the NFL Commissioner (or his designee, such as the disciplinary officer) would relinquish disciplinary authority and act as a prosecutor. He would retain complete authority to investigate, including meeting with players, with their lawyers present if they wish (although there would be no criminal procedure protections such as *Miranda* warnings or Fifth Amendment self-incrimination protections unless the parties mutually decided to adopt them), and compiling evidence against the players. If the NFL Commissioner believes that a player engaged in punishable misconduct, he would file a charge with the Independent Adjudicatory Committee, stating, with specificity, the misconduct in which the player allegedly engaged, the evidence against the player, and the recommended punishment. The Committee would then conduct a hearing, bound by the evidentiary, procedural, and substantive rules the NFL and NFLPA include in their amended CBA,[220] and it would release a written opinion explaining its ruling and reasoning. As more and more cases are adjudicated, the resulting opinions will form an NFL disciplinary common law. The Committee would have the authority to stray from its past rulings, but will be encouraged in the CBA to follow *stare decisis* principles.[221] Of course, the NFL and NFLPA could always mutually agree to overturn Committee precedent by amending their CBA, similarly to how Congress occasionally overturns Supreme Court interpretations of its legislation.[222]

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217. For instance, the American Arbitration Association's Consumer Arbitration Rules, which Pacifici explicitly states the NFL should use, allow for the filing and resolution of written motions only after the parties and arbitrator have held a conference call, which could considerable lengthen an arbitration. *Consumer Arbitration Rules*, AM. ARBITRATION ASS'N, at R-24 (Sept. 1, 2014), *available at*, https://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?_afrWindowId=12ua96wc7a_1&_afrLoop=2022891065107770&doc=ADRSTAGE2021424&_afrWindowMode=0&_adf.ctrl-state=hf27f5iaa_4#%40%3F_afrWindowId%3D12ua96wc7a_1%26_afrLoop%3D2022891065107770%26doc%3DADRSTAGE2021424%26_afrWindowMode%3D0%26_adf.ctrl-state%3D12ua96wc7a_79.

218. *See* Part III.C.

219. *See id.*

220. The only way to implement this approach would be for the NFL and NFLPA to mutually agree to amend their CBA to include it. *See infra* Conclusion.

221. *Stare decisis* is the principle that courts will generally abide to their precedents. *See* LEGAL INFORMATION INSTITUTE STARE DECISIS, https://www.law.cornell.edu/wex/stare_decisis (last visited Jan. 3, 2016). The United States Supreme Court follows this principle unless the prior precedent has been found unworkable due to serious inequity, instability, or societal change that renders the precedent irrelevant. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992).

222. *See, e.g.*, The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (overturning a Supreme Court decision, *Wards Cove Packing Co. v Atonio*, 490 U.S. 642 (1989)); The ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2009) (overturning two Supreme Court decisions, *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002)).

The Committee would consist of three independent former judges, each of which the parties mutually agree to in order to ensure independence.[223] To further this goal, the Committee members would receive a fixed annual salary; determined by the NFL and NFLPA together, so that the Committee members would not feel obligated to one party because of their pay structure. The NFL and NFLPA would determine the specifics of the members' terms during collective bargaining. For instance, the parties could agree that committee members serve staggered six-year terms (one replaced every two years), and each member would be eligible to serve up to two terms.

The Committee would also be bound by the evidentiary, procedural, and substantive rules to which the NFL and NFLPA agree. To this point, the parties would want to determine the broad evidentiary and procedural rules—for instance, the admissibility of hearsay, statute of limitations and other time constraints, the standard of proof, and the types of pre-hearing motions available and how they could be resolved—but leave specific details to the Committee members. The benefit of choosing former judges as members of the Committee is that they are experienced in and comfortable with filling gaps in evidentiary and procedural rules.[224] Thus, the NFL and NFLPA would simply include a provision allowing the Committee members to create such rules so long as they are not inconsistent with the CBA. The NFL and NFLPA could also always overturn a Committee rule through mutual agreement and CBA amendment.

The thorniest question regarding this proposal is how to define the substantive rules to which the Committee is bound. As it stands, NFL players are disciplined for off-the-field conduct that is "detrimental to the integrity of, or public confidence in, the game of professional football."[225] This vague standard is supplemented by the NFL's Personal Conduct Policy, which the owners imposed without any input from the NFLPA, and which offers little additional guidance as to what constitutes misconduct.[226] The NFL and NFLPA have three possible avenues to resolve this issue: (1) they could leave it entirely up to the Committee to define "conduct detrimental to the game;" (2) they could allow either party to unilaterally define the term;[227] or (3) they could do so together through collective bargaining. Ideally, the NFL and NFLPA would successfully pursue the third option. However, this is unrealistic as drafting a comprehensive NFL player disciplinary policy would be an onerous undertaking. Drafting such a policy to which the NFL and NFLPA would then agree is near impossible. The parties have met at the bargaining table on numerous occasions[228] and have presumably discussed player discipline without reaching an agreement. Otherwise, they would have

223. The NFL and NFLPA proved capable of doing this in the past when they mutually elected Judge Barbara Jones to hear Ray Rice's appeal. *See supra* Part II.A.

224. Generally, judges are permitted to promulgate local rules for their courtrooms so long as those rules are not inconsistent with any governing law. *See, e.g.*, LOCAL RULES FOR THE 17TH CIRCUIT OF FLORIDA, http://www.17th.flcourts.org/index.php/rules-and-policies/local-rules (last visited Jan. 3, 2016); LOCAL RULES FOR THE SIXTH JUDICIAL CIRCUIT, http://www.jud6.org/LegalCommunity/LocalRules.html (last visited Jan. 3, 2016).

225. NFL CBA, *supra* note 2, Art. 46, §1(a).

226. *See supra* Part I.C. (explaining that the new NFL Personal Conduct Policy merely addresses the procedure by which the NFL Commissioner disciplines players; it does not clarify what constitutes a violation of the "detrimental to the game" standard).

227. This party would likely be the NFL because the NFL already believes it has the power to do so. *See* Bell, *supra* note 70 (explaining that one of the NFLPA's primary challenges to the NFL's new Personal Conduct Policy is that the NFL could only adopt it through collective bargaining and amending the CBA, with which the NFL disagrees).

228. *See* Associated Press, *NFL Labor History Since 1968*, ESPN (Mar. 3, 2011), http://sports.espn.go.com/nfl/news/story?page=nfl_labor_history; Terrence Caldwell, An Overview and Comparative Analysis of the Collective Bargaining Agreements in the NBA, NFL, and MLB (Fall 2010) (unpublished B.A. thesis, Claremont University), *available at* http://scholarship.claremont.edu/cgi/viewcontent.cgi?article=1063&context=cmc_theses.

implemented one. Thus, the parties would be best served by choosing the first option: allowing the Committee, after hearing NFL Commissioner recommendations and player responses at individual hearings, to craft the policy through its written opinions. The parties could then collectively bargain over specific decisions that the Committee makes and mutually agree to change them as they see fit.

Last, it is important to keep in mind that the Committee would essentially be a highly specialized arbitration framework. Thus, the Committee would remain subject to the Federal Arbitration Act and other similar laws.[229] This affords both parties additional protection. If the Committee truly fails in its duties to fairly and impartially adjudicate disputes, the wronged party could still challenge the result in federal court, similarly to how Adrian Peterson and Tom Brady successfully litigated their discipline.[230] However, given the structure of the Committee, litigation similar to Peterson's and Brady's will be reduced.

Admittedly, by calling on the NFL to relinquish significantly more power, this proposal is more radical than Pacifici's hybrid system. However, the NFL would ultimately benefit from doing so. The NFL's face, its Commissioner, would be much better protected and insulated from unpopular disciplinary decisions. The NFL would also repair its relationship with arguably its most valuable product, its players. Last, it may ultimately help to deter future misconduct. Currently, players do not know for what or how severely they may be punished for specific conduct. The creation of a predictable common law will remedy that issue. As a result, players may begin to consider the punishment before doing the crime.

V. THE INDEPENDENT ADJUDICATORY COMMITTEE SYSTEM SOLVES THE ISSUES FROM WHICH THE NFL'S CURRENT DISCIPLINARY SYSTEM SUFFERS

A. IMPROVING THE COMMISSIONER'S PUBLIC IMAGE AND SOLVING HIS "ARBITRATOR'S DILEMMA"

As a result of the NFL's response to the scandals that recently rattled it, the NFL Commissioner's public perception and control over his disciplinary process has suffered. The public perceives the NFL Commissioner's application of his "best interests" disciplinary authority as unfair, and the NFL Commissioner is trapped in the "arbitrator's dilemma."[231]

Relinquishing some of his authority is the best way for the NFL Commissioner to solve his arbitrator's decision. Right now, the NFL Commissioner risks losing control over the disciplinary process and public confidence every time he chooses an arbitrator to hear player appeals of disciplinary decisions, whether or not that arbitrator is impartial.[232] The Independent Adjudicatory Committee proposal solves this problem. As prosecutor, the NFL Commissioner would retain considerable control over the process, and that control would remain constant regardless of the final outcome of the disciplinary proceedings. Further, the NFL Commissioner would not have to worry about having his disciplinary decision overturned (and losing the public's confidence) as he would not make a binding decision nor would he be concerned that his arbitrator choice fails the "evident partiality" test because he would not choose the arbitrator. In fact, as described in more detail infra,[233] eventually the Committee

229. *See* 9 U.S.C.A.§2 (West 2014).

230. *See supra* Part II.B–C.

231. *See supra* Part III.A.

232. *See id.*

233. *See id.*

would create a reliable common law. Thus, the NFL Commissioner could predict with more certainty what charges and punishments would be successful and choose to either bring those or suggest that the Committee revisit its precedent. The player would also have the opportunity to challenge precedent in front of the Committee. In essence, this proposal allows the NFL Commissioner to retain the most authority possible without subjecting him to repeated reversals, thereby protecting the integrity and respect of his office, without harming the NFL's brand.

B. PROTECTING THE NFL AS A BUSINESS

The NFL Commissioner's recent exercise of his "best interests" disciplinary authority has harmed the NFL's bottom line by undermining its product. The NFL is financially incentivized to keep its players on the field, unless they have done something so egregious that the NFL believes it will be better off by removing them. The current disciplinary system sometimes fails to do this by suspending players who do not deserve it or not suspending players who do. This costs the NFL money and alienates its fans.

The Independent Adjudicatory Committee system will ameliorate these problems. By adjudicating cases quickly, efficiently, and accurately, and creating reliable common law as a result, this system protects the NFL in two important ways. First, it reaches what more people will view as the objectively correct result. Because neutral former judges will be making the decisions, and the NFL and NFLPA can choose to change principles established by the Committee's opinions, it is more likely that only players that deserve to be suspended will be suspended. The NFL will no longer lose revenue from erroneously prohibiting players from playing. Equally importantly, the NFL will no longer alienate its fans by disciplining players in ways the fans feel are unjust. Second, even if the Committee reaches a conclusion that fans feel is unfair, the NFL will be distanced from that decision. The Committee would take the brunt of the public's backlash, not the NFL. Although the NFL would undoubtedly still face some fan outrage as the result of a bad decision by the Committee, that harm will be assuaged by the independent decision-making and predictability the Committee will inject into the disciplinary proceedings.

C. CREATING A FAIRER PROCESS FOR THE NFL'S PLAYERS

The NFL Commissioner's current disciplinary process takes significant time, which often unfairly costs the players playing time and money, is inconsistent and unpredictable, and often results in litigation, all to the players' detriment.[234] The Independent Adjudicatory Committee system will alleviate these problems. The main reason why the current process takes so long is because of the many steps it requires. After investigation, the NFL's disciplinary officer imposes discipline. The player then has to formally appeal, wait and prepare for two hearings (one with the Expert Panel, one with the NFL Commissioner or his designee), take the case through the hearings, and then wait for the NFL Commissioner or his designee's decision.[235] Throughout this process, the NFL Commissioner's punishment remains in effect. Worse, in the 2014 Personal Conduct Policy, the NFL Commissioner assumed the power to place players on paid leave during the initial investigation.[236] Thus, even if the arbitrator ultimately rules in favor of the player, the player will have already been unfairly punished while awaiting the

234. For a more in-depth discussion of these issues, *see supra* Part III.C.

235. *See supra* Part I; NFL CBA, *supra* note 2, Art. 46.

236. 2014 NFL CONDUCT POLICY FLOWCHART, *supra* note 57.

arbitrator's decision. This problem similarly exists with Pacifici's hybrid system.[237] Under the Independent Adjudicatory Committee system, the player will not serve a sentence until his case is heard by the Committee. Therefore, the player is not at risk of serving a sentence that is ultimately revoked and suffering the unrecoverable losses that come with unfair punishment.[238] Further, if the NFL Commissioner wishes to expedite a player's punishment, he can hurry his investigation and bring charges quickly. In fact, the Committee, or the NFL and NFLPA through collective bargaining, could establish a process similar to temporary restraining orders or preliminary injunctions for the most egregious cases. Because the Committee is a stable body of individuals tasked solely with adjudicating NFL "best interests" discipline, hearings should operate swiftly and efficiently. In all, the Independent Adjudicatory Committee system is designed to operate as efficiently as possible, while still maintaining accuracy.

The NFL Commissioner's current disciplinary track record is inconsistent at best.[239] As a result, players do not know for what conduct they will be punished, nor the severity of those punishments.[240] Former NFL Commissioner Paul Tagliabue stressed these concerns in his arbitration award overturning Commissioner Goodell's Bounty Scandal discipline decision,[241] Judge Doty touched on the importance of this concept when he discussed the NFL's "law of the shop,"[242] and Judge Berman found this to be a dispositive issue in overturning Tom Brady's arbitration award when he concluded that Brady did not have adequate notice that he would be punished as severely as he was because the NFL had never previously punished players so harshly for similar offenses.[243] My proposed system would help to ensure consistency and predictability in punishment. By creating a common law, protected by the basic principles of *stare decisis*, NFL players will have a much better understanding of what to expect when it comes to discipline for their off-the-field conduct.

Infusing the NFL "best interests" disciplinary system with common law principles will ultimately limit how often the players will file suit against the NFL. The NFL is visibly fearful of player litigation, as evidenced by its pre-emptive filing against Tom Brady.[244] Labor law disfavors litigation regarding collective bargaining agreements, and courts' ability to overturn arbitration awards is limited.[245] Yet, the NFLPA frequently challenges arbitration awards in court.[246] This generally occurs either because the NFL Commissioner chooses an arbitrator who the NFLPA believes fails the evident partiality test, or because the NFLPA feels the outcome is facially unfair.[247] Surprisingly, the NFLPA often wins,[248] and the limited remedies generally available could extend an already lengthy process. By creating a system that

237. *See supra* Part IV.A.

238. Critics may argue that the Committee could get the player's sentence wrong. Accuracy in punishment is a concern in any system. Further, it is almost impossible to objectively determine if punishment is "accurate." However, by appointing a panel of former judges, and allowing the parties to overturn their decisions, the Independent Adjudicatory Committee System will better uphold the goal of accuracy than the other possibilities. *See infra* Part IV.B.

