VOLUME XXII

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EDITOR'S NOTE

The University of Denver's Sports and Entertainment Law Journal is proud to complete its fourteenth year of publication. Over the past fourteen years, the Journal has strived to contribute to the academic discourse surrounding legal issues in the sports and entertainment industry by publishing scholarly articles and related content.

Volume XXII features a case comment discussing relevant case law in the college sports industry.

The case comment is written by a managing editor and sources editor on the Journal, Andrew Janson and Grant Shibao, respectively. This piece discusses an interesting case about three high profile executives accused of conspiracy and wire fraud for interfering with the college basketball recruiting process.

Volume XXII has six featured articles discussing relevant issues and proposing solutions for hotly contested topics we face in the sports and entertainment industries.

The first article, written by Sara Kirtley, examines whether universities are required to provide mental health treatment to their student-athletes as a component of the duty of care that universities owe specifically to their student-athletes.

Continuing the discussion on college athletics, David E. Missirian writes the second article, analyzing the cost of "winning" in the world of college athletics today, including the health and safety ramifications for student-athletes in highly competitive sports.

The third article, written by Mike Steenson, discusses the lawsuit where Jesse Ventura sued Chris Kyle for defamation, appropriation and unjust enrichment in connection with statements made in Chris Kyle's book, *American Sniper*, focusing on theories of recovery with an emphasis on jury instructions in the context of public figure lawsuits.

Transitioning to the music industry, the fourth article, written by Joe Noreña, explores the concept of how admitting defendant-authored rap lyrics as evidence of motive or intent can be unduly prejudicial and could constitute inadmissible character evidence.

The next article by Jack Noonan returns to college athletics with a discussion of implementing a promotion/relegation structure for college football to solve the problems and criticisms that the college football playoff structure currently faces.

The final article by Kenneth Wm. Thornicroft, highlights the Canadian Hockey League's class action lawsuit, including probable outcomes and potential ramifications, through an examination of the similarities and differences between the hockey league's players and NCAA Division I athletes.

We are truly pleased with Volume XXII's publication and would like to thank the authors for all of their hard work and contribution to this volume of the Journal. We would also like to thank our wonderful faculty advisor, Professor Stacey Bowers, and our outstanding dean, Dean Bruce Smith. To the editorial board, non-editorial board, and staff editors, I appreciate the endless effort and hard work that has perfected Volume XXII of the Journal. With each passing year, our Journal grows and improves thanks for our authors and our staff.

In closing, I would like to thank my parents, Mary Diguardi and Chris Diguardi, for their continuous support throughout law school. None of this would have been possible without your continued love and support. I am forever grateful to all those who have been by my side throughout this journey.

COURTNEY DIGUARDI
EDITOR-IN-CHIEF (ACADEMIC YEAR 2018-2019)
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U.S. V. GATTO: AN OLD CASE PROVIDES A NEW LOOK AT COLLEGE BASKETBALL'S LATEST SCANDAL

By: Andrew Janson[†] & Grant Shibao[††]

I. INTRODUCTION

On October 24, 2018, as a jury returned to a courtroom in New York City, the entire college basketball world held its collective breath, anxiously anticipating the verdict in a case that is arguably the largest scandal in college athletics history. After more than two days of deliberation and three weeks of testimony and exhibits,[1] the three defendants — high profile executives accused of conspiracy and wire fraud — were found guilty.[2] For many, the verdict marked the end of a long and highly-publicized investigation and attack on the college basketball system.[3] But with appeals already confirmed[4] and case law that could challenge the convictions,[5] this blemish on the college basketball world remains unresolved.

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[1] Will Hobson & Kevin Armstrong, *All Three Defendants Found Guilty of Wire Fraud in College Basketball Corruption Trial*, WASH. POST (Oct. 24, 2018), https://www.washingtonpost.com/sports/colleges/all-three-defendants-found-guilty-of-wire-fraud-in-college-basketball-corruption-trial/2018/10/24/fba5b866-d7be-11e8-a10f-b51546b10756_story.html?utm_term=.3600cb97eccb.
[2] *Id*.
[3] Mike Rutherford, *5 Winners and 7 Losers From the Big College Basketball Corruption Verdict*, SB NATION (Oct. 24, 2018). https://www.sbnation.com/college-basketball/2018/10/24/18009130/college-basketball-trial-winners-and-losers-arizona-louisville-duke-lsu.
[4] Christian Red, *NCAA Basketball Scandal: James Gatto, Merl Code, Christian Dawkins Fournd Guilty*, USA TODAY (Oct. 24, 2018). https://usatodayhss.com/2018/ncaa-basketball-pay-to-play-scandal-gatto-code-dawkins-guilty.
[5] *See* United States v. Walters, 913 F.2d 388 (7th Cir. 1990).

II. BACKGROUND

When you hear about big money in athletics, people often think of professional athletes. Between hundred million-dollar contracts and billion-dollar venues,[6] there is nothing small about the price tags and profit lines of professional sports organizations. But what about college athletics? In the midst of the ongoing debate about compensation for college athletes,[7] there is no denying that college athletics is a profitable industry.[8] In fact, of the $1.1 billion in revenue brought in by the National Collegiate Athletic Association ("NCAA") in 2017, nearly $951.4 million came from the annual Division I "March Madness" Men's Basketball Tournament.[9] The year before, the NCAA extended its partnership with CBS and Turner Entertainment for $8.8 billion.[10] Plenty of individual university athletic programs profit from successful college basketball as well.[11] For example, the University of Louisville, home of the most profitable college basketball program in the nation, brings in an astonishing $43.9 million a year.[12] College basketball is big money. So, it comes as no surprise that several talented high school athletes, destined for the NCAA and beyond, found themselves in the middle of one of the largest pay-for-play scandals in recent history.

In late September 2017, as college football season was in full swing and many anxiously awaited the return of college basketball, the sports world

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[6] *See generally* Khadrice Rollins, *Report: New Packers Contract Makes Aaron Rodgers Highest Paid NFL Player*, SPORTS ILLUSTRATED (Aug. 29, 2018). https://www.si.com/nfl/2018/08/29/aaron-rodgers-contract-extension-packers; *see also* Richard Velotta, *65,000 Seat Las Vegas Raiders Stadium Will Cost $1.8B to Build*, LAS VEGAS JOURNAL (Mar. 28, 2018), https://www.reviewjournal.com/business/stadium/65000-seat-las-vegas-raiders-stadium-will-cost-1-8b-to-build/.

[7] Matthew Brooks, *College Athletes Deserve to be Paid for Their Play*, THE TRIANGLE (Jul. 1, 2018), https://www.thetriangle.org/opinion/college-athletes-deserve-to-be-paid-for-their-play/.

[8] Scooby Axson, *NCAA Reports $1.1 Billion In Revenues*, SPORTS ILLUSTRATED (Mar. 7, 2018), https://www.si.com/college-basketball/2018/03/07/ncaa-1-billion-revenue.

[9] *Id*.

[10] *Id*.

[11] Brandon Wiggins, *The 25 Schools That Make the Most Money in College Basketball*, THE BUSINESS INSIDER (Mar. 31, 2018), https://www.businessinsider.com/louisville-was-college-basketballs-biggest-money-maker-in-2016-2018-2.

[12] *Id*.

was rocked by shocking news that ten individuals, all linked to college basketball, had been charged by federal prosecutors with several counts of conspiracy and fraud.[13] Eventually, eight of those ten individuals were indicted by a grand jury in New York.[14] Of those eight individuals, five would be tried together in front of a jury in the United States Southern District of New York.[15] The sealed complaint identified the defendants as Adidas executive James "Jim" Gatto, former Adidas consultant Merl Code, former NBA agent Christian Dawkins, former Amateur Athletic Union (AAU) Director Jonathan Augustine, and the Chief Executive Officer of Princeton Advisory Group, Munish Sood.[16] Prosecutors eventually dropped the charges against Augustine,[17] and Sood plead guilty.[18] But for the other three defendants, an early-October criminal trial was set.

III. TRIAL

Although, the NCAA was not a named party in this trial, their rules on amateurism became a central point of this case. According to the prosecution, the three defendants were guilty of both conspiracy to commit wire fraud and wire fraud.[19] The general theory was that when the three defendants made financial payments to high school basketball players, they effectively eliminated the players' opportunity to play for any academic institution because doing so would have violated the NCAA's amateurism policy.[20] On its own, these actions are not illegal or

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[13] Mark Schlabach, *NCAA Basketball Coaches Among 10 Charged with Fraud, Corruption*, ESPN (Sept. 26, 2017), http://www.espn.com/mens-college-basketball/story/_/id/20824193/ncaa-basketball-coaches-10-charged-fraud-corruption.

[14] *Chuck Pearson, Lamont Evans Among Eight Indicted in New York City*, ESPN (Nov. 7, 2017), http://www.espn.com/mens-college-basketball/story/_/id/21332121/chuck-person-group-indicted-ncaa-federal-corruption-charges.

[15] Indictment, *United States v. James Gatto, et al.* (filed Sept. 25, 2017).

[16] *Id*.

[17] Mark Schlabach, *Feds Drop Charges Against AAU Basketball Program Director in Adidas Scandal Case*, ESPN (Feb. 13, 2018), http://www.espn.com/mens-college-basketball/story/_/id/22418522/the-federal-government-drops-charges-jonathan-augustine-adidas-scandal-case.

[18] Mark Schlabach, *Munish Sood Expected to Testify in NCAA Hoops Case as Part of Plea Deal*, ESPN (Aug. 31, 2018), http://www.espn.com/mens-college-basketball/story/_/id/24539543/munish-sood-pleads-guilty-ncaa-basketball-corruption-case.

[19] *See* Indictment, *supra* note 15.

[20] *Id*.

fraudulent; but, in pursuit of their own economic goals, the defendants allegedly allowed the NCAA schools to sign and play these players without letting the schools know that they were ineligible.[21] It then follows that, as a result of the alleged fraud, the NCAA schools were unknowingly violating the NCAA eligibility rules and faced financial loss via sanctions, scholarships, and reputation.

In order to establish wire fraud, the prosecution needed to prove that there was (1) a scheme to defraud (2) to get money or property (3) furthered by the use of interstate wires.[22] The prosecution argued that the payments made by the defendants to the athletes constituted fraud against the universities that would eventually grant these athletes full athletic scholarships, because the schools gave resources and money (i.e. scholarships) to athletes they believed met the NCAA amateurism rules when, in fact, they did not.[23]

Both before and during the trial, the defendants did not contest the allegations concerning their payments to the players. Again, while it may have violated an NCAA rule, the payments to the athletes themselves were not illegal.[24] Instead, the defendants' argument centered around the theory that the prosecution failed to show that the purpose of the scheme was (1) to injure the NCAA schools, (2) to obtain money or property for themselves, and (3) to deprive the NCAA schools of money.[25]

Essentially, the defendants argued that the prosecution could not prove the payments were made in the effort to harm the schools and that the defendants did not gain any benefit from the schools. The defendants argued that they did not have the requisite intent to cause harm and,

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[21] *Id*.
[22] 18 U.S.C. § 1343 (2018).
[23] *See* Indictment, *supra* note 15.
[24] Pat Forde & Pete Thamel, *NCAA 'Aggressively' Seeking Information in Federal Hoops Corruption Case*, YAHOO SPORTS (Feb. 26, 2019), https://sports.yahoo.com/yahoo-exclusive-ncaa-aggressively-seeking-information-in-federal-hoops-corruption-case-233652244.html.
[25] Memorandum Opinion, *United States v. Gatto, 295 F. Supp. 3d 336* (S.D.N.Y. 2018).

therefore, could not be convicted of the federal charge.[26] This argument contended that the defendants "won" at the grassroots level when top-caliber players played in their high school camps, while the schools "won" when those same top-caliber players eventually played in their athletic programs.[27] In other words, the defendants claimed the schools actually *benefited* from the their actions.

During the trial, some of the most compelling evidence came from testimony by Brian Bowen Sr., the father of Brian "Tugs" Bowen II, one of the athletes the defendants allegedly paid.[28] Bowen Sr. described the bidding war that ultimately led his son to commit to playing for the University of Louisville.[29] In court, Bowen testified the price for his child's athletic abilities rose as high as $150,000[30] before the family settled on an agreement to join Rick Pitino and the Louisville Cardinals for $100,000.[31]

After three weeks of testimony, evidence, and arguments, the jury of eight women and four men deliberated for nineteen hours before returning a guilty verdict.[32]

IV. *U.S. V. WALTERS*

U.S. v. Gatto is not the first time that sports agents have tried to influence future college athletes with monetary gifts. *U.S. v. Walters*[33] is a similar case that may offer a clue as to how any appeal may play out. In August 1984, Norby Walters and Lloyd Bloom formed a sports agency, World

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[26] Dan Greene, *Attorneys Claim Defendants Had No Intent of Defrauding NC State, Kansas, Miami, and Louisville*, SPORTS ILLUSTRATED (Oct. 17, 2018), https://www.si.com/college-basketball/2018/10/17/ncaa-trial-christian-dawkins-merl-code-jim-gatto-closing-arguments.
[27] *Id*.
[28] *Id*.
[29] Tugs Bowen ultimately passed on his opportunity to play college basketball, instead electing to play in the National Basketball League in Australia. *Id.*
[30] *Id*.
[31] *Id*.
[32] Mark Schlabach, *James Gatto, Merl Code, and Christian Dawkins Found Guilty In Pay for Play Trial*, ESPN (October 25, 2018), http://www.espn.com/mens-college-basketball/story/_/id/25072946/james-gatto-merl-code-christian-dawkins-found-guilty-college-basketball-pay-play-trial.
[33] *Supra* note 5.

Sports & Entertainment (WSE), through which they planned to represent college football players,[34] though their plan for representation was not exactly above-board to say the least.[35] Against NCAA rules, Walters and Bloom were able to entice 58 college football players to sign exclusive representation contracts with WSE by lavishing the athletes with cash signing bonuses and sports cars.[36] Of those 58 players, only two honored their contracts with WSE, while the other 56 kept the cars and money and signed with other agents.[37] Walters and Bloom were eventually charged with seven counts of mail fraud and violations of the Racketeer Influenced and Corrupt Organizations Act (RICO).[38] At trial, a jury found Walters and Bloom guilty of the RICO violations but not guilty of mail fraud.[39]

On appeal, the conviction was overturned because the Seventh Circuit found the trial court had committed reversible error by not allowing a jury instruction regarding Walters' defense.[40] Prior to commencing his plan with Bloom, Walters had consulted with a law firm about the legality of the pair's activities, and it was during this consultation that Walters was advised that while he would be violating the NCAA rules, he would not be breaking any laws.[41] Walters therefore claimed that he was acting in good faith, a "complete defense to a charge of mail fraud" because it eliminates the requisite intent to defraud.[42] The appeals court found that the absence of an instruction to the jury about this defense constituted a reversible error that affected the fairness of Walters' trial, and remanded for a new trial.[43] Following the denial of a motion to dismiss, Walters took a plea deal, pleading guilty to the mail fraud charge in return for the

[34] *Id.* at 390.
[35] *Id.*
[36] *Id.*
[37] U.S. v. Walters, 997 F.2d 1219, 1221 (7th Cir. 1993).
[38] *Supra* note 5, at 390.
[39] *Id.*
[40] *Id.* at 391.
[41] *Id.*
[42] *Id.*
[43] *Id.* at 393.

dismissal of the RICO and conspiracy charges.[44] Walters again appealed, challenging the validity of the convictions on the evidence presented.[45] Under 18 U.S.C. § 1341, a person commits mail fraud when (1) after devising a scheme to defraud or to obtain money or property through fraudulent means, that person (2) places in any post office or authorized depository mail matter or knowingly causes delivery of mail (3) for the purpose of executing the scheme.[46] Walters himself never actually mailed anything, nor did he cause anyone else to do so; the question, therefore, became whether mailing was an "essential" part of the scheme as set out in *Pereira v. United States*.[47] Judge Easterbrook, writing for the court, held the answer in the negative.[48] The mailed matter of interest was the falsely-completed forms verifying each student athlete's eligibility to play college football.[49] But, as the court held, whether or not those forms were mailed was irrelevant to the success of Walters' plan.[50] Instead, all that was necessary (aside from the athletes' participation) was total secrecy and the deceit necessary to maintain that secrecy.[51]

The prosecution offered two other theories: (1) that even if Walters himself never mailed anything, he did "knowingly cause" the use of the mail with respect to fraudulent activity under the second element of mail fraud, or (2) that Walters caused the universities to lose their scholarship money by paying it to ineligible athletes, fraudulently obtaining money or property as a result.[52] The court held that as to (1), the argument was essentially the notion that "all frauds involving big organizations necessarily are mail frauds, because big organizations habitually mail things," a claim the court believed unsupported by the evidence put before the jury.[53] As to (2), the court noted that mail fraud required any scheme to defraud, or *for obtaining money or property*, neither of which Walters did because he did not receive any of the scholarship funds

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[44] *Supra* note 37.
[45] *Id.*
[46] 18 U.S.C. § 1341 (2018).
[47] 347 U.S. 1, 8 (1954) (mailing by third party is sufficient to constitute mail fraud when it is "incident to an essential part of the scheme").
[48] *Id.*
[49] *Supra* note 37, at 1222.
[50] *Id.*
[51] *Id.*
[52] *Id.* at 1223–24.
[53] *Id.* at 1223.

himself; rather, he planned to profit via a percentage of the signed athletes' professional incomes.[54] Taken together, the court held that the evidence presented was insufficient to support the conclusion that Walters had committed mail fraud.[55]

V. APPEAL AND PREDICTIONS

While defendants Code and Dawkins will face another criminal trial in April for related charges, defendant Gatto has already started preparing for an appeal.[56] The authors believe that though the facts are not exactly analogous, Gatto's arguments on appeal may at least be kin to those made by Walters in the early 1990s.

The crux of Walters' argument in his case was that there was no scheme to defraud the involved universities of money because, while it may have been true that they were unknowingly paying scholarship funds to ineligible athletes, Walters himself never sought nor received any of that scholarship money.[57] Similarly, the government's theory of wire fraud against Gatto suggests that he defrauded the universities out of this scholarship money by creating a "risk of tangible economic harm . . . including . . . distribution of [the universities'] limited athletic scholarships . . . ."[58] But as with Walters, Gatto never had any intent to "obtain money or property" from the universities; rather, he intended to secure lucrative representation contracts with college athletes, planning to profit from those in the long-term. A crucial element of wire fraud is therefore missing.

Though the Seventh Circuit *Walters* opinion will not be binding in the Second Circuit, the authors think it likely that Gatto's counsel has drawn upon the same similarities noticed here. Earlier in the proceedings, the defense filed a motion to dismiss the initial indictment of Gatto by a grand jury, asserting substantially the same argument outlined in the preceding paragraph: that the indictment "failed to allege that the defendants sought

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[54] *Id.* at 1224.
[55] *Id*. at 1227.
[56] Hobson, *supra* note 1.
[57] *See supra* note 37.
[58] Sealed Complaint, *U.S. v. James Gatto et al.* (filed Sept. 25, 2017).

to obtain money or property from the universities . . . ."[59] Following a second indictment containing minor changes to the factual allegations but none regarding the charges brought, the defense filed to dismiss that allegation as well.[60] Under these circumstances it seems likely on appeal that at least the wire fraud conviction may be reversed because the evidence may not support all elements of the crime.

Gatto was also charged and convicted of conspiracy to commit wire fraud. The prosecution presented evidence demonstrating the defendants acted as though they knew their actions were illegal,[61] including, for example, statements by the defendants to the athletes that cash payments are better because they were harder to track.[62] Whether or not a conspiracy was committed is a factual question that the Second Circuit should leave to the jury.

The conviction of Gatto and his associates exposed an underground element of the college basketball world that if nothing else may continue to add to the debate surrounding compensation for NCAA athletes. For Gatto, however, the story is far from over. A conviction for conspiracy under federal law carries the same penalty as a conviction for the crime alleged in the conspiracy.[63] Even if Gatto successfully challenges the wire fraud charge, jail time is still a probable outcome, especially as the prosecution has made it clear it wants to secure jail time for the defendants to reflect the seriousness of the defendants' conduct and promote deterrence.[64] Regardless of how the case proceeds, there is no doubt that members of the college basketball community will have their eyes on the Second Circuit for months to come.

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[59] Defendants' Memorandum of Law in Support of Their Joint Motion to Dismiss the Second Superseding Indictment, *United States v. James Gatto, et al.* (filed Sept. 12, 2018).
[60] *Id.*
[61] Hobson, *supra* note 1.
[62] *Id*.
[63] 18 U.S.C. § 1349 (2018).
[64] Danielle Lerner, *Federal Prosecutors Demand Jail Time for Men Convicted in College Basketball Trial*, USA TODAY (Feb. 27, 2019), https://www.usatoday.com/story/sports/ncaab/2019/02/27/college-basketball-recruiting-investigation-gatto-dawkins-code-face-jail-time/3003002002/.

HEALTHY MIND, HEALTHY BODY: AN EXAMINATION OF THE DUTY A UNIVERSITY OWES TO ITS STUDENT-ATHLETES REGARDING MENTAL HEALTH TREATMENT

By: Sara Kirtley[*]

ABSTRACT

With more and more university students in general, but student-athletes in particular, suffering from mental health issues, ranging from eating disorders to depression to serious anxiety, it seems like universities should have to provide some kind of mental health treatment for their student-athletes, especially considering their duty to provide physical health treatment for sports related injuries. However, the question is whether student-athletes would actually have an actionable right to mental health treatment, that they could turn into a successful claim against a university if the university failed to provide them with mental-health treatment.

[*] Sara Kirtley is a J.D. Candidate at Marquette University Law School.

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I. INTRODUCTION

Student-athlete. The term conjures up an image of a successful, healthy, and popular student, probably a male football or basketball player. If the term is changed to student-athlete health, the issues that most likely come to mind are physical, such as torn muscles, concussions, or heart problems. However, some of the most crucial issues plaguing young student-athletes in college are mental health issues, though they go largely unnoticed until the damage is already done. For instance, celebrated defensive tackle Will Heininger said that he was plagued with overwhelming emotional pain, insomnia, and depression while playing football at Michigan.[1] The difference between the treatment of his mental issues and the treatment of his torn ACL in 2010 is clear — everyone seemed to know about the torn ACL, but almost no one was aware of his depression.[2] Similar stories exist at schools across the nation. A former Syracuse offensive tackle recounted battling depression and even considering suicide after a particularly grueling scrimmage.[3] In the most tragic cases, the athletes are unable to discuss their suffering in college at all before it becomes distressing to the point that it drives them to suicide, as was the case with nineteen-year-old University of Pennsylvania runner Madison Holleran in 2014.[4]

Mental health issues plaguing student-athletes is an issue coming to the forefront in the media. As athletes are becoming more willing to share their mental health status with the public, the NCAA has also taken notice of the issue. In 2013, Dr. Brian Hainline, the chief medical officer of the NCAA, designated mental health as the number one health and safety concern for the NCAA.[5] However,

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[1] Nicole Noren, *Taking Notice of Hidden Injury*, ESPN, http://www.espn.com /espn/otl/story/_/id/10335925/awareness-better-treatment-college-athletes-mental-health-begins-take-shape (last visited March 1, 2018).
[2] *Id.*
[3] Lina Flanagan, *When College Athletes Face Depression*, THE ATLANTIC, https://www.theatlantic.com/education/archive/2014/03/when-college-athletes-face-depression/284484/ (last visited April 11, 2018).
[4] *Mental Health Issues a Huge Challenge for NCAA in Regard to Student-Athletes,* FOX SPORTS, https://www.foxsports.com/other/story/madison-holleran-ncaa-student-athletes-mental-health-issues-032515 (Oct. 8, 2018).
[5] *Id.*

although organizations such as the NCAA and universities are willing to recognize a problem exists, the extent of any legal responsibility is much less clear. Some courts have found that universities owe their student-athletes a duty of care, especially when the athlete has been specifically recruited to the school to play a particular sport. The question is how that duty of care translates to providing mental health treatment to student-athletes. Using past court decisions and industry sources, it seems clear that universities could be found to owe a duty to provide mental health treatment to their student-athletes, especially as the issue has become an increasingly important one.

II. MENTAL ILLNESS IN STUDENT-ATHLETES

Before analyzing the legal duty owed by universities, it is crucial to recognize the issues relating to mental health that student-athletes face every day. Mental health problems are an issue for student-athletes, not only as college students in general, but also as athletes in a competitive environment.

A. Mental Health Problems Facing College Students.

When compared with the general population, students seem to have poor overall health and in particular, endure difficulties with their emotional health.[6] Studies have shown that that the number of mental health problems among college students is increasing.[7] Before 1994, the most common problems reported to university counseling centers were relationship problems, but after 1994, stress and anxiety became the problems most commonly reported.[8] There are many stressors in the college environment that contribute to the development of mental health problems, including moving to a new place, living with new people in confined spaces, and for many

[6] Kim Storrie, et al., *A Systematic Review: Students with mental health problems-A growing problem*, 16 INT'L J. NURSING PRAC. 1, 4 (2010).
[7] Linda Cook, *Striving to Help College Students with Mental Health Issues*, 45 J. PSYCHOSOCIAL NURSING & MENTAL HEALTH SERVS. 40, 44 (2007).
[8] *See* Storrie, *supra* note 6.

students, dealing with being away from family and friends for the first time.[9] Students also have to deal with the academic rigors of the university setting, balancing their class schedules with work and social obligations.[10]

The number of students suffering from mental illness has proven to be fairly significant. In one study, forty-seven percent of students reported at least one mental health concern.[11] These problems run the spectrum of mental health issues, but the most common problems reported have been anxiety and depression, with some instances of psychotic disorders.[12] Across the board, distress for college students is extremely high; in the same study referenced above, eighty-three percent of students reported being either moderately or severely distressed.[13] Students struggling with their emotional health may face other problems as well, including trouble maintaining an acceptable GPA which often leads to the students dropping out entirely.[14]

The most concerning issue related to the increased mental health problems in college students is the number of students attempting or committing suicide. According to a 2013 article, suicide was found to be the second-leading cause of death among college students.[15] Student-athletes like Madison Holleran are among the college students suffering from these serious mental health issues, which can tragically lead to suicide in the worst cases.[16]

B. Mental Health Problems in Student-Athletes

Recent studies have shown that college athletes in particular "are susceptible to many mental health problems, such as depression, suicidal ideation, alcohol or substance abuse, and disordered

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[9] *See* Cook, *supra* note 7, at 41.
[10] *Id.*
[11] *See* Storrie, *supra* note 6, at 2.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] Deborah J. Taub & Jalonda Thompson, *College Student Suicide*, 2013 NEW DIRECTIONS FOR STUDENT SERVS. 141 (2013).
[16] FOX Sports, *supra* note 4.

eating."[17] For Kally Fayhee, for example, her anxiety about swimming eventually led to anxiety about eating and body weight, which resulted in an eating disorder.[18] One study found that thirty-three percent of Division I college athletes self-identified as depressed, and twenty-three percent of Division I college athletes met clinical levels of depression.[19] Additionally, a 2015 study found that suicide was the fourth leading cause of death for college athletes, and another found that nine percent of athletes across divisions felt a moderate-to-severe need to seek suicide prevention assistance.[20] Depression has been found across different sports and both genders, although a higher prevalence of clinically relevant symptoms appeared in female athletes compared to males.[21] Will Heininger, a former college football player, now works with student-athletes suffering from mental health issues and has said, "[i]t's something that's on their minds constantly with the pressures they face, yet they feel afraid to voice their opinions for fears of judgement, shame, or worse, losing their scholarships."[22]

Despite the fact that participation in athletics can help with mental health symptoms, there are certain factors relating to athletic competition that put student-athletes at an increased risk for mental health issues in general, and for increased severity of those issues.[23]

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[17] Matt Moore, *Stepping Outside of their Comfort Zone: Perceptions of Seeking Behavioral Health Services among College Athletes,* J. OF ISSUES IN INTERCOLLEGIATE ATHLETICS 130, 131 (2017).

[18] Ashley Scoby, *How a Michigan program is focusing on athletes' mental health*, ESPNW, (Mar. 31, 2016), http://www.espn.com/espnw/life-style/article/15102701/michigan-mental-wellness-program-athletes-connected-aims-help-student-athletes.

[19] Moore, *supra* note 17.

[20] *Id.*

[21] Andrew Wolanin et al., *Prevalence of clinically elevated depressive symptoms in college athletes and differences by gender and sport*, 50 BRIT. J. SPORTS MED. 167, 169 (2016).

[22] Associated Press, *Athletes' mental health to be explored*, ESPN (Jul. 16, 2014), http://www.espn.com/college-sports/story/_/id/11225172/university-michigan-gets-grant-mental-health-initiative.

[23] Shelley N. Armstrong et al., *Depression in Student-Athletes: A Particularly At-Risk Group? A Systematic Review of the Literature*, 7 ATHLETIC INSIGHT 177 (2015).

College athletes in particular may experience increased anxiety because of the increased mental and physical demands that come with frequent athletic practice and competition, the difficulty of balancing their athletic participation with their schoolwork, and increased scrutiny from their peers, both on and off the playing field.[24] Performance anxiety during competitions can be a particularly strong contributor to student-athlete anxiety issues that differ from those of the average college student.[25] These anxieties may be further exacerbated when competitions are broadcasted on television or the internet. Madison Holleran, the nineteen-year old Penn State track athlete who committed suicide in 2014, was, for example, known to be a perfectionist who struggled whenever she "performed poorly."[26] There were times when Madison broke down in tears after not achieving the results she wanted.[27] For student-athletes already working to live up to academic expectations, the added pressure of living up to athletic expectations as well can lead to mental illness. Another student, Adam Kern, described his struggles with participating in cross-country at Michigan and how he constantly felt as though he was fighting to stay on the team, which eventually transformed his love of running into hatred.[28] When Kern was eventually cut, he described it as "his worst nightmare" because "[m]y identity, I guess you could say, was cut away. I was not in a good place."[29]

Another particular issue for student-athletes and their mental health is the psychological response to injuries during practice or competition.[30] Because student-athletes in particular connect self-esteem and self-worth with athletic success, an injury from athletic practice or competition can trigger depression.[31] For instance, in a

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[24] *Id.* at 183.
[25] Margot Putukian, *The psychological response to injury in student athletes: a narrative review with a focus on mental health*, 50 BRIT. J. SPORTS MED. 145, 145 (2016).
[26] Kate Fagan, *Split Image*, ESPN (MAY 7, 2015), http://www.espn.com/espn/feature/story/_/id/12833146/instagram-account-university-pennsylvania-runner-showed-only-part-story.
[27] *Id.*
[28] Scoby, *supra* note 18.
[29] *Id.*
[30] Putukian, *supra* note 25.
[31] *Id.*

study of Division I football players, thirty-three percent of injured athletes reported high levels of depression, compared to twenty-seven percent of non-injured athletes.[32] In reviewing details in the backgrounds of five collegiate athletes who committed suicide, the fact that common factors included having a successful athletic career prior to injury, as well as a serious injury which required surgery is especially concerning.[33] Unfortunately, injuries are fairly common for athletes, especially athletes who are not professionals and have other concerns such as academics. Thus, many student-athletes are at risk for the types of injuries that can lead to increased depression and suicidal ideation. Katie McCaffertey, a runner for Georgetown, talks about how the hardest thing for her was dealing with a stress fracture she suffered from after one competition.[34] For McCaffertey, the injury caused her to feel as though she had lost an important part of her identity, that of a runner, and even though it was a temporary loss, it caused a loss in confidence and overall well-being for her.[35] According to the assistant athletic director for sports medicine at Syracuse, Timothy Neal, the psychological issues stemming from athletic injuries tend to be much worse than people realize. Yet issues such as these continue to be underappreciated by those involved with student-athletes and by student-athletes themselves.[36]

These issues are becoming more well-known to professionals in athletic departments, but receptivity to creating actual change varies across the board. In a positive move, research has shown that more NCAA Division I athletic departments are hiring sport psychology consultants, with approximately from thirty to fifty percent of departments having contracts for either full-time or part-time psychology consultants.[37] However, other research showed that

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[32] *Id.*
[33] *Id.*
[34] Flanagan, *supra* note 3.
[35] *Id.*
[36] *Id.*
[37] Craig A. Wrisberg et. al., *An Exploratory Investigation of NCAA Division-I Coaches' Support of Sport Psychology Consultants and Willingness to Seek Mental Training Services*, 24 THE SPORT PSYCHOLOGIST 489 (2010).

Division I athletic coaches overall were much more willing to send a student-athlete to a sport psychology consultant for a performance issue, rather than for personal problems.[38] In general, little has been researched about whether or not student-athletes are using these services. Although, research about interest in the sport psychology consultants training showed that interest in certain skills varied widely based on gender, type of sport, and prior experience with psychological training.[39] Similarly, although more schools are hiring these kinds of psychological professionals, it remains up to the student-athletes or their coaches to actually use their knowledge or volunteer to participate in their programs.[40]

C. Current NCAA Response to Mental Health Issues

In 2014, the NCAA published a collection of essays from former and current student-athletes, mental health professionals, as well as those in university athletic departments, which discussed a range of topics related to student-athlete mental health.[41] The essays include first person perspectives on mental health issues, descriptions of different mental health disorders, as well as more specific takes like risk factors for mental illness and the results of being injured on mental health.[42] Within the essays on the specific mental health disorders are text boxes which include advice on what can be done, by coaches, athletic trainers, or athletic departments in general, to help student-athletes suffering from these disorders.[43] The advice includes things like screening student-athletes for potential disorders, treating mental health problems the same way physical problems are treated, and just generally treating the issues as seriously as possible as soon as they are brought to personnel's attention.[44] The essays on risk factors include a focus on factors like

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[38] *Id.*
[39] *See Id.*
[40] *Id.*
[41] *See* Gary T. Brown, *Mind, Body, and Sport: Understanding and Supporting Student-Athlete Mental Wellness*, NAT'L COLLEGIATE ATHLETIC ASS'N, http://www.ncaapublications.com/productdownloads/MindBodySport.pdf (last visited February 22, 2018).
[42] *See Id.*
[43] *Id.*
[44] *Id.*

the time commitment of sports, pressure to perform, and the strong focus on group identity for teams.[45] Overall, this particular set of essays focuses more on educating individuals involved in college athletics on recognizing mental illness in student-athletes than on providing specific steps for colleges to follow in terms of changing their programs to better provide mental health treatment.

In 2016, the NCAA, in collaboration with the Sport Science Institute, published a best practices guide for understanding and supporting student-athlete mental wellness.[46] The guide was drafted by a core writing group from the multidisciplinary task force the NCAA formed in 2013 to address mental health issues facing NCAA student-athletes.[47] This guide is endorsed by a variety of organizations, including the American College of Sports Medicine, the Higher Education Mental Health Alliance, and the National Alliance on Mental Illness, among many others relating to both mental illness in general, and sports psychology specifically.[48] The guide's appendixes include both a resource checklist for mental health care, and suggested screening instruments to help identify student-athletes suffering from certain disorders.[49] In general, the 2016 guide suggests that the evaluation and treatment of student-athletes' mental health issues should be coordinated through athletic trainers and team physicians.[50] It also proposes that individual athletic departments should have written institutional procedures for managing emergency mental health situations and mental health referrals.[51] The guide finishes by encouraging athletic departments to work towards normalizing seeking out mental health treatment, and by also suggesting that a mental health screening be made a part

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[45] *Id.*

[46]The Sports Science Institute, *Interassociation Consensus Document: Mental Health Best Practices-Understanding and Supporting Student-Athlete Mental Wellness*, NAT'L COLLEGIATE ATHLETIC ASS'N, http://www.ncaa.org/sites/default/files/SSI_MentalHealthBestPractices_Web_20170921.pdf (last visited April 11, 2018)

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

of the pre-participation exam for student-athletes.[52] Despite these encouraging steps by the NCAA, this best practices guide provides only recommendations, not requirements, for universities.[53] In the end, each university and each individual athletic department makes the determination on their own as to how to respond to the mental health issues that their student-athletes may be facing.

III. DUTY OF CARE

With the focus on student-athlete mental health growing, it seems like the atmosphere supports the idea of a student-athlete bringing a case which would find that universities owe a duty to student-athletes to provide mental health treatment. In order for a case like that to be successful, universities would have to owe a duty of care to student-athletes in general, and then failure to provide mental health treatment would have to be found to be a violation of that duty of care.

A. University Duty of Care to Students

A potential argument for a university owing a student-athlete a duty of care could come from the university and student relationship in general. However, in general, courts have not ruled that a duty of care is created by the student-university relationship. In *Beach v. University of Utah,* a student was injured during a field trip held by her professor through the university.[54] The student had been drinking on the trip, and on her way back to her tent one evening, she got lost and fell, sustaining some injuries.[55] The student attempted to assert that the university had a duty to supervise and protect her while she was on a university sanctioned trip.[56] The court rejected this argument, finding that this student's situation did not differ from any other student on the trip, and so she did not have a special relationship with the university.[57] Without a special

[52] *Id.*
[53] *Id.*
[54] Beach v. Univ. of Utah, 726 P.2d 413 (Utah 1986).
[55] *Id.*
[56] *Id.*
[57] *Id.*

relationship, the university did not have any kind of affirmative duty to protect her, and the field trip itself was not enough to create a special relationship.[58] Essentially, the court found that universities do not generally have a custodial relationship with their adult students, and therefore there must be some kind of further relationship between the students and the university to create any kind of duty of care.[59]

Other cases, like *University of Denver v. Whitlock*, have come to similar conclusions. In that case, the court found that the university-student relationship on its own was not enough to create any kind of duty of care, since it was not actually in the educational interests of university students to give universities the obligation to strictly control their behavior.[60] Even when a function is held on university property, courts have not found that fact to be sufficient to create a duty of care between general students and the university.[61] Moreover, specific university personnel also do not generally have any kind of special relationship with students generally, except for in specific cases where "a college student will inevitably relinquish a measure of behavioral autonomy to an instructor out of deference to her superior knowledge, skill, and experience".[62] That finding continues to support the generally agreed upon proposition that universities do not owe a duty of care to their students generally. Only when a special relationship exists is there the potential for a finding that a university owes a specific duty of care.[63]

B. University Duty of Care to Student-Athletes

The NCAA Division I manual specifically lists student-athlete well-being as one of the NCAA's tenets, and says in the manual, "it is the responsibility of each member institution to protect the health of,

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[58] *Id.*
[59] *Id.*
[60] Univ. of Denver v. Whitlock, 744 P.2d 54, 62 (Colo. 1987).
[61] Alumni Ass'n v. Sullivan, 572 A.2D 1209, 1213 (Pa. 1990).
[62] Cope v. Utah State Valley College, 2012 UT App 319, ¶ 14, 290 P.3d 314. (Utah Ct. App. 2012).
[63] *See Id.*

and provide a safe environment for, each of its participating student-athletes".[64] While the NCAA lists protecting health and providing a safe environment for student-athletes as responsibilities, or duties, of the university, the courts have been more clear on exactly what legal duty a university might owe to a student-athlete in terms of their health and safety.

An early case involving a student-athlete took place in 1981 in Missouri, when a member of the softball team was struck in the eye during a practice.[65] Although it was said that the impact from the ball striking the player was extremely loud, the coaches of the team did not direct nor suggest the player see a doctor, and no one attempted to provide her with first aid.[66] When the student-athlete eventually sued her college for failing to provide her with medical assistance, the Eighth circuit relied on a previous Missouri decision which set forth three elements required to find a duty: 1) the defendant must have been able to appreciate the severity of the plaintiff's pain, 2) one or more of the defendants had to have been able to provide medical assistance, and 3) providing medical attention would have avoided the injury's ultimate harm.[67] In that case, it was therefore held that a university could potentially owe their student-athletes a duty to provide medical assistance, if the Court found that the three elements were satisfied.[68]

In a case in 1993, the Third Circuit found that a special relationship exists between a student-athlete and the university the athlete plays for.[69] In that case, a university lacrosse player died of cardiac arrest during a lacrosse practice.[70] The plaintiffs argued that the university did not take steps to protect against such an outcome during a practice, and therefore adequate medical care did not reach the

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[64] National Collegiate Athletic Association, *NCAA Division I Manual 2016-2017*, NCAA.org, Rule 2.2.3, http://www.ncaapublications.com/productdownloads/D117.pdf

[65] Stineman v. Fontbonne College, 664 F.2d 1082, 1085 (8th Cir. 1981).

[66] *Id.*

[67] *Id.* at 1086.

[68] *Id.*

[69] Kleinknecht v. Gettysburg College, 989 F.2d 1360, 1368 (3rd Cir. 1993).

[70] *Id.* at 1363-64.

player before he had already passed away from his symptoms.[71] The player's parents brought a wrongful death claim against the university, arguing that the student-athlete had a special relationship with the university because of his status as a member of the university's intercollegiate athletic team.[72] The court found that because the student-athlete in this case had chosen this university specifically because of their athletics program, because the university had specifically recruited this student for his athletic abilities, and because he was participating in a scheduled athletic activity for the athletics program that he had chosen the university for, there was a special relationship between the student-athlete and the university.[73] In this case, that special relationship meant that the university had a duty to respond quickly to a medical emergency involving a student-athlete during a scheduled athletic event.[74] From this case, it became clear that the relationship between a student-athlete and a university was indeed a special relationship, if the university had recruited that student-athlete specifically.[75] That special relationship has been extended to university-hired athletic staff as well as just the university itself.[76] University-hired athletic staff refers to the fact that coaches and athletic trainers also have a duty to exercise reasonable care for the health and safety of student-athletes.[77]

In recruiting student-athletes, it is important to note that the university's duty of care can be satisfied by testing athletes for medical issues and subsequently making a decision as to their ability to participate.[78] In *Knapp v. Northwestern University*, a student-athlete suffered from cardiac issues during a high school basketball

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[71] *Id.* at 1365, 1373.
[72] *Id.* at 1366.
[73] *Id.* at 1369.
[74] *Id.* at 1366.
[75] *Id.* at 1366-72.
[76] Pinson v. State, No. 02A01-9409-BC-00210, 1995 Tenn. App. LEXIS 807, at *12 (1995).
[77] Searles v. Trs. of St. Joseph's College, 695 A.2d 1206, 1209 (Me. 1997).
[78] Knapp v. Northwestern Univ., 101 F.3d 473, 785 (7th Cir. 1996).

game.[79] Although the player recovered, the university where he had previously accepted a basketball scholarship disqualified him from playing on their basketball team.[80] The court ruled that it was within the university's rights to determine that a student was not medically qualified to play.[81] The court specifically said that "medical determinations of this sort are best left to team doctors and universities as long as they are made with reason and rationality and with full regard to possible and reasonable accommodations."[82] Therefore, it is within the universities' rights to utilize their duty of care towards the health and safety of student-athletes by refusing to allow a student to participate in athletics when there is a reasonable risk of injury.[83]

Courts have extended the special relationship beyond just student-athletes who have been specifically recruited to participate in intercollegiate athletics. In *Davidson v. University of North Carolina at Chapel Hill*, a junior varsity cheerleader at the university was injured while performing a stunt with her squad in the absence of mats.[84] In this particular case, the university failed to provide a coach to the junior varsity cheerleading squad, and the only university employee involved with the squad was an administrative advisor.[85] In contrast to the varsity cheerleading squad that received a supervisor and safety instructions.[86] Despite the absence of a coach or supervisor, the university still had specific standards of conduct for the junior varsity squad, and they were considered representatives and ambassadors of the school, similar to the varsity cheerleading squad.[87] In this case, the injured student-athlete specifically stated that she expected the university to provide sufficient training to all cheerleaders, not just the varsity squad, and that she expected the university would "look out for her."[88]

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[79] *Id.* at 476.
[80] *Id.* at 477.
[81] *Id.* at 484.
[82] *Id.* at 485.
[83] *Id.* at 485-86.
[84] Davidson v. Univ. of N.C. at Chapel Hill, 142 N.C. App. 544, 546 (2001).
[85] *Id.*
[86] *Id.*
[87] *Id.* at 548.
[88] *Id.* at 550.

When determining whether the university owed this student-athlete a duty of care, the court found it particularly significant that the university exerted considerable control over the junior varsity cheerleading squad, especially because that control may have created a higher expectation from the student-athlete that the university would protect her.[89] In this case, the court found the existence of a special relationship because the student-athlete was injured during practice of a school-sponsored intercollegiate team.[90] Additionally, university owed a duty of care to the student-athlete because the university assumed responsibilities to the cheerleading teams in particular by providing the varsity squad with supervisors and safety instructions, so they owed similar care to the junior varsity squad as well.[91] Davidson is particularly important because it extended the duty found in *Kleinknecht v. Gettysburg College* from recruited student-athletes to student-athletes in general. The junior varsity cheerleaders had not been specifically recruited by the university to participate in athletics, but a duty of care was still found to be owed to them by the university.[92]

Although many courts have found that universities owe a duty of care to student-athletes, there are other cases which found that universities do not have a special relationship with their student-athletes, and therefore do not owe a duty of care to those students beyond that owed to the general student population. For instance, in a case involving an injured football player at Brigham Young University ("BYU"), the court ruled that a university has an educational, not a custodial, relationship with its adult students; therefore, the university cannot owe any special duty of care.[93] Despite the player's argument that BYU owed him a duty of care because the university provided him with medical services, the court

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[89] *Id.* at 555-56.
[90] *Id.* at 556.
[91] *Id.* at 551.
[92] James J. Hefferan Jr., *Taking One for the Team: Davidson v. University of North Carolina and the Duty of Care Owed by Universities to Their Student-Athletes,* 37 WAKE FOREST L. REV. 589 (2002).
[93] Orr v. Brigham Young Univ., 1997 U.S. App. LEXIS 6803 (10th Cir. 1997).

still found that the most the football player could actually assert was medical negligence against the medical providers.[94] In another case where the court denied an assertion that a university owed any duty of care, a student-athlete was punched during a college basketball game.[95] The student attempted to argue for a duty of care under the theory that he was an employee and the school hosting the basketball game was therefore his employer, but the court rejected this argument.[96] It is important to note that this particular case does have significant differences from others where a duty of care has been found. The student in question was not suing the university he attended, but instead another university that happened to host the game where he was injured.[97] It is possible the court would have found that the student's own university owed him a duty of care, but other universities have never been found to owe a duty of care to students merely visiting their campus or attending campus events, even when they are participating in those events.[98]

C. NCAA Duty of Care to Student-Athletes

The primary purpose of the National Collegiate Athletic Association ("NCAA") as listed in the NCAA manual under Rule 1.2(a) is "[t]o initiate, stimulate and improve intercollegiate athletics programs for student-athletes and to promote and develop educational leadership, physical fitness, athletics excellence, and athletics participation as a recreational pursuit."[99] Although not as clear as other related rules, a student-athlete could still read this rule as the NCAA assuming a duty to care for their health. However, courts have never specifically found that the NCAA owes a duty of care to intercollegiate student-athletes.

The NCAA manual may be viewed as a contract, creating contractual obligations, but that contract exists only between the

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[94] *Id.* at 8.
[95] Kavanagh v. Trs. of Boston Univ., 795 N.E.2d 1170, 1173 (Mass. 2003).
[96] *Id.* at 1174-75.
[97] *Id.* at 1172-73.
[98] *Id.* at 1177.
[99] Rule 1.2(a) *NCAA Division I Manual 2016-2017*, NATL COLLEGIATE ATHLETIC ASS'N, http://www.ncaapublications.com/productdownloads/D117.pdf (Last Visited May 3, 2018).

member universities and the NCAA, not between student-athletes and the NCAA.[100] In fact, the court in *Bloom v. NCAA* specifically stated that student-athletes were not third party beneficiaries to NCAA rules, with the exception of eligibility rules.[101] Under this ruling, the only way a student-athlete could bring a case against the NCAA would be if they were arguing an eligibility rule, rather than a health or safety rule.[102] Similarly, a subsequent case held that the NCAA does not assume any kind of duty of care when they provide information and guidance to their member universities; therefore, student-athletes cannot make an argument that the NCAA assumed a duty of care to them when they provided guidance to the universities.[103] An exception to this ruling exists pertaining to concussion guidance. A court found that the NCAA undertook and assumed a duty to protect student-athletes from brain injuries when they created and implemented concussion management plans.[104] A second exception exists when a court ruled that the NCAA violates a duty of care when they test for something at Division I universities but fail to do so at Division II or Division III universities, because the NCAA represents all intercollegiate athletics programs, not just those at Division I schools.[105] In general, however, student-athletes have not yet brought a successful suit against the NCAA in regard to a duty of care owed to student-athletes by the NCAA.

IV. ANALYSIS

The crucial question for student-athletes suffering from mental health problems is whether they could bring a successful claim against their university or the NCAA for failing to provide them with mental health treatment. In terms of the NCAA, the student-athlete's claim would likely fail, since courts have been reluctant to

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[100] Bloom v. Natl. Collegiate Athletic Ass'n., 93 P.3d 621 (Colo. App. 2004).
[101] *Id.* at 623-24.
[102] *Id.*
[103] Lanni v. Natl. Collegiate Athletic Ass'n, 42 N.E.3d 542, 550 (Ind. Ct. App. 2015).
[104] Bradley v. Natl. Collegiate Athletic Ass'n, 249 F. Supp. 3d 149, 168 (D. D.C. 2017).
[105] Hill v. Slippery Rock Univ., 138 A.3d 673 (Pa. Super. Ct. 2016).

attach a duty of care for student-athletes to the NCAA. As providing mental health treatment would not fall under an NCAA eligibility rule, it would be unlikely that the NCAA could be found to have a duty of care to student-athletes as related to mental health.[106] If a student were to bring a successful claim against the NCAA, it would more than likely have to occur in a very specific circumstance. For instance, under the decision in *Hill v. Slippery Rock University*, a student-athlete at a Division II or Division III school could bring a successful claim if the NCAA happened to start providing mental health treatment to Division I student-athletes.[107] That specific situation is highly unlikely to ever occur; therefore, without a finding that the NCAA owes a duty of care to student-athletes, it would be very difficult for a student-athlete to prove that the NCAA violated a duty of care by failing to provide mental health treatment, even with the existence of guidelines for universities regarding mental health.[108]

When it comes to the university's duty of care, a student-athlete is in a much better position. Although courts have not found that students have a right to participate in college athletics[109], courts have found that universities owe their student-athletes some duty of care. Specifically, universities owe a duty of care to provide treatment to student-athletes when they are injured during athletic participation for an activity they were recruited for.[110] Under the ruling in *Kleinknecht v. Gettysburg College*, a student-athlete could potentially bring a successful claim for a university's failure to provide mental health treatment if they were specifically recruited to participate in athletics by the university, and their mental health issues resulted from participating in that sport.

The more difficult part for student-athletes would be making the connection between athletic participation and their mental health issues. Although student-athletes have been found to suffer from

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[106] *See* Bloom, *supra* note 101.
[107] *See* Hill, *supra* note 106.
[108] Knelman v. Middlebury College, 898 F. Supp.2d 697, 714 (D. VT. 2012).
[109] Adam Epstein & Paul M. Anderson, *The Relationship Between a Collegiate Student-Athlete and the University: An Historical and Legal Perspective*, 26 MARQ. SPORTS. L. REV. 287, 288 (2016).
[110] Kleinknecht, 989 F.2d at 1368.

mental health issues at significant rates[111], proving the connection between athletics and those issues could be difficult, given that the average college student is also likely to experience mental health issues.[112] The connection between athletic participation and mental health problems is tenuous, especially for individuals in the college environment. Since college athletes are still experiencing the other stressors which have been linked to mental health problems, as well as academic stress,[113] universities would have a plausible defense to a claim that they violated their duty of care to student-athletes by failing to provide mental health treatment. Since universities have not been found to owe any duty of care to their students in general[114], they cannot owe a duty to provide mental health treatment for mental issues that relate to the university environment in general. Even if a court did rule that a university had a duty to provide mental health services to every student on campus, universities likely fulfill that duty by providing general counseling services. A university's duty of care to student-athletes has only been found to exist when the student-athlete is injured in the activity they participate in for the university.[115] Without a clear connection between the athletic activity and the mental health problem, a university would probably not violate their duty of care by failing to provide mental health treatment.

A student-athlete who was injured while participating in an athletic event, and thereafter suffered from mental health problems could possibly have more success. Since a strong connection has been proven between athletic injuries and mental health problems like depression[116], the connection between athletics and the mental health problems would be more clear in a case such as Katie McCafferty's.[117] In that case, as long as the student-athlete's mental health problems were documented to have begun after the injury

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[111] Moore, *supra* note 17, at 131.
[112] Storrie, *supra* note 6, at 2.
[113] Cook, *supra* note 7, at 41-42.
[114] Beach, 726 P.2d at 415, 420.
[115] Kleinknecht, 989 F.2d at 1368.
[116] Putukian, *supra* note 25, at 145.
[117] Flanagan, *supra* note 3.

occurred, they would have strong evidence that it was athletic participation that caused their mental health problems. Their case would be stronger if they could prove that the university knew or should have known that an athletic injury was likely to result in mental health problems. The likely outcome if a student-athlete did bring a successful case similar to this one would be that mental health treatment would become a common part of after-injury treatment, which could go far in assisting student-athletes suffering from mental health problems.

For the most part, student-athletes would have a difficult time proving that a failure to provide mental health treatment is a violation of a university's duty of care. The connection between mental health problems and athletic participation is not clear enough yet, and it would seem unfair to hold a university accountable for every student-athlete's mental health problems. The best possibility for finding that a university has to provide mental health treatment would be for a student-athlete who has suffered from an injury during an athletic activity because that situation presents the clearest connection between athletics and mental health issues.

V. CONCLUSION

It is well-recognized that college students are suffering more from mental health issues. It also seems clear that these students are failing to seek out the proper treatment, whether due to stigma or lack of knowledge about available services. The problem seems to be particularly serious in student-athletes. Although athletic participation in some ways can lower depression, it also appears to create issues in terms of getting treatment. Performance failures and injuries can also exacerbate existing mental-health issues.

Despite these problems, there seem to be significant hurtles to the idea that a university must provide their student-athletes with mental health treatment. It would be difficult to prove that participation in athletics causes the "injury," which in many cases is necessary in physical injury cases to prove that a university failed to provide reasonable care. It is also difficult to prove that a university is not fulfilling a duty, given that most universities provide counseling services on campus. In order for a case to succeed in court, there

would need to be a highly specific set of facts, alleging that athletics created or exacerbated the mental health issue, and that the university failed to reasonably care for the student when they discovered the problem. However, the fact that the NCAA has taken note of the issue, and is providing guidelines for universities on proper treatment and rules is an excellent sign that things are moving in the right direction.

HAVE UNIVERSITIES SOLD THEIR SOULS TO THE DEVIL: THE UNACCEPTABLE COSTS OF PRIORITIZING ATHLETICS OVER ACADEMICS

By: David E. Missirian[*]

ABSTRACT

The article will examine what it means "to win" in today's university sporting world and what the prize to be won is. In examining how the meaning of winning has changed over time, the article will look particularly at some of the indirect or hidden costs of achieving athletic excellence in today's highly competitive college sports. Ultimately, this article poses and attempts to answer the question: at what point does the cost to student athletes' health and safety become too high to justify the prize of "winning"?

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I. INTRODUCTION

What would you give to be a winner and not a loser? To have all those things the winners receive: the accolades, the prestige, the money, the fame? After all, isn't that what you have been told to strive for your entire life? A well-known quote states the commonly accepted paradigm succinctly: "There are only two types of people in this world, Winners and Losers."[1] Americans are competitive by nature and history.[2] In a country where bigger and faster have long been perceived as better,[3] it is no surprise that many indices declare the United States to be the most competitive country in the world.[4] This competitive spirit extends beyond the boardroom and the classroom to the athletic field. Indeed, the United States' cultural imperative to be perceived as a winner, has become so powerful that even universities, whose traditional objective has been to educate young adults and to prepare them for productive and meaningful lives,[5] have come to value the perception of athletic "winners" as much more desirable than attaining high academic ratings and reputation.[6]

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[1] Unknown source

[2] Matthew Hutson, *Why We Compete*, THE ATLANTIC, (Oct. 2015), https://www.theatlantic.com/magazine/archive/2015/10/why-we-compete/403201/.

[3] Tony Swartz, *When 'More, Bigger, Faster' is Not Better*, NY TIMES (Sept. 13, 2013), https://dealbook.nytimes.com/2013/09/13/when-more-bigger-faster-is-not-better/.

[4] *See, e.g.*, Victoria Richards, *America is Officially the Most Competitive Country in the World*, INDEPENDENT (May 29, 2015), https://www.independent.co.uk/news/business/news/america-is-officially-the-most-competitive-country-in-the-world-10280956.html.

[5] Bethany Zecher Sutton, *Higher Educations Public Purpose*, AACU (Jun 20, 2016), https://www.aacu.org/leap/liberal-education-nation-blog/higher-educations-public-purpose.

[6] *See, e.g.,* Hunter Sharf, *25 Top Colleges That Dominate Academically and Athletically*, FORBES (Aug. 2, 2017), https://www.forbes.com/sites/huntersharf

This article looks at the impact of universities placing an extremely high value on athletic victory. What are universities willing to do, to give up, or to pay to be "winners"? This is the university conundrum today. The article will look at what it means "to win" in today's university sporting world and what the prize to be won is. In examining how the meaning of winning has changed over time, the paper will look particularly at some of the indirect or hidden costs of achieving athletic excellence in today's highly competitive college sports. Ultimately, this article poses and attempts to answer the question: at what point does the cost to student athletes' health and safety become too high to justify the prize of "winning"?

Chronic Traumatic Encephalopathy (CTE) has been identified as a brain disorder suffered by athletes which has its roots in multiple concussive blows received by the student athletes during their athletic play.[7] CTE can cause victims to lose critical brain functions such as memory, impulse control, and a decline in their general ability to think and reason.[8] CTE can result in turning what could have been a prosperous future for a university student into one of despair, decline and eventual death.

If CTE presents such a significant problem, why are universities not simply altering their course of conduct? If the cost to win is so high, why is nobody doing anything about it? The answer lies in the fact that change sometimes requires sacrifice and effort. Sir Issac Newton noted that an object in motion will remain in motion and or direction unless acted upon by an outside force. Thus if universities are heading in a dangerous direction, they will continue over that cliff unless another more powerful force redirects their trajectory. Sometimes those forces push universities to do certain things, such as those things which might reduce expenses and sometimes they pull or lure universities in a given direction, such as finding new lucrative revenue streams. Universities have many interests to

/2017/08/02/25-top-colleges-that-dominate-academically-and-athletically/#47f224f97c3d (stating that "When deciding on a college, most high schoolers and their families think about academics first and foremost. But for many others, a college tradition rooted in athletic prowess is equally important").

[7] ROBERT CANTU, M.D. & MARK HYMAN, CONCUSSIONS AND OUR KIDS 90 (2013).

[8] *Id.* at 92.

satisfy, including not only their students, but also their enrollment numbers, their national prestige, their financial contributions and resources, and their expenditures, just to name a few.

The playwright George Bernard Shaw said progress is impossible without change, and those who cannot change their minds cannot change anything.[9] This is an interesting statement given that a university's purpose is to educate, to mold and to shape the minds of their students. The irony of Shaw's statement is that if universities are unwilling to change their misguided course then they have little hope of changing the minds of the students they teach regarding what are acceptable sacrifices to make for achievement or success.

Universities who refuse to change their sporting programs' behavior will therefore continue down a path which elevates their sporting programs at the physical and mental cost of its players. Current scientific and medical studies can no longer be ignored, which clearly demonstrate the irreparable mental concussive injury being suffered by the players all in the name of climbing higher on the rankings ladder. Hopefully universities will change their focus and seek to model courage and a willingness to engage in continuous self-improvement, then they will be part of that force of change and protect those student athletes who are paying the cost of successful sporting programs head on.

II. WHY IS WINNING SO IMPORTANT?

It is precisely the idea that winning is of the utmost importance which poses the problem. When we examine the historic notion of winning in the sports arena what precisely do we mean? Is there more to winning than just the numbers of wins and loses? Are there other kinds of "wins" or benefits which we need to consider when we talk about sports? Is it possible to lose a game and yet still come

[9] BrainyQuote, George Bernard Shaw, https://www.brainyquote.com /quotes/biography/george_bernard_shaw_biography (last visited Jan. 26, 2019).

out ahead? When our teams win what are the implications and costs to the players, the team, the university and other stakeholders?

A. What does it mean to win the minority view?

"By acclamation, Michael Jordan is the greatest basketball player of all time."[10] He dominated the scene of basketball from the mid 1980's through 2003.[11] He was a basketball player of unprecedented talent. Yet when he finished his career, he shared his perspective on winning, which is somewhat unique as compared to others throughout history. He is quoted as saying: "I've missed more than 9000 shots in my career. I've lost almost 300 games. 26 times, I've been trusted to take the game winning shot and missed. I've failed over and over and over again in my life. And that is why I succeed."[12]

Apparently for Michael Jordan there was a lesson to be learned from the loss. There was something from which he could personally benefit even in the midst of the failure which then propelled him to greater success. What he fails to disclose in that poignant statement is what exactly he learned from those losses, which would allow others to learn from his insight.

It is well known that sports in high school and college have a benefit beyond the prestige of the win. High school students who play competitive sports are less likely to drop out of school and have demonstrated consistently higher test scores in their academic studies.[13] These students also developed better time management skills, along with the ability to articulate specific achievement goals.[14] Sixty percent of female business executives who played

[10] NBA.com Staff, *Legends Profile: Michael Jordon*, NBA: HISTORY, http://www.nba.com/history/legends/profiles/michael-jordan (last visited Jan. 26, 2019).
[11] Biography, *Michael Jordon Biography*, https://www.biography.com /people/michael-jordan-9358066 (last visited Jan. 26, 2019).
[12] Luke Kerr-Dineen, *The 48 Greatest Quotes About Winning*, USA TODAY: FOR THE WIN (Feb. 9, 2016, 2:50 AM), https://ftw.usatoday.com/2016/02/best-sports-quotes-about-winning (citing quote by Michael Jordan).

[13] At Your Own Risk, *The Benefits of High School and Youth Sports,* http://www.atyourownrisk.org/benefits-of-sports/ (last visited Jan. 26, 2019).
[14] *Id*.

competitive sports agreed with the statement that sports participation gave them "a competitive edge" in the business world.[15] Sporting activities also cultivate persistence, patience and practice, all skills which benefit an individual in today's complex world.[16]

B. Winning and the Birth of Intercollegiate Sports

An overview of the collegiate sporting culture reveals some clues into what the majority feel it means to win. In addition, looking at how university sporting events have changed over time illustrates that the benefits and detriments of sports have also changed.

Colleges and universities did not always offer sports as part of their curriculum. In fact, in the very early years of universities in the United States there were no sports offered. Universities were places of learning. Adding sports to the curricula did not happen for several centuries.[17] It is unknown exactly who started the first university in the United States but Harvard University states that they are the "oldest institution of higher education in the United States, established in 1636 by vote of the Great and General Court of the Massachusetts Bay Colony."[18] Yale was the third oldest established in 1701 with University of Pennsylvania being fourth established by

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[15] *Id.*

[16] Grace Chen, *10 Reasons Why High School Sports Benefits Students*, PUBLIC SCHOOL REVIEW (June 12, 2017), https://www.publicschoolreview.com /blog/10-reasons-why-high-school-sports-benefit-students.

[17] Dr. Carol Barr, *History of Faculty Involvement in Collegiate Athletics,* NCAA FAR STUDY REPORT: ROLES, RESPONSIBILITIES AND PERSPECTIVES OF NCAA FACULTY ATHLETICS REPRESENTATIVES 42 (Michael A. Miranda & Thomas S. Paskus eds., 2013) (available at http://www.ncaa.org/sites/default/files /FAR_STUDY_Report_final.pdf).

[18] Harvard Univ., *History*, https://www.harvard.edu/about-harvard/harvard-glance/history (last visited Jan. 26, 2019).

Benjamin Franklin in 1740. U Penn was also the first to offer both undergraduate and postgraduate studies.[19]

Thus, by 1740 one hundred years of formal university education had become firmly entrenched in the United States, with four major institutions of learning in existence. An additional one hundred years would pass before college athletics began to appear on college and university campuses.[20] Interestingly enough collegiate athletics even in the 1850's were plagued with many problems in part due mostly to inadequate student supervision.[21] "Concerned by the failure of student-athletes to control their increasingly visible and powerful athletics programs, faculty members began to express their desire to become involved in this quickly evolving institution."[22] The meteoric rise in popularity of college athletics had both positive and negative consequences.

> "In the 1870s, the tremendous growth of intercollegiate athletics became a major source of pride for students on campuses, and, in the minds of some members of the faculty, the enthusiasm of student-athletes for their athletics programs had greatly surpassed that of their academic pursuits."[23] "Faculty began to take steps to engineer a greater degree of control over athletics, as student-controlled athletics began to disrupt academic pursuits."[24]

Unfortunately, the faculty's desire to rebalance the students' academic-athletic efforts in favor of academics hit a major hurdle as a result of a split in the consensus of the faculty of what exactly to do to remedy the situation.[25] Some faculty felt that given that sports was not an academic endeavor it should be left for the students to

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[19] Sabrina Collier, *10 of the Oldest Universities in the* US, TOP UNIVERSITIES (Jun. 6, 2018), https://www.topuniversities.com/blog/10-oldest-universities-us.
[20] *Supra* at note 17.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*

control.[26] Other faculty felt that the direction the sporting contests were taking was detrimental to the university's environment and mission and required involvement of the faculty.[27]

C. Things Change While Staying the Same

Many of the problems which began to surface some 150 years ago bear a striking similarity to the troubles of today. Upon the introduction of intercollegiate sports, faculty were concerned with the number of days student-athletes were spending away from campus participating in the sporting contest.[28] This time away from school meant that they were missing their academic classes. The students of the day also employed the use of professional athletes in contests to increase their chances of winning while at the same time betting on their own games.[29] The prevalence of this dubious behavior forced nearly every institution, by the turn of the century to form an independent athletics committee comprised of faculty members.[30] Their purpose presumably to offer moral guidance and direction to these apparent wayward charges.