239. *See supra* Part II–III.

240. *Id.*

241. *Id.*

242. *See* Adrian Peterson's Order Vacating Arbitration Award, *supra* note 96, at 11–14.

243. *See supra* Part II.C.

244. *See id.*

245. *See* David Pluchinsky, *The Basics of Confirming, Vacating, Modifying and Correcting an Arbitration Award Under the Federal Arbitration Act and the Texas Arbitration Act*, BEIRNE, MAYNARD & PARSONS, L.L.P. (Dec. 31, 2002), http://www.bmpllp.com/publications/34-the-basics-confirming-vacating-modifying-correcting-arbitration-award.

246. *See supra* Part III.C.

247. *Id.*

248. The NFLPA won its lawsuit on behalf of Adrian Peterson, and coaxed Commissioner Goodell into the result it wanted in the Bounty Scandal. *See supra* Part II.A; Pacifici, *supra* note 31, at 105–12.

implements truly independent adjudicators who create a consistent and known body of law, both of these litigious issues are mitigated.

The obvious consequence of a fair, consistent common law is that many cases will never even make it to the hearing stage, let alone a courtroom. Similar to a prosecutor and a defendant entering into a plea bargain, the NFL Commissioner and NFL player may reach a disciplinary agreement if they so choose. Right now, given the uncertainty in what constitutes "conduct detrimental to the game," what a fair punishment for misconduct is, and how vast the NFL Commissioner's extraordinary disciplinary authority actually is, NFL players and the NFL Commissioner alike have little incentive to settle. This is exceptionally relevant today, given the NFL and the NFLPA/Brady's failure to reach a settlement regarding Brady's DeflateGate punishment despite Judge Berman's insistence that they do.[249] Once common law principles are established, the likelihood of settlement will naturally increase. For the players, this further promotes efficient, fair outcomes that will not need to be litigated. For the NFL Commissioner, this bolsters his public image, rids him of the shame and embarrassment of having his decisions overturned, and allows him to focus his time on improving the NFL.

VI. CONCLUSION

The NFL Commissioner's current exercise of his "best interests" disciplinary authority is plagued with problems. Commissioner Goodell's recent exercise of this authority has damaged his credibility in the eyes of the public and has ultimately hurt the NFL's bottom line. Worse, the execution of his authority has been unnecessarily detrimental to the players and has, on increasing occasion, necessitated court action. However, the Independent Adjudicatory Committee system, under which the NFL Commissioner takes a prosecutorial role and leaves disciplinary decision-making authority in the hands of a neutral panel of three former judges, would solve many of these problems.

Still, neither party can unilaterally adopt the system, because doing so runs contrary to the parties' CBA. Thus, the parties would have to amend their CBA.[250] Because the parties currently have a CBA in place that discusses this subject, neither party is required to collectively bargain about this topic during the life of the agreement.[251] Moreover, the parties executed a "zipper" clause in their current CBA, meaning they waived all rights to bargain about any subjects covered or not covered in the CBA.[252] Nevertheless, if both parties agree to bargain, they can overcome their "zipper" clause. However, the parties will only agree to implement this system if it is truly in their best interests. Because this approach best solves the many issues with the current system, it is in both parties' best interests to do so. The ball is now in the NFL and NFLPA's field; it is their turn to act.

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249. *See supra* Part II.C.

250. Alternatively, the parties could wait until the current CBA expires and then collectively bargain for the system in the new CBA. However, the new CBA does not expire until 2020. *See* NFL CBA, *supra* note 2, Art. 69, § 1. Thus, the parties would be much better off amending their CBA.

251. National Labor Relations Act, 29 U.S.C.A. § 158(d) (West 2014); Jacobs Mfg. Co., 94 N.L.R.B. 1214 (1951).

252. NFL CBA, *supra* note 2, Art. 2, § 4(a). Parties may waive their rights to discuss future matters in their collective bargaining agreement so long as the waiver is clear and unmistakable. Johnson-Bateman Co., 295 N.L.R.B. 180 (1989). For a discussion about zipper clauses generally, see Note, *Mid-Term Modification of Terms and Conditions of Employment*, 1972 DUKE L.J. 813, 819–22 (1972).

Miley Cyrus and the Attack of the Drones: The Right of Publicity and Tabloid Use of Unmanned Aircraft Systems

Amanda Tate*

I. INTRODUCTION

Imagine that it is a Sunday afternoon and you are at home. You are walking around your apartment, attending to whatever you might be doing on a Sunday afternoon—maybe watching football, maybe cleaning, maybe reading a newspaper. Maybe you have not even changed out of your pajamas. And then, suddenly, you notice it. Something is hovering outside the window: a small machine with four rotors, whizzing through the air like a tiny UFO. You jump away from the window and the machine seems to react to your movements and flit away. With sudden outrage and understanding, you realize that you are seeing something called a "drone"[1]—and even more disturbing, whoever is flying it can probably see you too.

This may seem like something out of a science fiction novel, but it is almost exactly what happened to a Seattle woman changing in her 26th floor apartment in a highly publicized "Peeping Tom" drone incident in the summer of 2014.[2] The Seattle woman complained about the drone's presence and the operator, a man who flies drones for companies seeking aerial pictures of real estate and architecture, apologized to her.[3] The operator assured her that he was just photographing the building and that "no topless pic[ture]s exist[ed]."[4] While that response may or may not be reassuring, the troubling reality is that incidents like this are likely to become more commonplace.[5]

Drones are already a crucial, though controversial, element of covert operations, intelligence gathering, and targeted strikes for the military.[6] There has also been much talk about the use of drones as search and surveillance tools for law enforcement.[7] However,

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1. The term "drone" is a widely recognized term, but its use is mostly colloquial; the more technical term for a drone is "unmanned aircraft system" (UAS). INT'L CIVIL AVIATION ORG., UNMANNED AIRCRAFT SYSTEMS (UAS) iii–vii (2011), *available at* http://www.icao.int/Meetings/UAS/Documents/Circular%20328_en.pdf. Both terms are used interchangeably throughout this Note. For further discussion on the terminology of drone technology, *see infra* notes 16–17 and accompanying text.

2. *See, e.g.*, Devin Coldewey, *Drone Outside Window Spooks Seattle Woman But Cops Say No Law Broken*, NBCNEWS (June 24, 2014, 2:44 PM), http://www.nbcnews.com/tech/tech-news/drone-outside-window-spooks-seattle-woman-cops-say-no-law-n139626. The story became national news. *See, e.g.*, Lindsey Bever, *Seattle woman spots drone outside her 26th-floor apartment window, feels 'violated'*, WASHINGTON POST (June 25, 2014), http://www.washingtonpost.com/news/morning-mix/wp/2014/06/25/seattle-woman-spots-drone-outside-her-26th-floor-apartment-window-feels-violated/.

3. Bever, *supra* note 2.

4. *Id.*

5. Drones will soon become integrated into the national airspace. *See infra* notes 32-44.

6. *See, e.g.*, Cora Currier, *Everything We Know So Far About Drone Strikes*, PROPUBLICA (Feb. 5, 2013, 10:50 AM), http://www.propublica.org/article/everything-we-know-so-far-about-drone-strikes.

7. *See generally*, M. Ryan Calo, *The Drone as Privacy Catalyst*, 64 STAN. L. REV. ONLINE 29 (2011); Robert Molko, *The Drones Are Coming! Will the Fourth Amendment Stop Their Threat to Our Privacy?*, 78 BROOK. L. REV. 1279 (2013); Melanie Reid, *Grounding Drones: Big Brother's Tool Box Needs Regulation Not Elimination*, 20 RICH. J.L. & TECH. 9 (2014).

drones are not just tools for the military or police. The real threat drones pose is in their potential for use by non-government entities, such as businesses and even civilians. Their cost-effective, useful, and accessible technology means that drones have already proliferated the civilian sphere, employed by those from reporters to wedding photographers.[8] In particular, tabloids and news reporting agencies have capitalized on drone technology to take and publish otherwise difficult-to-obtain photos and film of celebrities and their children without consent.[9] Angered celebrities are already lobbying for increased regulation of these "journo-drones."[10]

While the technology is expanding rapidly, the ability of the law to grow in response to these new, pervasive privacy threats is limited. The precipitous increase in civilian drone use has triggered a cry to integrate civilian drones into the national airspace, but proposed federal rulemaking focuses mainly on registration, safety, and technology standards rather than the specific issue of drone paparazzi.[11] Because one of the current arenas for legal change in the drone war is taking place on the red carpet and in A-list parties, however, there may be an unexpected solution: the right of publicity, a cousin of privacy rights, originally designed to protect celebrities' rights to their image.[12] Several states recognize statutory rights to publicity.[13] Many more have created a common law basis for such a scheme.[14] More importantly, in today's digital age, when everyone is a short step away from becoming a YouTube sensation or Internet meme, the right of publicity could even have implications for everyday citizens.[15] As the American public—both celebrities and non-celebrities—becomes increasingly concerned with drone invasions of privacy, it is important to address this problem at the frontlines.

This Note analyzes the right of publicity as a potential avenue of protection against drone paparazzi. Part II gives a broad overview of the increased use of drones and the current regulatory landscape, as well as the conflicts increased use of the technology has created with the celebrity community. Part III provides a brief overview of the right of publicity, the current state of the right of publicity in the United States across jurisdictions, and some novel applications of the right of publicity in the courts. Part IV explains how the right of publicity can be modified to be an effective protection against drone paparazzi, explores alternative legal remedies that can be sought for drone invasions of privacy, and examines the potential implications of using the right of publicity as drone regulation for not only celebrities but non-celebrities as well.

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8. The wedding photographer in question, although his session took place in England, became somewhat of a global Youtube sensation because of his misuse of drone technology. James Nye, *Fail! Photographer's Drone Smacks Groom in the Head As He Looked for the Perfect Shot*, DAILY MAIL ONLINE (Aug. 16, 2013, 4:00 PM), http://www.dailymail.co.uk/news/article-2395933/Fail-Photographers-drone-smacks-groom-head-looked-perfect-shot.html.

9. Paparazzi photography of celebrity children without parental consent has become enough of a problem that celebrities in California saw fit to pass laws against it. *See* Keerthi Mohan, *Halle Berry Expresses Satisfaction As Anti-Paparazzi Bill Become Law, Which Protects Celebrity Kids*, INT'L BUS. TIMES (September 28, 2013, 9:34 AM), http://www.ibtimes.com/halle-berry-expresses-satisfaction-anti-paparazzi-bill-become-law-which-protects-celebrity-kids.

10. *Id.*

11. *See infra* notes 32–44 and accompanying text.

12. The term "right of publicity" was first used in recognition of celebrities' need for compensation for commercial appropriation of their image. *See* Haelan Laboratories v. Topps Chewing Gum, 202 F.2d 866, 868 (2d. Cir.), *cert. denied*, 346 U.S. 816 (1953).

13. *See* discussion *infra* Part IV.C.

14. *Id.*

15. *Id.*

II. THE DRONE PROBLEM

Civilian and commercial operation of drones is on the rise and is only going to increase. In contrast, drone regulation and drone enforcement have been slow to develop at the federal level and is confusing and patchy at the state level. Current regulation does not adequately address the specific problem of drone paparazzi, which is increasingly used to obtain unconsented footage or photographs of celebrities and celebrity children.

A. THE RISE OF UNMANNED AIRCRAFT SYSTEMS

The word "drone" conjures up images of spacecraft and model airplanes. In some cases this is not far from the truth, although the full range of drone technology is much wider. Although colloquially known as "drones", they are technically referred to as "unmanned aircraft systems" or "UAS".[16] Though the word "drone" seems more ambiguous, the term "UAS" in reality encompasses a broad range of unmanned aviation. It covers aircraft systems ranging in size from miniature (as small as a few grams) to large (several tons), as well as the equipment used to control, launch, and retrieve the system.[17]

A significant amount of drone technology is already employed by the military and law enforcement.[18] However, civilian and commercial use of UAS is on the rise. Realtors have used drones to show potential properties and scientists have used them to map terrain and document weather data.[19] The film industry has used them to shoot aerial scenes, and a beer company has even used drones to deliver beer to remote places.[20] The FAA has granted approval to Amazon to test delivery drones and to CNN to test drones for newsgathering.[21] And this is only the beginning. A report on integration of UAS in American airspace estimates that, through 2025, drone use will create an industry of $82 billion and more than 100,000 jobs in the United States.[22] An FAA official estimated that 1 million drones would be sold during

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16. INT'L CIVIL AVIATION ORG., UNMANNED AIRCRAFT SYSTEMS (UAS) iii–vii (2011), *available at* http://www.icao.int/Meetings/UAS/Documents/Circular%20328_en.pdf. For purposes of this note, the terms "drone" and "UAS" will be used interchangeably. The term UAV (unmanned aerial vehicle) is also sometimes used to refer to drone technology, but it is generally considered an outdated term. *Id.* at vii (labeling "UAV" in the glossary as an "obsolete term").

17. K. Dalamagkidis, K.P. Valvanis & L.A. Piegl, *On Unmanned Aircraft Systems Issues, Challenges and Operational Restrictions Preventing Integration into the National Airspace System*, 44 PROGRESS IN AEROSPACE SCIENCES 503, 504–05, fig. 1 (2008) (defining UAS and describing the usage of the term in federal publications and regulation).

18. For a comprehensive roadmap of military UAS use through 2030, *see* OFFICE OF THE SEC'Y OF DEF., UNMANNED AIRCRAFT SYSTEMS ROADMAP 2005-2030 (2005), *available at* https://fas.org/irp/program/collect/uav_roadmap2005.pdf. For interesting discussion on the privacy implications of law enforcement use of drones (beyond the scope of this note), *see, e.g.*, M. Ryan Calo, *The Drone as Privacy Catalyst*, 64 STAN. L. REV. ONLINE 29 (2011); Melanie Reid, *Grounding Drones: Big Brother's Tool Box Needs Regulation Not Elimination*, 20 RICH. J.L. & TECH. 9; Robert Molko, *The Drones Are Coming! Will the Fourth Amendment Stop Their Threat to Our Privacy?*, 78 BROOK. L. REV. 1279.

19. *See* George Lurie, *FAA Oks increased drone use by Realtors, farmers*, THE BUSINESS JOURNAL, www.thebusinessjournal.com/news/technology/18909-faa-oks-increased-drone-use-by-realtors-farmers (11:02 AM August 12, 2015); Brendan Richardson, *Drones could revolutionize weather forecasts, but must overcome safety concerns*, WASHINGTON POST, https://www.washingtonpost.com/news/capital-weather-gang/wp/2014/04/25/drones-could-revolutionize-weather-forecasts-but-must-overcome-safety-concerns/ (April 25, 2014).

20. *See* Jennifer Henry, *Commercial Use of Drones in a Holding Pattern*, FOR THE DEFENSE, August 2014, at 48, 50.