In furtherance of this endeavor "in 1898 a conference of Universities was held by seven of the present-day members of the Ivy League, minus Yale, for what was to be called the Brown Conference of 1898.[31] "This committee met several times throughout the spring of 1898, publishing the 1898 Report on Intercollegiate Sports."[32] However, of the 20 rules suggested, such as reducing the time spent on athletics in favor of academics, eliminating recruitment from secondary schools and lowering gate-money receipts to as low as

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[26] *Id.*
[27] *Id* at 42.
[28] *Id*.
[29] *Id*. at 43.
[30] *Id.* at 42.
[31] *Id.* at 43.
[32] *Id.*

possible, none were accepted by the majority of schools across the nation.[33] Nor was the conferences' suggestion to meet yearly to discuss the issue (adopted)."[34]

Though a significant problem with student athletics was acknowledged, getting individual colleges and universities to act in concert and to change their collective behavior for the better, even in the face of a known problem, failed to occur.[35] Whatever perceived benefits universities were experiencing not only outweighed the notion of changing their behavior but were strong enough to even outweigh the notion of meeting again to talk about the problem.[36]

Thus even though college athletics were spiraling out of control, faculty members thought it to be a frivolous waste of their time to be involved in the activities' administration.[37] "Busy faculties have neither the time nor the inclination to form and hold a consistent policy in regard to athletics."[38] As a direct result of the failure of the collective university community to act, students began to suffer.[39] The "sporting events" became more and more violent and dangerous. Players regularly died during the sporting contests.[40] In 1905, the death toll rose so high that the Chicago Tribune referred

[33] *Athletic Conference* Report, HARV. CRIMSON, (Oct. 11, 1900), https://www.thecrimson.com/article/1900/10/11/athletic-conference-report-pat-a-conference/.
[34] Carol Barr, *History of Faculty Involvement in Collegiate Athletics, in* FAC. ATHLETICS REP. 42, 43 (1999), *http://www.ncaa.org/sites/default/files /History+of+Faculty+Involvement_final.pdf*.
[35] *See Id.*
[36] *Id.*
[37] *Id.* at 42–43.
[38] *Id.* at 42.
[39] *Id.* at 43.
[40] *The Impact of Concussions on High School Athletes: Hearing Before the H. Comm. on Educ. & Labor*, 111th Cong. 7 (2010) (statement of Gerard Gioia, Chief, Division of Pediatric Neuropsychology, Director, Safe Concussions Outcome, Recovery and Education Program, Children's National Medical Center).

to college football as a "death harvest."[41] On November 25, 1905, three football players died in three separate sporting events.[42] On that day, a player who died, was drop kicked to death, another had his organs punctured by his ribs and another had his neck snapped, by another player.[43]

"According to Ken Crippen, executive director of the Professional Football Researchers Association, …There was nothing saying you couldn't drop-kick or punch or anything like that,…It was one of those things where, as a gentleman, you wouldn't do that."[44] There is a sad irony to the statement by Ken Crippen, in his referencing the actions of a gentleman. Did anyone at that time believe that these players acted like gentlemen? The Oxford Dictionary defines a gentleman as a chivalrous, courteous, or honorable man.[45] None of those characteristics were demonstrated here. There was no honor in killing one's opponent in a game, and even less honor in universities who failed to prevent it.

"In 1905 the sport of football was considered so dangerous, regularly killing participants, that President Theodore Roosevelt summoned the coaches of Harvard, Yale, and Princeton to Washington D.C. for a summit on how to make the game safer and threatened to take action in the absence of significant reform."[46] Public outcry also forced the creation of the NCAA in 1910 who added in a rule-making component to the game.[47]

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[41] Aaron Gordon, *Did Football Cause 20 Deaths in 1905?* Reinvestigating a Serial Killer, DEADSPIN (Jan. 22, 2014), https://deadspin.com/did-football-cause-20-deaths-in-1905-re-investigating-1506758181.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Gentleman*, ENGLISH OXFORD LIVING DICTIONARIES (available at https://en.oxforddictionaries.com/definition/gentleman).
[46] *The Impact of Concussions on High School Athletes*, *supra* note 40, at 50.
[47] *Id.*

The apparent lesson here being that even in face of regular student deaths universities, alleged bastions of higher learning and education, would rather placate their faculty and students by staying out of college sports administration, than step into the fray and save the lives of their students. It is this payment of human life in return for a placated faculty and student body, which disturbingly, has been carried forward even to today. Our freshman classes are being inundated with students who are suffering with concussive symptoms developing as a result of their high school and university athletic play.[48] One university Freshman, during the first month of school reported to his professor, that the reason he was doing poorly in his classes was because he suffered from headaches brought on by receiving 5 diagnosed concussions in the past month while playing football. He thought he should probably quit football. [49]

How did the university and its' athletic staff allowed this situation to continue?

What external and internal forces could have been at work at that time which stopped universities from acting to protect students and necessitated the President of the United States stepping in to require action? How could these educated faculty minds feel that bringing order and administration to sporting activities was frivolous when failing to do so caused numerous student deaths? One wonders what precisely these educators were teaching their students if death was relegated to such a meaningless thing. In the world, then and now, everything has a cost. The cost of universities' conduct is the death of those whom they should have protected, their students. One would like to hope that the payment was involuntary.

Everything people do is a choice, a weighing of positive and negative outcomes. Universities are no different, by performing a cost benefit analysis the universities decided that the benefits they received were worth the cost others were paying. For universities, the benefit garnered was a winning team and the accolades associated with that, as well as a happy student body who could revel

[48] Interview with athletic trainer who requested anonymity (Aug. 2016) (on file with author).
[49] *Id.*

in the triumph of their team over their opponents. For faculty, it meant less work and less responsibility. Thus from one perspective, the faculty's and university's lack of action, generated a net win for the university and students as a whole at the expense of a few. A sort of twisted Utilitarian theory.[50] Unfortunately, this university centric view does not work out well for those athletes who were maimed, injured or died. But, then again to make a cake we must crack some eggs.

D. A Small Step for Mankind

Despite the creation of the (now) NCAA, and its imposition of rules to allegedly make the game of football safer, safety took a back seat to other concerns of Universities and the NCAA. This can be seen when the most significant rule change of the era was contemplated, that of widening the playing area to open up the field and hopefully reducing player contact.[51] This suggested rule change was quickly dropped after it was found that Harvard had already created the first permanent football stadium at great expense and that the stadium would be rendered useless by a wider field.[52] Thus the rules committee legalized the forward pass instead with the hopes of it having the same general effect.[53] Whether this change had as significant an effect of player safety we will never know. What we do know is that saving money was a significant factor that outweighed safety considerations in this decision.

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[50] Utilitarianism is teleological theory (a consequence based theory) that is summarized as seeking the "greater good for the greater number." *See* GERALD R. FERRERA, ET AL., THE LEGAL ENVIRONMENT OF BUSINESS & ETHICS: INTEGRATED APPROACH 694 (1st ed., Wolters Kluwer L. & Bus. 2014).
[51] *College Football Page*, WILLIAM BESSETTE, http://williambessette.com /College%20Football.html
[52] *Id.*
[53] *Id.*

So it would seem that though, the beginning of the twentieth century did bring forth the creation of the NCAA with its promise of stricter rules for playing college sports designed to protect its student players, other forces and pressures were already at play to limit the expansion of such rules. Finances had begun to shape the purpose of college sports.

III. HAS WINNING ALWAYS BEEN THE ONLY THING?

Through its fledgling years, the justification for collegiate sports remained vague and elusive. Nonetheless, we knew we were committed to having it. Yet there seemed no clear consensus of the goal and purpose of collegiate sports. To put it bluntly why do we play collegiate level sports? Is it for fun, profit, glory, education, or personal enrichment? It is easy to say all of the above. But that is too simplistic an answer and it fails to illustrate the benefits and the costs of play and to whom those benefits and costs are enjoyed.

A. Pearls of Wisdom throughout Sporting History?

Historic quotes from legendary coaches and athletes shed some light on the apparent path we have chosen to walk, throughout the Twentieth Century. It does not tell us why we chose the path but rather what path we chose to be following. The first quote is from the early Twentieth Century and was said by a legendary Norwegian immigrant who attended Notre Dame. His name was Knute Rockne. Knute Rockne was a well-educated man who despite having a promising future in chemistry instead chose the path of college athletics.[54] He started as assistant football coach of the Notre Dame Football team and eventually became head coach and athletic director in 1918.[55] "Under Rockne, Notre Dame teams won 105 games, lost 12, and tied 5 from 1918 through 1931 and were declared national champions in 1924, 1929, and 1930."[56] Knute Rockne's oft mentioned quote exemplified what he and society of the day felt was important in a college sports programs.

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[54] *See* Knute *Rockne*, ENCYCLOPÆDIA BRITANNICA (available at https://www.britannica.com/biography/Knute-Rockne).
[55] *Id.*
[56] *Id.*

He said, "*Show me a gracious loser and I'll show you a failure*."[57] This commentary was made some twenty years after the NCAA instituted rules in collegiate sports whose purpose was to reign in the aggressive and unbridled play. A set of rules purportedly to remind players that they were supposed to be gentlemen. Yet these rules apparently did nothing to stop a more subtle undertone developing in the minds of those who engaged in play, those who were being instructed by those the likes of Rockne.

Why is being a gracious loser equated with being a failure? By that twisted logic, would being a poor loser be equated with being a winner? And how does acknowledging that you were beaten by the better team makes you a failure? The term gracious means, pleasantly kind and courteous, it does not equate to being a failure.[58] Losing also does not mean that you do not need to be disappointed by the loss but rather that you have enough civility and sense of appropriate societal behavior to congratulate the winner on a game well plaid. The study of human psychology will tell you that losing today is also not a predictor of whether you will win or lose tomorrow.[59] In fact this concept will be incorrect more often than it is correct.[60]

So given that Rockne's statement, (as oft quoted) is false, what might he have been trying to say and why do we as a society grab hold of it as gospel? It may be that he inappropriately used the term gracious in the sentence. Knute Rockne was a devout Catholic who held true to a strong set of Christian morals, a fact that can be substantiated by his daily attendance in church, and his devotion to

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[57] *Id.*
[58] *Gracious*, ENGLISH OXFORD LIVING DICTIONARIES (available at https://en.oxforddictionaries.com/definition/gracious).
[59] *See* Karen Franklin, *"The Best Predictor of Future Behavior is . . . Past Behavior"*, PSYCHOL. TODAY (Jan. 3, 2013), https://www.psychologytoday.com /us/blog/witness/201301/the-best-predictor-future-behavior-is-past-behavior.
[60] *Id.*

equality of players of all color and sexual orientation.[61] He is also quoted as stating to those he worked with that if anyone demeaned or discriminated against anyone of color or sexual orientation they would be immediately fired.[62] This support seems at conflict with his position on sports. The quoted statement shows a lack of civility and of caring for other individuals, which does not jive with what we know about the man. He was a caring passionate man with a drive to win, but apparently not to win at all costs. Perhaps he meant the statement to be, *show me a willing loser and I'll show you someone who will fail*.

Unfortunately for society and college athletics, the phrase remains imbedded in sporting folklore and memory. A tribute to arrogant Winners and a cautionary tale to the majority of us who may stumble and who therefore will forever be branded a loser, a failure, a person who lacks any redeeming social value.

Fast-forward another forty years to the famous Vince Lombardi, who was the head coach and general manager of the Green Bay Packers. Lombardi led the team to three NFL championships and to victories in Super Bowls I and II (1967 and 1968).[63] "Because of his success, he became a national symbol of single-minded determination to win."[64] As a result of this single minded determination he is quoted as saying: "winning isn't everything, it's the only thing."[65]

To try to win, triumph or succeed is certainly important in a sporting contest or in any test, whether mental or physical, but is it everything? How far down this road or slope are we as a society willing to go? How costly a win are we willing to pay for?

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[61] David Hartline, *Knute Rockne & The Eucharist*, AM. CATHOLIC (Jan. 7, 2013), http://the-american-catholic.com/2013/01/07/knute-rockne-the-eucharist/.
[62] *Id.*
[63] *Vince Lombardi Biography*, BIOGRAPHY (April 2, 2014), https://www.biography.com/people/vince-lombardi-9385362.
[64] *Id.*
[65] Kerr-Dineen, *supra* note 12 (citing quote by Vince Lombardi).

Now there is a difference between Lombardi and Rockne in that one was a professional NFL coach and the other was a university sports coach. Their goals were presumably different. Lombardi coached a team whose function was to provide sporting entertainment which people paid for. The players themselves were paid to play this game and presumably accepted the risks. Yet as a society are we prepared to say that in professional sports we do not care what the team does to win? Is cheating in a professional game acceptable if it can be done without being caught? Is intentionally lying to a player about his physical condition defensible if odds are that the player will only survive to play this last playoff game but be useless the rest of his life? Is it allowable to have the players themselves abused and abandoned as long as we are entertained? The Romans thought the system worked just fine in the Colosseum when slaves were put in to fight for the crowd's pleasure. After all, as a watcher of the sport your life is not in peril. Why do I need to worry about someone else? After all sacrificing one's morality for the sake of a game didn't hurt the Romans now did it? Besides how much money has morality ever made you anyway?

Maxims in the history of collegiate sports have followed a winding path, from "Show me a gracious loser and I'll show you a failure"[66] in the early 20th century to "Winning isn't everything it's the only thing"[67] in the late 1980s to musing from our current philosopher on sporting culture and purpose, professional golfer Tiger Woods, who said, "Winning solves everything."[68]

Tiger Woods' philosophy worked quite well as long as he was winning and as long as the praise of his play was louder than the press coverage of his multiple affairs and riotous home life.

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[66] Knute Rockne, *supra* note 54.
[67] Kerr-Dineen, *supra* note 12 (citing quote by Vince Lombardi) (emphasis added).
[68] *Id.* (citing quote by Tiger Woods) (emphasis added).

Apparently his fame, money and popularity, all results of his success, were insufficient to stand against his moral indiscretions on a long path of poor choices.

Being a popular athlete or winning coach does not necessarily make one a role model for appropriate behavior, though modern society seems to say otherwise. The blare of the media and the hype generated by sound bites and tweets has gotten so loud it now obscures the original purpose of the educational institution: learning. More and more, universities find themselves prey to the allure of being a winner, in the process losing the true meaning of the word.

B. No Amount is Too Much to Win

According to USA Today, "Division I schools with football spent $91,936 per athlete in 2010, seven times the spending per student of $13,628. Division I universities without football spent $39,201 per athlete, more than triple the average student spending."[69]

Again, the question is this: why is a university education important? What does it mean to receive an education? Are sports a key component of a "good" education, or merely an ancillary add-on? According to the American Association of Colleges and Universities:

> …getting a college education serves a purpose far beyond getting a job. What families and students themselves are paying for is much more than an accumulation of credits and a degree. It is more than knowledge of a particular field, training in a discipline, or even achievement of certain learning outcomes and critical skills…it is focusing not on the strictly defined goal of employment, but on the more

[69]Cliff Peale, *Athletics Cost Colleges, Students Millions*, USA TODAY (Sept. 15, 2013, 12:02 AM), https://www.usatoday.com/story/news/nation/2013/09/15/athletics-cost-colleges-students-millions/2814455/.

> humane and capacious goals of a better life, better communities, and a better society.[70]

If the American Association of Colleges and Universities is the standard bearer, it would seem that colleges and universities are intended to create a better society and community.

Yet the allocation of funds to that noble purpose seems skewed. As of the Fall 2018 semester, the University of Pennsylvania had an undergraduate population of around 26,000 students,[71] and the number of undergraduate student athletes is very small at 810. [72] That amounts to the athletic population making up a mere three percent of the total student body. Purportedly, fifteen out of the twenty-eight college sports at the University of Pennsylvania pay for themselves, which leaves the thirteen other sports as loss leaders (i.e. those that do not make money but rather serve as a student draw).[73] Calculating the exact amount spent on a universities' sporting program is difficult given the various revenue streams and expenditures. According to one source, the University of Pennsylvania lists its sporting expenses at $37,669,540 and its sports as $37,669,540.[74]

But where does this revenue come from? For many large universities, it comes from "surging television contracts, luxury

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[70] Bethany Zecher Sutton, *Higher Education's Public Purpose*, ASS'N AM. C. & U. (June 20, 2016), https://www.aacu.org/leap/liberal-education-nation-blog /higher-educations-public-purpose.
[71] University of Pennsylvania, *Facts*, https://www.upenn.edu/about/facts, (last visited Feb. 13, 2019).
[72] Megan Fleming, *Perks of Being a Student Athlete at Penn State*, ONWARD STATE (Oct. 31, 2014, 4:15 AM), http://onwardstate.com/2014/10/31/perks-of-being-a-student-athlete-at-penn-state/.
[73] *University of Pennsylvania Athletics Information*, C. FACTUAL, https://www.collegefactual.com/colleges/university-of-pennsylvania/student-life/sports/ (last visited Fed. 8, 2019).
[74] *Id.*

suite sales and endorsements."[75] For smaller schools, that burden is shifted to the other students who do not participate in sports by way of mandatory student fees.[76] Annually, these fees range from around fifty dollars up to $657.[77] At Rutgers and Florida State, the student fees allocated to sports generated $10.3 million and $8 million, respectively.[78]

C. The Song of the Golden Calf

What, then, are the forces that move universities to make this unusual allocation of funds? The mission statement of the NCAA states that its purpose is "to govern competition in a fair, safe, equitable, and sportsmanlike manner, and to integrate intercollegiate athletics into higher education so that the educational experience of the student-athlete is paramount."[79]

Yet, despite the statement and by extension, formalized collegiate sporting programs, that the ultimate purpose of the NCAA is to further the educational experience of the student, current statistical analysis done at Iowa State would suggest otherwise, and that college sports are, in fact, designed to generate revenue as opposed to the higher purpose of creating a better society. The purpose of college sports and the purpose of research by Professor Doug J. Chung of Iowa State University is:

> …[to] provide policy makers the measures (by quantifying the value of athletic success) to properly evaluate this issue, which would lead to better policies that will mutually benefit schools and student-athletes across different types of schools. Specifically, our findings can be used to structure an

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[75] Will Hobson & Steven Rich, *Why Students Foot the Bill for College Sports, and How Some are Fighting Back*, WASH. POST (Nov. 30, 2015), https://www.washingtonpost.com/sports/why-students-foot-the-bill-for-college-sports-and-how-some-are-fighting-back/2015/11/30/7ca47476-8d3e-11e5-ae1f-af46b7df8483_story.html?utm_term=.da67d92352dd.
[76] *Id.*
[77] *Id.*
[78] *Id*.
[79] Doug J. Chung, *How Much is a Win Worth? An Application to Intercollegiate Athletics*, 63 MGMT. SCI. 548, 549 (2017).

> appropriate pay-for-play contract between schools and players when deemed necessary. In addition, this research will help school administrators and marketers to financially evaluate their athletics programs in order to properly determine investment amounts by different types of sports.[80]

There are over twenty-nine thousand undergraduate students who attend UC Berkeley. That amounts to a total of over $66 million in potential additional revenue.[81]

The analytics involved in Dr. Chung's article focus on several issues important to this paper because they point directly at what people today seem to feel is the important function of student athletics. In other words, that college athletics are a money-making enterprise.[82] Dr. Chung's article points to the usefulness of the research in aiding the development of player pay-for-play contracts and for determining effective marketing strategies to maximize revenue from various types of sports.

Thus, the analysis is framed against the backdrop of fairness to players by giving them a piece of the monetary pie currently being consumed by the universities, and also by aiding schools in creating and utilizing effective marketing strategies for their sports programs to increase those very same revenues streams.[83]

What seems to be missing in the article is how each of these relates to the function of a university with respect to a student. Is attending college now an opportunity to become engaged in a potentially lucrative business venture?

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[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*

According to the National Labor Relations Board, the answer is yes. In a 2014 decision, the NLRB stated:

> ...Northwestern University must eliminate "unlawful" rules governing football players and allow them greater freedom to express themselves. The ruling, which referred to players as employees, found that they must be freely allowed to post on social media, discuss issues of their health and safety, and speak with the media.[84]

It is significant that a governmental agency referred to student football players as employees because it allows for the possibility that they may unionize and negotiate employment contracts, all in an effort to even the playing field and enable the student athletes to be fairly compensated. Is money now the golden calf to our present-day Faust? It is said that "those who cannot remember the past are condemned to repeat it."[85]

Universities have not only begun to chase after money, thus forsaking their original purpose, but have also shown by example that money is all important.

The goal of the race is no longer knowledge, charity, or student betterment, but money:

> Today's intercollegiate athletics has become a multibillion-dollar industry, generating large amounts of revenue for the participating institutions. During the 2013–14 academic year, 67 schools made more than $50 million and the top 19 schools each generated more than $100 million in revenues through their athletics programs. At the top of the list was the University of Texas at Austin, with $161

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[84] Lester Munson, *Free to Tweet: Northwestern's Restrictions on Football Players Ruled Unlawful,* ESPN (Oct. 10, 2016), http://www.espn.com/espn/otl/story/_/id/17765516/nlrb-rules-northwestern-restrictions-unlawful. (Emphasis added).

[85] Nicholas Clairmont, *"Those Who Do Not Learn History Are Doomed To Repeat It." Really?*, BIG THINK, http://bigthink.com/the-proverbial-skeptic/those-who-do-not-learn-history-doomed-to-repeat-it-really (last visited Feb. 8, 2019).

> million. Hence, intercollegiate athletics has become more than simply a tool to promote scholarship and diversity. It has become commercialized and represents a key source of revenue for many academic institutions.[86]

Dr. Chung found that success in a particular sport has a significant impact on the given sport's revenue.[87] To put it another way, if football succeeds, so do revenues attributable to football.[88] Also though winning in the regular season increases revenue for schools, the increase is most significant for larger, more established schools.[89] The same uptick in revenue also occurs for the lesser known schools, but only if their football teams participate in a prestigious bowl game.[90] The takeaway is that winning is the key to a university's financial success.

Which sports garner the most generation of revenue? Of Division I schools, men's football and basketball receive the most public attention and were the primary sources of revenue for each of the participating institutions in Dr. Chung's research.[91] There were 351 active member schools of Division I as of the 2014 season.[92] In football, the member payment from the NCAA ranged from $113 million for the highest paid school, to $800,000 for the lowest paid school.[93] In basketball, the numbers were $44 million for the highest paid school and $123,000 for the lowest paid school.[94] Dr. Chung's analysis of revenue in relation to a winning season show a

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[86] Chung, *supra* note 70, at 558.
[87] *Id*. at 504.
[88] *Id*.
[89] *Id.*
[90] *Id.*
[91] *Id.* at 550.
[92] *Id*.
[93] *Id.* at 551.
[94] *Id.*

clear link between school sports success and increase in revenue received.[95]

> Additionally a higher-winning percentage generates more enthusiasm from the base (current students, faculty and staff, alumni, and other fans) as well as more publicity on the national stage. This would lead to greater ticket revenues and donations from the base, unofficially known as booster money. Furthermore, in the world of entertainment, a higher proportion of wins tends to attract lucrative endorsements and TV contracts from local and national media outlets.[96]

Of the sports that currently inspire the most revenue production, intercollegiate football is the "main driving force. . . in terms of local and national attention."[97] Given that basketball season follows football season, there is some spillover of populace enthusiasm from football to basketball.[98]

There is a similarity between intercollegiate sports and professional sports in that greater success generates more excitement from a particular institution's base and garners more publicity at the local and national level which in turn may lead to more ticket sales, donations, endorsements, and merchandise sales.[99] Student, alumni and the general public want to be part of a winning tradition basking in reflected glory and disassociate themselves with losing teams thus cutting themselves off from reflected failure.[100] Students, alumni, and the general public likely want to be part of an organization that is associated with winning, and universities, aware of this association, see a financial opportunity. They are therefore driven to cultivate and promote that association.

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[95] *Id.* at 553.
[96] *Id.* at 555.
[97] *Id* at 560.
[98] *Id.*
[99] *Id.*
[100] *Id.* at 561.

IV. A FORGOTTEN HISTORY

Why were universities created in the first place? Professor Michael Bishop, professor of philosophy and history at Iowa State University, puts it thusly:

> A university education is much more than just learning facts. And it's more than mastering the ability to solve problems, to understand complicated issues, to detect bullshit (sophistry), and to articulate your views. A quality education requires a commitment to an ever deeper understanding of self and of one's place in the social and natural world; and when successful, it leads to a critical examination of the assumptions that guide one's life.[101]

Note the reference to one's place in the social and natural world. The purpose of a university education is to allow our students to figure out where they fit in our ordered and moral society.

A. What is the Purpose of a University Education?

The purpose of an education and more specifically one acquired by attending a college or university, has evolved over time. Originally, early universities sprang up as a result of people of learning, called Masters, gathering together and taking on students, educating them in a variety of subjects including the arts, music, geometry, astronomy, civil law, and Canon law.[102] Canon law is that law and decrees developed by the Catholic Church as derived from the Bible and the pronouncements of the Pope.[103] Eventually, these disparate

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[101] Michael Bishop, *What's wrong with cheating?*, CAL. ST. UNIV. SAN MARCOS, https://www.csusm.edu/dos/studres/wwwc.html (last visited Feb. 14, 2019).
[102] *Id.*
[103] Father James Goodwin, *What is Canon Law All About? Learn More About the Church's Organizational and Governance Structure, Which Helps it to Carry Out its Saving Mission*, OUR SUNDAY VISITOR (Mar. 1, 2017),

laws and decretals were collected into various books that became known as the Books of the Canon Law.[104]

> Book III is on The Teaching Function of the Church. This book covers preaching, catechesis, missions and education. This book tells us what levels of authority there are for Church teachings. It also has rules for educational institutions, including Catholic universities.[105]

The significance here is that university governance and educational philosophy has its roots in the religious tenets of the Bible and its moral teachings. From the Ten Commandments given to Moses in the Old Testament to the teachings of Jesus in the New Testament, the Bible is a book governing appropriate moral conduct. "It is a guide for living life to the full… [i]t gives us a road map for the perilous journey of life… [o]r to put it another way, on our voyage through life's ocean it is our anchor."[106]

It should come as no surprise that early colleges and universities had a curricula dedicated to faith and its propagation. The first American colleges offered a broad liberal arts curriculum designed to educate young Puritan ministers.[107] These early institutions were established by religious groups to foster the faith. One charter read:

> *"[S]o that the church of Virginia may be furnished with a seminary of the Ministers of the Gospel, and that the youth may be piously educated in good letters and manners, and that the Christian faith may be propagated..."*[108]

But secular life quickly took over. Harvard University, the oldest university in the United States, graduated about seventy percent

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https://www.osv.com/Article/TabId/493/ArtMID/13569/ArticleID/21660/What-Is-Canon-Law-All-About.aspx.

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] Claire Kaufman, *The History of Higher Education in the United States*, WORLD WIDE LEARNING, https://www.worldwidelearn.com/education-advisor/indepth/history-higher-education.php.

[108] *Id.*

clergymen in the 17th Century, forty-five percent in the 18th Century, and by the latter half of the 19th century, only ten percent.[109] James Walker, Harvard's president from 1853 to 1860, lamented the waning influence of divinity: "Now a professor is as much a layman as a lawyer or physician."[110]

In July of 1931, Professor S. Alexander wrote in his article *The Purpose of the University*, "I should describe the University as an association or corporation of scholars and teachers engaged in acquiring, communicating, or advancing knowledge, pursuing in a liberal spirit the various sciences which are preparation of the professions or higher occupations of life."[111]

Note the blended verbiage used; Alexander's version of an education was no longer simply linked to advancement of religious doctrine and moral codes, but instead to "acquire, and advance knowledge…to prepare for the higher occupations of life."[112]

One wonders if the phrase "higher occupations of life" refers to those more complex forms of occupation, presumably performed by a more skilled labor force, or those occupations in life which purportedly are more important than mere religious morality. Given the trajectory of universities in this century, it may have been the latter.

By the first half of the Twentieth Century, traditional liberal arts training gave way to science and vocational training.[113] "Universities forged relationships with industry, drawing funding from the private sector and producing an educated workforce in return."[114] Many secular schools were built, the practical mandate

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[109] *Id.*
[110] *Id.*
[111] S. Alexander, *The Purpose of a University*, 2 POLITICAL QUARTERLY 337, 337 (1931).
[112] *Id.*
[113] Kaufman, *supra* note 100.
[114] *Id.*

of which was to promote agriculture, science, and technology.[115] Liberal arts expanded to include social science, applied sciences such as engineering, and professional training. Theology schools, once the foundation of higher education, were relegated to a small almost forgotten subset.[116]

The blending of morality and the secular world continued as the 20th Century advanced, as evidenced by numerous court cases. Modern universities, though largely secular, attempt to maintain a balance between today's values and that heritage of valuing and developing student character and citizenship.

B. Universities continue their role as a Parent?

In describing the relationship between a university and a student with regards the student's welfare, the Supreme Court of Florida said in 1924:

> As to mental training, moral and *physical discipline*, and welfare of the pupils, college authorities stand in loco parentis and in their discretion may make any regulation for their government which a parent could make for the same purpose, and so long as such regulations do not violate divine or human law, courts have no more authority to interfere than they have to control the domestic discipline of a father in his family.[117]

The relationship was one of that of a parent and child, where the courts should only interfere if the actions of the university violated divine or human law.[118] This concept of *in loco parentis* has its roots in early law as far back as 1837:

> "One of the most sacred duties of parents is to train up and qualify their children, for becoming useful

[115] *Id.*
[116] *See Id.*
[117] John B. Stetson Univ. v. Hunt, 102 So. 637, 640 (Fla. 1924) (emphasis added).
[118] *Id.*

> and virtuous members of society; this duty cannot be effectually performed without the ability to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits .... The teacher is the substitute of the parent; ... and in the exercise of these delegated duties, is invested with his power."[119]

As society moved into the 1960s and early 1970s, the relationship between students and universities shifted. Tom Hayden, an activist of the time, expressed some of the feelings of his university student colleagues: "We are the people of this generation bred in at least modest comfort, housed now in universities, looking uncomfortably to the world we inherit."[120] Students no longer wanted to be followers, molded by the university; they wanted to make their own decisions and choices.

> Visible signs of their opposition to traditional society were hard to ignore. Highly distinctive dress marked the first obvious difference in the young's appearance: blue jeans (not the designer type of today; rather the faded, sometimes dirty, patched and bell-bottomed type) brightly-colored and often embroidered shirts, love beads, head bands, arm bands, fringed vests, American Indian designs on leather clothing, hand-made sandals were some of the characteristics of the new generations style. Hair worn long on men and natural on women (straight, curly or frizzy, but never rolled in curlers and

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[119] Morse v. Frederick**,** 551 U.S. at 393 (2007) (Thomas J. concurring) (quoting State v. Pendergrass, 19 N.C. 365, 365–66 (1837).

[120] Kenneth T. Walsh, *The 1960s: Polarization, Cynicism, and the Youth Rebellion*, U.S. NEWS & WORLD REP. (Mar. 12, 2010), https://www.usnews.com /news/articles/2010/03/12/the-1960s-polarization-cynicism-and-the-youth-rebellionredirect (quoting Tom Hayden).

> definitely not bouffant :). If other people lived separately, the new generation lived in communes. If others worked for large corporations with massively complex technology, the new generation worked alone making things by hand. If others drank alcohol and made marijuana illegal, the new generation denounced alcohol and smoked pot.[121]

The students of the 1960s demanded their freedom, both from their parents and the universities they attended. Thus, universities evolved from places of learning moral values and biblical truths, to places producing an educated workforce that promoted agriculture, science, and technology that would serve the businesses of the new economy. And as time progressed, the seeds planted by the student revolutions of the 1960s and 1970s came to full bloom, making the notion of *in loco parentis* and the moral obligations of a university a distant memory.

Fast-forwarding to 1986, during a school-sponsored field trip, Ms. Dana Beach and other students attended a lamb roast at a local farmer's ranch where she had one mixed drink and 3-4 homebrewed glasses of beer.[122] She was then driven back to the campsite in the university van, where she had some whiskey.[123] Upon returning to her tent she became disoriented and fell into a ravine, suffering extensive injuries that resulted in quadriplegia.[124]

In Beach's subsequent suit against the University of Utah, the court, finding for the University, made it clear that the obligations of a university were not like those of a parent.

> Colleges and universities are educational institutions, not custodial. Their purpose is to educate in a manner which will assist the graduate to perform well in the civic, community, family, and professional positions he or she may undertake in the

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[121] Linda Churney, *Student Protest in the 1960s*, YALE-NEW HAVEN TCHR.'S INST., http://www.yale.edu/ynhti/curriculum/units/1979/2/79.02.03.x.html.
[122] Beach v. Univ. of Utah, 726 P.2d 413, 415 (1986).
[123] *Id.*
[124] *Id.*

> future. It would be unrealistic to impose upon an institution of higher education the additional role of custodian over its adult students and to charge it with responsibility for preventing students from illegally consuming alcohol and, should they do so, with responsibility for assuring their safety and the safety of others.[125]

The court went on to say, that requiring an institution to babysit each student is a task beyond the resources of any school.[126] Furthermore, such measures would be inconsistent with the nature of the relationship between the student and the institution because it would produce a repressive and inhospitable environment, largely inconsistent with the objectives of a modern college education.[127]

It is interesting to see how the courts lost sight of the roots of *in loco parentis* when they outlined a universities' obligations to its students and their education.

In loco parentis originally had its roots steeped in the notion of creating a virtuous person and a valuable member of society — the same goals as a parent. How is it that we as a society and we as educators find it acceptable to allow a student to be placed in a potentially dangerous position and feel justified in doing nothing when we know with a reasonable degree of certainty that danger is imminent? The *Beach* case demonstrates the difference between law and morality: a moral person aids those in trouble or who need help.

Note the story of the good Samaritan. Although Samaritans and Jews despised each other, a Samaritan man took pity on an injured Jew on the side of road who had been beaten and passed over by

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[125] *Id.* at 419 (emphasis added).
[126] *Id.*
[127] *Id*.

others. Though he had no legal obligation to the man, the Samaritan took him to an inn to recover and told the innkeeper he would pay any charges. That man followed his moral convictions.

Apparently, the legal person that is a university need not have any such moral conviction. After all, "colleges and universities are educational institutions, not custodial, their purpose is to educate in a manner which will assist the graduate to perform well in the…professional positions he or she may undertake in the future."[128]

C. How many attend college anyway?

In the mid-1800s only a small percentage of students were attending higher education institutions throughout the country.[129] This amounted to only about one percent of the 18- to 24-year-old population.[130] This number of students was divided among 563 campuses, giving an average enrollment size of only 112 students.[131] Today, that number is a staggering 14 million students in the U.S. attending some 3,600 institutions, for an average enrollment of 3,931 students.[132] Approximately 33 percent of all college-age students are enrolled in college today, half of which are women.[133] The social, societal, technical and professional impact which universities now have on the population is immense. To meet these great obligations requires expenditure of large amounts of money for campuses, facilities, staff and teachers.

Sources of revenue needed for the schools to operate has remained relatively stable since universities came to existence.[134] Universities have various sources of income which historically have included endowments, federal funds, state funds, hospitals, federal and state

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[128] *Id.*
[129] U.S. DEP'T OF EDUC. OFFICE OF EDUC. RESEARCH AND IMPROVEMENT, 120 YEARS OF AMERICAN EDUCATION: A STATISTICAL PORTRAIT 64 (Thomas D. Snyder ed. 1993), https://nces.ed.gov/pubs93/93442.pdf [hereinafter 120 YEARS OF AMERICAN EDUCATION].
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.* at 71.

research grants, and auxiliary enterprises (included in this are sports tickets, merchandizing and media rights) and tuitions.[135] In general, student tuitions cover a little less than one-third of the expenses incurred by a university.[136]

As the numbers of schools have increased over time, so too have overall expenditures.[137] The cost expenditure for universities rose about 250 percent between 1930 and 1990.[138] Thus, the demand and necessity for alternative revenue streams have become vitally important to schools.

When we look at income streams associated with school sporting activities for some institutions, the media rights and branding rights which are sold are worth as much as the total ticket sales.[139]

As with all things, not every university benefits equally from their sporting programs.[140] For instance, Pennsylvania State University ("Penn State") has a $43 million surplus from football and men's basketball after covering the other sports.[141] This also covers coaches' salaries ($9.4m), student aid ($11.1m), recruiting ($967k) and game day expenses ($7.5m).[142] At the end of the day, Penn State shows a $26.4 million profit without the aid of student fees, direct institutional support, or state support.[143]

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[135] *See Id.* at 89.
[136] *Id.* at 72.
[137] *Id.* at 72–73.
[138] *Id.* at 88.
[139] *College Athletics Revenues and Expenses – 2008*, ESPN, http://www .espn.com/ncaa/revenue.
[140] Kristi Dosh, *Does Football Fund Other Sports at the College Level?*, FORBES (May 5, 2011, 9:02 PM), https://www.forbes.com/sites/sportsmoney /2011/05/05/does-football-fund-other-sports-at-college-level/#3c3f6eb171c2.
[141] *Id.*
[142] *Id.*
[143] *Id.*

Keep in mind that student fees can in some instances rival ticket sales in income. At the other end of the spectrum, student fees bring in significantly more income than ticket sales. University of California at Berkeley ("Berkeley"), for example, loses approximately $119,000 in net earnings even though its football and basketball programs profit $5.9 million and $1.1 million respectively.[144] These figures do not take into account that most universities collect student fees from their entire student population with a portion of those funds used to aid the athletics programs. At Berkeley, other student fees are approximately $2,668 per student.[145] Thus universities are placed in a financial conundrum. Nationally recognized, competitive sporting programs give universities access to large amounts of financial resources, which can be used to great advantage, even though at a cost.

V. A SIREN'S SONG

What then are the forces that pull us away from the universities' original path? If universities started off as places of knowledge where the schools and their faculties were charged with molding and shaping people into useful moral members of society, then why are men and women of purported good character turning a blind eye to the road they are following?[146] Universities may answer this by saying that they are economically and legally justified in their actions. While this may be true, it does not absolve universities of ethical responsibility. There may well be alternative ways to address the economic issues without sacrificing one of the core purposes of a university education. Contrary to the quote of Sophocles, the ends do not always justify the means.[147] Still, the temptation to generate revenue from sports has never been stronger for universities.

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[144] *Id.*

[145] *Cost to Attend University of California Berkeley*, COLLEGECALC, http://www.collegecalc.org/colleges/california/university-of-california-berkeley/. (last visited Nov. 18, 2018).

[146] *Id.* at 25.

[147] SOPHOCLES, ELECTRA ("The end excuses any evil."), http://www.quotationspage.com/quote/27322.html.

A. There's Gold in them thar Students

The eighties and nineties brought new revenue streams to universities. Television grew more popular and as a result, broadcasting of sporting events dramatically increasing. By 1960, there were 52 million television sets in American homes.[148] This figure soared to 219 million in 1997.[149] Currently there are approximately 90 million television viewers who watch sporting events on television.[150]

As a result of the networks broadcasting college sports, the NCAA and its affiliated members negotiated media contracts with various networks.[151] The revenue enjoyed from these contracts by the NCAA and its members has increased steadily over the last thirty years.[152] In 1982 a three year contract with CBS for media rights generated $49.9 million.[153] Six years later the same media deal was worth $166 million, a 300 percent increase in revenue.[154] Another three years later the media rights paid for by CBS jumped another 300 percent.[155] In 2010 the NCAA signed a 14 year $10.8 billion contract with Turner Broadcasting.[156] Of total NCAA revenue, media revenue accounts for approximately 80 percent.[157]

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[148] *Number of Televisions in the U.S.*, PHYSICS FACTBOOK, https://hypertextbook.com/facts/2007/TamaraTamazashvili.shtml.
[149] *Id.*
[150] *Sports on T.V. in the U.S.*, STATISTA DOSSIER (2013), https://comm3357spring17.files.wordpress.com/2017/01/study_id23358_sports-on-tv-in-the-us-statista-dossier.pdf.
[151] *See* Taylor McElrath, *NCAA Revenue Breakdown Infographic*, INFOGRAM, https://infogram.com/welcome_your_first_project-14625.
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*

Based largely on the monetary effect to universities on the NCAA not streaming games, the University of Oklahoma sued NCAA in 1982 when it did not televise games for fear it would reduce actual game attendance.[158] The US Supreme Court ruled against the NCAA stating its restrictions on televising the games was a restraint of trade.[159] The estimated revenue potentially lost by the association of schools was $73.6 million.

Despite the occasional grumbling over the size of the cash pie which the NCAA distributes, the most recent estimate from the NCAA research staff is that, college athletics programs annually generate about $6.1 billion from ticket sales, radio and television receipts, alumni contributions, guarantees, royalties and NCAA distributions. Another $5.3 billion is considered allocated revenue, which comes from student fees allocated to athletics, direct and indirect institutional support, and direct government support.[160]

Of the 231 NCAA division 1 schools 85 percent operate at a positive cash flow as a result of their participation in the NCAA.[161] Many schools are making tens of millions of dollars based on their athletic participation.[162] As an example of the financial incentive to having an active division 1 athletic program, Connecticut University generated a $35 million surplus from its athletic program.[163] Rutgers generated $28 million in revenue surplus from their sporting programs.[164] These monies come from ticket sales, student fees, and merchandizing and from NCAA distributions.[165] While it is true the

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[158] *See generally NCAA v. Board of Regents of Univ. Okla.,* 468 U.S. 85, 89–90 (1984).
[159] *Id.*at 98, 120.
[160] *See generally* Nat'l Collegiate Athletic Ass'n, 468 U.S. 85.
[161] Steve Berkowitz et al., *2015-2016 Finances: Top School Revenue*, USA TODAY, http://sports.usatoday.com/ncaa/finances/ (Previously cited in 21 U. Denv. Sports & Ent.L.J. (Spring 2018).
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] USA TODAY SPORTS, *Methodology for 2017 NCAA athletic department revenue database*, (June 28, 2018) http://sports.usatoday.com/2018/06/28 /methodology-for-2017-ncaa-athletic-department-revenue-database/, *supra* note 129.

larger schools receive the lion's share of the NCAA distributions, it is also true that all schools receive monies through their participation in the NCAA.[166] The fact that these distributions can be in the millions of dollars makes continuation of active winning sports programs a vital revenue stream.[167]

Given the cash cow that sports has become for some schools where is there incentive to reduce the cash flow? The cost to run a school keeps going up and it makes prudent fiscal sense to promote those things which generate revenue.[168] Since there is money to be made with a winning team, having the best players is a game requisite. In order to win games you need to put those players on the field. As the saying goes, "If you are going to ride in the Kentucky derby don't leave your prize stallion in the stable."[169] Besides we are after all doing this for the benefit of the students.

B. The Devil's Due

With all things, there is a cost. As said by Milton Freedman the famed economist, "there ain't no such thing as a free lunch."[170] The popular perception of college athletics is that it is good clean fun. Long forgotten are the days when the Chicago Tribune called college football a death harvest.[171] College athletics foster comradery and fellowship, yet so does any activity done by a group. The distinction is that in the college sporting world, our students are being significantly injured without their consent or knowledge. In the same way that other educational settings such as chemistry labs

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[166] Berkowitz et al., *supra* note 147.
[167] *Id.*
[168] 120 YEARS OF AMERICAN EDUCATION, *supra* note 118 AT 72.
[169] STAR TREK (Paramount Pictures 2009).
[170] *See generally* MILTON FRIEDMAN, THERE'S NO SUCH THING AS A FREE LUNCH (Open Court Pub Co, 1975).
[171] Gordon, *supra* note 37.

and physics labs can be made safe for students during their use, so too must sporting activities.

But isn't that just the nature of sports? You're bound to get a little banged up. No one is getting hurt really. And it is those clichés which cover up the true cost of playing today's college sports.

Student athletes are suffering concussive blows far in excess of what is being published by the NCAA or being recognized either intentionally or unintentionally by universities. According to an NCAA study the number of reported concussions was about 5.4 concussions per year for all sports played and 2.6 concussions per year for football.[172] Despite this claim a study done by Harvard and Boston University in 2014 which disclosed that these numbers were under estimated by a factor of 600%.[173]

> Despite years of education and growing public awareness about head injuries, college football players report having six suspected concussions and twenty-one so-called "dings" for every diagnosed concussion, with offensive linemen being the least forthcoming to trainers and team personnel.[174]

The Harvard/Boston University report broke down the statistical analysis by football position and found that offensive linemen reported significantly higher numbers of post impact symptoms than other positions.[175] These symptoms, which were reported as dings,

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[172] Jennifer M. Hootman, PhD, ATC, FACSM, Randall Dick, MA, FACSM, & Julie Angel, MA, ATC, *Epidemiology of Collegiate Injuries for 15 Sports: Summary and Recommendations for Injury Prevention Initiatives*, 42 J. Athletic Training 311 (2007).
[173] Christine M. Baugh, et al., *Frequency of Head Impact Related Outcomes by Position in NCAA Division I Collegiate Football Players*, 32 J. NEUROTRAUMA 314 (2015).
[174] Tom Farrey, *Study: 1 in 27 Head Injuries Reported*, ESPN (Oct. 3, 2014), http://espn.go.com/espn/otl/story/_/id/11631357/study-says-26-27-potential-concussions-unreported-college-football.
[175] Baugh, *supra* note 159, at 314.

included dizziness, headache, and seeing stars.[176] Despite these symptoms:

> Offensive linemen reported having returned to play while experiencing symptoms more frequently and participating in more full-contact practices than other groups. These findings suggest that offensive linemen, a position group that experiences frequent but low-magnitude head impacts, develop more post-impact symptoms than other playing positions, but do not report these symptoms as a concussion.[177]

The result of this non-reporting for things like dings or seeing stars is that the number of concussions suffered may be much higher than we anticipate, making the actual number of concussions suffered on a university campus being potentially much higher than thirty-two per year.

What are the long term effects of undiagnosed concussive blows to our student athletes? "An undiagnosed concussion is problematic because athletes who sustain additional brain trauma while recovering from a previous injury are at risk of more severe neurologic consequences."[178] There is the added complication that societal pressure creates and environment where athletes are constantly told that they should play through their injuries.[179]

Remember, "There are only two types of people in this world, Winners and Losers"[180] and "Winning isn't everything it's the only thing."[181]

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[176] *Id.*
[177] *Id.*
[178] *Id.* at 315.
[179] *Id.*
[180] Unknown source
[181] Kerr-Dineen, *supra* note 12 (citing quote by Vince Lombardi).

An example of this thinking is exemplified by a student from Catholic University. T.J. Cooney a former football player for Catholic University put it this way. He was raised to believe that football players were tough, nearly indestructible.[182] There were injuries which could not be played through but those were few and they did not happen to tough guys.[183] He thought for nearly his entire playing career that extreme headaches were part of the game.[184]

During his sophomore year T.J. suffered a concussion during practice which left him with a severe headache. He then suffered two more concussion nine days later during the first half of a game.[185] He chose not to inform his coach of the difficulties he was having and then during the second half of the game he collapsed falling flat on his face.[186] It took eight months for him to recover from his injuries, though not completely.[187]

C. The Devil is in the Details

The problem with concussive illness being suffered by student athletes is that exactly what is a concussion is actual misunderstood by most people.

> A concussion is the shaking of the brain inside the skull that changes the alertness of the injured person. That change can be relatively mild. (She is slightly dazed). It can be profound. (She falls unconscious). Both fall within the definition.[188]

Symptoms of a concussion fall into four major categories somatic, (headaches, nausea, vomiting, dizzy spells), emotional, (sadness to the point of depression even suicide, nervousness, irritability), sleep disturbances, (sleeping more of less than usual or trouble falling

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[182] CANTU & HYMAN, *supra* note 7, at 132.
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] CANTU & HYMAN, *supra* note 7, at 133.
[188] *Id.*

asleep), and cognitive, (difficulty concentrating, troubles with memory feeling mentally slow or as if they are in a fog that will not lift).[189] "Rest is the hallmark of concussion therapy. The best we can do for the patient is to shut things down physically and cognitively."[190]

According to Dr. Cantu, most concussions resolve in seven to ten days and athletes return to their normal activities in two weeks.[191] Unfortunately, twenty percent of concussions are post-concussion syndrome cases.[192] These are cases where the injury can last at least one month and can persist, with the patient experiencing unusually intense symptoms.[193] According to Dr. Cantu, rest is the only effective therapy and sports should stop completely until the patient is symptom free.[194]

Yet the sports public, rather than believing current medical science choose to rely on myth and falsehood. Whether they follow these myths, merely to blindly support the game, or because they refuse to believe that sports could actually be hurting their children is unclear. What is clear is that the following well-known sports concussion "facts" are myths. "You can't have a concussion without being hit on the head."[195] Unfortunately this is untrue. Abrupt rotational force, which whips the head and brain around can cause concussive injury.[196] "To have a concussion you need to be knocked unconscious."[197] Only five percent of athletes who suffered concussions are knocked unconscious, the bulk remain

[189] *Id.* at 8.
[190] *Id.* at 10.
[191] *Id.* at 71.
[192] *Id.*
[193] *Id.* at 72.
[194] *Id.*
[195] *Id.* at 105.
[196] *Id.* at 106.
[197] *Id.*

conscious.[198] "Helmets prevent most concussions."[199] While when a well-padded helmet is worn properly it can diffuse a direct hit, it does not protect well against off center hits to the helmet nor does it protect against slams to the body, which cause the head to whip from one side to another.[200] These violent motions of acceleration and sudden deceleration cause the brain to shake within the skull potentially causing concussive damage to the brain.[201]

These false beliefs about concussions held by parents, student athletes, and promoted by coaches alike, coupled with a desire to win at all cost put these student's at great risk for long term injury. In a recent study, I asked the following question to 100 of the top Division 1 football coaches: If your star player suffered a concussion during a playoff game, would you put him back into the game to play? Of the twenty coaches who responded, one coach admitted that he would send the player back in. On one hand you might think that one in twenty is not bad but on the other hand, I suggest that answering in the negative is clearly the correct answer. This was an anonymous survey. If he chose to answer yes to sending the player back in, how many other coaches knew what the correct answer was and simply chose to play it safe and answered no?

What is the payment for all of those media dollars, for all of the merchandising, the ticket sales, the prestige, and accolades heaped upon the universities?

The risk is our student athlete population developing Chronic Traumatic Encephalopathy ("CTE") from being exposed to chronic concussive and sub-concussive blows to their heads and bodies.[202] It is currently unknown exactly how many blows results in a student developing CTE.[203] What is known, however, is that CTE is a progressive degenerative brain disease found in people exposed over many years to brain trauma, including concussive and sub-

[198] *See Id.*
[199] *Id.* at 107.
[200] *Id.*
[201] *See Id.*
[202] *Id.* at 12–13.
[203] *Id.* at 13.

concussive blows experienced over years of play.[204] The result is that in 15 or 20 years after finishing their collegiate play, these students may develop the early stages of CTE which includes loss of critical brain functions such as memory, impulse control, and a decline in their general ability to think and reason.[205] Once these symptoms begin, there is no turning back. Their cognitive decline may mimic Alzheimer's and ALS.[206] At the present time CTE can only be diagnosed after death by postmortem neuropathological analysis.[207] There is no known way to use MRI, CT, or other brain imaging methods to diagnose CTE.[208]

D. One Last Post Mortem

Consider the death of Nathan Stiles, a high school senior who was both a running back and a linebacker. By all accounts he was an undisputed star. Nathan died during a game after he intercepted a pass and was tackled.[209] He told his coach his head really hurt and was taken out of the game, he then collapsed and was taken to the hospital where he later died as result of a cerebral re-bleed from a concussive impact earlier in the season which had not healed fully.[210] After he passed away, an autopsy was done on his brain and it was discovered that though this had not caused his demise, Nathan was suffering from early stages of CTE.[211]

Now, think about at what early age children are playing contact sports. Think about how many times during a game a player is

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[204] *Id.* at 90.
[205] *Id.* at 92.
[206] *Id.*
[207] *Frequently Asked Questions*, B. U. CTE CTR., http://www.bu.edu/cte/about/frequently-asked-questions/.
[208] *Id.*
[209] CANTU & HYMAN, *supra* note 7, at 97.
[210] *Id.*
[211] *Id.* at 98.

knocked to the ground, has their direction of movement abruptly changed, heads the ball, is tackled or crushed between two players. Nathan was only a high school senior when he suffered the onset of concussive illness. Presumably he had four more good years of blows to his brain to endure.

VI. CONCLUSION

Universities used to be bastions of learning and education; places where scholars met to discuss mathematics, literature, culture and morality. The purpose of a college education was to mold and shape men and women into productive members of society. Universities were also tasked with instructing men and women on how to be moral and ethical members of society. To that I say, "Physician heal thyself."[212] How did they lose sight of their duty?

"One of the most sacred duties of parents is to train up and qualify their children, for becoming useful and virtuous members of society; this duty cannot be effectually performed without the ability to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits .... The teacher is the substitute of the parent; ... and in the exercise of these delegated duties, is invested with his power."[213]

Given that universities used to stand in the place of parents, it hopefully goes without saying that part of a parent's duty is to protect their children from bad choices and poor decisions.

Yet somehow at the turn of the twentieth century, the duty held by the universities shifted from one of guiding and protecting their charges to promoting activities which were detrimental to the students. Collegiate sports, originally created by students as a diversion from college study, evolved, unrestrained, into an obsession as opposed to a casual diversion.

At that fork in the road, universities failed in their mission to protect their students from sporting excesses. Instead of reining in the

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[212] *Luke* 4:23 (King James).

[213] Morse v. Frederick**,** 551 U.S. 393, 413–414 (quoting State v. Pendergrass*,* 19 N.C. 365, 365–66 (1837) (emphasis added).

students and explaining to them the true purpose of a college education, the universities placated their children, not wanting to offend or alienate. Faculty also shirked their obligations by hiding behind a cloak of misplaced belief that to care what happens outside their classroom was none of their business.

Informal collegiate sports grew and expanded into formalized collegiate sporting *events* governed by a group, the NCAA, who purportedly had been created to protect the students and keep the best interests of the athletes in mind. With the birth of television came televised sporting events, which grew into multi-million dollar and now billion dollar ventures. There were vast amounts of money to be made by the NCAA, the universities and media companies alike.

Intercollegiate sports became nothing more and nothing less than a business; a very lucrative business. And like all businesses which produce a product, there are raw materials which go into the making. In this case, those materials are human beings. The students, universities were originally charged with protecting, are now nothing more than materials. The universities use until they are used up. The student athletes' maximum useful life to the university is four years. After that time, that used student can be replaced by a younger stronger model. The benefit to the school is untold millions in dollars in revenue. A winning sports season means national publicity, marketing opportunities, and more money. Today, studies are even being performed to demonstrate to universities how much money can be made by a winning season. These studies also support the notion that winning sports programs is good for the student athletes as well, because it means that they too can potentially share in the money. Is this what college and advanced education has devolved to, nothing more than a revenue stream?

But at what cost? Would you allow your brother, sister, son or daughter to participate in an activity which could leave them

mentally crippled for the bulk of their lives? If you knew that there was a high possibility that in 20 years your family would be burdened with the symptoms of ALS, Alzheimer's, memory loss, headaches, tremors and seizures, which ultimately could lead to a premature death, would you tell them it is acceptable to continue with that activity?

That is exactly what universities are doing with college athletics. There is no question that students today are suffering CTE or concussive illness from playing high school and collegiate sports. It has been documented by numerous studies that student athletes are ill equipped to remove themselves from play and that coaches and trainers are under-staffed and under-funded to protect their players. There is no parent, nor should there be any university, who would allow their son, daughter, or student to engage in an activity which will devastate that child's life in the future. Is there anyone who believes that the symptoms of ALS and Alzheimer's are trivial?

The reality is that CTE can only be definitively proved by a post mortem autopsy. This makes prevailing in a negligence suit against a university extremely difficult while the student is alive. Universities further hide behind the court's recent case law that students are adults and should be treated as such, allowed to make their own choices. But what if they are not educated enough yet to make that choice. Isn't the reason for attending college to acquire knowledge? Also, is what constitutes bad behavior only that conduct which finds someone responsible in a court of law? Morality and proper societal behavior come from a higher law.

What is the force which propels such reckless conduct? Its name is the all mighty dollar. Universities dream of the revenue stream and student athletes fantasize of someday turning sports into a lucrative fountain of money. Unfortunately, the reality is that .08% of high school athletes will ever be drafted by the pros.[214] This also means is that 99.08% of high school athletes who do not make the pros are on the road to concussive illness. There are almost one half a million

[214] Lynn O'Shaughnessy, *The Odds of Playing College Sports*, CBS NEWS: MONEY WATCH (Apr. 4, 2011, 12:49 PM), https://www.cbsnews.com/news/the-odds-of-playing-college-sports/.

student athletes at NCAA universities alone whose brains are being subjected to trauma each and every year; a figure just slightly less than the number of deaths from cancer each year. Like cancer, CTE is a slow, lingering death.

Multiple ethical theories, taught at universities, show the immorality of their actions. Judao/Christian: "do unto others as you would have them do unto you."[215] Buddhism: Hurt not others in ways that you yourself would find hurtful."[216] Confucianism: "What I do not wish men to do to me, I also wish not to do to men."[217] Islam: None of you [truly] believes until he wishes for his brother what he wishes for himself."[218]

It is travesty that universities and colleges as a whole will not voluntarily act to protect their student athletes because of the money making opportunities of college sports programs. One would hope that the ethics would be enough. It is a sad commentary that we need to prove to Universities that to act ethically can also be good for business. One would think that such a noble profession would act honorable for its own sake. Apparently acting according to a moral code is no longer good fiscal policy.

The business solution for universities has two prongs. First, universities need to spend a little money on prevention, and second, the NCAA needs to implement a significant rule change requiring mandatory removal from play of any athlete who suffers a concussive or sub-concussive blow. Failure to do so resulting in a forfeiture of the game.

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[215] *Luke* 6:31 (New International).
[216] *Udana-Varga* 5:18.
[217] *Analects* 15:23.
[218] Abu Zakaria Yahya Ibn Sharaf al-Nawawaī, "Hadith 13", NAWAWAĪ'S FORTY HADITH.

If each school spent a mere $200,000 dollars annually, equating to allowing 5 more students to enter the school per year, up to date concussion monitoring devises could be worn by all athletes. Additionally, multiple athletic trainers could be employed to monitor all sporting events and remove athletes from play the moment a concussive or sub-concussive blow is suffered. This insertion of funds would address both the challenge of monitoring all players at all times, and put professionals on the field who can act immediately in response to the information provided by the tracking devices. It would also, from a legal perspective, demonstrate in a suit for negligence against the university that the university is already doing all that can reasonably be done to protect its student athletes, demonstrating how much they care.

The NCAA rule change would level the playing field across all NCAA teams making the perceived handicap of losing a player felt by all teams equally. It would, in fact, encourage, all be it for a less obvious reason, teams to look out for concussions being suffered by opposing team players, thereby forcing that player to be removed from the game, giving the notifying team a player advantage. The rule would not change the quality of play because all teams would be effected equally. The revenue stream would maintain and the students would be protected. The solution is both fiscally sound and has large marketing potential. What parent would not want their child to both play sports and be appropriately protected by their university? The marketing campaign would certainly drive up enrollment and again, more revenue.

These solutions give us a new road to travel, one which at least might protect our student athletes, but it fails to address the ethical deterioration in our society as exemplified by university sporting culture. Hopefully someone will listen before our next generation is burdened with an array of brain illness for which death is the only cure.

VENTURA V. KYLE AND AMERICAN SNIPER: THE ANATOMY OF A PUBLIC FIGURE'S LAWSUIT

By: Mike Steenson[*]

ABSTRACT

Chris Kyle's book, American Sniper, detailed his exploits as a prolific Navy SEAL sniper. In a book subchapter Kyle detailed an encounter with a "Mr. Scruff Face" in a San Diego Bar. The book states that Ventura made certain statements that were demeaning of the United States and the Navy SEALS." Scruff Face was subsequently identified by Chris Kyle as Jesse Ventura, former governor of Minnesota. Ventura sued Chris Kyle for defamation, appropriation, and unjust enrichment. Relying on trial court documents, briefs, and the opinions in the case, this article probes those theories of recovery with an emphasis on the jury instructions, with a view to establishing clearer instructions in public figure lawsuits involving overlapping defamation and appropriation claims.

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I. INTRODUCTION – THE STORY

Chris Kyle, a prolific Navy SEAL sniper, wrote a book about his life entitled *American Sniper, the Autobiography of the Most Lethal Sniper in U.S. Military History*.[1] The book was released at the beginning of January 2012.[2] By the end of January, it had topped the New York Times' Bestseller list.[3] In June of 2012, Warner Brothers purchased the film rights.[4] The book was subsequently made into a movie, *American Sniper*.[5]

The book details Chris Kyle's life before he joined the Navy, his experiences training to be a SEAL, his marriage, war experiences, and struggles to adjust to life in the United States between deployments and after his discharge.[6] It intersperses Tara Kyle's observations about the turmoil in her marriage to Chris Kyle.[7]

There are numerous instances in the book that detail Kyle's drinking episodes, brawls and altercations.[8] In chapter 12 of the book, covering Kyle's experiences while home after his third deployment to Iraq, he wrote in a subchapter, *Mr. Scruff Face*, of an alleged encounter in a bar at a wake for a fellow SEAL who was killed in the line of duty in Iraq:

> AFTER THE FUNERAL WE WENT TO A LOCAL BAR FOR THE WAKE proper.
>
> As always, there were a bunch of different things going on at our favorite nightspot, including a small party for some older SEAL's and UDT members who were celebrating the anniversary of their graduation. Among them was a celebrity I'll call Scruff Face.

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[1] CHRIS KYLE, WITH SCOTT MCEWEN & JIM DEFELICE, AMERICAN SNIPER, THE AUTOBIOGRAPHY OF THE MOST LEGAL SNIPER IN U.S. MILITARY HISTORY 354-56 (2012) [hereinafter AMERICAN SNIPER].
[2] Ventura v. Kyle, 63 F. Supp. 3d 1001, 1005 (D. Minn. 2014).
[3] *Id.*
[4] *Id.*
[5] *Id.*; AMERICAN SNIPER (Warner Brothers 2014).
[6] *Id.*
[7] *Id.*
[8] *Id.*

Scruff served in the military; most people seem to believe he was a SEAL. As far as I know, he was in the service during the Vietnam conflict but not actually in the war.

I was sitting there with Ryan and told him that Scruff was holding court with some of his buddies.

"I'd really like to meet him," Ryan said.

"Sure." I got up and went over to Scruff and introduced myself.

"Mr. Scruff Face, I have a young SEAL over here who's just come back from Iraq. He's been injured but he'd really like to meet you."

Well, Scruff kind of blew us off. Still, Ryan really wanted to meet him, so I brought him over. Scruff acted like he couldn't be bothered.

All right.

We went back over to our side of the bar and had a few more drinks. In the meantime, Scruff started running his mouth about the war and everything and anything he could connect to it. President Bush was an asshole. We were only over there because Bush wanted to show up his father. We were doing the wrong thing, killing men and women and children and murdering.

And on and on. Scruff said he hates America and that's why he moved to Baja California. 9/11 was a conspiracy.

And on and on some more.

The guys were getting upset. Finally, I went over and tried to get him to cool it.

"We're all here in mourning," I told him. "Can you just cool it? Keep it down."

"You deserve to lose a few," he told me. Then he bowed up as if to belt me.

I was uncharacteristically level-headed at that moment.

> "Look," I told him, "why don't we just step away from each other and go on our way?" Scruff bowed up again. This time he swung.
>
> Being level-headed and calm can last only so long. I laid him out.
>
> Tables flew. Stuff happened. Scruff Face ended up on the floor.
>
> I left.
>
> Quickly.
>
> I have no way of knowing for sure, but rumor has it he showed up at the BUD/S graduation with a black eye.[9]

"Scruff Face" was not named in the book, but Kyle confirmed in radio, television, and print interviews that it was Jesse Ventura, former Navy Special Forces Underwater Demolition/SEAL Teams member during the Vietnam War, professional wrestler, actor, and former Governor of Minnesota.[10] On two talk shows Kyle repeated the alleged statement that Ventura said "You deserve to lose a few guys." The same statement appeared on Fox News.[11]

Based on the book subchapter and interviews, Ventura sued Kyle in state district court, asserting claims of defamation, misappropriation, and unjust enrichment.[12] The case was removed to the United States District Court for the District of Minnesota.[13] After Kyle was killed by a fellow veteran in February 2013, his wife was appointed executrix of his estate and substituted as the defendant in the lawsuit in July of 2013.[14]

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[9] Ventura v. Kyle, *supra* note 2 at 1005–06.
[10] *Id.* at 1006.
[11] *Id*.
[12] Complaint, Ventura v. Kyle (D. Minn. Jan. 26, 2012) (No. 27-CV-12-4221).
[13] *See* Notice of Removal, Ventura v. Kyle, 2012 WL 4844623 (D. Minn. Feb. 23, 2012).
[14] Ventura v. Kyle, *supra* note 2 at 1006.

The case was tried to a jury in July of 2014 on the three claims the plaintiff asserted in the complaint. Because the unjust enrichment claim was equitable, the jury acted in an advisory capacity only on that claim.[15]

The jury struggled to reach a verdict. After four full days of deliberation, the jury concluded that it could not reach a decision. After the district court instructed the jury to continue its deliberations, they reported back the next day, still unable to reach a verdict. The following morning the parties consented to a 9–1 verdict, but the jury still could not reach a verdict. The next day the parties agreed to an 8-2 verdict on the fifth full day of deliberations.[16]

The jury found for Ventura on the defamation claim and awarded him $500,000 in damages.[17] The jury found for Kyle on the appropriation claim but found for Ventura on the unjust-enrichment claim and awarded damages of $1,345,477.25.[18] The district court adopted the jury's findings on the unjust-enrichment claim.[19] On appeal, the Eighth Circuit reversed.[20] Ventura petitioned the Supreme Court for a writ of certiorari. It was denied on January 9, 2017.[21]

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[15] *Id.*; FED. R. CIV. P. 39(c)(1) covers the use of juries in an advisory capacity. The jury instructions on liability and damages are set out in an appendix to this article.
[16] Ventura v. Kyle, *supra* note 2 at 1006
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] Ventura v. Kyle, 825 F.3d 876, 878 (8th Cir. 2016) (No. 14–3876). The Eighth Circuit reversed the district court on the defamation claim because "Ventura's counsel's closing remarks, in combination with the improper cross-examination of two witnesses about Kyle's insurance coverage, prevented Kyle from receiving a fair trial." *Id.* at 886. While a key issue, the insurance question is not analyzed in this article because it is unrelated to the article's main themes.
[21] Ventura v. Kyle, 137 S. Ct. 667 (2017). The petition for certiorari was based on Ventura's claim that the Eighth Circuit denied him his Seventh Amendment right to a jury trial:

> Is a defamation plaintiff denied his Seventh Amendment right to trial by jury where, in the absence of "extraordinary circumstances" or a "plain miscarriage of justice," an appellate court vacates a damages verdict that was found to be neither excessive nor irrational based upon its subjective opinion that comments made during closing argument to which the defense chose not to object until after the jury retired to deliberate were "prejudicial"?

Ventura v. Kyle, 2016 U.S. S. Ct. Briefs LEXIS 3978, at *4-*5 (Oct. 31, 2016).

This article traces the case from its initiation through the Eighth Circuit's decision. With the aid of briefs and other trial court documents in the case, it examines the development of the theories in the case, the defenses, the jury instructions and special verdict form, and the appeal and Eighth Circuit's decision.

The case raises an array of questions concerning invasion of privacy, defamation, and unjust enrichment theories, their relationship to each other, the recoverable damages under the theories, and the First Amendment implications involved in the theories as they were asserted in the case. The primary focus is on how cases involving public figures should be submitted to juries, including how juries should be instructed and what special verdict questions should accompany those instructions. As the article demonstrates, the concepts involved in the theories may be understandable to judges and lawyers, but making them comprehensible to juries is yet another question. That is the primary focus of this article.

Part I of this article examines Ventura's complaint. Part II analyzes Ventura's claims of defamation, appropriation, and unjust enrichment. The analysis of the claims focuses on the disputed issues involved in each of the claims and the jury instructions and verdict form that emerged from those disputes. The article concludes with some suggestions that simplify the instructions and clarify the verdict form that might be used these sorts of cases in order to facilitate a jury's understanding of the law and its ability to apply it.