21. *See* Brian Resnick, *CNN's Drone Journalism Is Just the Beginning*, THE NATIONAL JOURNAL (Jan. 12, 2015), http://www.nationaljournal.com/tech/cnns-drone-journalism-is-just-the-beginning-20150112; Nick Wingfield, *Amazon Wins Approval to Test Delivery Drones Outdoors*, NY TIMES (Mar. 19, 2015), http://www.nytimes.com/2015/03/20/technology/amazon-wins-approval-to-test-delivery-drones-outdoors.html?_r=0.

22. ASS'N FOR UNMANNED VEHICLE SYS. INT'L, THE ECONOMIC IMPACT OF UNMANNED AIRCRAFT SYSTEMS INTEGRATION IN THE UNITED STATES, 3–4 (2013), *available at* http://www.auvsi.org/econreport.

the 2015 holiday season.[23] This dramatic rise in civilian and commercial UAS use can perhaps be attributed in part to increasingly cost-effective and accessible technology.[24] For example, Amazon offers basic "quadcopter" (four rotor) drones for sale at prices as low as around $40.[25] A more sophisticated drone with a longer flight time can cost only a few hundred dollars.[26] GoPro, an action camera company, recently released footage from its forthcoming camera drones, expected to be released to consumers early next year.[27] Accessible technology and prices have made drone technology attainable and cost-effective, and correspondingly highly attractive to civilian and commercial operators alike.

One area of commercial drone use that has already become widespread is paparazzi and media use.[28] The drones that journalists are using can be referred to colloquially as "journo-drones" and can be classified more specifically as "small unmanned aircraft systems" ("sUAS").[29] They are called sUAS because these journo-drones are usually on the smaller end of the range of drone technology, weighing only a few pounds.[30] This cost-effective and lucrative technology can allow journalists to scale walls, fly over public events, and access areas that a human reporter could not in pursuit of a story.[31] It is this incredible flexibility of the journo-drone combined with the fact that technology has increased far faster than the law that makes it perhaps so alarming.

B. THE REGULATORY STRUGGLE

When it comes to specific legal recourse against drone paparazzi, the existing regulatory schemes for drone technology offer a confusing and hole-ridden landscape. At the federal level, regulation of drone technology has been slow to develop and focuses mainly on safety standards and the registration process. The Federal Aviation Administration ("FAA") did not begin outlining its plans for drone approval until the fall of 2005, when it issued a

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23. Michael Adaddy, *The number of drones expected to sell during the holidays is scaring the government*, FORTUNE.COM, fortune.com/2015/09/29/drones-holiday-sales/ (Sept. 29, 2015, 3:15 PM).

24. Michael Berry & Nabiha Syed, *Journo-Drones: A Flight Over the Legal Landscape*, 30 Communications Lawyer (June 2014) *http://www.americanbar.org/publications/communications_lawyer/2014/june/journodrones_flight_over_legal_landscape.html.*

25. In fact, Amazon has its own "Photography Drones" section. AMAZON, http://www.amazon.com/b?node=9699105011 (last visited Jan. 8, 2016). Many of the products come with the warning that "Many countries, including the United States, regulate the use of unmanned aircraft. Before flying, make sure to understand the rules that apply to you." *See, e.g.,* AMAZON, http://www.amazon.com/Syma-Explorers-6-Axis-Quadcopter-Camera/dp/B00MNG37C2/ref=sr_1_2?s=electronics&ie=UTF8&qid=1449338723&sr=1-2&keywords=quadcopter (last visited Jan. 8, 2016). Amazon also provides links to safety guidelines and regulation references, including links to the FAA website. AMAZON, http://www.amazon.com/b/ref=amb_link_424317902_2?ie=UTF8&node=9961522011&pf_rd_m=ATVPDKIKX0DER&pf_rd_s=merchandised-search-top-4&pf_rd_r=0ZW5NZD1SM09YNW6MATD&pf_rd_t=101&pf_rd_p=1907498762&pf_rd_i=9699105011 (last visited Jan. 8, 2016).

26. Berry & Syed, *supra* note 24.

27. Nathan Ingraham, *GoPro will release a quadcopter in the first half of next year*, THEVERGE, www.theverge.com/2015/5/27/8675211/gopro-will-release-a-quadcopter-in-the-first-half-of-next-year (May 27, 2015, 8:34 PM); Sean O'Kane, *This is the first footage shot by the GoPro drone*, THEVERGE, www.theverge.com/2015/10/28/9631626/gopro-drone-quadcopter-test-footage (Oct. 28, 2015, 5:45 PM).

28. *See* discussion *infra* Part II.C.

29. Berry & Syed, *supra* note 24.

30. *Id.*

31. For example, in states where it is illegal for people to take photos or videos of livestock, drones have been put forth as a way to document and expose the animal cruelty occurring in factory farms. *See* Ariel Schwartz, *Drones Can Get Around Strict "Ag Gag" Laws And Document Horrifying Factory Farms,* FAST COMPANY (July 7, 2014, 9:44 AM), http://www.fastcoexist.com/3032446/fund-this/drones-can-get-around-strict-ag-gag-laws-and-document-horrifying-factory-farms (describing a crowd-funded campaign proposed to film factory farms from drones).

memorandum[32] providing detailed safety standards and guidance for determining which UAS could be granted a certificate of authorization ("COA") to fly within national airspace.[33] In 2007, the FAA expanded its COA process to allow for petitions by private entities, opening the door for civil UAS operation.[34] However, the outlined process contained rigorous safety and operational standards,[35] resulting in very few COA grants.[36] Meanwhile, the decreasing cost of drone technology, combined with the stringent and exclusive certification system, created pressure for real legislative action.

Legislative action came in the form of the FAA Modernization and Reform Act of 2012 ("FMRA"), a Congressional mandate that required the FAA to create a plan for integration of civilian UAS into the national airspace by September 2015.[37] In response, in 2013, the FAA promulgated a 74-page roadmap for integration of UAS into the national airspace,[38] and issued a press release that the FAA was moving forward with the rulemaking process regarding sUAS operation.[39] The proposed federal rulemaking mostly centers on operator certification processes, aircraft requirements, and operational limitations focused on safety and knowledge.[40]

However, the exponential increase in civilian drone use and commercial drone applications has forced the FAA to act. The FAA acknowledged that it could no longer ignore the serious safety issue presented by drones in the national air space.[41] In the fall of 2015, the FAA, alarmed by increased reports of drone sightings and overwhelmed with the difficulty of enforcing actions against unidentified drone operators, announced that it would begin implementing an electronic registration system for both commercial and recreational drone operators.[42] As of December 2015, the FAA registration site went live and requires that recreational drone users with drones meeting certain weight requirements register the drone

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32. Federal Aviation Administration, Unmanned Aircraft Systems Operations in the U.S. National Airspace System—Interim Operational Approval Guidance, AFS-400 UAS POLICY 05-01, (Sept. 16, 2005), *available at* http://www.eoss.org/sites/default/files/imported/faa/AFS_400_UAS_POLICY_05_01.pdf.

33. *See id.* For example, the memorandum stated that UAS pilots will be held to the same standards of pilots of manned aircraft (6.17.10), including but not limited to such requirements as preflight inspection of unmanned aircraft (6.17.7), airworthiness of the aircraft (6.17.8), limitations for the number of crew working on one unmanned aircraft at a time (6.18.1), and more.

34. Unmanned Aircraft Operations in the National Airspace System, 72 Fed. Reg. 6689, 6689-90 (Feb. 13, 2007) (to be codified at 14 C.F.R. pt. 91), *available at* http://www.gpo.gov/fdsys/pkg/FR-2007-02-13/pdf/E7-2402.pdf.

35. *Id.*

36. As of June 2014, nearly all of the limited certificates for civil UAS had gone to private defense companies, one to an oil drilling company, and none to any media entity. Berry & Syed, *supra* note 24. However, the FAA has recently begun issuing more grants for testing of commercial drone use. *See, e.g.*, Resnick, *supra* note 21; Wingfield, *supra* note 21.

37. *See* FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95 Sec. 332.

38. Federal Aviation Administration., Integration of Civil Unmanned Aircraft Systems (UAS) in the National Airspace (NAS) Roadmap (1st ed. 2013), *available at* http://www.faa.gov/uas/media/uas_roadmap_2013.pdf. The roadmap follows a five year timeline and tackles integration of UAS by dividing it into three phases: first, accommodation for limited use of current UAS technology; second, establishing threshold performance requirements for further integration of UAS; and third, the evolution of UAS regulations once baseline standards and technology have been established. *Id.* at 21.

39. Press Release, Federal Aviation Administration, DOT and FAA Propose New Rules for Small Unmanned Aircraft Systems (Feb. 15, 2015), https://www.faa.gov/news/press_releases/news_story.cfm?newsId=18295.

40. *Id.*

41. The FAA noted that pilot reports of drone sightings have doubled from 2014 to 2015, and that drone operations have even forced emergency personnel fighting wildfires to ground operations. Federal Aviation Administration, *Clarification of the Applicability of Aircraft Registration Requirements for Unmanned Aircraft Systems (UAS) and Request for Information Regarding Electronic Registration for UAS*, 80 Fed. Reg 63,912, 63,913 (Thursday, October 22, 2015), *available at* www.gpo.gov/fdsys/pkg/FR-2015-10-22/pdf/2015-26874.pdf.

42. *Id.*

online and follow all FAA safety and operational guidelines, marking a step toward comprehensive regulation of civilian drone use..[43] Commercial drone operators must register by paper and have an exemption to fly.[44] Thus, while the FAA is cracking down on drone operation, federal action up to this point focuses on practical limitations such as safety standards and registration processes for UAS operators, not on drone paparazzi.[45]

Federal enforcement thus far has also focused on punishing unregistered or unsafe use of drones, not on the specific issue of drone journalism. Due to the lack of federal rules, the FAA has had to rely on its 2007 policy for any measure of enforcement, which consists mainly of "cease-and-desist" letters to unapproved drone users, and almost no real punishment by legal recourse.[46] The most notable time the FAA has taken legal action against a civilian for unauthorized use of a UAS was against Raphael Pirker, whom the FAA fined for reckless operation of an unmanned aircraft after he flew a drone at altitudes as low as ten feet over sidewalks, towards a person, through a tunnel full of vehicle traffic, and within 100 feet of a heliport.[47] Although a 2014 National Transportation Safety Board ruling, *Huerta v. Parker*, put civilian drone operators on notice that the FAA has the power to enforce claims,[48] the case still centers on punishing unsafe and unregistered drone operation, not on paparazzi use specifically. And while *Huerta* and impending FAA rulemaking impose safety and registration requirements that can limit civilian UAS operation, as a practical matter the slow-to-develop federal drone legislation and relatively low federal enforcement efforts have been easily outpaced by the reality of drone use.[49]

While civilian drone operators must obey federal safety and registration rules, they may also have to navigate a complicated system of differing state regulatory schemes. As of September 2014, bills proposing drone-related regulation had already entered the legislature in forty-four states.[50]. The states that have passed UAS statutes offer a wide array of regulatory schemes.[51] Some states, in lieu of passing UAS regulations, simply imposed a moratorium on drone use until 2015 in anticipation of FAA rules mandated by the FMRA.[52] Besides drone regulation, those operating drones for journalistic or commercial purposes also have to navigate a myriad of localized laws covering privacy intrusion by photographs, video, and audio recordings.[53] Most pointedly, California enacted legislation that makes flying a device over

43. FAA, "Register My UAS," FAA.GOV, https://www.faa.gov/uas/registration/ (last visited Jan. 8, 2016).

44. *Id.*

45. *See id.*; *see supra* note 38.

46. Berry & Syed, *supra* note 24.

47. *Id.* at 3; *Huerta v. Pirker*, NTSB Docket CP-217, at 1–2 (November 18, 2014).

48. In 2014, an administrative law judge dismissed the case on the grounds that the FAA did not have the authority to regulate drone use under the definition of "aircraft." *Huerta v. Parker*, NTSB Office of Administrative Law Judges Docket CP-217 (March 6, 2014), *available at* http://www.ntsb.gov/legal/Pirker-CP-217.pdf. On appeal, the National Transportation Safety Board (NTSB) held that Pirker's UAS satisfied the definition of "aircraft" for FAA regulation, thus stating that the FAA has the explicit authority to regulate commercial and civil UAS—a fact that, despite the FAA's previous memoranda and roadmap, had never been formally established. *Huerta v. Pirker*, NTSB Docket CP-217, at 12 (November 18, 2014).

49. *See supra* Part II.A. Even the FAA has acknowledged drone journalism use, granting CNN authorization to test drones for newsgathering in January. *See* Resnick, *supra* note 21.

50. The results are mixed: some have passed into law, some are still pending, and some have failed. Joseph M. Hanna, *The Drones Are Coming! Is New York Ready?: New York's Proposed Regulation of Unmanned Aerial Vehicles*, 86-SEP N.Y. ST. B.J. 10, 12 (2014).

51. *Id.* at 15–16 (comparing and contrasting several state UAS statutory schemes).

52. *Id.* at 16.

53. *See* Margot E. Kaminski, *Drone Federalism: Civilian Drones and the Things They Carry*, 4 CALIF. L. REV. 57, 67–69 (2013). In California, privacy restrictions have recently been tightened to cover invasive drone use, spurred on by pressure from harassed celebrities. *See infra* notes 68-69.

private property to capture sound or images a physical invasion of privacy.[54] Even so, state regulation of drones, pitting enforcement budgets and priorities against technology that is widely available, presents a formidable task and is probably unlikely to stop determined commercial operators.

The reality is that civilian UAS use is increasing and will continue to increase.[55] The very existence of state drone legislation and the federal rulemaking and registration system confirms this fact. With drones being sold on popular websites like Amazon, the task of enforcing every civilian use of UAS will be daunting. If federal drone legislation focuses mainly on safety and technology standards, it may not wholly account for the problem created by drone paparazzi.[56] Even with a law like California's in place, celebrities may seek additional protection from drone paparazzi in public places or need a creative avenue of protection outside of California. Another possible solution then arises in a federal cause of action for the right of publicity, a cause of action that can help effectively combat drone paparazzi along with current state and federal regulation.[57]

C. CELEBRITIES ON THE FRONT LINES

Drone paparazzi are a real problem; journalists already use drones and will increasingly do so for several reasons. For example, journo-drones offer tremendous potential for newsgathering, particularly where access to locations may be limited.[58] Journo-drones may also drastically improve safety in unpredictable conditions, such as at crime scenes, in places of conflict, or environmental disaster locations.[59] Drones may even improve journalistic business models by creating more competition in the field.[60] These advantages are not unknown to the industry, and even the FAA has recognized them. For example, the FAA has allowed CNN—along with several other commercial entities—to test drones for newsgathering purposes.[61] The FAA has also granted exemptions to several media production companies for drone use on film sets.[62] These moves signify that the FAA recognizes the business demand for journo-drones and their many cost-effective and competitive advantages. Accordingly, journo-drones will most likely become an even greater presence in the skies.

However, the broad range of journo-drone applications also provides ample room for misuse. Aggressive paparazzi outlets, which can receive up to $100,000 for celebrity photographs, especially if the photographs are of celebrities at their most vulnerable or

54. *See* CAL. CIV. CODE ANN. § 1708.8 (West 2015)

55. *See supra* Part II.A.