II. THE COMPLAINT

The complaint in the case was initially filed in Ramsey County District Court. It identifies Ventura as a former governor of Minnesota and "a veteran of the United States Navy, having served his country as a member of the Naval Special Forces Underwater Demolition/SEAL Teams."[22] It describes his current occupation as "that of television performer and host for a program titled *Conspiracy Theory*, which airs on the truTV network, and . . . a bestselling author who continues to write books." It also identifies him as "an active political commentator" who "has not definitely ruled out another run for political office."[23]

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[22] Complaint, ¶ 5, Ventura v. Kyle (D. Minn. Jan. 23, 2012) (No. 27-CV-12-4221) [hereinafter Complaint].
[23] *Id.* at ¶ 8.

The complaint alleged that:

> Governor Ventura has become well known to the public throughout the United States as a professional wrestler, entertainer, actor, speaker, author, and politician; has created for himself a unique public personality and image; and his professional names, "Jesse Ventura" and "Jesse 'the Body' Ventura," as well as his image, voice, photograph likeness and public persona, have become commercially valuable commodities.[24]

The core of the complaint concerns the statements made by Chris Kyle in his book, specifically the sub-chapter that is captioned "Punching Out Scruff Face,"[25] which details the alleged encounter between Kyle and Ventura at a bar in San Diego. Ventura was not identified by name, but the complaint alleges that Kyle later identified "Scruff Face" as Ventura in talk show appearances, including two appearances on the Opie & Anthony radio show,[26] and the O'Reilly Factor.[27] His appearance on the *O'Reilly Factor* was then discussed on *The Five*, a FOX News commentary show in which the hosts discussed the incidents, agreeing that Kyle was telling the truth concerning the comments attributed to Ventura.[28]

The complaint establishes the factual allegations for the counts that follow:

> Knowing that the alleged statements he attributes to Governor Ventura were never made, and that the alleged assault and battery incident involving Governor Ventura had never occurred, for the purpose of gaining notoriety and generating publicity for his *American Sniper* book, and thereby furthering his own economic gain, and/or for other reasons presently unknown, Kyle knowingly, intentionally and maliciously published the false and

[24] *Id.*at ¶ 6.
[25] AMERICAN SNIPER at 354.
[26] Complaint, *supra* note 16, ¶ 21.
[27] *Id.* at ¶ 24.
[28] *Id.* at ¶ 23.

> defamatory statements of and concerning Governor Ventura . . .
>
> By falsely claiming that Governor Ventura said United States Navy SEALs deserve to die, Kyle intended to inflict a vicious, deliberate and calculated assault on Governor Ventura's character, honor and reputation, and to turn the SEAL and military community, and Americans in general, against Governor Ventura and to cause them to have contempt, scorn, disgust and hatred for him, and to hold him in the lowest possible regard.
>
> By his own admission, Kyle has gained more notoriety and publicity for the false, defamatory and malicious statements he has made about Governor Ventura, than he has for all of the military exploits he writes about in *American Sniper*.[29]

The first count in the complaint alleged defamation, including libel and slander. The complaint alleges that because of the defamatory statements, "Governor Ventura's reputation and standing in the community, including Minnesota and the United States, has been harmed, he has been embarrassed and humiliated, and he has suffered emotional distress.[30] The complaint also alleged that the publication of the statements "has negatively affected, and will continue to negatively affect Governor Ventura in connection with his businesses and professions, including but not limited to his current and future opportunities as a political candidate, political commentator, author, speaker, television host and personality, and all other commercial endeavors that involve exploitation of his name, likeness and public persona."[31]

Count two alleged misappropriation of Ventura's name and likeness. It alleged that "Governor Ventura has acquired a property right in the exclusive commercial use of his own identity, as represented by his name, image, voice, photograph and public persona,"[32] and that "Kyle has wrongfully appropriated and used Governor Ventura's identity for his

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[29] *Id.* at ¶¶ 32-34.
[30] *Id.* at ¶ 42.
[31] *Id.* at ¶ 43.
[32] *Id.* at ¶ 47.

own economic advantage and gain, including Governor Ventura's name, image and public persona."[33]

Count three alleged unjust enrichment. It alleged that "[a]s a direct result of his tortious, inequitable and unlawful conduct, Kyle has been unjustly enriched at Governor Ventura's expense,"[34] and that "[e]quity requires that Kyle make restitution to Governor Ventura for all property and benefits unjustly received, including but not limited to income from the sale of *American Sniper* books and/or any subsidiary or ancillary rights sales."[35]

The complaint prayed for damages in excess of $50,000[36] for the defamation and invasion of privacy counts and "restitution for all property and benefits unjustly received."[37]

III. THE THEORIES OF RECOVERY

Each of the theories presented complex problems that had to be resolved by the trial court in deciding whether and how the case should be submitted to the jury.

A. Defamation

Ventura alleged that Kyle's story about the altercation in the bar was false and Kyle knew it or had serious doubts about the veracity of the story. As the case proceeded, several issues arose concerning the clam. The parties generally agreed on the definition of defamation and the standard for determining falsity, but there were also several contested issues concerning the defamation claim. One was whether the defamation claim was confined to the specific statements attributed to Ventura or encompassed the whole story (the Scruff Face subchapter), and the correlative question of whether the district court erred in instructing the jury. A second was whether the clear and convincing evidence or convincing clarity standard, which is the standard that applies as a

[33] *Id.* at ¶ 48.
[34] *Id.* at ¶ 50.
[35] *Id.* at ¶ 51.
[36] Minnesota law provides that "If a recovery of money in an amount greater than $50,000 is demanded, the pleading shall state merely that recovery of reasonable damages in an amount greater than $50,000 is sought." MINN. STAT. ANN. § 544.36 (2016).
[37] Complaint, *supra* note 16, at 17.

constitutional mandate to the actual malice issue in defamation cases involving public figures, also applied to the falsity element, and whether the trial court erred in failing to instruct that Ventura had to meet the higher evidentiary standard on the falsity issue. A third involved the issue of whether the trial court committed error in instructing the jury to consider whether the story was defamatory, rather than just the isolated statements in the story. A fourth concerned the damages that may be awarded in a defamation action, including the issues of whether Ventura should be entitled to recover for damages for emotional harm and how the rule permitting presumed damages should apply.

1. Jury Instructions – Defamation and Falsity

The requested instructions on the definition of defamation submitted by Ventura[38] and Kyle[39] followed Minnesota's pattern jury instruction on the definition of defamation. The district court used that instruction:

> The first element is that Mr. Kyle's story about Mr. Ventura was *defamatory.* The story was defamatory if it tends to:
>
> 1. So harm the reputation of Mr. Ventura that it lowers his esteem in the community; *or*
>
> 2. Deter persons from associating or dealing with him; *or*
>
> 3. Injure his character; *or*
>
> 4. Subject him to ridicule, contempt, or distrust; *or*
>
> 5. Degrade or disgrace him in the eyes of others.
>
> Mr. Ventura must prove this element by the greater weight

[38] Plaintiff's Proposed Jury Instructions, Ventura v. Kyle, at 24 (D. Minn. Apr. 21, 2014) (No. 12-0472).
[39] Defendant's Revisions to Selected Proposed Jury Instructions at 1–8; *Ventura*, 63 F. Supp. 3d at 1001; Ventura v. Kyle, No. 12-cv-0472, 2014 WL 8721598 (D. Minn. July 18, 2014).

of the evidence (see Instruction No. 7).[40]

2. The Individual Statements or the Entire Story?

There was conflict at the outset of the case over the basis for the defamation claim and the method of submitting the claim to the jury. The complaint in the case focused on the specific statements Kyle attributed to Ventura, although Ventura claimed that the entire story was defamatory. In response to interrogatories, Ventura listed 15 separate statements in the story that were alleged to be defamatory.[41]

Pruning the list to six statements, Kyle wanted the jury to be able to independently determine whether each statement met the definition of defamation, whether the statements were published with actual malice, and then decide what damages were caused by each statement.[42] Ventura's position in the case was that the individualized consideration

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[40] Jury Instructions, Jury Instruction No. 8A, Ventura v. Kyle, 2014 WL 3729686 (D. Minn. July 22, 2014) (No. 12-cv-0472). The court's definition is standard in pattern instructions. *See, e.g.*, ARIZONA PATTERN JURY INSTRUCTIONS-CIVIL, Defamation 2 (2017); CAL. JURY INSTR.--CIV. 7.00 (Mar. 2018); PATTERN INSTRUCTIONS KANSAS – CIVIL 127.51 (Nov. 2016); 8 TENN. PRAC. PATTERN JURY INSTR. T.-CIVIL 7.01 (2017 ed.).

[41] Defendant's Trial Brief, Part I., B, Ventura v. Kyle, No. 12-cv-0472, 2014 WL 3729664 (D. Minn. Apr. 21, 2014). The fifteen statements were:

1. Ventura said that he "hates America."
2. Ventura said Navy SEALs "deserve to lose a few."
3. Ventura said Navy SEALs "deserve to lose a few guys."
4. Ventura said "y'all [Navy SEALs] deserve to lose a few guys."
5. Ventura said Navy SEALs "were killing innocent people."
6. Ventura said Navy SEALs "were murderers."
7. Ventura said "We were doing the wrong thing, killing men and women and children and murdering."
8. Ventura "bowed up as if to belt" Kyle.
9. Ventura "bowed up again."
10. Ventura "swung" at Kyle.
11. "Stuff happened. Scruff Face ended up on the floor."
12. Ventura "showed up at the BUD/S graduation with a black eye."8
13. Kyle "was in a bar fight with Jesse Ventura," Kyle "punched him ... in the face," "he went down," Kyle "knocked him down," Kyle "popped him," and/or "he [Ventura] went down."
14. Ventura threatened or assaulted Kyle.
15. Kyle physically assaulted, battered, or punched Ventura.

[42] Plaintiff Jesse Ventura's Reply to Defendant's Trial Brief, Part A, Ventura v. Kyle, 2014 WL 3729676 (D. Minn. May 5, 2014) (No. 12-0472).

of the statements would actually detract from the jury's consideration of whether the entire *story* was fabricated.[43] Ventura argued that:

> It is, of course, obvious why the Estate wants the jury to consider particular words and phrases isolated from Kyle's story as a whole: when taken out of context, words lose not only their original meaning, but also lose their power to evoke emotion, and to cause harm. The Estate's proposed verdict form illustrates the point.[44]

Kyle's position was reiterated in her response to Ventura's brief in opposition to Kyle's motion for judgment as a matter of law:

> Why is it important for the Court to engage in this paring-down exercise? Because if the jury is simply asked to decide whether the *entire* "Punching Out Scruff Face" subchapter is materially false, it could find that the statement that Ventura said "You deserve to lose a few" is *not* materially false, but that the statement that Kyle punched Ventura (or that "tables flew" or that Ventura was rumored to have a black eye) *is* materially false. It could then go on to find that, because the subchapter as a whole (including the portions it believed to be true) damaged Ventura's reputation, Ventura is entitled to monetary compensation. This would be a miscarriage of justice because the jury would be awarding Ventura damages even though the only portions of the subchapter that it found to be materially false (*i.e.,* the statements related to the physical altercation, as opposed to the verbal exchange) are-as Ventura concedes – not defamatory and thus not actionable. Such a broad and ambiguous verdict would complicate independent review both by this Court upon a motion for JNOV and for appellate courts at a later stage.[45]

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[43] *Id.*
[44] *Id.*
[45] Defendant's Reply in Support of Motion for Judgment as a Matter of Law, Ventura v. Kyle, No. 12-cv-0472, 2014 WL 3729672 (D. Minn. July 21, 2014) (footnote omitted).

Kyle lost the argument. As submitted, the verdict form asked only "Did Plaintiff Jesse Ventura prove his claim of defamation against Chris Kyle? (See Jury Instruction Nos. 8, 8A, 8B, 8C.)"[46] The district court's introductory jury instruction on defamation notes Ventura's claims that he was defamed by Kyle when he asserted in his book, on television, and radio, "that Mr. Ventura said "he hates America," the SEALs "were killing men and women and children and murdering," and the SEALs 'deserve to lose a few.'"[47] The remaining part of the introductory defamation instruction set out the elements of the defamation claim, including the requirement that Mr. Kyle's story about Mr. Ventura had to be defamatory.[48]

This resulted in some jury confusion at trial. After it began deliberations the jury asked the district court:

> In jury instruction #8, when referring to Mr. Ventura's story (Punching Out Scruff Face) is the "story" the sub-chapter or the 3 lines? ("he hates America," "we're killing men & women and children and murdering," "deserve to lose a few")."[49]

Ventura's attorney argued in a conference in chambers that it was necessary to "focus on what the jury's question was. Their question is: 'is the story the subchapter or the 3 lines?' The answer to that is, obviously, it's the whole story. It's not three lines of a story."[50] The trial court agreed.[51]

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[46] Verdict Form, Question 1, Ventura v. Kyle, 2014 WL 3729676 2014 WL 3729681 (D. Minn. July 29, 2014) (No. 12-0472). Jury instructions 8A, 8B, and 8C are the jury instructions on the elements of a defamation claim. Minnesota's pattern special verdict form covering libel claims by public figures breaks down the elements of a defamation claim into separate special verdict questions. *See* 4 MINN. PRAC. SERIES, CIVSVF 50.93 (6th ed. 2014).

[47] Jury Instructions, Jury Instruction No. 8, Ventura, 2014 WL 3729686.

[48] *Id.*

[49] Plaintiff Jesse Ventura's Memorandum in Opposition to Defendant's Motion for Judgment as a Matter of Law or a New Trial, Part II., B., 2, Ventura v. Kyle, 2014 WL 5018930 (D. Minn. Sept. 26, 2014) (No. 12-0472).

[50] *Id.*

[51] *Id.*

The district court's response to the jury's question was that:

> "The story," as used in Instruction No. 8 (and other Instructions), refers to the statements Mr. Kyle made about Mr. Ventura in the Punching Out Scruff Face subchapter and on television and radio, which include the three statements identified in your question. You are instructed to consider each element of Instruction No. 8 as to the story as a whole.[52]

This was consistent with Magistrate Judge Boylan's earlier ruling that the story as a whole had to be considered, rather than just the individual statements.[53]

Ventura argued in his reply to the defendant's trial brief that:

> Ventura's complaint is that his reputation has been damaged by publication of the fabricated story told in the *Scruff Face* sub-chapter, and by media interviews in which Kyle repeated the story. Ventura is not claiming, and has never claimed, that his reputation has been damaged by individual words and phrases *taken out of their context and viewed in isolation.* Because it is the story, as a whole, that is defamatory, the jury cannot be asked to consider isolated words and phrases apart from their context.[54]

The clarifying instruction told the jury that the "story" as used in the jury instructions included both the subchapter and Kyle's comments on it on television and radio, and that the "story" included the three statements noted in the instruction on defamation. Jury instruction 8 initially stated that "Plaintiff Jesse Ventura claims that Chris Kyle defamed him by asserting in *American Sniper,* as well as on television and radio, that Mr.

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[52] *Id.* (footnote omitted).

[53] *See* Plaintiff Jesse Ventura's Reply to Defendant's Trial Brief, Part A, Ventura v. Kyle, No. 12-0472, 2014 WL 3729676 (D. Minn. May 5, 2014).

[54] *Id.* (emphasis supplied). Ventura's brief cited Harman v. Heartland Food Co., 614 N.W.2d 236, 240 (Minn. Ct. App. 2000) for the proposition that "Whether a defamatory meaning is conveyed is dependent upon how an ordinary person understands 'the language used in the light of surrounding circumstances.'") (quoting Gadach v. Benton County Co-op Ass 'n, 53 N.W.2d 230, 232 (Minn. 1952)).

Ventura said 'he hates America,' the SEALs 'were killing men and women and children and murdering,' and the SEALs "deserve to lose a few.'"[55]

The variance between the district court's initial defamation instruction, which focused on the three specific statements, and the remaining defamation instructions, which focused on the story, was confusing. Focusing on the story as a whole means that a jury could find that the story as a whole was false, even if some or all of the statements Kyle attributed to Ventura were true. It might have concluded, for example, that Ventura made the three statements, but that other parts of the story, including the encounter between Kyle and Ventura, and the punch that Kyle said knocked Ventura down were falsified.

On the other hand, the order of the instructions required a finding that the story was defamatory, that it was false, and that Kyle knew or believed the story was false, or had substantial doubts about its truth. While the special verdict form only asked whether Ventura had established his claim for defamation, *the jury's path to answer that question*, the jury would have (should have) worked through the elements of the defamation claim to arrive at its conclusion that the story was defamatory. Considering the jury instructions as a whole, it is hard to argue that the instructions were erroneous. Kyle raised the issue on appeal, but the Eighth Circuit did not reach that issue.[56]

Nonetheless, there is a question as to whether the method of presenting the issue to the jury could have been clarified. The jury might have been asked to consider whether Ventura made those statements and whether they were defamatory against the background of the events set out in the subchapter in American Sniper.

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[55] Jury Instructions, Jury Instruction No. 8, Ventura, 2014 WL 3729686.

[56] Brief of Appellant at 24, 26-27, Ventura, 825 F.3d 876 (8th Cir. 2016) (No. 14–3876). Had the Eighth Circuit reached the issue it seems unlikely that the court would have reversed on that basis. Trial judges have wide latitude in framing instructions. *See* Reed v. Malone's Mech., Inc., 765 F.3d 900, 907 (8th Cir. 2014); McCoy v. Augusta Fiberglass Coatings, Inc., 593 F.3d 737, 744 (8th Cir. 2010). This case is a good example of why. *See* Reed v. Malone's Mech., Inc., 765 F.3d 900, 907 (8th Cir. 2014); McCoy v. Augusta Fiberglass Coatings, Inc., 593 F.3d 737, 744 (8th Cir.2010).

Generally, courts, the Restatement (Second) of Torts, and treatise writers take the position in defamation cases that statements alleged to be defamatory must be considered in light of the context of the work in which the statements appear.[57] As the Restatement (Second) of Torts notes, "[t]he context of a defamatory imputation includes all parts of the communication that are ordinarily heard or read with it."[58]

Conveying that law to the jury is another issue. The jury instruction could have explained more simply the importance of context in determining whether a statement is defamatory. Arizona's pattern instruction provides an example of how it might have been explained to the jury:

> A statement is defamatory if it tends to bring [Name of Plaintiff] into disrepute, contempt or ridicule, or to impeach [Name of Plaintiff]'s honesty, integrity, virtue, or reputation. The defamatory nature of the statement is determined by the natural and probable effect a reading of the entire [statement, publication, or broadcast] in context would have on the mind of the average [reader or hearer].[59]

The key point is that context has to be considered in determining whether a communication is defamatory (and false). A clearer jury instruction on the issue would have told the jury to simply consider the allegedly

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[57] *See, e.g.,* Yohe v. Nugent, 321 F.3d 35, 41 (1st Cir. 2003) (applying Massachusetts law); Celle v. Filipino Reporter Enterprises Inc., 209 F.3d 163, 181 (2d Cir. 2000) (applying New York law); Biro v. Conde Nast, 883 F.Supp.2d 441, 457 (S.D.N.Y. 2012) (applying New York law); Miracle v. New Yorker Magazine, 190 F.Supp.2d 1192, 1199 (D. Haw. 2001) (applying Hawaiian law); Clawson v. St. Louis Post-Dispatch, L.L.C., 906 A.2d 308 (D.C. Ct. App. 2006); Solaia Technology, LLC v. Specialty Publishing Co., 852 N.E.2d 825, 39 (Ill. 2006); McKee v. Laurion, 825, 725, 731 (Minn. 2013); Schlieman v. Gannett Minnesota Broadcasting, Inc., 637 N.W.2d 297, 304 (Minn. Ct. App. 2001); Ward v. Zelikovsky, 643 A.2d 972, 978 (N.J. 1994); Musser v. Smith Protective Services, Inc., 723 S.W.2d 653, 655 (Tex. 1987); RESTATEMENT (SECOND) OF TORTS § 563 cmt. d (Am. Law Inst. 1977) ("In determining the meaning of a communication, words, whether written or spoken, are to be construed together with their context."); ROBERT D. SACK, 1 SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 2.4.2[A], at 2-20 – 2-21 (4th ed. 2012) ("Particular words must be read in the context of the communication as a whole").

[58] RESTATEMENT (SECOND) OF TORTS § 563 cmt. d (Am. Law Inst. 1977).

[59] ARIZONA PATTERN JURY INSTRUCTIONS-CIVIL, Defamation 2 (2014).

defamatory statements in context.

3. Burden of Proof

Public figures and officials are required to prove a false and defamatory communication, but also that the communication was made with "actual malice," which has to be established by clear and convincing evidence.[60] There was a dispute in the case as to whether both falsity and actual malice had to be proven by clear and convincing evidence, or only the actual malice element. There was also a dispute over the definition of actual malice.

Kyle argued throughout the case that the clear and convincing evidence standard should also apply to the falsity issue, and that the evidence was insufficient to meet the higher standard.[61] The trial court rejected the argument that the clear and convincing evidence standard applied to the falsity issue because of the lack of any binding Supreme Court, Eighth Circuit, or Minnesota authority on the issue, [62] instead instructing the jury on both the preponderance of the evidence and clear and convincing evidence standards.[63] The court applied the preponderance of the evidence standard to the falsity issue[64] and the clear and convincing evidence standard to the actual malice issue.[65] The district court also concluded that the evidence was sufficient to meet the higher standard.[66]

The Supreme Court bypassed the burden of proof issue in *Harte-Hanks Communications, Inc. v. Connaughton*.[67] The state and federal cases vary

[60] Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).
[61] Memorandum in Support of Defendant's Motion for Judgment as a Matter of Law or a New Trial, Ventura v. Kyle, No. 12-cv-0472, 2014 WL 4425622 (D. Minn. Sept. 4 2014); Brief of Appellant at 37-39, Ventura, 825 F.3d 876 (8th Cir. 2016) (No. 14–3876).
[62] Ventura, 63 F. Supp. 3d at 1012.
[63] Jury Instructions, Jury Instruction No. 7, Ventura, 2014 WL 3729686. The district court also concluded that the evidence on the falsity issue was sufficient to meet the clear and convincing burden of proof. *Ventura*, 63 F. Supp. 3d at 1007 n.1.
[64] *Ventura*, 2014 WL 3729686 at No. 8B.
[65] *Id.* at No. 8C.
[66] Ventura, 63 F. Supp. 3d at 1007 n.1.
[67] Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 661 n.2 (1989). The Court noted that "[t]here is some debate as to whether the element of falsity must be established by clear and convincing evidence or by a preponderance of the evidence, but expressed no view on the issue.

in their treatment of the issue.[68] Courts may conclude that the plaintiff must prove falsity of the defamatory communication by a preponderance of the evidence[69] or by clear and convincing evidence.[70] Or, they may conclude that a plaintiff bears the burden of proving all elements of a defamation claim by clear and convincing evidence.[71] Still others recognize the split in authority without reaching the issue.[72] The analysis in many of the opinions is conclusory.

The argument in favor of applying the preponderance standard turns primarily on the lack of a Supreme Court holding on the issue.[73] The argument in favor of the clear and convincing evidence standard is set out in *DiBella v. Hopkins*,[74] a Second Circuit decision applying New York

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[68] *See* Daniel William Weininger, Note, *"We Express No View On This Issue": The Standard of Proof for the Element of Falsity In A New York Public Official/Figure Defamation Action*, 81 ST. JOHN'S L. REV. 455 (2007).

[69] In Rattray v. City of Nat'l City, 51 F.3d 793, 801 (9th Cir. 1994), the Ninth Circuit concluded that the clear and convincing evidence standard did not apply to the falsity element of a defamation claim. Judge Hug, dissenting, argued that the clear and convincing evidence standard should apply to the falsity element to avoid the same chilling effect the Supreme Court sought to avoid in applying the higher standard of proof to the actual malice issue. *Id.* at 804 (Hug, J., dissenting).

[70] *See* Phillips v. Ingham County, 371 F.Supp.2d 918 (W.D. Mich. 2005) (applying Michigan law, holding that clear and convincing evidence standard applies to falsity element).

[71] Pritt v. Republican Nat'l Comm., 557 S.E.2d 853, 862-63 (W. Va. 2001) (following Miller, J.'s dissenting opinion in Hinerman v. Daily Gazette Co., 423 S.E.2d 560, 590 (W. Va. 1992)).

[72] *See* Gleason v. Smolinski, 125 A.3d 920, 957 n. 44 (Conn. 2015) (noting the division in authority without deciding the issue). In Nevada Indep. Broad. Corp. v. Allen, 664 P.2d 337 (1983), the Nevada Supreme Court noted that the burden of proof on the falsity issue is unclear. *Id.* at 343. In a footnote, the court noted the division of authority on the issue, but observed, without further explanation, that "[p]ractically speaking, it may be impossible to apply a higher standard to 'actual malice' than to the issue of falsity." *Id.* at 343 n. 5. That observation is similar to the court's in Robertson. Robertson v. McCloskey, 666 F. Supp. 241, 248 (D.D.C. 1987).

[73] *See, e.g.*, Goldwater v. Ginzburg, 414 F.2d 324, 341 (2d Cir. 1969) (concluding that the Supreme Court only changed the burden of proof with respect to the actual malice requirement, not the other elements of a defamation claim).

[74] 403 F.3d 102 (2d Cir. 2005) (predicting New York law), *cert. denied*, 546 U.S. 939 (2005). The Minnesota Supreme Court has not addressed whether the common law requires a public figure to prove falsity by clear-and-convincing evidence or a mere preponderance. The U.S. Supreme Court, after noting a split in authority, avoided deciding the issue of whether the First Amendment requires it. Harte-Hanks Commc 'ns, Inc. v. Connaughton, 491 U.S. 657, 661 n.2 (1989). The Eighth Circuit has not

law. The court concluded that the majority of courts to consider the issue have applied the higher standard of review to the falsity issue. The rationale for the higher standard is threefold. One is that a rule favoring the higher standard of care is more speech protective. A second is that plaintiffs who are public figures effectively already bear the higher burden of proof because the issue of falsity is subsumed in the actual malice requirement that the defamatory communication was made with knowledge of its falsity or in reckless disregard of the truth. A third is that instructing a jury that the plaintiff has to prove falsity by a preponderance of the evidence, but must prove actual malice by clear and convincing evidence, is likely to result in confusion and error.[75]

The Eighth Circuit did not reach the issue on appeal.[76] The court commented on the issue in a footnote, however, noting "the complications that can arise when a general verdict form is used in pubic-figure defamation cases."[77] The alternative, a special verdict form, would break the defamation claim into its elements, requiring separate findings on the defamation, falsity, and actual malice issues.

4. Actual Malice

There are at least two issued relating to the actual malice standard, which is part of a public figure plaintiff's burden of proof in establishing a right to recover for defamation. There are lingering questions concerning the proper standard for actual malice and in drafting appropriate jury instructions that will make the standard comprehensible for juries.

a. The Actual Malice Standard

The Supreme Court applied the First Amendment to a defamation case for the first time in *New York Times Co. v. Sullivan*.[78] The Court

decided the issue. But most jurisdictions addressing the issue hold that public figures must prove falsity by clear-and-convincing evidence. *See, e.g.*, DiBella v. Hopkins, 403 F.3d 102, 110-15 (2d Cir. 2005) (collecting cases); Brokers' Choice of Am., Inc. v. NBC Universal, Inc., 757 F.3d 1125, 1128 (10th Cir. 2014); see also R. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 3:4 at 3-14 to -15 & n. 52 (4th ed. 2010 & Supp. 2013).

[75] *Id.* at 114 (quoting Robertson v. McCloskey, 666 F. Supp. 241, 248 (D.D.C.1987)).

[76] Ventura v. Kyle, 825 F.3d 876, 802 n. 4. (8th Cir. 2016).

[77] *Id.* at 886 n. 8. The court cites as examples Greenbelt Co–op. Pub. Ass'n v. Bresler, 398 U.S. 6, 11 (1970) and West v. Media Gen. Operations, Inc., 120 Fed. Appx. 601, 602, 619 (6th Cir. 2005) (unpublished) (collecting cases).

[78] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

established a First Amendment baseline that precludes recovery by public officials for false and defamatory statements relevant to their conduct in office unless the officials establish actual malice by clear and convincing evidence.[79]

The actual malice standard requires proof that a defamatory communication was made "with knowledge that it was false or with reckless disregard of whether it was false or not."[80] The Supreme Court has variously defined reckless disregard to mean publication with "serious doubts" about the truth of the communication[81] or publication with a "high degree of awareness . . . of probable falsity,"[82] but the Court has also noted that there is no single, "infallible definition" of the term."[83] The Court has suggested that one of the definitions should be used in lieu of the use of the term "actual malice," to avoid jury confusion.[84]

b. Actual Malice – Jury Instructions

Federal and state pattern jury instructions are generally consistent in defining the term "actual malice" to mean publication with knowledge of its falsity or reckless disregard of whether it is false or not.[85] The term "reckless disregard" may or not be further defined in pattern instructions. If it is, it is typically defined as publication with serious doubts as to the truth of the publication.[86]

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[79] *Id.* at 279-280. The Court drew the standard from the Kansas Supreme Court's decision in Coleman v. MacLennan, 98 P. 281 (Kan. 1908), which enunciated a rule that several state courts had adopted. The standard in *Coleman* was based on the free press provision in the Kansas Constitution. *Id.* at 283.

[80] Sullivan, 376 U.S. at 280.

[81] St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

[82] Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

[83] Connaughton, 491 U.S. at 667 (quoting Thompson , 390 U.S. at 730).

[84] Masson v. New Yorker Mag., Inc. 501 U.S. 496, 511 (1991).

[85] *E.g,* 3 FED. JURY PRAC. AND INSTR. § 124.11 (6th ed. 2015) ("A publication is made with "actual malice," as that term is used in this charge, if it is made with knowledge that it is false, or with reckless disregard of whether it is false or not"); DEL. P.J.I. CIV. § 11.16 (2000) ("A publication is made with "actual malice" if it is made with knowledge that it is false or with reckless disregard for whether it is false"); VA. PRAC. JURY INSTR. § 48.15 (2015) ("'Actual malice' is that malice that shows that a statement was made with knowledge that it is false or with reckless disregard of whether it is false or not").

[86] *E.g.*, JOSEPH D. LIPCHITZ & JOHN F. NUCCI, MASS. SUPER. CT. CIV. PRAC. JURY INSTRUCTIONS, § 6.3.1 (2014) ("'Reckless disregard' means that the defendant or the

Ventura's requested instruction was drawn from the Eighth Circuit[87] and Minnesota[88] pattern jury instructions on actual malice. The requested instruction read as follows:

> In a defamation suit, it must be proved by clear and convincing evidence that the allegedly defamatory statement or communication was published with actual malice. A statement or communication is published with "actual malice" if the person who publishes it knew it was false or had serious doubts about its truth. "Clear and convincing evidence" means it is highly probable that the statement was published with actual malice. Put another way, you must firmly believe that the defendant published the statement with actual malice.[89]

In contrast, Kyle's requested jury instruction on actual malice was quite detailed:

> The third thing that Jesse Ventura must prove is that Chris Kyle made his January 2012 statements (that Jesse Ventura made offensive statements at the Michael Monsoor wake on October 12, 2006, including the "deserve to lose a few" statement) with actual knowledge that they were false or with a high degree of subjective awareness that they probably were false.
>
> Ventura must prove by clear and convincing evidence that the allegedly defamatory statements were made with actual knowledge that they were false or with a high

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defendant's agent entertained serious doubts as to the truth of the publication"); MINN. DIST. JUDGES ASS'N, JURY INSTRUCTION GUIDE – CIVIL, CIVSVF 50.93 (6th ed. 2014) ("actual malice" is defined in part as publication with "serious doubts about its truth"); COMMITTEE ON PATTERN JURY INSTRUCTIONS, N.C. PATTERN JURY INSTRUCTIONS FOR CIVIL CASES, No. 806.85 (2018) ("Reckless disregard means that, at the time of the publication, the defendant had serious doubts about whether the statement was true") (footnote omitted).

[87] COMMITTEE ON MODEL JURY INSTRUCTIONS, MANUAL OF MODEL CIV. JURY INSTRUCTIONS FOR THE DIST. COURTS OF THE EIGHT CIR. § 3.04 (2013).

[88] MINN. DIST. JUDGES ASS'N, JURY INSTRUCTIONS GUIDE – CIVIL, CIVJIG 50.40 (6th ed. 2014) (modified).

[89] Plaintiff's Proposed Jury Instructions, Instruction 18, Ventura v. Kyle, (D. Minn. Apr. 21, 2014) (No. 12-0472 27) (footnotes omitted).

> degree of subjective awareness that they probably were false.[10]
>
> Knowledge that the statement was false means that Chris Kyle actually knew that he was saying something that was untrue.
>
> A high degree of subjective awareness that statements probably were false is shown if Kyle actually recognized that the statement was probably false, but went ahead and made it anyway, ignoring that it was probably false.
>
> That Chris Kyle was or might have been careless in making the statements does not constitute subjective awareness of probable falsity. Chris Kyle's conduct is not to be measured by whether a reasonably prudent person would have made the challenged statements, or would have been more careful in how the statement was worded, or would have investigated more before making the challenged statements.
>
> Disapproval, ill will, prejudice, hostility or contempt do not by themselves amount to knowledge of falsity or awareness of probable falsity. Evidence that a party or a witness had a lapse in memory regarding one event while he clearly recalls other events is not implausible, nor does it demonstrate that he knew his statement was false or probably false. Anyone with a less-than-perfect memory will recall some things precisely and other things in a fog.[90]

The proposed instruction was cobbled together from various sources. The actual malice standard in the proposed instruction appears to be based primarily on *Masson v. New Yorker Magazine, Inc.*, which notes that a "high degree of awareness of . . . probably falsity" is necessary to establish reckless disregard.[91] The Supreme Court has equated the serious

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[90] Defendant's Revisions to Selected Proposed Jury Instructions at 4, Ventura, 2014 WL 8721598 (footnotes omitted).
[91] Masson, 501 U.S. at 510.

doubt half of the standard with "subjective awareness of probable falsity."[92] In *St. Amant v. Thompson*, the Court stated that "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing," and that "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."[93] *Niska v. Clayton*, an unpublished Minnesota Court of Appeals decision, was the basis for part of the penultimate sentence and the last sentence of the instruction.[94]

The instruction the trial court gave was considerably shorter than Kyle's requested instruction. It also differed from Ventura's requested instruction. Without using the term "actual malice," the court instructed the jury that:

> The third element is that Mr. Kyle published the story about Mr. Ventura despite:
>
> 1. Knowing the story was false; *or*
>
> 2. Believing the story was false; *or*
>
> 3. Having serious doubts about the story's truth.[95]

There was some jury confusion about the instructions. Two questions were raised, one by the full jury during deliberations and one by an individual juror after the jury deadlocked. During its initial deliberations, the jury asked for guidance on the meaning of "serious doubt."[96] Kyle argued in his post-trial motion[97] for judgment as a matter of law or a new trial and on appeal[98] that the trial court should have instructed the jury

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[92] Gertz, 418 U.S. at 334 n.6.
[93] Thompson, 390 U.S. at 731.
[94] Niska v. Clayton, No. A13–0622, 2014 WL 902680 at *5 (Minn. Ct. App. Mar. 10, 2014), *cert. denied*, 135 S. Ct. 1399 (2015). The case involved the application of MINN. STAT. § 211B.06, subd. 1(a) (2014) (held unconstitutional in 281 Care Committee v. Arneson, 766 F.3d 774, 785 (8th Cir. 2014)).
[95] Ventura, 2014 WL 3729686, at *5.
[96] Brief of Appellant at 9–10, Ventura, 2014 WL 3729686.
[97] Memorandum in Support of Defendant's Motion for Judgment as a Matter of Law or a New Trial at 13, Ventura v. Kyle, 2014 WL 4425622 (D. Minn. Sept. 14, 2014) (No. 12-cv-0472).
[98] Brief of Appellant at 5, Ventura, 2014 WL 3729686.

that "serious doubt" means a "high degree" of "awareness of probable falsity."

The trial court instead told the jury that there was no legal definition of the term "serious doubt" and that they would have to "rely on [their] common sense in interpreting and applying the standard."[99] The trial court was undoubtedly correct in telling the jury that there was no legal definition of "serious doubt." The circularity of the definitions of "reckless disregard" and "serious doubt" establish that.[100]

The court responded to the second question by referring the jury to instructions 8 through 8C, the defamation instructions.[101] The juror's question about whether the jury had "to believe that Kyle thought he was telling the truth" may well have been prompted by the second part of the third element of jury instruction 8C. The focus of the Supreme Court decisions on actual malice and the pattern jury instructions does not include the "belief" element. While the issue of belief in the truth of the defamatory matter was relevant at common law to a determination of whether there was actual malice sufficient to overcome conditional privileges, the focus, post-*Sullivan*, is on whether the defamatory communication was made with knowledge of its falsity or with serious doubts about its truth.[102]

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[99] Brief and Addendum of Appellant at 45–47, Ventura, 825 F.3d 876 (8th Cir. 2016) (No. 14-3876).

[100] *See supra* notes 72–79 and accompanying text.

[101] *See supra* notes 72–79 and accompanying text.

[102] Before Sullivan, 376 U.S. 254 (1964), proof of malice necessary to overcome a conditional privilege meant that the defendant must have made the defamatory statement with an improper motive, which turned on "the intent or purpose with which the publication was made, the belief of the defendant in the truth of his statement, or upon the ill will which the defendant might have borne toward the plaintiff." Herbert v. Lando, 441 U.S. 153, 164-65 (1979). That approach was adopted in section 600 of the Restatement of Torts, which provided that a conditional privilege was abused if the person publishing a false and defamatory communication did "not believe in the truth of the defamatory matter." A conditional privilege was abused under section 601 of the person making the person publishing the false and defamatory communication "although believing the defamatory communication to be true" did not have reasonable grounds for that belief. RESTATEMENT OF TORTS §§ 600, 601 (Am. Law Inst.1938).

Section 600 of the Restatement (Second) of Torts combined those two sections of the Restatement of Torts. It provides that a conditional privilege is overcome if the person publishing the defamatory communication does so knowing

Belief is irrelevant to the issue of whether Kyle knew the story was false. Either he knew it was false or he didn't. Belief might be seen as the flip side of whether he had serious doubts about the truth of the story. If he believed it was true, he might not have serious doubts about the truth of the story. If so, there is no need to use both in a jury instruction because it would prompt a jury to look for different answers to the same question. Also, in some cases, there could be doubts about the truth of a story, but the evidence is nonetheless sufficient to justify publication because of corroborating evidence, even in the face of those doubts.[103]

5. Damages

Ventura alleged in his original complaint that "[a]s a direct result of Kyle's publication of knowingly, intentionally, and maliciously false and defamatory statements," his "reputation and standing in the community, including Minnesota and the United States, has been harmed, he has been embarrassed and humiliated, and he has suffered emotional distress."[104] He also alleged that:

> Kyle's publication of knowingly, intentionally and maliciously false and defamatory statements has negatively affected, and will continue to negatively affect Governor Ventura in connection with his businesses and professions, including but not limited to his current and future opportunities as a political candidate, political commentator, author, speaker, television host and

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that it is false or "acts in reckless disregard as to its truth or falsity." RESTATEMENT (SECOND) OF TORTS § 600 (AM. LAW INST. 1977).

A comment to section 600 of the Second Restatement notes that at common law the traditional balance was achieved by imposing strict liability for a defamatory communication only if the defendant "did not believe the statement to be true or lacked reasonable grounds for so believing." *Id.* cmt. a.

The Reporter's Note to the section explains that the combined section has shifted the focus from the issue of whether the defendant believed in the truth of the defamatory matter or had reasonable grounds for believing it was true, to a standard that asks whether the defendant knew the defamatory communication was false, or acted in reckless disregard of its truth or falsity. Id. reporter's note. "Belief" is excised from the black letter statement.

[103] *E.g.*, Jackson v. Paramount Pictures Corp., 84 Cal. Rptr. 2d 1, 15 (Cal. Ct. App. 1998) ("A healthy skepticism is a normal part of a reputable journalist's makeup and leads him or her to obtain corroborating evidence to back up a source's story.").

[104] Complaint, paragraph 42, Ventura v. Kyle, No. E 0:12-cv-00472-RHK-JJG.

> personality, and all other commercial endeavors that involve exploitation of his name, likeness and public persona.[105]

He sought to recover for presumed damages, including injury to reputation and emotional harm, as well as for economic loss caused by the defamatory communication.

The case raised several issues concerning his right to recover damages for emotional harm. Kyle contested Ventura's right to recover damages for emotional distress, as well as his evidence of diminished reputation.[106] and Ventura contested Kyle's proof of Ventura's diminished reputation.[107]

Injury to reputation is generally presumed in libel cases[108] and in defamation claims by public officials,[109] figures,[110] or in cases involving public issues,[111] once *New York Times* actual malice is established.

A key question in any defamation case concerns the plaintiff's burden of establishing damages, not only for injury to reputation, but also for emotional harm caused by the defamatory communication. Injury to reputation is generally presumed in libel cases.[112] In defamation claims by public officials,[113] figures,[114] or in cases involving public issues,[115] there no First Amendment impediment to the award of presumed

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[105] *Id.* at paragraph 43.
[106] Memorandum in Support of Defendant's Motion In Limine to Exclude Certain Evidence not Properly Admissible With Regard to Plaintiff's Reputation at 2–3, Ventura v. Kyle, 2014 WL 3729659 (D. Minn. Apr. 21, 2014) (No. 12-cv-0472).
[107] Plaintiff Jesse Ventura's Memorandum in Support of Motion In limine to Exclude David A. Schultz From Testifying as an Expert Witness for the Defense and to Confirm the Exclusion of Robert G. Meekins as A Defense Expert, Ventura v. Kyle, 2014 WL 3729652 (D. Minn. Apr. 21, 2014) (No. 12-0472).
[108] W.J.A. v. D.A., 43 A.2d 1148, 1154 (N.J. 2012).
[109] Sullivan, 376 U.S. at 279–80, 283–84.
[110] *See* Gertz, 418 U.S. at 343.
[111] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 756–61 (1985) (plurality).
[112] W.J.A., 43 A.2d at 1154.
[113] Sullivan, 376 U.S. at 279–80, 283–84.
[114] *See* Gertz, 418 U.S. at 343.
[115] Dun & Bradstreet, 472 U.S. at 756–61.

damages, once *New York Times* actual malice is established. While damages may be presumed, nothing precludes the plaintiff from attempting to prove actual injury to reputation. On the other hand, evidence that a plaintiff already had a bad reputation may tend to establish that an additional defamatory communication would not result in any increased harm.[116]

In contrast, the plaintiff has the burden of pleading[117] and proving special damages.[118] A plaintiff seeking to recover for special damages has to show the loss of something of pecuniary value.[119] It may include various sorts of losses, such as loss of a contract, a loss of earnings, credit, or employment.[120]

a. Damages for Emotional Harm

Under applicable state and federal law Ventura was entitled to presumed damages for emotional harm upon proof that the statements were false and defamatory and made with actual malice.[121] The claim for emotional

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[116] *See* ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 10.5.5[B] (4th ed. 2012).
[117] Fed. R. Civ. P. 9(g).
[118] *See* RESTATEMENT (SECOND) OF TORTS §§ 575, 622 (1977). The defamatory communication must the "legal cause" of the special harm to the plaintiff. *Id.* § 622A. It is a legal cause if it was a "substantial factor" in causing the harm. *Id.* § 622A (a).
[119] RESTATEMENT (SECOND) OF TORTS § 575 cmt. b (AM. LAW INST. 1977).
[120] DAVID A. ELDER, DEFAMATION: A LAWYER'S GUIDE § 9:3 (West Supp. 2016); 2 RODNEY A. SMOLLA, LAW OF DEFAMATION § 9.35 (2d ed. 2013).
[121] *See* Gertz, 418 U.S. at 343. Minnesota law permits presumed damages in libel cases. Mike Steenson, *Presumed Damages in Defamation Law*, 40 WM. MITCHELL L. REV. 1492, 1511-12 (2014). In Richie v. Paramount Pictures, Inc., 544 N.W.2d 21, 26 (Minn. 1996). However, the Minnesota Supreme Court restricted the right of a private plaintiff involved in a public issue to recover damages by limiting the right to recover damages for emotional distress to cases in which the plaintiff is able to establish actual injury to reputation, at least when the plaintiff is unable to establish actual malice. While it is clear that *Gertz* permits recovery of actual damages, including damages for emotional distress, *see* Time, Inc. v. Firestone, 424 U.S. 448, 46 (1976) (recovery permitted for emotional distress absent proof of actual injury to reputation in libel case involving a public issue), the Minnesota Supreme Court held that as a matter of Minnesota law a plaintiff involved in a public issue who brings suit against a media defendant has to prove actual injury to reputation in order to recover damages for emotional distress. Richie was inapplicable in Ventura's case, however, because he established actual malice, entitling him to presumed damages.

harm was a hotly contested issue.

Kyle argued in his trial brief that Ventura should not allowed to recover damages for emotional harm. Rather than producing his medical records, Ventura stipulated to the removal of any reference to "mental distress" and "emotional distress" or, as argued in the trial brief, "variations of those terms" as noted in Ventura's complaint. The brief acknowledged, however, that the stipulation did not affect Ventura's "continuing allegations regarding humiliation, embarrassment, harm to his reputation and standing in the community, or regarding negative effects in connection with Plaintiff's business and professions."[122]

Kyle nonetheless argued that the lack of medical support for Ventura's claim for "mental/emotional distress" was significant, because "Minnesota law does not permit recovery of such damages in the absence of reliable evidence,"[123] and that plaintiffs seeking recovery for those damages must "offer medical proof of physical manifestations of alleged mental distress or anguish."[124] Building on that proposition, Kyle argued that Ventura would "have a difficult time distinguishing damages for 'mental distress' and 'emotional distress,' which he has withdrawn, from damages for 'humiliation, embarrassment' which he continues to assert."[125]

The supporting authority for that argument[126] was drawn from Minnesota Court of Appeals cases involving claims for emotional distress, but those claims were not parallel to Ventura's claim for emotional harm. The cases involved claims for promissory estoppel,[127] negligent infliction of

[122] Defendant's Trial Brief at 11, Ventura v. Kyle, 2014 WL 3729664 (D. Minn. Apr. 21, 2014) (No. 12-cv-0472).
[123] *Id.*
[124] *Id.*
[125] *Id.* at 12.
[126] *Id.* (citing Deli v. Univ. of Minn., 578 N.W.2d 779 (Minn. Ct. App. 1998); Soucek v. Banham, 503 N.W.2d 153 (Minn. Ct. App. 1993); Copeland v. Hubbard Broad., Inc., No. C7-97-733, 1997 WL 729195 (Minn. Ct. App. Nov. 25, 1997)).
[127] Deli, 578 N.W.2d at 779. The plaintiff, the women's gymnastics coach at the University, brought suit against the University for breach of the athletic director's oral promise not to view a videotape containing not only the performance of the gymnastics team but also of her sexual encounter with her husband in a hotel room. The court of appeals held that absent an independent tort claim the plaintiff could not recover damages for emotional harm under a promissory estoppel theory, but that even

emotional distress,[128] and trespass.[129] Those cases are inapposite for two reasons.

First, Minnesota law seems clear in holding that a plaintiff is entitled to recover for presumed damages in libel cases, and that presumed damages include damages for mental suffering.[130] Kyle did not dispute that point, although Kyle argued that Ventura's right to recover damages for any emotional harm was foreclosed by his stipulation to withdraw his claims for mental distress.[131] Second, claims for emotional harm in libel cases need not be supported by physical symptoms or medical evidence. The Minnesota Supreme Court cases on that issue are clear.[132]

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if those damages were allowable the plaintiff's evidence, the lack of medical evidence supporting the claim would preclude recover for those damages. *Id.* at 783-84.

[128] Banham, 503 N.W.2d at 153. The plaintiff sued police officers and the City of Minneapolis for negligent infliction of emotional distress arising out the death of his dog, which was shot to death by the officers. The court held that the plaintiff was not entitled to recover for emotional distress because Minnesota requires the person seeking to recover under that theory to prove that he is in the zone of danger and reasonably feared for his own safety, or is able to show "a direct invasion of his rights, such as defamation, malicious prosecution, or other willful, wanton or malicious conduct." *Id.* at 163.

[129] Copeland, No. C7-97-733, 1997 WL 729195. Defendant news room employee of the defendant, accompanied a veterinarian who was being investigated by the defendant's news station, to the plaintiffs' home. She asked to accompany the vet because she was interested in becoming a veterinary technician. The Copelands sued the defendants for trespass. The trial court granted partial summary judgment on the trespass claim, holding that the plaintiffs could not recover damages for their emotional harm caused by the trespass. The court of appeals affirmed, holding that the plaintiffs were required to show physical symptoms arising out of the trespass, but that the evidence was insufficient to justify the claim. *Id.* at *4 -*5.

[130] Thorson v. Albert Lea Pub. Co., 251 N.W. 177, 179 (Minn. 1933) ("Mental suffering is an element of general damage. Such suffering is presumed to have naturally resulted from the publication of a libelous article.").

[131] Memorandum in Support of Defendant's Motion in Limine to Exclude Evidence of "Mental Distress" and "Emotional Distress," Ventura v. Kyle, 2014 WL 3729678 (D. Minn. Apr. 21, 2014) (No. 12-cv-0472).

[132] In Lickteig v. Alderson, Ondov, Leonard & Sween, P.A., 556 N.W.2d 557, 560 (Minn. 1996) (citations omitted), the Minnesota Supreme Court noted that:

> In tort cases, emotional distress may be an element of damages in only three circumstances. First, a plaintiff who suffers a physical injury as a result of another's negligence may recover for the accompanying mental anguish. . . Second, a plaintiff may recover for negligent infliction of emotional distress when physical symptoms arise after and because of emotional distress, if the plaintiff was actually exposed to physical harm as a result of the negligence

b. Presumed Damages - Jury Instructions

The jury instructions on presumed damages in the case raised two issues. First, if Ventura withdrew his claims for mental distress, there was still an issue as to whether he should nonetheless be entitled to recover for other emotional harm, including humiliation and embarrassment. Second, there was an issue as to whether the instructions should in some way constrain the jury's discretion to award presumed damages.

Ventura's requested instruction on presumed damages was a slightly modified version of Minnesota's pattern instruction on the issue:

> The only question for you to decide [in answering Question __] is the amount of money plaintiff is entitled to receive for:
>
> 1. Harm to his reputation and standing in the community
> 2. Humiliation
> 3. Embarrassment
> 4. Economic loss caused by the defamatory statements or communication
>
> No evidence of actual harm is required.[133]

Ventura requested the following instruction on presumed damages:

> Jesse Ventura is seeking to recover against Chris Kyle's Estate what the law calls "presumed damages."
>
> No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for presumed damages, and no evidence of actual harm is required. Nor is the opinion of any witness required as to the amount of reasonable compensation. In

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> of another (the "zone-of-danger" rule). . . Finally, a plaintiff may recover emotional distress damages when there has been a "direct invasion of the plaintiff's rights such as that constituting slander, libel, malicious prosecution, seduction, or other like willful, wanton, or malicious conduct."

[133] Plaintiff's Proposed Jury Instructions, No. 28, Ventura v. Kyle, No. 12-0472 27 (D. Minn. Apr. 21, 2014) (12-cv-0472). Minnesota's pattern instruction is 4 MINN. PRAC. SERIES, CIVJIG 50.55 (6th ed. 2014).

> making an award of presumed damages you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in the light of the evidence.
>
> In determining an award of presumed damages in this case, you must not include any amount for emotional distress or mental distress. Ventura is not seeking these types of damages.
>
> Presumed damages are permitted because in some cases injury to reputation may be difficult of monetary proof, but presumed damages nonetheless are intended to be an approximate compensation for real injury. Presumed damages are intended as some estimate, however rough, of the probable degree of actual loss that a person will suffer given the particular charge against him, even though the loss cannot be identified in money terms. You are not required to award presumed damages, and you may consider any evidence that may exist that Ventura did not suffer any damages. If you find that Ventura has not suffered any actual injury to reputation as a result of the challenged book passage, then you should not award presumed damages.
>
> Presumed damages are not intended to punish Chris Kyle or his Estate for making the challenged statements and are not intended to deter or prevent others from making similar statements in the future.[134]

The proposed instruction is lengthy but generally accurate.

The third paragraph states that the jury is not to award damages for "emotional or mental distress." That was a debatable point, in light of Ventura's stipulation that he would not seek to recover damages for mental or emotional distress.

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[134] Defendant's Revisions to Selected Proposed Jury Instructions, Ventura, 2014 WL 8721598.

The next to the last sentence of the instruction states that the jury may not award presumed damages unless Ventura suffered "actual injury to reputation as a result of the challenged book passage." That part of the requested instruction would have been accurate had Ventura not been a public figure, but if he established that the statement was defamatory, and that it was made with knowledge of the falsity or in reckless disregard of the truth, presumed damagers would be recoverable, absent additional state law restrictions. There are none.[135]

The district court's jury instruction on damages for Ventura's defamation claim tracked Minnesota's pattern instruction, as requested by Ventura. It did not restrict Ventura from recovering for humiliation and embarrassment, although it does not specifically include damages for mental distress:

> If you find that Mr. Ventura has proved his claim of defamation, you may presume he has suffered damages and award him the amount of money you determine he is entitled to receive for harm to his reputation and standing in the community, humiliation, and embarrassment. No evidence of actual harm is required for you to award him these damages.[136]

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[135] In Richie, 544 N.W.2d at 26, however, the Minnesota Supreme Court restricted the right of a private plaintiff involved in a public issue to recover damages by limiting the right to recover damages for emotional distress to cases in which the plaintiff is able to establish actual injury to reputation, at least when the plaintiff is unable to establish actual malice. While it is clear that *Gertz* permits recovery of actual damages, including damages for emotional distress, *see* Firestone, 424 U.S. at 482–83 (recovery permitted for emotional distress absent proof of actual injury to reputation in libel case involving a public issue), the Minnesota Supreme Court held that as a matter of Minnesota law a plaintiff involved in a public issue who brings suit against a media defendant has to prove actual injury to reputation in order to recover damages for emotional distress. The court clearly recognized that its holding was inapplicable in cases where a public figure establishes actual malice. Richie at 26 (" In a case such as this, where the defamatory statements were made by the media, involved a matter of public concern, and there have been no allegations of actual malice, recovery cannot be based on presumed damages"). *Richie* was inapplicable in Ventura's case because Ventura established actual malice, entitling him to presumed damages.

[136] Jury Instructions, Instruction No. 12, Ventura v. Kyle, WL 3729686.

Kyle prevailed on the mental distress issue, but not the argument that any emotional harm that might be categorized as mental distress should not be recoverable. The instructions clearly permitted Ventura to recover for humiliation and embarrassment, however. Both types of injuries are emotional responses to the defamatory communication.

The jury instruction, coupled with the special verdict question on defamation damages, raises additional issues. Question No. 2 on the verdict form asked:

> What amount of money, if any, will fairly and adequately compensate Plaintiff Jesse Ventura for damages directly caused by the defamation? (See Jury Instruction Nos. 12 and 13 for the means of determining damages.)[137]

The instruction on presumed damages states that the jury may award damages without evidence of actual harm. There were no limitations on the instruction along the lines suggested by Kyle ("[p]resumed damages are intended as some estimate, however rough, of the probable degree of actual loss that a person will suffer"), which raises questions concerning whether and how presumed damages can be subject to reasonable limitations and how to convey that concept to a jury.

There is generally a disconnect between the acknowledgment that presumed damages should be an approximation of the damages that would ordinarily flow from the defamatory communication and jury instructions that actually impose boundaries on presumed damages.

The district court's instruction did not limit presumed damages, but the special verdict question on defamation damages did in asking the jury to determine what amount of money would fairly and adequately compensate Ventura "for damages directly caused by the defamation." Incorporation of the causation requirement imposed a limitation that is inconsistent with the concept of presumed damages. Some of these problems are illustrated in a Minnesota saga, *Longbehn v. Schoenrock*,[138]

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[137] Question No. 2, Verdict Form, Ventura v. Kyle, No. 12-472 (D. Minn. July 29, 2014).

[138] Schoenrock was an appellant in the first appeal in the case, Longbehn v. City of Moose Lake, No. A04-1214, 2005 WL 1153625 (Minn. Ct. App. May 17, 2005). The

which involved a series of trials and appeals over a twelve-year period, cases in which the presumed damages problem was pivotal.

The defamation suit arose out of a single phone call made by the defendant to a third person, during the course of which he referred to the plaintiff, a police officer, as "Pat the Pedophile," a sobriquet that referred to the fact that Longbehn had dated a younger woman. That case rocked back and forth between the trial court and court of appeals for several years as the courts grappled with the issue of how to constrain the jury's discretion in awarding presumed damages to the plaintiff in a case involving "defamation per se." In the first trial of the case the jury awarded the plaintiff $230,000 in presumed damages for past and future harm to reputation, mental distress, humiliation, and embarrassment.

Concerned about the size of the damages award, but keenly aware that the presumed damages rule gives courts little control in determining damages, the court of appeals applied a review standard drawn from a comment to section 621 of the Restatement (Second) of Torts, which states that "in the absence of proof, general damages are limited to harm that 'would normally be assumed to flow from a defamatory publication of the nature involved,"[139] and concluded that the award for "general damages far exceeds the amount of past and future harm to appellant's reputation, mental distress, humiliation, and embarrassment that would normally flow from a publication of this kind."[140]

On remand, the trial court, trying to accommodate the court of appeals, was careful in attempting to establish parameters for the jury by instructing them, in part, that:

> A person is liable for the general harm *which results from* the defamatory statement.
> Your duty as a jury is to determine the amount of damages, if any, *that the plaintiff sustained by* the defendant's use

court of appeals opinions in the second and third appeals are Longbehn v. Schoenrock, 727 N.W.2d 153 (Minn. Ct. App. 2007); No. A09-2141 2010 WL 3000283 (Minn. Ct. App. Aug. 3, 2010). For a detailed analysis of the cases see Mike Steenson, *Presumed Damages in Defamation Law*, 40 WM. MITCHELL L. REV. 1492, 1523-39 (2014).

[139] Schoenrock, 727 N.W.2d at 162 (quoting RESTATEMENT (SECOND) OF TORTS § 621 cmt. a (1977)).

[140] *Id.*

> of that nickname. In making your decisions, the court has determined as a matter of law that, number one, the defendant used the offensive nickname on one isolated occasion. . . .
> *A party asking for damages must prove the nature, extent, duration and consequences of his harm.* You must not decide damages based on speculation or guess.[141]

In addition, the first four special verdict form questions asked if "Longbehn 'suffer[ed]' some form of harm 'from the Defendant's use of the defamatory nickname.'"[142]

The court of appeals held that the trial court erred in giving the highlighted parts of the instruction and in formulating its special verdict form because they required a finding of causation, a requirement that is inconsistent with the presumed damages rule as set out in its previous opinion in the case.[143]

The case was reversed and remanded. The trial court, which by now may have thought it was playing whack-a-mole, instructed the jury in the retrial as follows:

> Deciding harm for defamation
> The only question for you to decide is the amount of money the Plaintiff is entitled to receive for
> 1. Harm to his reputation and standing in the community;
> 2. Mental distress;
> 3. Humiliation; and
> 4. Embarrassment
> No evidence of actual harm is required.
> You may base the amount of money Plaintiff if entitled to receive on your assessment of the harm that would normally be assumed to flow from a defamatory publication of the nature involved here.

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[141] Longbehn v. Schoenrock, No. A09-2141, 2010 WL 3000283, at *3 (Minn. Ct. App. Aug. 3, 2010) (emphasis the court's).
[142] *Id.*
[143] Schoenrock, 727 N.W.2d at 160 (stating that where damages are presumed the plaintiff is entitled to recover without proof that the publication caused actual harm).

> In your assessment of presumed general damages you may consider: (1) the character of the Plaintiff; (2) the Plaintiff's general standing and his reputation in the community; (3) the character of the defamatory publication; (4) the extent of dissemination of the statement by the Defendant; and (5) the extent and duration of the circulation of the Defendant's publication.[144]

The special verdict question on damages, with the jury's response, was as follows:

> 1. What amount of money will fairly and adequately compensate the Plaintiff for Defendant's use of the defamatory nickname?
>
> a. Harm to Plaintiff's reputation and standing in the community $ 00.00
> b. Mental distress $ 00.00
> c. Humiliation $ 750.00
> d. Embarrassment $ 00.00[145]

The court was careful in framing the question to avoid any requirement of a causal connection between the defendant's use of the defamatory nickname and any harm to the plaintiff's reputation or mental distress, humiliation, and embarrassment.

The district court's jury instructions and special verdict questions in the *Ventura* case would have more accurately reflected Minnesota law had there been limitations on presumed damages and had the causal connection required in the special verdict form been removed. Only Ventura would have complained about that, of course, and a verdict in his favor rendered it moot. As to the lack of limitations on presumed damages in the instruction, the broad discretion trial courts have in instructing juries would have made it an effectively nonappealable point. Nonetheless, the instructions and special verdict form in the *Ventura* case illustrate the inadequacies of jury instructions and special verdict questions on the presumed damages issue. The dilemma created by the

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[144] Mike Steenson, *Presumed Damages in Defamation Law*, 40 WM. MITCHELL L. REV. 1492, 1535–36 (2014).
[145] *Id.* at 1536.

presumed damages rule, which permits damages in the absence of proof of those damages, and the need for some boundaries in a jury's discretion to award those damages, can be avoided. Instructions such as those in the last trial in *Longbehn v. Schoenrock* illustrate that reasonable limitations can be imposed on presumed damages without running afoul of the contrary rule that there does not have to be proof of actual harm to justify a damages award.[146]

B. Invasion of Privacy – Appropriation

Section 652C of the Restatement (Second) of Torts provides that ""[o]ne who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."[147] Relying on section 652C, Ventura alleged that he "has acquired a property right in the exclusive commercial use of his own identity, as represented by his

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[146] North Carolina's pattern instruction on presumed damages in cases involving claims for presumed damages by public figures or officials suggests a guide for juries to follow:

> The determination of the amount of presumed damages is not a task which can be completed with mathematical precision and is one which unavoidably includes an element of speculation. The amount of presumed damages is an estimate, however rough, of the probable extent of actual harm, in the form of loss of reputation or standing in the community, mental or physical pain and suffering, and inconvenience or loss of enjoyment which the plaintiff has suffered or will suffer in the future as a result of the defendant's publication of the [libelous] [slanderous] statement.

NC PATTERN JURY INST. - CIV. 806.83 (June 2017).
California's Bar Association Jury Instruction is another example of a limiting instruction:

> Presumed damages are those damages that necessarily result from the publication of defamatory matter and are presumed to exist. They include, but are not limited to, reasonable compensation for loss of personal [or professional] reputation, shame, mortification, and hurt feelings. No definite standard [or method of calculation] is prescribed by law by which to fix reasonable compensation for presumed damages, and no evidence of actual harm is required. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for presumed damages you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable.

CAL. JURY INSTR.--CIV. 7.10.1 (March 2018).
[147] RESTATEMENT (SECOND) OF TORTS §652C (Am. Law Inst. 1977). The Minnesota Supreme Court adopted section 652C in 1998. Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 233 n.3, 236 (Minn. 1998).

name, image, voice, photograph and public persona,"[148] and that "Kyle has wrongfully appropriated and used [his] identity for his own economic advantage and gain, including Governor Ventura's name, image and public persona."[149]

There is a substantial body of case law and overlapping Restatement provisions covering the tort of appropriation, and a lack of clarity in the law.[150] Threading that law through the eye of the jury instruction needle is made harder because of that lack of clarity. The treatment of appropriation in the *Ventura* case is a good illustration of the problems.

There are several intersecting problems that have to be addressed in understanding the tort of appropriation, including what kind of appropriation is necessary to trigger the tort, what the defendant's purpose has to be in appropriating the plaintiff's name or likeness, what damages the plaintiff is entitled to recover if the appropriation is established, when the exception for the incidental use of a plaintiff's name or likeness applies, and what limitations the First Amendment imposes on the right to recover for appropriation. Those recurring issues in appropriation cases were all involved in the case.

1. Jury Instructions

The jury instructions on appropriation in the *Ventura* case, proposed and given, highlight the problems involved in understanding the tort of appropriation and in explaining the law to the jury in a comprehensible form.

Ventura's requested jury instruction on appropriation, which was drawn from Minnesota's pattern jury instruction, was brief and straightforward:

> Invasion of privacy by appropriation occurs when a person appropriates another person's name or likeness for his or her own use or benefit.[151]

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[148] Complaint *supra* note 16, ¶ 16.
[149] *Id*. at ¶ 48.
[150] *See* Eric E. Johnson*, Disentangling the Right of Privacy,* 111 NW. U.L. REV. 891, 93–909 (2017); Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. REV. 477, 546–59 (2006).
[151] Plaintiff's Proposed Jury Instructions, Ventura v. Kyle, (RHK/SER) 27 (D. Minn. Apr. 21, 2014) (No. 12-0472). The proposed instruction is taken verbatim from MINN. PRAC. SERIES, CIVJIG 72.15 (6th ed. 2014).

Kyle's proposed jury instruction on appropriation was more detailed:

> A defendant is liable for invasion of privacy/appropriation if he improperly appropriates another person's name for his or her own use or benefit. The value of a plaintiff's name is not appropriated by mere mention of it, or by reference to it in connection with legitimate mention of his public activities.
>
> A plaintiff does not have the right to object merely because his name or his appearance is brought before the public. The publication of biographical data of a well-known figure does not constitute an invasion of privacy or a wrongful appropriation of his name.
>
> A plaintiff cannot recover where the plaintiff's name is used in connection with communications about matters of legitimate public interest, so long as there is a real relationship between the plaintiff and the subject matter of the publication.
>
> The plaintiff has the burden to show that his name has been appropriated. If he does not meet this burden, you must find for the defendant.[152]

The district court gave the following five-sentence instruction on appropriation:

> Plaintiff Jesse Ventura also claims that Chris Kyle invaded his privacy by appropriating his name. To prevail on this appropriation claim, Mr. Ventura must have proved his defamation claim. Mr. Ventura must also prove by the greater weight of the evidence that Mr. Kyle appropriated to his own use or benefit the value of Mr. Ventura's name.
>
> The value of a person's name is not appropriated by mere mention of it or in connection with publication about matters of legitimate public interest, so long as there is a

[152] Defendant's Revisions to Selected Proposed Jury Instructions, Defendant's Revised Final Instruction No. 24--Elements of the Claim of Appropriation, Ventura v. Kyle, 2014 WL 8721598 (footnotes omitted).