56. *See supra* notes 32-45 and accompanying text.

57. *See infra* Parts IV.A–B.

58. For example, in states where it is illegal for people to take photos or videos of livestock, drones have been put forth as a way to document and expose the animal cruelty occurring in factory farms. *See* Ariel Schwartz, *Drones Can Get Around Strict "Ag Gag" Laws And Document Horrifying Factory Farms,* FAST COMPANY (July 7, 2014, 9:44 AM), http://www.fastcoexist.com/3032446/fund-this/drones-can-get-around-strict-ag-gag-laws-and-document-horrifying-factory-farms (describing a crowd-funded Kickstarter campaign proposed to film factory farms from drones).

59. Astrid Gynnild, *The Robot Eye Witness: Extending Visual Journalism Through Drone Surveillance,* 2 DIGITAL JOURNALISM 334, 337–40 (2014).

60. *Id.*

61. *See* Resnick, *supra* note 21; Ass'n for Unmanned Vehicle Sys. Int'l, Snapshot of the First 500 Commercial UAS Exemptions, at 4, *available at* higherlogicdownload.s3.amazonaws.com/AUVSI/f28f661a-e248-4687-b21d-34342433abdb/UploadedFiles/Section333Report.pdf (noting that of the first 500 COA grants, 9 exemptions were for "newsgathering" purposes).

62. Clay Dillow, *Why the FAA's Approval of Film Production Drones Goes Far Beyond Hollywood,* FORTUNE (Sep. 26, 2014, 4:06 PM), fortune.com/2014/09/26/faa-approval-drones-hollywood.

"unguarded" moments, are the prime suspects for misuse of drone technology.[63] Already celebrities have produced a tremendous outcry against paparazzi drone use. Back in March 2014, one member of the paparazzi, denied from capturing in-person footage of Selena Gomez at a photo shoot, stated "They tried to stop us from taking pictures . . . and we said, 'You know what? Release the drone.' . . . When there is a lot of fandemonium [sic] . . . all these people trying to block us and stuff, we'll send a drone up and we get great footage."[64] Since that time, drone paparazzi use has only grown. Kanye West complained about drones stalking his 1-year old daughter and voiced his fear that a drone filming her swimming lessons would fall in next to her and electrocute her.[65] Miley Cyrus posted a video on her Instagram account of a quadcopter drone with the caption "Drone Pap[arazzi] wtf."[66] A number of other celebrities, including Kristen Bell, Dax Sheppard, Halle Berry, and Jennifer Garner, have also led the charge against drone journalism and aggressive paparazzi techniques.[67] Recently, the Governor of California signed a bill making flying a device over private property to capture sound and video a physical invasion of privacy.[68]

As a result, it is clear that drone journalism poses a legal and ethical problem. In fact, a Professional Society of Drone Journalists ("PSDJ") now exists, preaching ethical drone journalism and keeping its members abreast of developments in the field.[69] To underscore the issues created by journo-drones, the PSDJ has identified in its code of ethics the most prevalent issues facing drone journalists today: privacy, sanctity of law and public spaces, safety, and newsworthiness.[70] While many of the legal issues facing drone journalists have already been mentioned,[71] the topics identified by the PSDJ involve not only celebrities but also everyday citizens. All civilians are concerned with their privacy. No one wants a "Peeping Tom" incident like the one in Seattle. The sanctity of public spaces, public filming, and public photography, as implicated by journo-drones, reaches to all citizens. As drones begin to increasingly fill the

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63. *See* Keith D. Willis, Note, *Paparazzi, Tabloids, and the New Hollywood Press: Can Celebrities Claim a Defensible Publicity Right in Order to Prevent the Media from Following Their Every Move?*, 9 TEX. REV. ENT. & SPORTS L. 175, 176–77 (2007).

64. Patrick Gomez, *Are Drones Spying on Miley Cyrus and Selena Gomez?*, PEOPLE (August 7, 2014, 2:15 PM), http://www.people.com/article/miley-cyrus-selena-gomez-paparazzi-drones. For the original video of the paparazzi statement and the actual drone footage of Selena Gomez's photo shoot, *see* Cesar, *(Super Exclusive) Selena Gomez in the First EVER Drone Paparazzi Video in NYC 3-11-14*, 247PAPS.TV (March 13, 2014), http://247paps.tv/super-exclusive-selena-gomez-in-the-first-ever-drone-paparazzi-video-in-nyc-3-11-14/.

65. TMZ Staff, *Kanye West: I Fear Electrocution by Drone*, TMZ (Aug. 6th, 2014, 3:20 PM), www.tmz.com/2014/08/06/kanye-west-drones-paparazzi-electrocute-daughter-north-west-deposition.

66. Gomez, *supra* note 65.

67. Kristen Bell helped coin the term "pedorazzi" for paparazzi who stalked children. *Kristen Bell and Dax Shepard Confront Paparazzi Agency Over Celebrity Kids Photos*, HUFFINGTON POST (March 6, 2014, 1:29 PM), http://www.huffingtonpost.com/2014/03/06/kristen-bell-dax-shepard-paparazzi_n_4912469.html. Halle Berry and Jennifer Garner backed a previous California anti-paparazzi bill. *See* Keerthi Mohan, *Halle Berry Expresses Satisfaction As Anti-Paparazzi Bill Become Law, Which Protects Celebrity Kids*, INT'L BUS. TIMES (September 28, 2013, 9:34 A.M.), http://www.ibtimes.com/halle-berry-expresses-satisfaction-anti-paparazzi-bill-become-law-which-protects-celebrity-kids.

68. *See supra* note 55. This is not the first time lobbying celebrities in California pressured the legislature to act, but is the most targeted legislature toward drone paparazzi. For example, in California, a proposed bill sponsored by Senator Alex Padilla was specifically designed to limit invasive paparazzi use of UAS, although it ultimately failed to pass. S.B. 15, 2013-2014 Reg. Sess. (Cal. 2013). Another, narrower bill also become California law in September; this law expands liability for privacy invasions to invasions caused by the use of any device, not just visual or auditory enhancing devices (thereby encompassing intrusive UAS use). A.B. 2306, 2013-2014 Reg. Sess., (Cal. 2013). The new bill marks a stricter penalty for privacy invasion of this manner. *See id.*

69. *PSDJ: Professional Society of Drone Journalists*, www.dronejournalism.org (last visited Jan. 8, 2016).

70. The PSDJ's ethics code can be found at www.dronejournalism.org/code-of-ethics. The four elements mentioned are part of the society's "Drone Journalist 'hierarchy of ethics.'"

71. *See supra* section II.B.

skies, civilians and celebrities alike must worry that unauthorized footage and photographs could be captured anytime and anywhere.

One solution that has not yet been discussed is applying a legal remedy called the right of publicity[72] to unauthorized drone footage. The right of publicity compensates a person for the misappropriation of his or her likeness.[73] The right of publicity guarantees that individuals—even celebrities such as Kim or Kanye West who live highly publicized lives and thus seemingly invite privacy invasions—still have the right to control the use of their likeness.[74] While celebrities are on the front lines of the journo-drone war, this right can act as a highly effective measure to help combat unauthorized drone journalism. Additionally, as journo-drones become more and more prevalent and as the world becomes less and less private—a phenomenon already occurring through social media and the Internet and only apt to increase through drone use—the right of publicity can have implications for everyone.[75]

III. EXPLORING EXISTING PUBLICITY RIGHTS LAW

The right of publicity protects individuals from commercial harm caused by misappropriation of their likeness and shares common threads with privacy, intellectual property, trademark, copyright, and antitrust law. The intersection of the right of publicity with many other branches of law makes it unique. However, the lack of a federal right of publicity and the myriad of differing state common law and statutory schemes create confusion. A comparison of different state right of publicity laws, and an examination of how courts have applied the right of publicity to novel contexts, show how a cohesive strand of right of publicity law can be applied to the drone paparazzi context.

A. BRIEF HISTORY AND OVERVIEW OF THE RIGHT OF PUBLICITY

The right of publicity began as a spinoff from privacy law as an economically based common law right, protecting a person's right to commercial use of his or her own image.[76] In fact, the term "right of publicity" as it is used today was first coined in recognition of celebrities' need for compensation for the use of their pictures in advertisements and news outlets.[77] Although its economic nature makes the right of publicity unique from other privacy torts based on emotional harm, it was still originally grounded in traditional privacy tort theory.[78] Even before the term "right of publicity" was used, the original vision of the right of publicity—put forth by Warren and Brandeis in their treatise tellingly labeled *The Right to Privacy*—focused mainly on the emotional harm suffered by those whose likenesses were

72. *See infra* Part III.A.

73. 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 6:3 (2d ed. 2014).

74. *See infra* notes 86-87 and accompanying text, discussing how the right of publicity was formulated to meet the needs of celebrities who could not claim a privacy invasion because of the public nature of their profession, but should still be guaranteed the right to control the use of their own image.

75. *See* discussion *infra* Part IV.C.

76. MCCARTHY, *supra* note 74.

77. *See* Haelan Laboratories v. Topps Chewing Gum, 202 F.2d 866, 868 (2d. Cir.), *cert. denied*, 346 U.S. 816 (1953).

78. *Id.* (recognizing the right of publicity as a right based on the commercial value of a person's image, but describing this right as tangential to the emotional harm celebrities experienced from public exposure). The court thought labeling the right of publicity not as a privacy tort but as a property right because of its commercial nature was to make an "immaterial" distinction. *Id.*

appropriated by others.[79] Thus, once the right of publicity theory began to develop, it was labeled as one of four major privacy torts created by common law.[80]

Because of its origin in privacy law, the right of publicity is still often confused with the "appropriation" facet of the right to privacy.[81] Part of this can also be attributed to the fact that when the theory of publicity rights developed, society was not capable of widespread publication and could not anticipate the value of such publication.[82] However, as time and technology have progressed, the commercial value of appropriating a person's likeness, rather than the potential privacy invasion created by such appropriation, has become the main concern of the right of publicity.[83] The right of publicity has diverged from privacy law into a separate right focused on "injury to the pocketbook," while appropriation privacy law is based upon "injury to the psyche."[84] This divergence also occurred because courts assumed celebrities could not claim appropriation under privacy law because their celebrity status amounted to an acceptance of privacy invasion, leaving celebrities without relief for appropriation of their likenesses.[85] The right of publicity originally spun off from privacy law to meet the needs of celebrities who suffered commercial disadvantage by appropriation, rather than emotional injury.[86] In its present day iterations, however, the right of publicity is significantly broad in its protection that it can cover everyday citizens and is not exclusive to celebrities.[87] Additionally, the right of publicity's transformation from a right focused on emotional harm to one focused on commercial harm makes it better suited to a society where privacy expectations have changed and widespread publication of information is a fact of life—and therefore ideal for application to the journo-drone context.[88]

As the right of publicity has grown to protect not just a privacy invasion but instead focus more on a loss of commercial advantage, it has begun to intersect with several other areas of the law. For example, the right of publicity has recently come up in the context of "unfair competition" cases.[89] In fact, the right of publicity, previously existing only in the Restatement of Torts, has now been added to the Restatement (Third) of Unfair Competition.[90]

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79. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Warren and Brandeis based the theory of protecting a person's right to control publication of his or her image on the idea of an "inviolate personality", an extension of the right to privacy. *Id.* at 205–06.

80. William L. Prosser, *Privacy,* 48 CALIF. L. REV. 383, 389 (1960). Prosser identified four major strands of privacy law on the "appropriation, for the defendant's advantage, of the plaintiff's name or likeness." *Id.*

81. 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 5:63 (2d ed. 2014).

82. *See* Barbara A. Burnett, *The Property Right of Publicity and the First Amendment: Popular Culture and the Commercial Persona*, 3 Hofstra Prop. L.J. 171, 175–76 (1990).

83. *See, e.g.*, Melville B. Nimmer, *The Right of Publicity*, 19 LAW AND CONTEMPORARY PROBLEMS 203 (1954).

84. MCCARTHY, *supra* note 82, *citing* Rose v. Triple Crown Nutrition, Inc., 2007 WL 7070348 (M.D. Penn. 2007) ("the invasion of privacy by appropriation of name or likeness is a personal right created to protect one's privacy, while the right of publicity more closely resembles a property right created to protect commercial value").

85. *See* Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 228–29 (2005).

86. Nimmer, *supra* note 84, at 203–04 (1954) (questioning whether the original Warren and Brandeis formulation of the right of publicity "satisfactorily meets the needs of Broadway and Hollywood"). Nimmer's article paved the way for the right of publicity to be separate from privacy claims based on the "economic value of celebrity identities." McKenna, *supra* note 86, at 229 (2005). However, McKenna also argues that this distinction is empty—that the commercial value protected by the right of publicity is not based on celebrity identity but on an "interest in autonomous self-definition." *Id.*

87. *Infra* notes 114-117 and accompanying text.

88. For a discussion on how expanding technology in the digital age has eroded privacy expectations, *see* Charles E. MacLean, Katz *on a Hot Tin Roof: The Reasonable Expectation of Privacy Doctrine is Rudderless in the Digital Age, Unless Congress Continually Resets the Privacy Bar*, 24 ALB. L.J. SCI. & TECH. 47, 59–69 (2013-2014).

89. *See, e.g.*, O'Bannon v. NCAA, 7 F.Supp.3d 955 (N.D. Cal. 2014).

90. *See* Restatement (Second) of Torts 652 (1977); Restatement (Third) of Unfair Competition 46 (1995).

Additionally, its commercial aspect makes the right of publicity in some ways closer to a property interest than to a privacy interest.[91] Still, re-labeling the right of publicity as a property right is not without its issues. Chief among them is the "descendibility problem," or the debate about whether or not a person's right to use of his or her image should be available after death.[92] Some of the earliest cases to hold that the right of publicity was descendible and transferable involved such well-known figures as Martin Luther King, Jr. and Elvis Presley.[93] In the Martin Luther King, Jr. case, the Georgia Supreme Court concluded that, "without assignability, the right of publicity could hardly be called a 'right.'"[94] There has been a range of continuing judicial debate concerning the subject, ranging from whether or not the commercial value of a person's likeness can expire based on exploitation during life[95] to how long that right should last after death, and state statutory schemes differ on the issue.[96]

The right of publicity can also create confusing overlap with intellectual property law, specifically trademark and copyright laws. The distinction is that trademark and copyright laws attach to a copyright or trademark owner's specific, tangible piece of work, while the right of publicity attaches to a person's likeness.[97] The two causes of action can be brought simultaneously, but are not mutually exclusive.[98] For example, if a drone operator were to take a picture of a celebrity and sell it to a magazine without the celebrity's permission, the magazine and photographer could both potentially have a remedy in copyright law against subsequent unauthorized use of the specific photograph, while the celebrity could go after anyone using

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91. A property interest includes a right "to have the advantage accruing from anything", hence the ability for a property interest to be assigned/descendible. *See What is Interest?*, THE LAW DICTIONARY, lawdictionary.org/interest; Jonathan Faber, *Indiana: A Celebrity Friendly Jurisdiction*, 43 RES GESTAE para. 4 (March 2000), *available at* http://www.luminarygroup.com/images/ResGestae_2000-03.pdf ("The Right of Publicity is often confused with its more recognized cousins in the intellectual property family").

92. *See* Burnett, *supra* note 83, at 183. The problem lies in the right of publicity's unique ties to rationales based on both financial and emotional harm, and the fact that the person whose likeness is at issue can experience neither of those after he or she dies. *Id.* If the right of publicity is a property right, however, a person could assign the right to another, thus preserving the right postmortem and protecting the estate of the deceased. *Id.*

93. Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc., 296 S.E.2d 697 (Ga. 1982); Factors Etc., Inc., v. Pro Arts, Inc., 579 F.2d 215 (2d Cir. 1978).

94. *Martin Luther King, Jr.*, *supra* note 94 at 704. The court in *Martin Luther King, Jr.* also approved some of the lower court's language from the Elvis Presley case, although the Presley case was later abrogated, agreeing that to hold that the right of publicity was not descendible would grant a windfall to those who appropriate a person's likeness after death. *Id.* (citing Factors Etc., Inc., v. Pro Arts, Inc., 579 F.2d at 221 (2d Cir. 1978)).

95. *See, e.g.*, Hicks v. Casablanca Records, 464 F.Supp. 426, 429 (S.D.N.Y. 1978); Guglielmi v. Spelling Goldberg Productions, 603 P.2d 454, 459 (Cal. 1979). The *Martin Luther King Jr.* case cited these previous cases and rejected the idea that only celebrities who have exploited their own image during life can recover postmortem, saying, "[t]hat we should single out for protection after death those entertainers and athletes who exploit their personae during life, and deny protection after death to those who enjoy public acclamation but did not exploit themselves during life, puts a premium on exploitation. Having found that there are valid reasons for recognizing the right of publicity during life, we find no reason to protect after death only those who took commercial advantage of their fame." 296 S.E.2d at 706 (Ga. 1982).

96. *See, e.g.*, IND. CODE ANN. § 32-36-1-8 (West 2012) (extending the right of publicity to 100 years beyond the death of the subject); FLA. STAT. ANN. § 540.08 (West 2014) (imposing no explicit time limit but stating that consent for use of a subject's likeness must be obtained, in the case of no previous contractual agreement, from the subject's surviving spouse or children).

97. Faber, *supra* note 92, at para. 5. ("Copyright applies to the bundle of rights one acquires in 'original works of authorship fixed in any tangible medium of expression' . . . so the exclusive rights held by a copyright owner apply to the work itself.").

98. *Id.* ("Because these are wholly distinct claims with independent parties charged with standing to assert them, federal copyright laws generally will not preempt a state-based, Right of Publicity claim").

the photograph without permission—including the original photographer and the magazine—under the right of publicity.[99]

Clearly, in many ways the exact contours of the right of publicity are still vague. Right of publicity law is similar enough to several other strains of law—property law, copyright and trademark law, antitrust and unfair competition law, and privacy tort law—that the overlap can be confusing. To further compound the issue, a tapestry of state variations on the law is the only current framework.[100] However, the unique and versatile nature of the right of publicity, evident in its intersections with several other bodies of law and its many different iterations across states, make it adaptable to the problem of drone paparazzi.[101] Furthermore, there are enough commonalities between state laws to select the essential underlying elements from amongst the variations and develop a single, cohesive strain of law that could help protect against drone paparazzi.[102]

B. COMPARING STATE RIGHT OF PUBLICITY SCHEMES

Currently, around thirty states recognize the right of publicity in some capacity.[103] These states can typically be divided into two categories: 1) those that expressly recognize the right of publicity under common law[104] and 2) those that recognize a statutory right of publicity (either with express publicity rights provisions or statutes broad enough to cover publicity rights under the umbrella of "privacy").[105] Several of these states recognize both a common law and

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99. *Id.* ("This can get complicated, as Right of Publicity and copyright considerations can simultaneously be implicated in a single usage. An advertisement featuring a celebrity's picture may require authorization from the photographer for the copyright use, and from the celebrity for the Right of Publicity use.").

100. For example, while some states do explicitly recognize the right of publicity as a separate right, many simply read it into another existing legal scheme, often as an extension of privacy law. *See infra* Part III.B, discussing differing state schemes for right of publicity.

101. *See infra* Part IV.A.

102. *See infra* Part IV.B.

103. Some scholars differ in how they may categorize certain states; for example, while Thomas McCarthy only includes Arizona in the list of states who recognize a common law right of publicity, Jonathan Faber counts Arizona as having a statutory right of publicity although this statutory right only applies to unauthorized use of soldiers' likenesses. 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 6:3 (2d ed. 2014); *cf.* Jonathan Faber, *Statutes*, RIGHTOFPUBLICITY.COM, rightofpublicity.com/statutes (last visited Jan. 8, 2016). However, comparing the two lists reaches a total of around thirty (differing by perhaps one in either direction) states that recognize some form of the right of publicity.

104. A non-exhaustive list of several state cases recognizing a common law right of publicity, although several other states also recognize a common law right of publicity. *See, e.g.*, Ventura v. Titan Sports, 65 F.3d 725, (8th Cir. 1995) ("We believe that the Minnesota Supreme Court would recognize the tort of violation of publicity rights."); Pooley v. National Hole-in-One-Association, 89 F. Supp. 2d 1108, 1112 (D. Ariz. 2000) ("The Court sees no reason why a claim for invasion of the right of publicity should not be recognized in Arizona."); Henson Productions, Inc., v. Brady & Associates, Inc., 867 F. Supp. 175, 189 (S.D.N.Y. 1994) ("I find no reason to believe that Connecticut would buck the apparent trend . . . towards recognizing the right of publicity."); Minnifield v. Ashcraft, 903 So.2d 818, 825–26 (Ala. Civ. App. 2004) ("[T]he right to privacy in Alabama does protect the commercial value of a public figure's identity."); Fergerstrom v. Hawaiian Ocean View Estates, 441 P.2d 141, 142–44 (Haw. 1988) (extending Hawaiian privacy law to cover a right of publicity claim); Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc., 296 S.E.2d 697, 703 (Ga. 1982) ("[W]e hold that the appropriation of another's name and likeness . . . without consent and for the financial gain of the appropriator is a tort in Georgia").

105. Again, a non-exhaustive list (in alphabetical order) of several state statutory schemes recognizing a right of publicity follows, although several other states also contain statutory right of publicity provisions. *See e.g.*, Illinois: ILL. COMP. STAT. ANN. 1075 (West 2014); Indiana: IND. CODE ANN. §§ 32-36-1-1 to 32-36-1-20 (West 2012); Massachusetts: MASS. GEN. LAWS ANN. ch. 214, §3A (West 2014); Nebraska: NEB. REV. STAT. ANN. §§ 20-202, 20-208 (West 2014); Nevada: NEV. REV. STAT. ANN. §§ 597.800, 597.810 (West 2014); Oklahoma: OKLA. STAT. ANN. tit. 12, §§ 1448–49 (West 2014); Washington: WASH. REV. CODE ANN. §§ 63.60.010-.060 (West 2015).

statutory right of publicity.[106] Additionally, the dominant view is that the right of publicity is so established in nature that even in states where the right of publicity is not expressly recognized by statute or court, the right nevertheless exists.[107] A commonality across all states that recognize the right of publicity is that most protect what is called the "trifecta" of elements—the "name, image, and likeness" of a person.[108] Moreover, all states recognize that the right extends to everyone, although in practice celebrities are the plaintiffs most capable of establishing a claim.[109]

There is some divergence as to how the right is classified among the states recognizing a common law right of publicity. Several states lump the right of publicity under privacy law as an appropriation tort.[110] In others, the right of publicity is recognized as its own distinct cause of action. In these states, a claim usually requires a showing of some variation of the following elements: (1) the defendant appropriated plaintiff's likeness, (2) without the plaintiff's consent, (3) to some commercial advantage.[111]

However, states may broaden or narrow these requirements. For example, California allows a showing that the defendant used the plaintiff's likeness to any advantage, "commercial or otherwise."[112] This broad language means an injury to the plaintiff is often assumed as long as the other elements are proven; a plaintiff need not show a huge commercial advantage—or in fact be a celebrity—to establish a claim.[113]

In contrast, some states, like Kentucky, have common law right of publicity language that is narrower in coverage.[114] The elements of the Kentucky right of publicity claim require a showing that the plaintiff's identity is distinctive and recognizable enough to have commercial value, that the plaintiff intended to profit from this value, and that the defendant profited instead without plaintiff's consent.[115] This language is much more celebrity-centric—focused

106. California, Florida, Kentucky, Ohio, Pennsylvania, Texas, and Wisconsin. 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 6:3 (2d ed. 2014).

107. *See* Bill Cross, *The NCAA as Public Enemy Number One*, 58 U. KAN. L. REV. 1221, 1224 (2010), *quoting* Jonathan L. Faber, *Indiana: A Celebrity-Friendly Jurisdiction*, 43 RES GESTAE, No. 9, (Mar. 2000).

108. Jonathan Faber, *Brief History of RoP*, RIGHTOFPUBLICITY.COM, http://rightofpublicity.com/brief-history-of-rop (last visited Jan. 8, 2016), *adapted from* Jonathan Faber, *Indiana: A Celebrity Friendly Jurisdiction*, 43 RES GESTAE (March 2000), *available at* http://www.luminarygroup.com/images/ResGestae_2000-03.pdf..

109. *Id.*

110. *See, e.g.*, Minnifield v. Ashcraft, 903 So.2d 818, 825–26 (Ala. Civ. App. 2004) ("[T]he right to privacy in Alabama does protect the commercial value of a public figure's identity"); Fergerstrom v. Hawaiian Ocean View Estates, 441 P.2d 141, 142–44 (Haw. 1988) (extending Hawaiian privacy law to cover a right of publicity claim); Cason v. Baskin, 20 So.2d 243 (Fla. 1945) 247–53 (Supreme Court of Florida discussing natural evolution of right of privacy to cover personality invasion).

111. *See, e.g.*, Pooley v. National Hole-in-One-Association, 89 F. Supp. 2d 1108, 1111 (D. Ariz. 2000); Eastwood v. Superior Court, 149 Cal. App. 3d 409, 417 (Cal. Ct. App. 1983).

112. California requires that: (1) the defendant used the plaintiff's identity; (2) the defendant appropriated the plaintiff's name or likeness to some advantage, commercial or otherwise; (3) the defendant did so without the plaintiff's consent; and (4) injury to the plaintiff resulted. The "commercial or otherwise" requirement hints of privacy law and emotional harm, and makes the language broad enough to cover a wide variety of cases. *Eastwood*, *supra* note 112, at 417 (Cal. Dist. Ct. App. 1983). Although this case was later superseded by statute, California still recognizes both a common law and statutory right of publicity. 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY, §6.3 (2d ed. 2014).

113. *Id. See also* KNB Enterprises v. Matthews, 78 Cal. App. 4th 362 (Cal. Ct. App. 2000).

114. *See* Cheatham v. Paisano Publications, Inc., 891 F. Supp. 381, 386–87 (W.D. Ky. 1995) (requiring a showing that the personality has commercial value). Like Kentucky, Michigan looks for "significant commercial value" in a claim, acknowledging that the right of publicity was meant specifically to protect celebrities. *See* Landham v. Lewis Galoob Toys, Inc., 227 F.3d 619, 624 (6th Cir. 2000).

115. *Cheatham*, 891 F. Supp. at 386–87.

on distinctive, recognizable, and commercially valuable identities—than that of the California common law claim. However, even Kentucky recognizes that celebrity status is not a prerequisite for a right of publicity claim.[116]

There are also variations and flexibility among the states that have statutory provisions broad enough to cover the right of publicity. On one end of the spectrum lies Indiana's statute, considered to be the most comprehensive model.[117] It not only protects the use of a personality's name, image, or likeness, but also the use of voice, signature, photograph, distinctive appearance, gestures, or mannerisms.[118] It allows and protects such unauthorized use if it is in a literary, theatrical, film, radio, or television work; when the use is in material with political or newsworthy value; if it is in an original work of fine art; when it is part of promotional material not reasonably suggesting that a personality endorses the material; when it is part of reporting an event of general or public interest; or when the use has commercial value only because the personality is charged or convicted of criminal conduct.[119] Indiana extends the right of publicity action for unconsented personality use up to 100 years after the death of the personality, and the rights are freely transferable and descendible.[120] Damages may include a $1,000 penalty, actual damages, punitive damages, attorney's fees, or even injunctive relief.[121] Several states follow a model similar to that of the Indiana statute, creating an express right of publicity that covers a broad range of unprotected uses (not confined to commercial use), can be assigned or transferred, and contemplates many contexts in which the interest of publication may be greater than the commercial disadvantages, such as when free speech concerns arise or higher education institution use a likeness.[122]

On the other end of the spectrum, many states have much narrower coverage or provisions only broad enough to cover publicity rights under privacy law. For instance, Massachusetts covers only unauthorized use of a "name, portrait, or picture" for "advertising purposes or for the purpose of trade" and does not describe the right as descendible or transferable.[123] Similarly, Nebraska includes the right of publicity under its "rights of privacy" statute, and protects unconsented exploitation of a "person, name, picture, portrait, or personality", unless the use is part of a bona fide news report with current or historical public interest and not for commercial purposes, or when the person is depicted solely as a member of the public and not identified in the photograph.[124] Most states restrict the cause of action to unauthorized commercial use (or provide some exemptions defining what is or is not commercial use), like the Massachusetts and Nebraska statutes, but do not rise to the level of coverage, transferability, or extent of available damages of the Indiana statute.[125]

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116. *Id.*

117. IND. CODE ANN. §§ 32-36-1-1 to 32-36-1-20 (West 2012).

118. *Id.* at § 32-36-1-7.

119. *Id.* at § 32-36-1-1.

120. *Id.* at §§ 32-36-1-8, 32-36-1-16.

121. *Id.* at §§ 32-36-1-10 to 32-36-20.

122. For example, the Ohio statute contemplates both of these exceptions as well as many exemptions similar to those of the Indiana statute, discusses the transferability of the right, and has a definition of "persona" that is almost as broad as Indiana's definition. OHIO REV. CODE ANN. §§ 2741.01–09 (West 2013-14). The Nevada statute protects unauthorized "commercial" use of "name, voice, signature, photograph, or likeness" and allows that the right is freely transferable. NEV. REV. STAT. ANN. §§ 597.800, 597.810 (West 2014). The Illinois statute also allows for a transferable right of publicity, and lists a range of available remedies similar to the Indiana statute. ILL. COMP. STAT. ANN. 1075 (West 2014). Other similarly broad statutes include, for example, those of Oklahoma and Washington. OKLA. STAT. ANN. tit. 12, §§ 1448–49 (West 2014); WASH. REV. CODE ANN. § 63.60.060 (West 2015).