> real relationship between the plaintiff and the subject matter of the publication. It is only considered appropriation when a plaintiff's name is used for the purpose of appropriating to the defendant's benefit the commercial or other value associated with the plaintiff's name.[153]

The first sentence introduces the claim. The second sentence states that Ventura has to prevail on his defamation claim in order to be entitled to recover for invasion of privacy. The third incorporates Ventura's proposed instruction, except rather than stating that the appropriation had to be of the person's name or likeness, it states that Kyle had to have appropriated the "value" of Ventura's name. The fourth sentence was taken from the penultimate paragraph of Kyle's proposed appropriation instruction, which stated that there is no appropriation if a name is merely mentioned or used in connection with "matters of legitimate public interest," if "there is a real relationship between" the person and "the subject matter of the publication." The last sentence of the instruction was based substantially on the third-to-the-last paragraph of comment d to section 652C of the Restatement (Second) of Torts.[154]

The only question on appropriation on the special verdict form was, "Did Plaintiff Jesse Ventura prove his claim of appropriation against Chris Kyle?"[155] The jury answered that question in the negative, but because the elements of the claim were not broken down in the verdict form, there is no way of knowing why the jury found in Kyle's favor. The jury might have found that there was no appropriation because Kyle's purpose was not to appropriate the commercial or other value associated with Ventura's name, that the publication was about a matter of "legitimate public interest," that there was only a "mere mention" of Ventura's name in connection with a publication about a matter of "legitimate public interest," or that there was no "real relationship" between Ventura and the subject matter of the publication. Take your pick.

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[153]Jury Instructions, Jury Instruction No. 9, Ventura v. Kyle, No. 12-472, 2014 WL 3729686. The instruction uses the term publication. The defamation instruction focused on the story. The instructions should have been consistent in use of the "story" as the focus of both claims.

[154] *See* RESTATEMENT (SECOND) OF TORTS § 652C cmt. d (AM. LAW INST.1977).

[155] Special Verdict Form No. 2, Ventura v. Kyle, No. 12-0472 (D. Minn. July 29, 2014).

The last four sentences of the instruction raise several issues. The second sentence, conditions the right to recover for invasion of privacy on Ventura's right to recover for defamation. The issue is why. The third sentence raises an issue as to what constitutes an appropriation for one's "use or benefit." Commercial use is obvious. Other "benefit" is not. The fourth raises the issue of how a matter of "legitimate public interest" is defined, whether it means the same thing as newsworthiness for First Amendment purposes, why it would be relevant if a jury is first required to find "actual malice" (a requisite finding if the jury first has to find in Ventura's favor in order to even consider the appropriation issue), and why in any event it would be a jury issue rather than a question of law for the court. The final part of the sentence raises a question as to what a "real relationship" is between Ventura and the subject matter of the publication. That sentence also uses the term "publication," which apparently refers to the book, although Ventura's theory of appropriation was also based on the subsequent publicity the book received through Kyle's radio and television appearances to promote the book.

The next sections unpack the instruction and suggest a more simplified alternative instruction for appropriation cases.

2. Defamation as a Prerequisite to Appropriation

The first issue is why a finding of defamation should be a prerequisite to recovery for appropriation. Kyle argued in the first motion for summary judgment that he was entitled to summary judgment because the First Amendment protected his statements about Ventura. In a heading entitled "Invasion of Privacy/Appropriation," the district court noted that summary judgment was inappropriate because the parties could not agree whether the statements were true or false.[156] That linked the appropriation claim to the defamation claim, but without explaining why.

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[156] Ventura v. Kyle, Civ. No. 12–472, 2012 WL 6634779, at *3 (D. Minn. Dec. 20, 2012). This is the court's analysis of the issue:

> Kyle argues that he is entitled to summary judgment because his statements about Ventura are protected by the First Amendment. See Zacchini v. Scripps–Howard Broad. Co., 433 U.S. 562, (1977) (applying First Amendment analysis to invasion-of-privacy claim); C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818, 823–24 (8th Cir.2007) (First Amendment privilege defeated right-of-publicity claim). But this argument depends entirely on his own version of the facts and ignores Ventura's. His statements are not protected by the First Amendment

If the jury did not find for Ventura on the defamation claim, it could have been for various reasons. The jury might have found that Ventura was unable to prove that the story was false, or if it was, that Kyle did not know it was false or that he did not have substantial doubts about its truth. But even if the defamation claim failed for either or both of those reasons, the issue is why the appropriation claim would necessarily be barred. While there is often an element of falsity in appropriation claims, appropriation of a person's name or likeness for the defendant's benefit, commercial or otherwise, may be actionable, Ventura might have claimed that even if the story were true, Kyle used the story (and Ventura's name) for the primary purpose of gaining a commercial advantage. If so, there would still be impediments to the claim, however. The story about Kyle's encounter with Scuff Face would most certainly be newsworthy, and that story played only a small part in Kyle's overall life story, small enough to be simply an incidental use in connection with that larger story.

If that is accepted, the issue then is why a finding of defamation, which necessarily included a finding that the story was defamatory, false and that Kyle published it with knowledge of the falsity or with substantial doubts about its truth, would place Ventura in a better position with respect to the appropriation claim. If the Scruff Face story was false, and Kyle knew it was false or had substantial doubts about its truth, the newsworthiness defense would necessarily collapse, opening the door to an appropriation claim that would likely be precluded if the story were true. There is no First Amendment interest in protecting a false appropriation claim when the use of a person's name or likeness is defamatory, false, and made with actual malice.

The conclusion that follows from the court's ruling is that if the statements are not protected by the First Amendment because they were false, and that Kyla knew they were false or had substantial doubts about their truth, there is no *constitutional* bar to the claim for appropriation. Kyle's publication of a false story with knowledge of the falsity or

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> if they were knowingly false and defamatory, as Ventura claims. See, e.g., First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964); Garrison v. Louisiana, 379 U.S. 64, 73 (1964). Because the parties do not agree whether Kyle's statements were true or false, the Court cannot determine whether the First Amendment protects them.

Id.

substantial doubts about its truth tips the case to actionable appropriation. But, whether true or false, Ventura would still have to establish that his name or likeness was more than just an incidental use of his name or likeness.

The finding that the actual malice standard was met leads to the next question of whether that finding should have prevented jury consideration of whether the publication was about a matter of legitimate public concern. There is an auxiliary question of whether that issue should have been for the jury in any event.

3. Legitimate Public Interest

The instruction states that the value of a person's name is not appropriated if there is a "mere mention of it in connection about matters of legitimate public interest." The term "legitimate public interest" is not defined for the jury, but incorporation of the term in the instruction requires a finding on that issue in order for the jury to consider the other parts of the instruction.

There are at least two issues that are involved. One is how the term "legitimate public interest" should be defined. A second is whether the issue is one for the jury, or a question of law for the court. A third is whether consideration of that issue was foreclosed by the jury's finding in Ventura's favor on the defamation claim.

Defining what is newsworthy, or what is a matter of legitimate concern to the public is problematic,[157] as is the issue of whether newsworthiness should be a question of fact for the jury or a question of law for the court. In cases involving the issue of whether a public employee may be discharged for commentary on a matter of public concern, courts take the position that the issue is a question of law for the court.[158] The Supreme Court considers it to be a question of law in defamation claims involving

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[157] *See* Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 NEB. L. REV. 754, 778 (1999); Allen Rostron, *The Mugshot Industry: Freedom of Speech, Rights of Publicity, and the Controversy Sparked By An Unusual New Type of Business,* 90 WASH. U. L. REV. 1321, 1330 (2013).

[158] *E.g.*, Callaghan v. City of S. Portland, 76 A.3d 348, 354 (Mass. 2013); Santer v. Bd. of Educ. of East Meadow Union Free Sch. Dist., 13 N.E.3d 1028, 1038 (N.Y. 2014); Sprague v. Spokane Valley Fire Dep't, No. 93800-8, 2018 WL 547363, *9 (Wash. Jan. 25, 2018).

a matter of public concern,[159] limitations on the claims for intentional infliction of emotional distress,[160] and cases involving speech by public employees.[161] Leaving the issue to a jury in cases involving appropriation claims is inconsistent with those decisions.

4. Use or Benefit and Damages

Early wrangling over Ventura's appropriation claim involved the issue of whether Ventura should be limited to damages for commercial appropriation. Kyle argued in his motion for summary judgment that appropriation was limited to commercial appropriation, but the district court rejected the argument.[162] The trial court instructed the jury that Ventura had to prove that Kyle "appropriated to his own use or benefit the value of Mr. Ventura's name," and that "[i]t is only considered appropriation when a plaintiff's name is used for the *purpose* of appropriating to the defendant's benefit the commercial *or other value* associated with the plaintiff's name."[163] According to the instruction, actionable appropriation is not limited to the appropriation of just the commercial value of the plaintiff's name, and the benefit may be other than commercial.

That left the damages instruction.

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[159] *See* Milkovich v. Lorain Journal, Inc., 497 U.S. 1, 20 (1990); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767,778 (1986); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).
[160] *See* Snyder v. Phelps, 562 U.S. 443, 553 (2011).
[161] *See* Lane v. Franks, 134 S. Ct. 2369, 2380 (2014).
[162] Ventura, 2012 WL 6634779, at *3.
[163] Jury Instructions, Jury Instruction No. 9, Ventura v. Kyle, 2014 WL 3729686 (first emphasis the court's; second emphasis added).

Ventura's proposed instruction on damages was based on section 49 of the Restatement (Third) of Unfair Competition[164]:

> Damages for invasion of privacy by appropriation are the greater of either the pecuniary loss to the person whose likeness is appropriated or the pecuniary gain to the person who appropriated the other's likeness.

Kyle proposed the following instruction on damages for appropriation (and unjust enrichment):

> Jesse Ventura has also claimed damages for invasion of privacy/appropriation and unjust enrichment. No fixed standard exists for deciding the amount of damages for using a plaintiff's name or likeness for the benefit of a defendant. You must use your judgment to decide a reasonable amount based on the evidence and your common sense. If you do not find by a preponderance of the evidence that Ventura has proved the elements of appropriation or unjust enrichment, then he cannot prevail

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[164] Section 49 in its entirety reads as follows:

> (1) One who is liable for an appropriation of the commercial value of another's identity under the rule stated in § 46 is liable for the pecuniary loss to the other caused by the appropriation or for the actor's own pecuniary gain resulting from the appropriation, whichever is greater, unless such relief is precluded by an applicable statute or is otherwise inappropriate under the rule stated in Subsection (2).
>
> (2) Whether an award of monetary relief is appropriate and the appropriate method of measuring such relief depend upon a comparative appraisal of all the factors of the case, including the following primary factors:
>
> (a) the degree of certainty with which the plaintiff has established the fact and extent of the pecuniary loss or the actor's pecuniary gain resulting from the appropriation;
>
> (b) the nature and extent of the appropriation;
>
> (c) the relative adequacy to the plaintiff of other remedies;
>
> (d) the intent of the actor and whether the actor knew or should have known that the conduct was unlawful;
>
> (e) any unreasonable delay by the plaintiff in bringing suit or otherwise asserting his or her rights; and
>
> (f) any related misconduct on the part of the plaintiff.

RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 (Am. Law. Inst.1995).

> on that claim and you must find in favor of the Kyle Estate as to this element of damages.[165]

Ventura's proposed instruction was narrowed to pecuniary loss, notwithstanding his earlier arguments that damages should not be so limited in appropriation cases; the defendant's proposed instruction was not so limited, although it was vague in terms of the exact kinds of damages that the jury could award.

The trial court accepted Ventura's proposed jury instruction, with modifications:

> If you find that Mr. Ventura has proved his claim of appropriation, you must award him the greater of either the amount the Defendant Estate has gained as a direct result of the appropriation *or* the amount Mr. Ventura has lost as a direct result of the appropriation.[166]

The damages instruction effectively compresses the broader theory of appropriation into the narrower theory of publicity.

The value of Ventura's name would have to be the commercial value. The benefit could be other than commercial benefit, although what that benefit might be is not defined in the instruction; but the damages instruction necessarily limits that gain to commercial gain and the loss to Ventura commercial loss. That gain and loss was the focus of the proof in the case.[167] Ventura's argued that damages should not be limited to commercial loss,[168] but his proposed jury instructions for appropriation damages compressed the issue into one of commercial loss.[169]

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[165] Plaintiff's Proposed Jury Instructions, Instruction No. 25 (Custom Instruction 2) Ventura v. Kyle, No. 12-0472 27.

[166] Jury Instructions, Jury Instruction No. 13, Ventura v. Kyle, 2014 WL 3729686 (D. Minn. July 22, 2014) (12-cv-0472) (emphasis the court's).

[167] Plaintiff Jesse Ventura's Memorandum in Opposition to Defendant's Motion for Judgment as a Matter of Law or a New Trial, Ventura v. Kyle, 2014 WL 5018930 part D, (detailing evidence of gain and loss on the unjust enrichment issue).

[168] Plaintiff Jesse Ventura's Reply to Defendant's Trial Brief, Part D.1, Ventura v. Kyle, 2014 WL 3729676 (No. 12-0472), (D. Minn. May 5, 2014).

[169] The Restatement is clear that section 49 "states the rules governing the recovery of monetary relief in actions for infringement of the right of publicity." RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 cmt. a (Am. Law. Inst.1995).

The potential damages for appropriation, other than commercial loss, could include damages for emotional harm associated with the appropriation. The damages instruction effectively seems to foreclose those damages.

5. Real Relationship

The instruction states that there is no appropriation of a person's name by "*mere mention* of it or in connection with publication about matters of legitimate public interest, so long as there is a *real relationship* between the plaintiff and the subject matter of the publication." The terms "mere mention" and "real relationship" are not defined in the instruction.

Comment d of the Restatement (Second) of Torts explains the issue:

> The value of the plaintiff's name is not appropriated by *mere mention* of it, or by reference to it in connection with legitimate mention of his public activities; nor is the value of his likeness appropriated when it is published for purposes other than taking advantage of his reputation, prestige, or other value associated with him, for purposes of publicity. No one has the right to object merely because his name or his appearance is brought before the public, since neither is in any way a private matter and both are open to public observation. It is only when the publicity is given *for the purpose* of appropriating to the defendant's benefit the commercial or other values associated with the name or the likeness that the right of privacy is invaded.[170]

The dividing line is important, because in cases where a book is published, and it discusses a public figure, there is always the possibility that there was at least *some* motivation to use that name to enhance the story and the salability of the book. Not all uses are actionable, however. The "real relationship" standard is a means of separating actionable from nonactionable uses, but when it is used as a standard for a jury to apply without further definition, it does not provide much assistance. The focus, as noted in comment d, is on the purpose of the use of the name or likeness. That was the key factor in Ventura's case: was Kyle's *purpose*

[170] RESTATEMENT (SECOND) OF TORTS § 652C cmt. d (AM. LAW. INST. 1965) (emphasis added). An incidental use of the plaintiff's name or likeness is insufficient to trigger liability for appropriation. The reason is that the incident

to gain an advantage by his portrayal of Ventura in the Scuff Face subchapter and in the talk shows following.

6. An Alternative?

Embodying the key concepts in appropriation cases in a way that juries can understand is difficult. We may have a pretty good idea of the paradigms that spawn appropriation claims, but the general way in which the law is formulated, including in the Restatements, is not particularly helpful in drafting coherent jury instructions on appropriation. In effect, the issue is effectively punted in pattern jury instructions, which leaves juries without sufficient guidance in deciding the cases. An additional complicating factor is the lack of clarity concerning the role of judges and juries in appropriation cases. That may lead to over-instructing a jury in appropriation cases. That seemed to be what happened in Ventura's case.

What follows is a suggested instruction that avoids some of the common problems with jury instructions in appropriation cases:

> (Defendant) appropriates the value of another person's name or likeness when (he) (she)
>
> (1) takes advantage of the reputation, prestige, or other value that is associated with the other person's name or likeness, and
>
> (2) a primary purpose of (defendant) is to use that reputation, prestige, or other value associated with the other person's name or likeness for (his) (her) own benefit.
>
> The use may be for commercial benefit, although it does not have to be.

The proposed instruction is perhaps conspicuous because of what it does *not* include. The instruction is based on the assumption that the issue of whether the public concerned a matter of legitimate public interest is a question of law for the court to decide. It omits the "mere mention" and "real relationship" language that was used in the district court's instruction. Those concepts are difficult for a jury to understand and apply and may be more suitable for a court considering a summary judgment motion in an appropriation case. The key element is whether the defendant's primary purpose was to use the plaintiff's name or likeness for his own advantage.

The damages issue also has to be sorted. The pecuniary loss to the plaintiff/pecuniary gain jury instructions in the case ran damages through what was effectively a "publicity" pinch point. Damages may be broader and jury instructions on the damages issue should provide for the broader elements of damages, if the controlling law allows.

C. Unjust Enrichment

Ventura's third theory of recovery was unjust enrichment. The complaint alleged that "[a]s a direct result of his tortious, inequitable and unlawful conduct, Kyle has been unjustly enriched at Governor Ventura's expense,"[171] and that "[e]quity requires that Kyle make restitution to Governor Ventura for all property and benefits unjustly received, including but not limited to income from the sale of *American Sniper* books and/or any subsidiary or ancillary rights sales."[172]

Kyle argued from the outset that Ventura was not entitled to recover for unjust enrichment, in part because Ventura had an adequate remedy at law and in part because an unjust enrichment theory basing damages on the benefit to the defendant would be inconsistent with the First Amendment.[173]

1. Jury Instructions

Ventura proposed the following instruction on unjust enrichment:

> Definition of unjust enrichment
>
> A defendant has been unjustly enriched where:
>
> 1. Defendant knowingly received something valuable from the plaintiff;
>
> 2. Defendant is not entitled to the benefit received; and
>
> 3. Circumstances exist that would make it unjust for the defendant to retain the benefit received without compensation to the plaintiff.

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[171] Complaint, ¶ 50.
[172] *Id.* ¶ 51.
[173] Defendant's Memorandum in Support of Motion for Partial Summary Judgment, Part III, Ventura v. Kyle, 2012 WL 11622854 (D. Minn. Aug. 28, 2012) (No. 12-472).

> An action for unjust enrichment must be based on situations where it would be morally wrong for one party to enrich himself at the expense of another.
>
> Damages that can be recovered for an unjust enrichment claim are based on what the person enriched has inappropriately received, rather than on what the opposing party has lost.[174]

Kyle's proposed instruction on unjust enrichment reads as follows:

> A defendant has been unjustly enriched if he "has knowingly received or obtained something of value for which [he] in equity and good conscience should pay." "Unjust enrichment claims do not lie simply because one party benefits from the efforts or obligations of others, but instead it must be shown that a party was unjustly enriched in the sense that the term 'unjustly' could mean illegally or unlawfully." An author or publisher is not held to have received a benefit merely because the publication that referred to plaintiff was published for profit. In such cases, unjust enrichment requires Plaintiff to prove a deliberate association with the defendant's products in an advertising or promotional scheme unrelated to the book, broadcast, or other mass communication.
>
> The Plaintiff has the burden to prove that the defendant was enriched and the amount by which the defendant was enriched. If Jesse Ventura fails to do so, you must find for Taya Kyle.[175]

The district court gave the following instruction on unjust enrichment:

> Plaintiff Jesse Ventura also claims that Chris Kyle and the Defendant Estate were unjustly enriched by the story about Mr. Ventura. To prevail on this unjust-enrichment

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[174] Plaintiff's Proposed Jury Instructions, Custom Instruction 3, Ventura v. Kyle (D. Minn. Apr. 21, 2014) (No. 12-0472).

[175] Defendant's Revisions to Selected Proposed Jury Instructions, Defendant's Revised Final Instruction No. 25--Elements of the Claim of Unjust Enrichment, Ventura v. Kyle, 2014 WL 8721598 (D. Minn. June 18, 2014) (No. 12-cv-0472) (footnotes omitted).

> claim, Mr. Ventura must have proved his defamation claim. He must also prove by the greater weight of the evidence:
>
> One, the Defendant Estate knowingly received a benefit from the story; and
>
> Two, the Defendant Estate is not entitled to the benefit received because circumstances exist that would make it unjust for the Defendant Estate to retain that benefit without compensating Mr. Ventura.[176]

The instruction closely followed Ventura's proposed instruction. The two elements required a showing of benefit to Kyle's estate, but without defining that benefit, and second, that the estate was not entitled to the benefit it received because it would be unjust for the estate to retain the benefits without compensating Ventura. Because unjust enrichment is an equitable claim, the jury was acting in an advisory capacity in determining whether Ventura established the claim.[177]

The district court's instruction on damages for unjust enrichment gave the jury substantial latitude in awarding damages:

> If you find that Mr. Ventura has proved his claim of unjust enrichment, you must award him the amount of money by which you find the Defendant Estate has been unjustly enriched. However, if you find that Mr. Ventura's

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[176] Jury Instructions, Jury Instruction No. 10, Ventura, 2014 WL 3729686 (No. 12-0472). The instruction's generality is a function of the general nature of the unjust enrichment theory. *See* DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES § 4.1(2) (3d ed. 2018). Other pattern instructions are similar to Minnesota's. For example, Maryland's pattern instruction states that:

> A plaintiff may recover from a defendant on a claim for unjust enrichment upon proving the following three elements:
> (1) A benefit conferred on the defendant by the plaintiff;
> (2) An appreciation or knowledge by the defendant of the benefit; and
> (3) The acceptance or retention by the defendant of the benefit under circumstances that would make it inequitable for the defendant to retain the benefit without the payment of its value.

MARYLAND CIV. PATTERN JURY INSTRUCTIONS, MPJI-Cv 9:32 (5th ed. 2018). The damages instruction states simply that "[t]he measure of damages for unjust enrichment is the value of the benefit conferred upon the defendant." *Id.*

[177] Ventura, 63 F. Supp. 3d at 1006.

> damages award for defamation and/or appropriation provide him with an adequate remedy, you may not award him any further damages for unjust enrichment.[178]

Question five on the special verdict form asked only:

> Did Plaintiff Jesse Ventura prove his claim of unjust enrichment against Chris Kyle and the Defendant Estate? (See Jury Instruction No. 10.)[179]

The jury answered "yes" to that question.

The damages question asked:

> By what amount of money, if any, has the Defendant Estate been unjustly enriched? (See Jury Instruction No. 13 for the means of determining damages.)[180]

The jury set the damages at $1,345,477.25.

Kyle argued in his motion for JMOL that the damages award for unjust enrichment could not be sustained because Ventura had an adequate remedy at law. The district court initially rejected the argument because it was not raised in a timely manner, but held that even if it had, the damages award for defamation was not *adequate*.[181]

The Eighth Circuit, reversed, holding that Ventura was not unjustly enriched as a matter of Minnesota law and that it was therefore unnecessary to reach the First Amendment claim or the issue of whether the district court's factual findings supported the damages claim.[182]

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[178] Jury Instructions, Jury Instruction No. 13, Ventura, 2014 WL 3729686 (No. 12-0472).
[179] Verdict Form, Question 5, Ventura v. Kyle, 2014 WL 3729681 (D. Minn. July 29, 2014) (No. 12-CV 12-472).
[180] Special Verdict Form, at 2, Ventura v. Kyle, No. 12-0472 (D. Minn. July 29, 2014).
[181] Ventura, 63 F. Supp. at 1009–1011.
[182] 825 F.3d 876, 886 (8th Cir. 2016)The evidentiary support for the jury's award of substantial damages for unjust enrichment was questionable. The district court defended its decision to accept the jury's award of $1,345,477 in damages for unjust enrichment, holding that the evidence supported the court's conclusion that Kyle "unfairly profited from the story regarding" Ventura, and "that the jury's calculation of damages fell within a reasonable range (approximately 25% of *American Sniper's*

2. The Common Law

The Minnesota Supreme Court has characterized unjust enrichment as "an equitable doctrine that allows a plaintiff to recover a benefit conferred upon a defendant when retention of the benefit is not legally justifiable."[183] The theory requires the claimant to "establish an implied-in-law or quasi-contract in which the defendant received a benefit of value that unjustly enriched the defendant in a manner that is illegal or unlawful."[184] Equitable relief is not permitted where the party has an adequate remedy at law.[185]

The Eighth Circuit rejected the unjust enrichment claim for two reasons. First, while noting that Ventura was correct in noting that a quasi-contract will be imposed if the plaintiff "unknowingly or unwillingly" imposes a

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profits)." Ventura, 63 F. Supp. 3d at 1009 n.3. Kyle's brief attacked the award based on the lack of evidentiary support for the award. Brief of Appellant at 65-68, Ventura, 825 F.3d 876 (8th Cir. 2016) (No. 14–3876). The brief argued, among other things, that "Ventura relied solely on speculation that the mention of his name on a radio and a television interview must have increased profits simply because sales of the book continued to rise following those appearances," *Id.* at 65, and "[t]he district court asserted that its award constituted "approximately 25%" of the $6 million in royalties Ventura claimed the book had generated," but with "no basis for its assertion that 'approximately 25%' of the book's sales were driven by use of Ventura's name; it plucked the number from thin air." *Id.* at 67.

In Ventura v. Titan Sports, Inc., 65 F.3d 725 (8th Cir. 1995), in contrast, the damages for Ventura's quantum meruit claim arising out of the use of his likeness on wrestling videotapes produced by Titan Sports, Ventura established damages with specificity. The evidence was much more specific on the value of the use of his likeness and on the royalty rates applicable to the use of his likeness.

[183] Caldas v. Affordable Granite & Stone, Inc., 820 N.W.2d 826, 838 (Minn. 2012). There are numerous Minnesota cases stating that unjust enrichment is applicable in cases in which it would be morally wrong for a party to enrich himself at the expense of the plaintiff. *See, e.g.*, Klass v. Twin City Fed. Sav. & Loan Ass'n, 190 N.W.2d 493, 495 (Minn. 1971) (suit by lessee to recover part of a condemnation award that was intended to reimburse the lessor for real taxes that had been paid by the lessee under the provisions of a lease agreement); Cady v. Bush, 166 N.W.2d 358, 362-63 (Minn. 1969) (suit by motel purchases against vendors for the return of properties that were exchanged and cash payments that were made pursuant to a contract); Holman v. CPT Corp., 457 N.W.2d 740, 745 (Minn. Ct. App.1990) (unjust enrichment claim based on failure to pay sales commissions).

[184] *Id.*

[185] Ventura, 825 F.3d at 887, quoting ServiceMaster of St. Cloud v. GAB Bus. Serv., Inc., 544 N.W.2d 302, 305 (Minn.1996) ("A party may not have equitable relief where there is an adequate remedy at law available.").

"benefit" on the defendant, the court rejected Ventura's argument "that Ventura conferred a 'benefit' on Kyle by Ventura's mere existence as a colorful figure who might inspire people to make up stories about him."[186]

Second, the equitable remedy of unjust enrichment would be unavailable because Ventura, a public figure, had an adequate remedy at law in his defamation claim against Kyle for money damages. The district court held that Ventura's claim for defamation claim was inadequate:

> The jury was expressly advised—*at Defendant's behest* . . . that it could *not* award additional damages for unjust enrichment if it found that Plaintiff's "damages award for defamation ... provide[d] him with an adequate remedy." . . . This scuttles Defendant's argument. Plaintiff's defamation claim provided him with no means to obtain the disgorgement of Defendant's ill-gotten gains—money the jury found, and the Court agreed, that Defendant made by defaming Plaintiff in *American Sniper.* Only through unjust enrichment could Plaintiff attempt to force Defendant to yield those improper profits. Under these circumstances, Plaintiff's legal remedy was inadequate to fully ameliorate Defendant's wrongful conduct, and the defamation claim did not preclude the unjust-enrichment claim as a matter of law.[187]

The Eighth Circuit rejected that argument for two reasons. The first is that the issue of whether there is an adequate remedy at law is a question of law for the court, rather than a question of fact for the jury.[188] The second reason is that Ventura was adequately compensated for injury to his reputation by the jury's award of $500,000 on his defamation claim. The court found no contrary authority that would support the award of damages for unjust enrichment in these circumstances.[189]

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[186] *Id.* (citing Galante v. Oz, Inc., 379 N.W.2d 723, 725–26 (Minn. Ct. App. 1986)). This evokes the incidental use issue in appropriation cases.

[187] Ventura, 63 F. Supp. 3d at 1011 (emphasis is the court's).

[188] Ventura v. Kyle, 825 F.3d at 887.

[189] Ventura, 825 F.3d at 887. The court cited "one of the few cases addressing the issue," Hart v. E.P. Dutton & Co., 93 N.Y.S.2d 871, 879 (N.Y. Sup. Ct. 1949), which noted the novelty of such a claim and the absence of support for such a claim. 825

3. The First Amendment

The district court rejected Kyle's argument that that the damages award for unjust enrichment violated the First Amendment. While recognizing that the Supreme Court has taken the position that some knowingly false speech is protected by the First Amendment, the court concluded that defendants have "no *carte blanche* immunity to lie with impunity," and that Kyle was simply wrong in his claim that the First Amendment necessitates limiting damages for actionable false speech.[190] The court relied in part on the Supreme Court's opinion in United *States v. Alvarez*,[191] for the proposition that government restrictions on speech are permissible in cases "[w]here false claims are made to effect a fraud *or secure moneys or other value considerations,*"[192] and in part on *Gertz v. Robert Welch, Inc.*,[193] for the proposition that because punitive damages are available in a defamation action where there is knowledge of the falsity or reckless disregard of the truth, by analogy damages for disgorgement should be allowed for unjust enrichment because both damages claims transcend compensatory damages.[194]

The district court's ruling on the First Amendment issue drew fire in Kyle's appellate brief[195] and in two amicus briefs in the case.[196] One amicus brief attacked the district court's holding based primarily on the lack of support in Minnesota law for an unjust enrichment claim.[197] The other opened its argument by stating that "[t]he notion that a court may award profits as damages for allegedly defamatory conduct is all but

F.3d at 888. The Eighth Circuit also relied on the Supreme Court's opinion in Milkovich, 497 U.S. at 23, noting that the claim for damages, even if an imperfect remedy, is the only means of vindicating a claim for injury to reputation.

[190] Ventura, 63 F. Supp. 3d at 1011.

[191] United States v. Alvarez, 567 U.S. 709 (2012).

[192] Ventura, 63 F. Supp. 3d at 1011, (citing Alvarez, 567 U.S. at 723 (emphasis the district court's)).

[193] Gertz v. Robert Welch, Inc. 418 U.S. 323, 349 (1974).

[194] Ventura, 63 F. Supp. 3d at 1011, (citing, 418 U.S. at 349 (1974)).

[195] Brief of Appellant at 59-65, Ventura, 825 F.3d 876 (8th Cir. 2016) (No. 14–3876).

[196] Brief of Amici Curiae 33 Media Companies and Organizations at 16-24, Ventura, 825 F.3d 876 (8th Cir. 2016) (No. 14–3876); Brief of Amicus Curiae Thomas More Law Center at 2, Ventura, 825 F.3d 876 (8th Cir. 2016) (No. 14–3876).

[197] Brief of Amicus Curiae Thomas More Law Center, Ventura, 825 F.3d 876 (8th Cir. 2016) (No. 14–3876).

unknown in American jurisprudence."[198] The brief focused on the reasons for the lack of authority for the award of those damages as a first point. As a second, the brief attacked the district court's analogy of disgorgement damages to the award of punitive damages in defamation cases, based in part on the criticism of permitting punitive damages in public figure defamation cases, the lack of any Supreme Court decision expressly permitting public figures to recover for those damages, and the more stringent standards states, including Minnesota, have adopted in punitive damages cases.[199]

The Eighth Circuit avoided the necessity of deciding the First Amendment issue because of its conclusion that Minnesota law did not support the unjust enrichment theory.[200] If followed, the court's position that compensatory damages in unjust enrichment cases will not be allowed where the plaintiff has an adequate remedy in law via a defamation action would foreclose any necessity of the consideration of the issue from a First Amendment standpoint in any future cases.

IV. CONCLUSION

Jesse Ventura's lawsuit against Chris Kyle's estate brought into sharp focus important issues relating to defamation, appropriation, and unjust enrichment. Many of the legal issues concerning the standards that governed the theories of recovery were heavily briefed and thoughtfully considered by the district court, which had difficult decisions to make in determining how to instruct the jury. The key defamation issues that are the subject of this article were not considered by the Eighth Circuit when it reversed based on the improper mention of insurance in the case. It did not reach the appropriation issues because the jury found in Kyle's favor on that claim. The judgment on the unjust enrichment claim was reversed because Minnesota law did not support it.

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[198] Brief of Amici Curiae 33 Media Companies and Organizations at 16, Ventura, 825 F.3d 876 (8th Cir. 2016) (No. 14–3876).

[199] Brief of Amici Curiae 33 Media Companies and Organizations at 22–24, Ventura, 825 F.3d 876 (8th Cir. 2016) (No. 14–3876). Minnesota's punitive damages statute, Minn. Stat. § 549.20 (2016), requires proof of deliberate indifference to the rights of the plaintiff and applies a clear and convincing evidence standard to that determination.

[200] Ventura, 825 F.3d at 886.

While key issues swirling around Ventura's defamation and appropriation claims were irrelevant in the Eighth Circuit's decision, those issues will be recurrent in many cases. The goal of this article in working through those issues is to suggest a way of avoiding some of the sticking points, resolving them early, and generating jury instructions that can simplify the issues for juries asked to decide these sorts of cases.

In defamation cases, there should be early clarification of the standard for determining actual malice and the burden of proof on the falsity issue. Pattern instructions generally provide working definitions of "actual malice" that need not be amplified.

A public figure who establishes actual malice is entitled to presumed damages, but it is important to understand that there are boundaries that can be imposed on those damages through appropriate jury instructions. The issue concerning the limitation on damages for mental distress will not be replicated in other cases, leaving plaintiffs who establish *New York Times* actual malice open to recovery for emotional harm as an element of presumed damages. It is also important to understand that even though damages are presumed, the plaintiff may attempt to prove actual damages. Defendants may also attempt to prove diminished reputation with appropriate evidence.

The appropriation claim in a public figure context seems complex. There were several issues in the case that had to be resolved in determining how the case would be submitted to the jury. Had the Scruff Face story been true, it would not have been actionable, which is why the district court instructed the jury that it had to first find that Ventura was entitled to recover for defamation before it could consider the appropriation claim. When Ventura necessarily established *New York Times* actual malice in order for the jury to get to the appropriation claim, it should have precluded jury consideration of the issue of whether the publication was a matter of legitimate pubic concern.