123. MASS. GEN. LAWS ANN. ch. 214, §3A (West 2014).

124. NEB. REV. STAT. ANN. § 20-202 (West 2014).

125. *See, e.g.*, R.I. GEN. LAWS ANN. § 9-1-28.1 (West 2014) (Rhode Island statute); 42 PA. CONS. STAT. § 8316 (West 2014) (Pennsylvania statute); FLA. STAT. ANN. § 540.08 (West 2014) (Florida statute); UTAH CODE ANN. §§ 43-

As illustrated above, the right of publicity takes many forms. It is a flexible right either falling under the umbrella of privacy or more closely resembling a property right. It may, as in the case of states like Kentucky, mainly intend to cover celebrities or, as seen in California, include language broad enough to cover non-celebrities as well. Like the Indiana statute, it may be an explicit right that covers a broad range of uses while providing many exemptions and may be punishable by a diverse range of damages. This makes applying the right of publicity quite varied, yet also easily adaptable to new applications, such as in the context of drone paparazzi.

C. EXPANDING THE RIGHT OF PUBLICITY IN THE COURTS

Since the case that coined the term "right of publicity" in 1953, there have been many notable cases.[126] Many of these cases involve well-known celebrities or their estates.[127] While a lot of cases simply involve disputes over what constitutes essential elements to a right of publicity claim, some cases have been groundbreaking in their expansion and adaptation of the right of publicity.[128] For example, a few notable cases deal with the concept of "reminders," when the exact likeness of a plaintiff may not be technically implicated by the unauthorized use in question.[129] Some cases (sometimes labeled "impersonator" cases) involve actors impersonating celebrities in an advertisement, trading off of the similarity of the impersonator's voice or image to a particular celebrity.[130] Most interesting to the application of the right of publicity to drone paparazzi, however, are cases involving novel iterations of the right of publicity in the arena of new technology.

The clash between the right of publicity and new technology has risen recently in several well-publicized video game cases, where college and professional athletes sued video game companies for using their likenesses without compensation.[131] The core issue of these video game cases was striking a balance between the potentially protected art of the video games and the publicity rights of the uncompensated athletes. The courts in these cases struggled with what kind of balancing test to employ.[132] The only Supreme Court case on point—in fact, the only time the Supreme Court heard a right of publicity case—is *Zacchini v. Scripps-Howard Broadcasting*, 433 U.S. 562, 574–576 (1976), where the Court balanced First Amendment

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3-2 to 45-3-4 (West 2014) (Utah statute).

126. *See* Haelan Laboratoris, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 867 (2d Cir. 1953) (introducing the idea of a celebrity controlling the commercial exploitation of his or her image).

127. Especially in jurisdictions where the right of publicity is descendible or transferable, cases can involve the estates of such A-list celebrities as Marilyn Monroe and Jimi Hendrix. *See, e.g.*, Shaw Family Archives, Ltd., v. CMG Worldwide Inc., and Marilyn Monroe, LLC, 486 F. Supp. 2d 309 (S.D.N.Y. 2007); Experience Hendrix, L.L.C., v. The Hendrix Foundation, 2005 WL 2922179 (W.D. Wash. 2005).

128. For example, one issue that several landmark cases deal with is whether or not the right of publicity is heritable or assignable and debate whether or not this quality exists for a right of publicity, something that will then be established in the common law or be resolved in the adaptation of a statutory provision covering the right. *See, e.g.*, Factors Etc., Inc., v. Pro Arts, Inc., 579 F.2d 215 (2d Cir. 1978); Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc., 296 S.E.2d 697 (Ga. 1982); Lugosi v. Universal Pictures, 25 Cal. 3d 813 (Cal. 1979).

129. *See, e.g.*, White v. Samsung Electronics America, Inc., 971 F.2d 1935 (9th Cir. 1992), *reversed by* White v. Samsung Electronics America, Inc., 989 F.2d 1512 (9th Cir. 1993); Motschenbacher, v. R. J. Reynolds Tobacco Company, 498 F.2d 821 (9th Cir. 1974).

130. Faber, *supra* note 92, citing *Waits v Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) and *Midler v. Ford Motor Company*, 849 F.2d 460 (9th Cir. 1988).

131. *See, e.g.*, Davis v. Electronic Arts, 775 F.3d 1172 (9th Cir. 2015); Hart v. Electronic Arts, Inc., 717 F.3d 141 (3rd Cir. 2013); *In re* NCAA Student-Athlete Name & Likeness Licensing Litigation, 724 F.3d 1268 (9th Cir. 2013).

132. *Davis*, 775 F.3d at 1177; *Hart* at 148–49; In re *NCAA* at 1271.

concerns against the plaintiff's incentive to create an economically valuable performance.[133] However, the *Zacchini* test was too vague, leading the district courts in several video game cases to reach opposite rulings.[134] On appeal, the Ninth and Third Circuit Courts of Appeals applied the "transformative use" test.[135] This test asked if the depiction of the players in the video games added any additional meaning or expression, however small, to the player's likeness or whether the use was merely an imitation with little variation.[136] The court ruled that there was not enough variation or "transformation" of the players' likenesses in the games to escape a right of publicity claim and held for the plaintiffs.[137]

The video game cases and the balancing test employed in the cases are significant because they underline the conflict between protected use and individuals' interest in their right of publicity, a conflict that will no doubt arise in the context of drone journalism. The cases also show that the right of publicity is flexible and able to protect victims of misappropriation while still allowing for some protected use. These cases also show that the right of publicity can be adapted to new arenas of technology. All of these aspects make the right of publicity applicable in the journo-drone context.

Several other novel areas where the right of publicity has been applied show the right of publicity's adaptability to the journo-drone context as well. For example, several cases implicating the interests of plaintiffs that are considered "non-celebrities" demonstrate how the right of publicity can be applied to a society where technology is blurring the lines between "celebrity" and "ordinary citizen." One such case where the right of publicity was used to protect individuals who are not necessarily "A-List" celebrities is *KNB Enterprises v. Matthews*, 92 Cal. Rptr. 2d 713 (Cal. Ct. App. 2000).[138] In that case, the plaintiff owned the publicity rights to models' images in erotic photos and posted the photos on certain newsgroups to promote its website.[139] The defendant identified and copied the photos without the plaintiff's consent on its own commercial site.[140] The court took an interesting approach when it stated that "none of the models is a celebrity," but "[t]heir anonymity. . .is allegedly a valuable asset in the marketing of erotic photographs."[141] The court quoted plaintiff's complaint that stated the defendant profited in at least three ways: 1) by garnering sales for defendant's website, 2) by saving money because of the eliminated need for defendant's own models and photography, and 3) by saving time by doing so.[142]

Moving down the scale of what is typically considered a "celebrity," an even broader application of the right of publicity lies in the social media context. This application has

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133. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 574–576 (1976) (where petitioner's entire "human cannonball" act was shown without consent on a news report, the Court held that the news channel could not claim as privileged or newsworthy a showing of the entire performance because the petitioner's interest in an "economic incentive . . . to make the investment required to produce a performance of interest to the public" outweighed the news channel's interests).

134. *See* In re *NCAA*, 724 F.3d at 1271 (noting that the district court in this case held that the defendant had no First Amendment defense); *Davis*, 775 F.3d at 1181 (affirming the district court in the earlier case, which rejected appellants' motion to strike the case based on the argument that they were protected by First Amendment protection). *See also* Timothy J. Bucher, *Game On: Sports-Related Games and the Contentious Interplay Between the Right of Publicity and the First Amendment*, 14 TEX. REV. ENT. & SPORTS L. 1, 19–23 (2012).

135. *Hart* at 160–65; *Davis* at 1181; In re *NCAA* at 1273–79.

136. *Hart* at 160–65; In re *NCAA* at 1273; Davis at 1178.

137. *Hart* at 170; In re *NCAA* at 1284; Davis at 1181.

138. *KNB Enterprises v. Matthews*, 92 Cal. Rptr. 2d 713 (Cal. Ct. App. 2000).

139. *Id.* at 716.

140. *Id.*

141. *Id.* at 718.

142. *Id.*

interesting implications because social media, as a platform where anyone can cultivate his or her own image, further blurs the lines between celebrities and everyday citizens. A touchstone case is *Fraley v. Facebook,* 830 F. Supp. 2d 785 (N.D. Cal. 2011).[143] In this case, normal Facebook users brought a class action against Facebook for its use of "Sponsored Stories."[144] These Sponsored Stories are advertisements that show up on a user's sidebar with a Friend's picture and likeness, and the caption that a Friend has "liked" a particular page, service, or product, used as an endorsement to advertise that service or product.[145] Facebook receives most of its revenue from these advertisements.[146] The court held that Facebook users were local "celebrities" within their own social media network and that the "Sponsored Stories" were not "newsworthy" because they were used for commercial and not journalistic purposes.[147] The court did not find that the Facebook users needed to establish a "preexisting commercial value" to their identity and refused to impose a higher pleading standard on "non-celebrities," despite the acknowledgement that most "non-celebrity" cases had involved models or entertainers with preexisting commercial value to their identity.[148] Thus, the court held that the plaintiffs had established a sufficient basis for unauthorized commercial use of likeness to withstand a motion to dismiss the right of publicity claim.[149]

The right of publicity has come up in other social media contexts, such as with the popular online networking site LinkedIn.[150] In *Perkins v. LinkedIn Corp.*, the plaintiffs sought to bring a class action suit against LinkedIn Corporation for a right of publicity claim under California's right of publicity statute.[151] The plaintiffs took issue with LinkedIn's access of users' email contacts, which the site then used to send a user's contacts an email stating that the user had "invited" the contact to join LinkedIn, as well as several reminder follow-up emails.[152] However, here the court held that plaintiffs had not established a right of publicity claim because they did not establish a minimum injury, as no actual damages were sought and no mental harm was shown.[153]

All of these cases, from the video game context to the social media context, show that the right of publicity is flexible enough to be applied in unique contexts involving novel technology. Furthermore, cases such as *KNB Enterprises* and *Fraley* demonstrate the right of publicity's ability to protect plaintiffs beyond the typical celebrity. The fact that the video game cases carefully employed balancing tests to reach their conclusions and that *Perkins* held against the plaintiffs make the right of publicity even more powerful—these cases show that the right of publicity is flexible enough to protect the interests of the press or artists as well as seemingly opposed interests. With this in mind, there is every reason to believe that the right of publicity will prove just as powerful a tool when applied to the drone paparazzi context.

143. Fraley v. Facebook, Inc., 830 F. Supp. 2d 785 (N.D. Cal. 2011).
144. *Id.* at 790.
145. *Id.*
146. *Id.* at 791.
147. *Id.* at 804–05.
148. *Id.* at 806–10.
149. *Id.* at 810.
150. Perkins v. LinkedIn Corp., 53 F.Supp.3d 1190 (N.D. Cal. 2014).
151. *Id.* at 1202.
152. *Id.* at 1195-99.
153. *Id.* at 1219.

IV. THE RIGHT OF PUBLICITY AS A SOLUTION TO DRONE PAPARAZZI

A federal right of publicity is a viable avenue of protection against journo-drones. Such a uniform right of publicity would alleviate some of the criticisms against the right of publicity by drawing on the best aspects from different state schemes, creating a cohesive and well-balanced cause of action. Several alternatives to the right of publicity would help to complement protection for those who face intrusion by drone paparazzi. Furthermore, the unique and flexible nature of the right of publicity allows it to expand to protect even non-celebrities. Together, this makes the right of publicity well suited to tackle journo-drone invasion of not only celebrity but also civilian privacy.

A. APPLYING THE RIGHT OF PUBLICITY TO THE JOURNO-DRONE CONTEXT

1. Criticisms of the Right of Publicity

The right of publicity has faced many criticisms, but the concerns raised by these critics do not stop the right of publicity from being a viable solution in the context of journo-drones. One major and obvious criticism the right of publicity faces is the lack of uniformity between state schemes.[154] However, this creates an important niche that a federally recognized right of publicity can fill. A federal right of publicity could eliminate a "race to the bottom" effect created by inconsistent state legislatures, an effect in which some states enact ever-broadening, plaintiff-friendly legislation that leads to forum-shopping and legislative pressure in other states.[155] Incongruous state right of publicity schemes can also potentially increase costs for companies, forcing them to become familiar with the schemes of different jurisdictions, calculate the risk of a lawsuit in those jurisdictions, and even potentially litigate multiple claims in multiple states with multiple laws.[156] These market effects can create censorship and burdens on companies in a digital age where advertising practices are nationwide or global, not statewide.[157] Thus, a federal right of publicity would create predictability and eliminate such costs.[158] This is especially important to allow the cross-boundary business of drone technology to expand without undue administrative restrictions.

A federal right of publicity would also eliminate some of the other concerns that critics of the right of publicity have, most notably the unresolved definitional conflicts of the claim.[159] States have taken divergent approaches on elements of the right of publicity, like whether it is a tort or a property right, whether it is descendible and assignable, or what kinds of unauthorized uses are protected.[160] A single, clear federal right of publicity would solve this problem by laying out the elements once and for all and preempting state right of publicity claims. This

154. *See, e.g.*, Brittany A. Adkins, *Crying Out for Uniformity: Eliminating State Inconsistencies in Right of Publicity Protection Through a Uniform Right of Publicity Act*, 40 CUMB. L. REV. 499, 545–56 (stating that a uniform federal right of publicity would decrease erratic outcomes in cases across states); Jonathan L. Faber & Wesley A. Zirkle, *Spreading Its Wings and Coming of Age: With Indiana's Law as the Model, State-Based Right of Publicity is Ready to Move to the Federal Level*, 45 NOV. RES. GESTAE 31 (2001); Jean-Paul Jassy & Kevin L. Vick, *Why a Federal Right of Publicity Statute is Necessary*, 28 COMM. LAW. 14, 14, 19 (2011) (complaining that the lack of uniformity between state regulatory schemes causes definitional confusion and also a threat to cohesive First Amendment protection, both of which could be fixed by a federal right of publicity);

155. *See, e.g.*, Jassy & Vick, *supra* note 155, at 16–17.

156. *Id.* at 17.

157. *Id.*

158. *See* Adkins, *supra* note 155, at 544–45 (stating that a uniform right of publicity could eliminate inconsistent case results across jurisdictions and therefore facilitate simpler "commerce and business planning").

159. Jassy & Vick, *supra* note 155, at 14–15.

160. *Id.*

would involve overriding state legislatures and broadening or narrowing the definitions and elements of the right of publicity that state legislatures have already enacted, perhaps eliminating states as the "laboratories for experimentation."[161] However, over two-thirds of states already recognize a right of publicity, and so a federal right of publicity would act as a natural method of consolidating results of the state "experiments" and taking the best aspects of each.[162] Furthermore, the concerns raised by the current, inconsistent patchwork of state law,[163] as well as the reality that drones are and will be flying in the national airspace and will be capturing and sending data to places all over the country, [164] make federal action necessary.

The biggest and perhaps most important criticism is that the right of publicity unduly restricts commercial speech and infringes on First Amendment rights.[165] However, the right of publicity has enough built-in protection and reverence for the First Amendment that it will not infringe on free speech except in severe cases.[166] The only time the Supreme Court has ever ruled on a right of publicity case, it focused on the importance of balancing the plaintiff's economic interests and the defendant's creative interests.[167] Even in jurisdictions where the right of publicity is considered broad, such as Indiana, the right of publicity is weighed against free speech concerns.[168] In fact, Indiana, considered the most plaintiff-friendly jurisdiction, has a long and comprehensive list of defenses and exemptions.[169] In the cases where plaintiffs objected to the use of their likenesses in video games, which are typically protected by free speech, the plaintiffs were successful mainly because of the extremely high degree of imitation without meaningful variation, and so the right of publicity would still provide adequate protection for more liberal imitations.[170] Furthermore, even though free speech protection is built in to the right of publicity schemes in several states,[171] a federal right of publicity could pave a middle ground between the broadest and narrowest protections afforded by differing state schemes. Again, affording some freedom with a federal right of publicity could help protect celebrities but also balance their interests with the growing journo-drone business.

Additional concerns with the right of publicity, and in particular with imposing a federal right of publicity preempting state law schemes, center on difficulties in the application of

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161. Margot E. Kaminski, *Drone Federalism: Civilian Drones and the Things They Carry*, 4 CALIF. L. REV. 57, 74 (2013) (concluding that drone regulation should be left to the states as "laboratories for experimentation in achieving a balance between First Amendment rights and privacy protection"). As Kaminski's conclusion refers specifically to drone regulation, it does not necessarily apply to a federal right of publicity scheme, since the right of publicity is broader than the drone context.

162. *See supra* notes 104-110 and accompanying text.

163. *See supra* Part III.B (detailing the differing state common law and statutory right of publicity schemes).

164. *See supra* Part II.A (describing increasing use of UAS).

165. *See, e.g.*, Adkins, *supra* note 155, at 532–33 (addressing the need for appropriate First Amendment safeguards in a federal right of publicity); Jassy & Vick, *supra* note 155, at 19 (decrying the lack of a federal right of publicity as a threat to the First Amendment).

166. *See* Willis, *supra* note 64 at 184–91 (discussing courts' strong historical presumption for protection of the press, and arguing that an even broader exemption from the right of publicity could be made for "newsworthy" material).

167. *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 574–76 (1976).

168. IND. CODE ANN. § 32-36-1-1 (West 2012) (protecting uses in literature, theater, film, radio, or television; uses in material with political or newsworthy value; original works of fine art, and more).

169. *Id.*

170. The test applied was called the "transformative use" test, a test which failed in those cases because the video game producers in question produced likenesses of the plaintiffs that were similar in all attributes but name. *See* Davis v. Electronic Arts, 775 F.3d 1172 , 1181 (9th Cir. 2015); Hart v. Electronic Arts, Inc., 717 F.3d 141, 170 (3rd Cir. 2013); *In re* NCAA Student-Athlete Name & Likeness Licensing Litigation, 724 F.3d 1268, 1284 (9th Cir. 2013).

171. *See supra* note 123.

claims. For example, some may be concerned with the difficulty of drawing a distinctive line between celebrities and non-celebrities for purposes of a right of publicity claim.[172] However, expanding definitions of who is and who is not a celebrity—such as in the *Fraley* and *Perkins* cases—do not guarantee a windfall to every citizen.[173] The *Fraley* case, although decided for the plaintiffs, ultimately only resulted in a remedy of a handful of dollars per plaintiff.[174] The court in *Perkins* held that the plaintiffs did not prove economic injury or even a minimum mental injury to support a right of publicity claim, demonstrating that even in plaintiff-friendly jurisdictions like California a line can still be drawn—non-celebrities must still rise to the standard of celebrities when seeking relief, and violations must reach at least a certain level of emotional or economic severity.[175] While some critics have argued for a standard that does not focus on commercial advantage,[176] the commercial element present in many state publicity right schemes can act as insurance against "open season" for plaintiffs. Furthermore, in practice, the line between celebrity and civilian will be further demarcated by the costs of litigating a claim; not everyone can afford to go after every single violation if the returns or chance of success are low, but everyone still deserves the opportunity for relief when it is warranted and worthwhile.[177]

In summary, while the right of publicity may be imperfect in its ability to satisfy all parties—i.e., the desires of every state legislature, the celebrities' cry for steeper protection, or the defendants concerned with restrictions on free speech—a federal right of publicity could go a long way in affording protection in the drone paparazzi and journo-drone context. And while these criticisms may reflect a concern that the litigation "floodgates" will open, the correct response is the one the Supreme Court of Hawaii gave to defendants concerned with the imposition of a right of publicity in Hawaii.[178] As the court in that case pointed out, "undoubtedly, when a court recognizes a new cause of action, there will be many cases based on it. Many will be soundly based and the plaintiffs in those cases will have their rights vindicated. In other cases, plaintiffs will abuse the law for some unworthy end, but the possibility of abuse cannot obscure the need to provide an appropriate remedy."[179] Further, the right of publicity is uniquely designed to be an appropriate remedy in the realm of drone paparazzi: its ability to take on tort-like qualities and protect against both mental and economic harm;[180] its potential as a property right to combat unfair competition and create a contractually assignable and descendible right;[181] its incredible adaptability to new technology and

172. *See, e.g.*, Alicia Hunt, Comment, *Everyone Wants To Be a Star: Extensive Publicity Rights for Noncelebrities Unduly Restrict Commercial Speech*, 95 Nw. U. L. Rev. 1605 (2001) (although somewhat outdated, Hunt's Comment is still a valid iteration of the complaint that expanding right of publicity protection for non-celebrities will create a right of action for anyone and therefore restrict commercial speech).

173. Perkins v. LinkedIn Corp., 53 F.Supp.3d 1190 (N.D. Cal. 2014); Fraley v. Facebook, Inc., 830 F. Supp. 2d 785 (N.D. Cal. 2011).

174. *See* Benny Evangelista, *Facebook Suit Settlement E-mail is Real, But You Might Not Get $10*, SFGATE (Jan. 28, 2013, 6:21 PM), http://blog.sfgate.com/techchron/2013/01/28/facebook-suit-settlement-e-mail-is-real-but-you-might-not-get-10/ (describing the dilution of the $20 million in settlement fees amongst litigation costs and thousands of plaintiffs).

175. 53 F.Supp.3d at 1219.

176. *See* McKenna, *supra* note 86, at 294 (arguing that the law has wrongly pursued protection of an economic interest in an individual's personality, when the interest the law should seek to protect is the individual's right to control his or her association with products or services and therefore define self-image).

177. For example, litigating the *Fraley v. Facebook* case, while resulting in a multi-million dollar settlement, still only paid out a few dollars in compensation after dividing up amongst plaintiffs and litigation costs. *See supra* note 175.

178. Fergerstrom v. Hawaiian Ocean View Estates, 441 P.2d 141 (Haw. 1988).

179. *Id.* at 143–44.

180. *See supra* notes 77-81 and accompanying text (providing an overview of the right of publicity, including its origins in tort law to provide for protection from the emotional harm caused by misappropriation).

181. *See supra* notes 92-97 and accompanying text (outlining the right of publicity's similarity to intellectual

applications where the line between celebrity and non-celebrity is blurred;[182] the convenient niche for a federal and cross-jurisdiction federal right of publicity; and its built-in balancing tests and exemptions to protect free speech all make it the perfect weapon to address the pervasive nature of commercial drone use.

2. Alternatives to the Right of Publicity to Regulate Journo-Drones

Several alternatives to the right of publicity in the journo-drone context may involve privacy torts and state privacy law, anti-paparazzi statutes, FAA rulemaking, or civilian law, among others. However, these alternatives do not represent better solutions than the right of publicity, but rather represent claims for legal issues that either complement, strengthen, or are better addressed by the right of publicity.

Beginning with privacy tort law, this "alternative" to the right of publicity is actually merely an offshoot of the right of publicity—the two can address the same harms.[183] While the right of publicity is a distinct right, one of its most unique features is its origins and overlap with privacy tort law.[184] Many states only cover the right of publicity within the blanket of an appropriation privacy tort.[185] States that have an express right of publicity, however, may still allow for damages that reflect the "mental and emotional harm" aspects of tort while also covering the "economic harm" suffered by misappropriation.[186] Therefore, the right of publicity can encompass the appropriation privacy tort and address both emotional and economic harm.

States may have other privacy laws, however, that address issues the right of publicity does not necessarily cover. For example, "[s]tate wiretapping laws, Peeping Tom laws, video voyeurism laws, and paparazzi laws all currently regulate privacy-intrusive photography, videography, and sound recordings," and can apply to the drone context as well.[187] Specifically, the Governor of California signed a recent bill prohibiting recording images or sounds by flying a device over private property.[188] A federal right of publicity could also help protect celebrities from paparazzi outside of their private property and outside of California. These are not alternatives to the right of publicity, but instead complementary forms of regulation—while the federal right of publicity would protect everyone across the nation from unauthorized misappropriation of likenesses, these laws would protect individuals from invasive capture of their likeness on a more localized, state level. The difficulty lies in that there is no

property law).

182. *See supra* Part III.C (exploring novel applications of the right of publicity).

183. *See supra* notes 77-81 and accompanying text (describing the right of publicity's origins in privacy tort law and its original aim to provide protection against emotional harm caused by misappropriation).

184. *See* Warren & Brandeis, *supra* note 80. Warren and Brandeis originally based the theory of protecting a person's right to control publication of his or her image was based on the idea of an "inviolate personality", an extension of the right to privacy. *Id.* at 205–206.

185. *See, e.g.*, Minnifield v. Ashcraft, 903 So.2d 818, 825–26 (Ala. Civ. App. 2004) ("the right to privacy in Alabama does protect the commercial value of a public figure's identity"); Fergerstrom v. Hawaiian Ocean View Estates, 441 P.2d 141, 142–44 (Haw. 1988) (extending Hawaiian privacy law to cover a right of publicity claim); Cason v. Baskin, 20 So.2d 243, 247-53 (Fla. 1945) (discussing natural evolution of right of privacy to cover personality invasion).

186. California common law requires a showing of an injury, "commercial or otherwise." Eastwood v. Superior Court, 149 Cal. App. 3d 409, 417 (Cal. Ct. App. 1983). Indiana law provides for punitive damages, not just actual damages. IND. CODE ANN. §§ 32-36-1-10 to 32-36-20 (West 2012).

187. Margot E. Kaminski, *Drone Federalism: Civilian Drones and the Things They Carry*, 4 CALIF. L. REV. 57, 65–66 (2013).

188. *Supra* note 55.

comprehensive federal privacy law; therefore a system where a federal right of publicity exists but only a state privacy invasion claim can be brought seems counterintuitive.[189] This does not detract from the right of publicity, however, because the right of publicity is meant to address a harm that will occur and has been occurring on a national level. As one article puts it, "[b]ecause of technological advances, expressive works and advertisements are increasingly disseminated on a national, if not international, scale" resulting in lawsuits crossing jurisdictions.[190] So while the right of publicity—a cross-boundary issue—makes sense as a federal claim, state privacy and anti-paparazzi laws could be effectively defined by the state in which the actual invasion occurred. The two would complement each other nicely.

Another alternative would be to cover the right of publicity in FAA rulemaking. However, as previously discussed, FAA's regulations and publications seem to be more concerned with safety, licensing, and standards to get drones up in the air and regulated.[191]A federal right of publicity would cover the much more specific issue of drones capturing unauthorized uses of individuals' likenesses. Thus, a federal right of publicity would complement FAA safety and registration standards and help create a holistic legal scheme for preventing misuse of drones.

One remaining alternative would be to rely on "civilian law" to police drones on individual land. This has already occurred in a widely publicized incident about a New Jersey man who saw a neighbor's camera-laden drone fly over his lawn and took matters into his own hands—or more accurately, his trigger finger, which he used to shoot the drone down with a shotgun.[192] In a parody of this incident, a recent episode of the popular sitcom *Parks and Recreation* featured main character Ron Swanson shooting down a drone delivering packages to his son.[193] While the show used the incident for comedic effect, the incident has already sparked legal debate about the extent of land ownership into airspace, the nature of self-defense and perceived threats, and the legal regulation of self-help against robots and chattels.[194] Of course, the right of publicity could not be expected to physically intervene to protect a person from a drone hovering on their lawn. It could, however, protect the person from anything the drone may collect and use for the drone owner's personal advantage.

B. PROPOSED FEDERAL RIGHT OF PUBLICITY TO COMBAT DRONE PAPARAZZI

A federal right of publicity is well suited to deal with the rise of civilian drone use and the inevitable data collection by journo-drones and drone paparazzi.[195] A federal right of publicity would create uniformity and predictability, therefore decreasing the costs and potential censorship caused by current confusion among a patchwork of differing state schemes.[196] Because of the cross-boundary nature of drone technology, a uniform right of publicity is

189. *Kaminski*, *supra* note 188 ("There is no federal omnibus privacy law in the United States").

190. Jassy & Vick, *supra* note 155, at 14.

191. *Supra* notes 32-45 and accompanying text.

192. *See, e.g.*, Jeff John Roberts, *Can You Shoot Down a Drone on Your Land? New Incident Raises Self-Defense Questions*, GIGAOM (Oct. 1, 2014, 9:28 AM), https://gigaom.com/2014/10/01/can-you-shoot-down-a-drone-on-your-land-new-incident-raises-self-defense-questions/.

193. Potential Republican presidential candidate Rand Paul mentioned the recent episode and threatened to shoot down a drone as well. Matt Wilstein, *Rand Paul Channels* Parks and Rec's *Ron Swanson with Threat to Shoot Down Drone*, MEDIAITE (Jan. 28th, 2015 3:00 PM) http://www.mediaite.com/tv/rand-paul-channels-parks-and-recs-ron-swanson-with-threat-to-shoot-down-drone/.

194. *See* A. Michael Froomkin & Zak Colangelo, *Self-Defense Against Robots* (March 19, 2014), SSRN working paper, *available at* http://ssrn.com/abstract=2504325.

195. *Supra* Part IV.A.

196. *See supra* notes 155-159 and accompanying text.

essential. The patchwork of state statutory and common law schemes make enforcement difficult and confusing litigation inevitable.[197] A federal right of publicity would solve these problems and be uniquely adapted to drones in the national airspace as a federal issue.

There are several key elements that a federal right of publicity would need to contain in order to effectively address the problem of drone paparazzi:

First, a federal right of publicity, in order to combat the use of drone paparazzi, would be best suited by a broad definition of "identity" such as those in the Indiana or Ohio statutes.[198] Drones can record sound, video, and images, and so a definition of "identity" that is broad enough to cover mannerisms, gestures, and other aspects of a persona is important.

Second, the federal right of publicity should, like the California and Indiana models, offer remedies for both emotional and economic harm.[199] Language stating that harm be "commercial or otherwise," as in the California claim, would allow for some latitude when the plaintiff is not a traditional A-list celebrity worth millions of dollars.[200] Potential remedies that, like the Indiana statute, include a minimum award for a successfully presented claim or emotional injury, as well as the potential remedies of injunctive relief, actual damages, punitive damages, or attorney's fees would capture the broadest class of plaintiffs within its protective net.[201] However, to prevent claims without merit—and to avoid the no doubt countless incidental photographs of civilians in public places that could be captured by drones in the air—a showing for a right of publicity claim under the federal statute should require proof of some injury, even if the injury is emotional or mental in nature.[202]

Third, a federal right of publicity should be heritable and assignable to align with the economic nature of its policy, and to preserve the intellectual property aspects of the right of publicity.[203] Allowing the right to be assignable and transferable loosens up the strict "without consent" use, preventing a person who is a member of a celebrity's estate or a celebrity from having to okay every use of his or her likeness. Furthermore, if the right is assignable, it could open up a market where civilians may allow operators of journo-drones to use their image, distinctive likeness, mannerisms, gestures, and other aspects of their persona for advertising or commercial gain.

However, besides these elements where a federal right of publicity should be broad in scope, in other aspects the right should be more limited in scope than the Indiana and California schemes.[204] A middle ground would be a compromise between the differing poles of

197. *See* Adkins, *supra* note 155, at 544–45 (a uniform right of publicity could eliminate inconsistent case results across jurisdictions).

198. The Indiana right of publicity statute covers unprotected use name, image, likeness, voice, signature, photograph, distinctive appearance, gestures, or mannerisms. IND. CODE ANN. § 32-36-1-7 (West 2012) statute has a definition of "persona" that is almost as broad as Indiana's definition. OHIO REV. CODE ANN. §§ 2741.01–09 (West 2013-14).

199. California law requires a showing of an injury, "commercial or otherwise." Eastwood v. Superior Court, 149 Cal. App. 3d 409, 417 (Cal. Ct. App. 1983); *see also* Perkins v. LinkedIn Corp., 2014 U.S. Dist. LEXIS 160381 at *30–31, *41–42 (N.D. Cal. 2014) (stating that a California statutory right of publicity action can be based on emotional injury). Indiana law provides for punitive damages, litigation costs, and even injunctive relief, not just actual damages. IND. CODE ANN. §§ 32-36-1-10 to 32-36-20 (West 2012).

200. Eastwood, *supra* note 200, at 417.

201. IND. CODE ANN. §§ 32-36-1-10 to 32-36-20 (West 2012).

202. *See Perkins* at *41–42 (stating that where a plaintiff had shown no injury, either emotional or otherwise, no right of publicity claim can be made).

203. *See supra* notes 92-97 and accompanying text (describing the right of publicity's similarities to intellectual property law and how jurisdictions have interpreted the transferability of such a right).

204. *See supra* Part III.B for a look at the different spectrum of protection afforded by current state right of

protection found in the states,[205] ensuring that no serious restrictions of speech and First Amendment concerns are implicated. For example, a right of publicity that is descendible for a period of up to 100 years after a person's death, as in Indiana, could be cut in half to 50 years, and limits to the amount of times the right could be transferred could be established.[206] This would prevent a monopoly on a person's right to publicity when genuinely important commentary or expression could result.

Most importantly, to protect such commentary and expression, a sufficient list of exemptions from the right of publicity must be included in order to protect the freedom of speech so important to the Supreme Court in *Zacchini v. Scripps-Howard*.[207] To start, exemptions under the Nebraska right of publicity statute would suffice to protect media: bona fide news reports, events of public interest, and likenesses of persons depicted solely as a member of the public when not named or identified should be protected.[208] These exemptions would require some line-drawing by federal courts, but would at least initially build in some protection against photographing celebrities and their children—or ordinary citizens—when they are not engaged in events that are newsworthy or of some public interest.[209]

Additionally, Indiana's list of exceptions for original works of fine art, works with political value, and works of literature, art, radio, theater, music, or television would help protect creative expression.[210] Furthermore, video games would be included in the exemption. The works-of-political-value exception could be expanded to cover political speech. Protecting all of these mediums would serve to strike a balance between plaintiffs' economic interest and defendants' creative interests.

However, to counteract cases like the video game cases, where the medium at issue is technically "protected" but the defendants have truly profited off of the plaintiffs' likeness, the federal right of publicity could codify the "transformative use" test.[211] In situations where the speech would normally be protected, if the speech does not add anything meaningful or novel to the use of a person's likeness and is really just an imitation with only trivial variation, the defendant's protected speech defense would fail.[212] This test has been held as the appropriate test for a right of publicity claim because it takes into account the policy overlap with trademark and unfair competition cases.[213] Explicitly codifying the test as a rebuttal of a protected speech defense would resolve the uncertainty created by *Zacchini* about how to properly balance free speech and right of publicity interests.[214]

The unique nature of the right of publicity makes it an effective solution in the context of drones because of the technology's ability to infiltrate celebrity and civilian life in a way that before would require time, persons, and money. Its dual nature as both a tort against intentional misuses and invasion of likeness, as well as a property right promoting fair

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publicity schemes.

205. *Id.*

206. IND. CODE ANN. §§ 32-36-1-8, 32-36-1-16 (West 2012).

207. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1976).

208. NEB. REV. STAT. ANN. § 20-202 (West 2014).

209. *See* Willis, *supra* note 64, at 176–77 (describing how such photographs of celebrities when they are "unguarded" are in high demand).

210. IND. CODE ANN. § 32-36-1-1 (West 2012).

211. *See* Davis v. Electronic Arts, 775 F.3d 1172, 1181 (9th Cir. 2015); Hart v. Electronic Arts, Inc., 717 F.3d 141, 160–65 (3rd Cir. 2013); *In re* NCAA Student-Athlete Name & Likeness Licensing Litigation, 724 F.3d 1268, 1273–79 (9th Cir. 2013).

212. *Davis* at 1178; *Hart* at 160–65; In re *NCAA* at 1273.

213. *Hart* at 152, 170 (looking to *Zacchini* as justification for balancing First Amendment protections and publicity rights interests, and choosing the transformative use test as the appropriate way to do so).

214. *Id.*

competition and commercial use of one's own image, make it versatile enough to provide redress and compensation for the prolific and pervasive use of drone technology by paparazzi. A federal right of publicity would create a national cause of action to prevent such harms.

C. IMPLICATIONS BEYOND THE PAPARAZZI

The incredibly rapid increase of drones—and the decision to regulate and integrate rather than eliminate drone technology—means that undetected intrusions on privacy already are and will become increasingly normal.[215] Drones will be constantly collecting data that is not used for commercial gain, and policing and enforcing such use would be an insurmountable task. Because of this, it would be incredibly difficult to protect everyone from every actionable violation. But the unique ex post, economic basis of the right of publicity provides a realistic strategy for preventing drone privacy invasions of both celebrities and regular civilians.

One reason the right of publicity is equipped to handle the deluge of privacy intrusion and data-collection of drones is that it can be construed broadly enough to cover "non-celebrities," and can meet the demands of new technology.[216] This flexibility is crucial because the digital age has created an ever-blurry line between defining a celebrity versus an "ordinary" citizen. Anyone could be one short step or incidental drone video away from becoming a YouTube, Facebook, or Twitter sensation.[217] Further, there can be actual economic gain involved in such ordinary Internet activity; anyone can benefit from ads on successful personal websites or blogs, or create profit for other sites by generating hits.[218] Everyone is in some way attempting to profit off of his or her image by the likeness they portray on networking and social media sites, and after a certain point, a person should be able to seek redress for commercial benefit of their image as taken by a drone or used online. The cases involving social media, such as *Fraley* and *Perkins*, show how the right of publicity can help determine this point: *Fraley* stands for the idea that even everyday users of social media can protect themselves from being taken commercially advantage of under the right of publicity, while *Perkins* draws the line where there is no real showing of injury—either economic or emotional—to establish a claim.[219]

This line is important to draw in order to deter needless or effusive litigation over images and likenesses recorded by drones. A high enough threshold will keep any drone user filming or photographing from feeling the need to request a waiver of consent from everyone in the vicinity. It will also keep Internet sites, which benefit from the traffic they receive, from bearing an undue cost of litigation from anyone who has generated enough traffic on something like a recreational family drone video and wants to be compensated. This line can, as in the *Perkins*

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215. *E.g.*, Devin Coldewey, *Drone Outside Window Spooks Seattle Woman But Cops Say No Law Broken*, NBCNEWS (June 24, 2014, 2:44 PM), http://www.nbcnews.com/tech/tech-news/drone-outside-window-spooks-seattle-woman-cops-say-no-law-n139626.

216. *See supra* Part III.C (discussing expansion of the right of publicity to cover new technology and a changing definition of the "celebrity" plaintiff).

217. Even in a limited network of "friends" on social media, Jesse Koehler discusses how, after *Fraley*, from the court's viewpoint "misappropriation of an individual's right of publicity in the social networking context will almost inherently be newsworthy because a user's actions in the social network will nearly always be to a limited audience that has opted to 'friend' the user." Jesse Koehler, *Fraley v. Facebook: The Right of Publicity in Online Social Networks*, 28 BERKELEY TECH. L.J. 963, 993 (2013).

218. *See, e.g.*, Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 790 (N.D. Cal. 2011) ("Sponsored Stories" ads garnered actual profit for Facebook through unauthorized use of users' images and "endorsements"); KNB Enterprises v. Matthews, 92 Cal. Rptr. 2d 713, 716 (Cal. Ct. App. 2000) (unauthorized use of plaintiff's photos generated sales and traffic for defendant's website).

219. Perkins v. LinkedIn Corp., 2014 U.S. Dist. LEXIS 160381 at *41–42 (N.D. Cal. 2014); *Fraley* at 804–805.

case, be implied in the "injury" prong of a right of publicity claim, establishing a minimum threshold the plaintiff must meet.[220] Interestingly enough, there has been some attempt to quantify this threshold outside of the "injury" context through the use of sites like Klout, which actually gather data on the activity of a person's social media accounts and seek to quantify the person's "social clout."[221] Companies may send a Klout member products if they believe the benefit of the person's endorsement, as determined by the person's social clout, will contribute to sales.[222]

Still, quantifying social clout is an imperfect and new "science," if it can even be called that. Thus, while the line of "celebrity" versus "non-celebrity" may work itself out naturally in the application of the "injury" prong of the right of publicity, the line is nowhere near a fixed, bright line test—and that is the beauty of the right of publicity. The right of publicity language is based on the commercial advantage derived by the defendant, not the commercial value of the plaintiff's identity (although the two are usually correlated), and so allows for a sliding scale of celebrity.[223] An amateur model may have a right of publicity claim.[224] A college athlete may have a right of publicity claim.[225] An average Facebook user may have a right of publicity claim.[226] While none of these fit comfortably within the traditional, A-list definition of "celebrity", the ability of the line to move further and further—certainly the court in *Halean v. Topps*, writing about chewing gum and baseball, could not have imagined a class action suit about Facebook ads—is why the right of publicity is best designed to combat the rise of the drone age.[227] Drones will be flying in all different areas, capturing footage and photographs and potentially profiting off of all kinds of people, be they social media sensations or A-list celebrities.

The blurriness of this line between celebrity and non-celebrity is one of the right of publicity's greatest attributes. It allows the right of publicity to adapt and protect a wider group of people in a wider group of settings, a characteristic that is invaluable in an era where technology is increasing and privacy is decreasing.[228] Standard privacy law, and indeed standard notions of privacy in general, will no doubt change because of the growing and inevitable intrusions already present in the social media context and now in the drone context.[229] On the other hand, the right of publicity is a right that looks outward, not inward, and protects individuals not from invasion of their inner sanctum, but rather gives individuals control over how they externally present and define themselves to the world.[230] This makes the right of

220. *Perkins* at *41–42.

221. Brian Wassom, *Klout, Commercial Value, and the Right of Publicity*, WASSOM.COM (Feb. 4, 2014), http://www.wassom.com/klout-commercial-value-and-the-right-of-publicity.html.

222. *Id.*

223. For example, California does not require that the plaintiff be a celebrity or even demonstrate a commercial value of his or her persona to show a claim. Eastwood v. Superior Court, 149 Cal. App. 3d 409, 417 (Cal. Ct. App. 1983); KNB Enterprises v. Matthews, 92 Cal. Rptr. 2d 713, 716 (Cal. Ct. App. 2000) (recognizing that none of the plaintiffs was a celebrity and allowing a right of publicity claim anyway). *But see* Kentucky and Michigan, who do look for a showing that the personality has commercial value. *See* Landham v. Galoob, 227 F.3d 619, 624 (6th Cir. 2000); Cheatham v. Paisano Publications, Inc., 891 F. Supp. 381, 386–87 (W.D. Ky. 1995).

224. *See KNB Enterprises* at 716.

225. *See* Hart v. Electronic Arts, Inc., 717 F.3d 141 (3rd Cir. 2013); *In re* NCAA Student-Athlete Name & Likeness Licensing Litigation, 724 F.3d 1268 (9th Cir. 2013).

226. *See* Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 790 (N.D. Cal. 2011).

227. Haelan Laboratories v. Topps Chewing Gum, 202 F.2d 866, 867 (2d. Cir.), *cert. denied*, 346 U.S. 816 (1953).

228. *See* MacLean, *supra* note 89, at 59–69 (examining how expanding technology has eroded privacy expectations).

229. *Id.*

230. *See* McKenna, *supra* note 86, at 294 (arguing that the real interests the right of publicity protects are individuals' right to control their association with products or services and therefore define their self-image).

publicity more suitably adapted to tackling the new digital age, in which the meaning of privacy has changed and journo-drones and social media abound.

V. CONCLUSION

Civilian and commercial use of drone technology is on the rise, and both federal and state legislation are under way to prepare for the dawning of this age of drones.[231] The paparazzi have already taken advantage of this technology to capture unauthorized footage of celebrities.[232] While many of the pending legislation focuses on safety and technology standards, the use of journo-drones may still continue unaddressed and even authorized by the federal government.[233] This is where the right of publicity comes in as a cause of action that protects an individual from unauthorized commercial use of his or her likeness.[234]

Although no federal right of publicity exists and critics have pointed to the right of publicity's lack of consistency across states as a shortcoming,[235] the case of drone paparazzi places the right of publicity in a unique position to be an effective solution. The inconsistency of the right of publicity has created a niche for a solution: one federal right of publicity combining the most essential elements from across the states. Furthermore, a federal right of publicity with language broad enough to encompass not only economic but emotional harm could have implications for non-celebrities as well as celebrities.[236] In a world of expanding technology and decreasing privacy, where social media may make everyone a celebrity and drones will soon be whizzing through the skies, the right of publicity presents an intriguing and viable protection from journo-drones collecting unauthorized personal images and recordings.

231. *See supra* Parts II.A–B.

232. *See supra* Part II.C.

233. *See, e.g.*, Brian Resnick, *CNN's Drone Journalism Is Just the Beginning*, THE NATIONAL JOURNAL (January 12, 2015), http://www.nationaljournal.com/tech/cnn-s-drone-journalism-is-just-the-beginning-20150112.

234. 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 6:3 (2d ed. 2014).

235. *Supra* note 155.

236. *See supra* Part IV.C.