That still would have left issues concerning Kyle's purpose in using the Scruff Face story. Looking at the district court's instructions in the case, questions remained concerning whether there was simply a "mere mention" of Ventura's name, or a "real relationship between the plaintiff and the subject matter of the publication," according to the district court's jury instruction on appropriation. The language is loose, not only in the jury instruction, but in the cases. Providing a jury with a tighter standard

for resolving those key issues, and eliminating the issues the jury need not decide, will facilitate the jury's decision-making in these cases.

While damages in appropriation cases may include damages for mental distress, Ventura abandoned his claim for emotional harm based on the appropriation. The damages issue in Ventura's case narrowed to a consideration of the amount of loss to Ventura or the amount gained by the estate; the district court's instruction excluded damages for emotional harm. Those damages would be permissible in an appropriate case, assuming a proper foundation, and assuming that the relevant jurisdiction does not limit damages for the tort of appropriation solely to commercial loss to the plaintiff or gain to the defendant. Any time there is an appropriation claim, questions may arise concerning the appropriate measure of damages. Ventura's circumstances seemed to be unique, given the stipulation concerning recovery of damages for mental distress, but in other cases those damages may be awarded, given appropriation proof. Plaintiffs in cases involving damages for emotional harm will not have to prove the value of their name or likeness in order to justify recovery. In cases involving commercial appropriation there will have to be proof of the benefit to the defendant or the loss to the plaintiff.[201]

The unjust enrichment issue was Minnesota-specific in the case, but the specter of using that theory as a means of enhancing damages in a defamation case is questionable. The Eighth Circuit's opinion in the case, if followed, puts the issue to rest.

Many appropriation cases will involve the issue of whether there are First Amendment limitations on the right to recover. The starting point for jury instructions will be pattern instructions, but many of the pattern instructions are very brief, primarily because of the lack of authority that would justify more expansive instructions on the privacy issues. The First Amendment issue should be a question of law for the court, and, in the suggested alternative instruction, issues concerning "mere mention" and "real relationship" should be collapsed into the more simplified issue of the defendant's purpose in using the plaintiff's name or likeness.

As a final point, there is significant benefit in working through a complex lawsuit like this. The excellent work of the lawyers exhibited in the

[201] Plaintiff Jesse Ventura's Memorandum in Opposition to Defendant's Motion for Judgment as a Matter of Law or a New Trial, Part II, Ventura v. Kyle, 2014 WL 3729679 (D. Minn. July 18, 2014).

numerous skirmishes over jury instructions in the case has hopefully resulted in a clearer understanding of the law that applies in public figure cases involving defamation and appropriation claims, and in the jury instructions that emerge from that law.

APPENDIX

Jury Instructions, Ventura v. Kyle, 2014 WL 3729686 (D. Minn. July 22, 2014)(12-cv-0472)

JURY INSTRUCTION NO. 6

Plaintiff Jesse Ventura asserts three claims against Chris Kyle and the Defendant Estate: (1) defamation; (2) invasion of privacy by appropriation; and (3) unjust enrichment. The following instructions will explain each of these claims in more detail, as well as Mr. Ventura's burden of proof.

JURY INSTRUCTION NO. 7

There are two standards of proof that you will apply to the evidence in this case, depending on the issue you are considering.

For the most part, you must decide whether certain facts have been proved by "the greater weight of the evidence." A fact has been proved by the greater weight of the evidence if you find that it is more likely true than not true. You decide that by considering all of the evidence and deciding which evidence is more believable.

But on one issue (discussed in Instruction No. 8C), you must decide whether a certain fact has been proved by "clear and convincing evidence." A fact has been proved by clear and convincing evidence if you find it is highly probable that it is true or, put another way, you firmly believe it is true.

You may have heard the term "proof beyond a reasonable doubt." That is a stricter standard that applies in criminal cases. It does not apply in civil cases such as this one.

JURY INSTRUCTION NO. 8

In this case, Plaintiff Jesse Ventura claims that Chris Kyle defamed him by asserting in *American Sniper,* as well as on television and radio, that Mr. Ventura said "he hates America," the SEALs "were killing men and women and children and murdering," and the SEALs "deserve to lose a few." To prevail on this defamation claim, Mr. Ventura must prove:

One, Mr. Kyle's story about Mr. Ventura was defamatory;

Two, the story was materially false; *and*

Three, Chris Kyle published the story knowing it was false, believing it was false, or having serious doubts about its truth.

If any of these three elements has not been proved, then you must answer "No" to Question No. 1 on the Verdict Form.

The following instructions explain each of these elements in more detail.

JURY INSTRUCTION NO. 8A

The first element is that Mr. Kyle's story about Mr. Ventura was *defamatory.* The story was defamatory if it tends to:

1. So harm the reputation of Mr. Ventura that it lowers his esteem in the community; *or*

2. Deter persons from associating or dealing with him; *or*

3. Injure his character; *or*

4. Subject him to ridicule, contempt, or distrust; *or*

5. Degrade or disgrace him in the eyes of others.

Mr. Ventura must prove this element by the greater weight of the

evidence (see Instruction No. 7).

JURY INSTRUCTION NO. 8B

The second element is that Mr. Kyle's story about Mr. Ventura was *materially* false or, put another way, was *not substantially accurate.* The story may be substantially accurate even if it contains minor inaccuracies, as long as the substance or gist of it is accurate.

Mr. Ventura must prove this element by the greater weight of the evidence (see Instruction No. 7).

JURY INSTRUCTION NO. 8C

The third element is that Mr. Kyle published the story about Mr. Ventura despite:

1. Knowing the story was false; *or*

2. Believing the story was false; *or*

3. Having serious doubts about the story's truth.

Mr. Ventura must prove this element by clear and convincing evidence (see Instruction No. 7).

JURY INSTRUCTION NO. 9

Plaintiff Jesse Ventura also claims that Chris Kyle invaded his privacy by appropriating his name. To prevail on this appropriation claim, *Mr. Ventura must have proved his defamation claim.* Mr. Ventura must also prove by the greater weight of the evidence that Mr. Kyle appropriated to his own use or benefit the value of Mr. Ventura's name.

The value of a person's name is not appropriated by mere mention of it or in connection with publication about matters of legitimate public interest, so long as there is a real relationship between the plaintiff and the subject matter of the publication. It is only considered appropriation when a plaintiff's name is used for the *purpose* of appropriating to the

defendant's benefit the commercial or other value associated with the plaintiff's name.

JURY INSTRUCTION NO. 10

Plaintiff Jesse Ventura also claims that Chris Kyle and the Defendant Estate were unjustly enriched by the story about Mr. Ventura. To prevail on this unjust-enrichment claim, Mr. Ventura must have proved his defamation claim. He must also prove by the greater weight of the evidence:

One, the Defendant Estate knowingly received a benefit from the story; *and*

Two, the Defendant Estate is not entitled to the benefit received because circumstances exist that would make it unjust for the Defendant Estate to retain that benefit without compensating Mr. Ventura.

JURY INSTRUCTION NO. 11

I am about to instruct you as to damages, and you should understand that this should not be considered as suggesting any view of mine as to whether Mr. Ventura has proved any of his claims or is entitled to damages.

JURY INSTRUCTION NO. 12

If you find that Mr. Ventura has proved his claim of defamation, you may presume he has suffered damages and award him the amount of money you determine he is entitled to receive for harm to his reputation and standing in the community, humiliation, and embarrassment. No evidence of actual harm is required for you to award him these damages.

JURY INSTRUCTION NO. 13

Before you award any of the following damages that I am about to describe, you must first determine that Mr. Ventura has proved them by

the greater weight of the evidence. He has the burden of proving the nature, extent, duration, and consequences of these damages (if any) and your award may not be based on speculation or guess.

If you find that Mr. Ventura has proved his claim of defamation, you must also consider whether he has suffered economic loss as a direct result of the defamation in determining his damages. Economic loss includes the loss of employment, as well as the denial of employment which he would have secured but for the defamation.

If you find that Mr. Ventura has proved his claim of appropriation, you must award him the greater of either the amount the Defendant Estate has gained as a direct result of the appropriation *or* the amount Mr. Ventura has lost as a direct result of the appropriation.

If you find that Mr. Ventura has proved his claim of unjust enrichment, you must award him the amount of money by which you find the Defendant Estate has been unjustly enriched. However, if you find that Mr. Ventura's damages award for defamation and/or appropriation provide him with an adequate remedy, you may not award him any further damages for unjust enrichment.

If you find that damages you would award Mr. Ventura for one claim are duplicative of the damages you would award him for another claim, you may not award him those damages under both claims because the law does not allow double recovery.

Finally, you must not award any damages as a form of punishment or deterrent.

JURY INSTRUCTION NO. 14

In conducting your deliberations and returning your verdict, there are certain rules you must follow. I shall list those rules for you now.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment, because your verdict must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the court security officer, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone -- including me -- how your votes stand numerically.

Fourth, your verdict must be based solely on the evidence presented to you and on the legal principles which I have given to you in my instructions. Nothing I have said or done is intended to suggest what your verdict should be -- that is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decision that you reach in this case. You will take this form to the jury room. The form has specific questions for you to answer. The form reads: (read form).

Consider the questions in order and follow the directions on the verdict form. The answer to each question must be the unanimous answer of the jury. Your foreperson will write the unanimous answer in the space provided opposite each question. As you will note from the wording of the questions, some questions should be answered only if certain answers are given to prior questions.

When each of you has agreed on the verdicts and your foreperson has entered those verdicts on the form, the foreperson should sign and date

the form and advise the court security officer that you have reached a verdict. However, you should not tell anyone what your verdict is, nor should you give the verdict form to the court security officer.

THE TENDENCY TO SEE PROPENSITY: HOW ADMITTING DEFENDANT-AUTHORED RAP LYRICS AS EVIDENCE OF MOTIVE OR INTENT CAN LOOK LIKE INADMISSIBLE CHARACTER EVIDENCE

By: Joseph Noreña[*]

ABSTRACT

Defendant-authored rap lyrics admitted as evidence present unique evidentiary issues. In particular, when such lyrics are admitted to prove the motive or intent of the defendant-author, the lyrics can look like character evidence and be unduly prejudicial. Nevertheless, sometimes those lyrics valuably provide specific admissions of the defendant-author's motive or intent. As a balance, this article argues that courts should be careful to admit defendant-authored rap lyrics where they are only generally related to a defendant's motive or intent because of the prejudice a jury might have when seeing or hearing defendant-authored rap lyrics.

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[*] Joseph Noreña is a recent graduate of Boston College Law School. He wishes to thank the University of Denver Sports & Entertainment Law Journal staff for their helpful edits, and his professors and especially his family for their support.

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I. INTRODUCTION

In August of 2014, the New Jersey Supreme Court affirmed an appellate court's reversal of Vonte Skinner's murder conviction on the grounds that the trial court had improperly admitted violent and profane rap lyrics, authored by Skinner, against the defendant.[1] While the state argued that the trial court had properly admitted the lyrics into evidence under New Jersey Rules of Evidence 404(b) to show Skinner's motive and intent in committing the crime, the New Jersey Supreme Court disagreed.[2] The court reversed Skinner's conviction, holding that the trial court had improperly admitted the defendant-authored rap lyrics because the prejudicial effect of such lyrics substantially outweighed any possible probative value on Skinner's motive or intent.[3] The court held such lyrics inadmissible unless the lyrics themselves reveal a "strong nexus" between the specific details of the composition and the crime charged.[4]

In an unpublished decision written less than one year later, a California appellate court affirmed Michael Heartsman's murder conviction, dismissing his claim (among other claims) that the trial court had

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[1] State v. Skinner, 95 A.3d 236, 238 (N.J. 2014). As an example of Skinner's lyrics, the court cited the following:

> I'm the n***a to drive-by and tear your block up, leave you, your homey and neighbors shot up, chest shots will have you spittin' blood clots up. Go ahead and play hard. I'll have you in front of heaven prayin' to God, body parts displaying the scars, puncture wounds and bones blown apart, showin' your heart full of black marks, thinkin' you already been through hell, well, here's the best part. You tried to lay me down with you and your dogs until the guns barked.

Id. at 241.

[2] *Id. See also* N.J. R. EVID. 404(b) (standing for the dual propositions that evidence of crimes of other acts are not admissible to show a defendant's propensity, but such evidence may be admitted for non-propensity purposes like intent, motive, knowledge or identity, among others).

[3] *Skinner*, 95 A.3d at 238. N.J. R. Evid. 404(b) is functionally equivalent to Fed. R. Evid. 404(b) as well as what most states refer to as Rule 404(b). *See, e.g.*, FED. R. EVID. 404(b) (establishing a general prohibition against using evidence of crimes or other acts to show propensity but allowing the admission of such evidence to show non-propensity purposes such as motive or intent). The article will reference and define the various equivalent state evidentiary rules where applicable but will generally refer to all of the equivalent rules as "Rule 404(b)" or "the other acts rule." *See* notes 31–126.

[4] *Skinner*, 95 A.3d at 238–39.

improperly admitted a violent and profane rap video featuring the defendant rapping his own lyrics.[5] The appellate court held that the lower court properly admitted the video under California Evidence Code § 1101, finding that it provided evidence of Heartsman's motive and not his propensity to commit crimes, and because the prejudicial effect of the video did not outweigh the video's probative value.[6] The court decided that Heartsman's video and the accompanying rap lyrics showed Heartsman's involvement and familiarity with gang violence, and thus the trial court did not abuse its discretion in admitting the video as evidence of motive to shoot rival gang members.[7]

In jurisdictions throughout the country, courts increasingly are admitting defendant-authored rap lyrics as evidence against criminal defendants.[8] In

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[5] People v. Heartsman, No. C166800, 2015 WL 2400736, at *14 (Cal. App. Dep't Super. Ct. May 20, 2015). As an example of Heartsman's lyrics, the court cited the following: "Somebody disrespecting, I'm gonna bounce out and get it, get it…If I'm trippin', trippin', then yeah, it's getting physical." *Id.* at *5.
Significantly, Heartsman relied on *Skinner* to make his argument that the rap video was inadmissible under Cal. Evid. Code § 1101; however, the appellate court explicitly denied any application of *Skinner* to Heartsman's case. *See id.* at 14 (explaining how the court was not persuaded by defendant's argument that the *Skinner* test should apply in California courts); *see also* CAL. EVID. CODE § 1101 (establishing a California evidentiary rule functionally equivalent to both N.J. R. Evid. 404(b) and Fed. R. Evid. 404(b)).

[6] *See Heartsman*, 2015 WL 2400736, at *14 (agreeing that the rap video showed the defendant's motive involving an ongoing gang dispute where the prosecution's theory was that the shootings were gang-related).

[7] *Id.*

[8] *See, e.g.*, United States v. Pierce, 785 F.3d 832, 841 (2d Cir. 2015) (holding that rap lyrics are generally admissible where they are relevant and not unduly prejudicial); Andrea Dennis, *Poetic (In)justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 2 n.6 (2007) (explaining in 2007 that research had turned up only one case in which defendant-authored lyrics admitted against the defendant did not appear to be rap lyrics); Lorne Manly, *Legal Debate on Using Boastful Rap Lyrics as a Smoking Gun*, N.Y. TIMES (Mar. 26, 2014) (explaining that in the two years preceding the 2014 article, more than three dozen prosecutions had substantially relied on rap lyrics); *see also* Toni Messina, *Rap-Crimination*, ABOVE THE LAW, (Aug. 28, 2017), https://abovethelaw.com/2017/08/rap-crimination/ (citing various cases in which the prosecution heavily relies on defendant-authored rap lyrics to prosecute the defendant. For example, the article cites the case against Ackquille Jean Pollard, also known as Bobby Shmurda, whose 2015 Billboard Music Award Top Rap Song nomination, Hot N***a, was used to prosecute Pollard and co-gang members); *see also*

fact, at least two prosecutor training manuals encourage prosecutors to use defendant-authored rap lyrics to shape a case theory.[9] Despite the prevalence of the admission of defendant-authored rap lyrics, no consistent framework exists amongst the various jurisdictions or even within particular jurisdictions that have seen multiple such cases.[10] This is likely because the admissibility of rap lyrics typically depends on a wide range of evidentiary concerns such as whether those lyrics constitute hearsay, whether a lay witness or expert witness can testify to the meaning of those lyrics, whether those lyrics can be authenticated, and whether those lyrics are relevant.[11]

This article does not argue for a consistent framework, both because of the multiple layers of evidentiary concerns and also because cases in which a court admits defendant-authored rap lyrics are highly fact-sensitive.[12] Instead, this article examines the problems that arise when defendant-authored rap lyrics are admitted to show motive or intent of the defendant, and concludes that such evidence more likely than not constitutes impermissible character evidence that is substantially prejudicial.[13] Evidence admitted to show motive or intent can be admitted under either Federal Rule of Evidence 404(b) and its state equivalents ("Rule 404(b)"), or under Federal Rules of Evidence 401 and 402 ("Rules 401 and 402")

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id. (citing an ongoing case against a Texas teenager who jumped bail and wrote a rap song about it, a YouTube video of which has over 168 million views as of May, 2019).

[9] *See* Alan Jackson, *Prosecuting Gang Cases: What Local Prosecutors Need to Know*, National District Attorney's Association (Apr. 2004), http://www.ndaa.org/pdf/gang_cases.pdf at 15–16 (recommending that prosecutors use music lyrics to show a jury the "defendant's true personality"); Lyddane, *Understanding Gangs and Gang Mentality: Acquiring Evidence of the Gang Conspiracy*, 54 U.S. ATTORNEY'S BULL., no. 3, 2006, at 8 (advising prosecutors to obtain search warrants of homes and jail cells in order to obtain rap lyrics from alleged gang members since such lyrics "reflect true-life experiences" and sometimes can be the source for an investigative lead).

[10] *See, e.g.*, Michael Gregory, Note, *Murder Was the Case That They Gave Me: Defendant's Rap Lyrics as Evidence in a Criminal Trial*, 25 B.U. PUB. INT. L.J. 329, 332 (2016) (arguing that courts should apply the New Jersey Supreme Court's approach in *Skinner* when faced with the admissibility of defendant-authored rap lyrics).

[11] *See* Dennis, *supra* note 8, at 8–14 (listing a number of evidentiary issues courts face when dealing with the admissibility of defendant-authored rap lyrics).

[12] *See infra* notes 127–201 and accompanying text (elaborating on the factual distinctions of the various cases dealing with defendant-authored rap lyrics).

[13] *See infra* notes 31–201 and accompanying text.

and their state equivalents.[14] Rule 404(b) explicitly allows for the admission of evidence to show motive or intent, and Rules 401 and 402 allow in evidence to show motive or intent where that evidence is relevant to a material fact in the case.[15]

Although not all courts that admit defendant-authored rap lyrics to show motive or intent do so under Rule 404(b),[16] Rule 404(b) provides an important starting point for understanding the admission of defendant-authored rap lyrics to show motive or intent. This article argues that defendant-authored rap lyrics admitted to show motive or intent tend to look like impermissible character evidence, and Rule 404(b) explicitly allows for the admission of "other act" evidence to show "motive" or "intent" *as long as* that evidence is not probative of a person's character.[17]

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[14] *See* FED. R. EVID. 401 (explaining that evidence is relevant if it tends to make a material fact more or less probable); FED. R. EVID. 402 (explaining that relevant evidence is admissible unless the Constitution, a statute, or Supreme Court rules determine otherwise); FED. R. EVID. 404(b) (explaining evidence of other crimes or acts may be admissible if offered for the limited purpose of showing motive or intent).

[15] FED. R. EVID. 401; FED. R. EVID. 402; FED. R. EVID. 404(b). Courts have also admitted defendant-authored rap lyrics to show as suggestive of a mens rea. *See, e.g.*, United States v. Foster, 939 F.2d 445, 457 (7th Cir. 1991) (affirming the admission of defendant-authored rap lyrics to show intent to distribute cocaine where the defendant had been convicted of possession with intent to distribute cocaine).

[16] *See, e.g.*, People v. Williams, No. 263892, 2006 WL 3682750, at *1 (Ct. App. Mich., Dec. 14, 2006) (holding that a defendant's rap lyrics should not be admitted under Mich. R. Evid. 404 as they did not constitute an "other act," and instead should be analyzed under the rules of hearsay).

[17] *See* FED. R. EVID. 404(b) (explaining that evidence of other crimes or acts is admissible as long as that evidence is probative of something other than character, such as motive or intent). Rule 404(b), which the article will also refer to as the "other acts rule," is one of the most frequently used and appealed Rules of Evidence. *See* FED. R. EVID. 404(b) advisory committee's note to 1991 amendment (stating that Rule 404(b) has become arguably the most cited Rule and that the prosecution regularly relies on other acts evidence as an integral part of proving their case); *see also* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 4.28, p. 730 (4th ed. 2013) (explaining that an observer could fairly call the use of other acts evidence a rule of inclusion as opposed to a rule of exclusion because of how frequently it is used at trial). Subsection (1) of the Rule bars the admission of evidence of a crime or other act as character evidence to show that the person has a propensity to act in accordance with that character. FED. R. EVID. 404(b)(1). Nevertheless, subsection (2) of the Rule allows the admissibility of such evidence if used to show a non-propensity purpose such as motive or intent. FED. R. EVID. 404(b)(2). The "other acts" rule concerns other acts that may be probative of something other than character—like motive, intent, identity, or opportunity, just to name a few.

Even without Rule 404(b) though, a court can admit defendant-authored rap lyrics as evidence of motive or intent where the rap lyrics arguably show motive or intent and that motive or intent has probative value to the crime charged per Rules 401 and 402.[18]

The admission of defendant-authored rap lyrics to show motive or intent (whether under Rule 404(b) or Rules 401 and 402) runs the risk that factfinders will improperly use the rap lyrics to draw conclusions about the defendant's propensity to commit a crime.[19] As a safeguard, evidence offered to show motive or intent must still overcome a balancing test under Federal Rule of Evidence 403 or its state equivalents ("Rule 403").[20] Significantly, Rule 403 allows courts to exclude otherwise relevant evidence if the unfair prejudicial effect of that evidence substantially

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See id. (explaining that evidence of crimes or other acts may be admissible to show motive, intent, identity, or opportunity, among other things).

[18] *See* CLIFFORD S. FISHMAN & ANNE T. MCKENNA, JONES ON EVIDENCE, 7th ed., § 17:70 (explaining how courts generally admit evidence of threats, for example, to show a defendant's motive or intent as relevant evidence); *see also* 12 Ind. Prac., Indiana Evidence § 401.110 (4th ed.) (explaining how evidence that sheds light on a defendant's motive or intent can constitute relevant evidence).

[19] *See* FED. R. EVID. 404(b) advisory committee's note to 1991 amendment (stating that Rule 404(b) has become arguably the most cited Rule and that the prosecution regularly relies on other acts evidence as an integral part of proving their case); Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove* Mens Rea: *The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 OHIO ST. L.J. 575, 577 (1990) (citing various collections of cases on the subject); Even though the article frequently focuses on the Federal Rules of Evidence, all of the similar state Rules of Evidence unless otherwise noted are based on the same ideas and principles. *See* Dennis, *supra* note 8, at 8 n.34 (citing CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 1.2 n.2 (3d ed. 2003)) (explaining that as of 2002, forty-two states had fashioned their rules of evidence from the Federal Rules of Evidence). Finally, while the discussion focuses on Rule 404(b) and its state equivalents, Rule 404(b) interacts with a number of different evidentiary rules, most notably Rule 403. *See* FED. R. EVID. 403 (stating that a court may exclude relevant evidence if its prejudicial effect substantially outweighs its probative value); FED. R. EVID. 404(b) advisory committee's note (explaining that courts must make 404(b) admissibility determinations on the basis of whether the probative value of such evidence is not outweighed by its prejudicial effect).

[20] *See* FED. R. EVID. 403 (explaining that even if evidence is otherwise relevant, a court may exclude that evidence if its probative value is substantially outweighed by unfair prejudice, confusion of the issues, misleading the jury, or wasting time and judicial resources).

outweighs its probative value.[21] The use of defendant-authored rap lyrics to show motive or intent can be unfairly prejudicial because of the negative societal perceptions of rap music and the presumption that rap lyrics convey autobiographical events.[22]

When a court admits evidence to show the motive or intent of a criminal defendant, a court is allowing the factfinder to consider whether the defendant's mindset may have driven the defendant to commit the alleged crime.[23] As a result, an inherent overlap exists between evidence that shows motive or intent and inadmissible character evidence.[24] A close discussion

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[21] *Id*.; *see* FED. R. EVID. 403 advisory committee's note (defining unfair prejudice as allowing the factfinder to use the evidence for improper purposes). An admission under Rule 404(b) necessitates a Rule 403 balancing test because of the very real possibility that the factfinder uses evidence admitted to show intent, for example, for impermissible character evidence purposes instead. *See* M.C. Slough and J. William Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325, 325 (1956) (explaining that other acts evidence typically has probative value, but it should be withheld if it can cause unfair prejudice); MUELLER, *supra* note19, at 731 (explaining that other acts evidence brings a greater risk of prejudice than most other types of evidence). An admission under Rules 401 and 402 also necessitates a Rule 403 balancing test. *See* FED. R. EVID. 403 (explaining that the court may exclude *relevant* evidence if the prejudicial effect of that evidence substantially outweighs its probative value).

[22] *See infra* notes 104–126 and accompanying text (explaining how negative societal perceptions of rap music affect the prejudicial effect that defendant-authored rap lyrics can have on juries).

[23] *See, e.g.*, 1A John Henry Wigmore § 54.1, at 1156 (Peter Tillers rev. 1983) (recognizing that there are instances where we mask otherwise inadmissible character evidence as non-character evidence just by calling it something else); *see also* Imwinkelried, *supra* note 19, at 583 (arguing that evidence admitted under Rule 404(b) runs the serious risk that it will be used for improper purposes and thus have a prejudicial effect); *compare Skinner*, 95 A.3d at 238 (denying the admission of defendant-authored rap lyrics because such lyrics risked unfairly swaying the jury against the defendant); *with Foster*, 939 F.2d at 455–56 (holding that defendant-authored rap lyrics showed the defendant's intent because the defendant put his intent directly at issue).

[24] *See* FED. R. EVID. 404 advisory committee's note to 2006 Amendment (elaborating that the Federal Rules of Evidence discourage circumstantial character evidence since it creates the risks of "prejudice, confusion, and delay"); FED. R. EVID. 404(b) advisory committee's note (emphasizing that other crimes, wrongs, or bad acts are not admissible to show propensity, due to the close relation between other acts evidence and character evidence); *see also* Imwinkelried, *supra* note 19, at 577 (arguing and citing other commentators who have argued that the distinction between inadmissible character evidence and seemingly character evidence admitted for non-character purposes is almost non-existent).

of the case law concerning the admission of defendant-authored rap lyrics to show motive or intent, coupled with the context in which defendants pen their own rap lyrics, reveals a heightened concern that juries and judges use defendant-authored rap lyrics for inadmissible character evidence purposes.[25] This article aims to synthesize the various cases to show that except in particularly egregious circumstances, admitting defendant-authored rap lyrics against defendants at trial to show motive or intent invites the factfinder to use impermissible character evidence.[26]

Part II of this article discusses the evidentiary framework under which courts admit defendant-authored rap lyrics and highlights the particular problem that arises when courts admit those lyrics to show motive or intent.[27] Part III of this article analyzes the growing body of case law in which courts admit defendant-authored rap lyrics to show motive or intent.[28] Further, it addresses the Rule 403 balancing test between probative value and prejudicial effect in the context of defendant-authored rap lyrics.[29] Part IV of this article aims to provide working guidelines that may help prosecutors who attempt to admit this evidence, defendants who attempt to object to this evidence, and judges who ultimately have to decide on the admissibility of it.[30]

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[25] *See, e.g.*, *Skinner*, 95 A.3d at 238–39 (holding that defendant-authored rap lyrics should not be admitted against a defendant unless a "strong nexus" exists between the lyrics and the crime charged because certain inflammatory lyrics combined with societal perceptions of rap music could unduly prejudice the jury against the defendant); *see also* Dennis, *supra* note 8, at 11–12 (citing the various cases in which defendants object to the admission of defendant-authored rap lyrics on the grounds that such evidence is "functionally equivalent" to inadmissible character evidence and on the grounds that such evidence is unfairly prejudicial). For a case illustration, see Bryant v. State, 802 N.E.2d 486, 498 (Ind. Ct. App. 2004), *transfer denied*, 822 N.E.2d 968 (Ind. 2004) (explaining that the defendant objected to the admission of his own rap lyrics on the grounds that they constituted impermissible character evidence, were prejudicial, and were irrelevant).

[26] *See infra* notes 31–201 and accompanying text.

[27] *See infra* notes 31–126 and accompanying text.

[28] *See infra* notes 127–201 and accompanying text.

[29] *See infra* notes 127–201 and accompanying text.

[30] *See infra* notes 202–219 and accompanying text.

II. ADMITTING DEFENDANT-AUTHORED RAP LYRICS AS EVIDENCE AGAINST THE DEFENDANT AND THE ISSUES THAT ARISE WHEN THOSE LYRICS ARE ADMITTED TO SHOW MOTIVE OR INTENT

When courts admit defendant-authored rap lyrics to show the defendant's motive or intent, the admission of such evidence often provides judges or juries with an opportunity to use the defendant's character to draw impermissible conclusions about the defendant's propensities.[31] Moreover,

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[31] *See, e.g.*, Dennis, *supra* note 8, at 11–12 (citing the various cases in which defendants object to the admission of defendant-authored rap lyrics on the grounds that such evidence is functionally equivalent to inadmissible character evidence and on the grounds that such evidence is unfairly prejudicial); Gregory S. Parks & Rashawn Ray, *Poetry as Evidence*, 3 U.C. IRVINE L. REV. 217, 233-34 (2013) (explaining the close relationship between rap lyrics being admitted to show motive or intent and those same rap lyrics being used to show a defendant's propensity to commit crimes); *see also Bryant*, 802 N.E.2d at 498 (explaining that the defendant objected to and subsequently appealed the admission of his rap lyrics for the explicit reason that they constituted impermissible character evidence).
Various other legal issues arise when courts admit defendant-authored rap lyrics, such as whether defendant-authored rap lyrics constitute hearsay or whether prosecution on the basis of those lyrics raises First Amendment and other constitutional issues. *See, e.g.*, Dennis, *supra* note 8, at 8, 25 n.153, 33 n.191 (arguing that defendant-authored rap lyrics typically constitute inadmissible hearsay because rap music lyricists are more like fiction writers than non-fiction writers; consequently, courts should not interpret rap lyrics as literal admissions of a party opponent, for example); Donald F. Tibbs & Shelly Chauncey, *From Slavery to Hip-Hop: Punishing Black Speech and What's Unconstitutional About Prosecuting Young Black Men Through Art*, 52 WASH. U. J. L. & POL'Y 33, 36, 38 (2016) (arguing that prosecuting Black men by using rap lyrics that they wrote against them potentially violates their First Amendment rights to free speech and the Fourteenth Amendment's Equal Protection Clause). Nevertheless, this article solely aims to address the issue that courts confront when prosecutors ask them to admit defendant-authored rap lyrics into trial for the purpose of showing the motive or intent of the criminal defendant. *See infra* notes 31–201 and accompanying text. Further, though not within the scope of this article, the First Amendment issues arguably are exaggerated since the First Amendment right to free speech, though fundamental, is not absolute. *See* Wisconsin v. Mitchell, 508 U.S. 476, 489 (1993) (holding that speech may be used as evidence against a criminal defendant). The First Amendment does not prohibit using speech as evidence to establish elements of a crime or to prove motive or intent in a criminal trial. *Id.* Certain cases seem to necessitate the admission of defendant-authored rap lyrics in order to ensure an accurate conviction. *See, e.g.*, Greene v. Commonwealth, 197 S.W.3d 76, 86–87 (Ky. 2006) (affirming the admission of defendant-authored rap lyrics under Ky. R. Evid. 404(b) where the lyrics constituted an admission to the very specific details of the alleged murder of his wife).

the unfair prejudice of defendant-authored rap lyric evidence can outweigh the probative value of that evidence, more so than other kinds of evidence admitted under Rule 404(b).[32]

Section A of this Part offers a general historical background of the Federal Rules of Evidence and explains how most states have adopted some version of these Rules, including the underlying theories of Rules 404(b) and 403.[33] Section B of this Part discusses the general evidentiary framework under which courts admit defendant-authored rap lyrics into a trial.[34] Section C introduces the theoretical and practical issues that arise with evidence admitted to show motive and intent rather than character.[35] Finally, Section D of this Part explains the adverse societal perceptions of rap music and the potential influence those perceptions may have on a factfinder to use rap lyrics for inadmissible propensity purposes.[36]

A. A Brief Historical Overview of Federal and State Rules of Evidence, and the Emergence of the Other Acts Rule

The Federal Rules of Evidence originated with a Special Committee of the judicial branch, appointed by then-Chief Justice Earl Warren to study the possibility of creating uniform rules of evidence in federal courts.[37] Ultimately, this Special Committee became an Advisory Committee, which, pursuant to the Rules Enabling Act, drafted the first draft of the Federal Rules of Evidence and sent them to Congress for approval.[38] After

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[32] *See* FED. R. EVID. 404(b) advisory committee's note (emphasizing that courts making the admissibility determination of evidence offered for non-propensity purposes such as motive or intent must make those determinations in light of the balancing of the evidence's unfair prejudice and the evidence's probative value). The Advisory Committee Note also explains that a court *must* balance the prejudicial effect and the probative value of other acts evidence. *Id.*

[33] *See infra* notes 37–54 and accompanying text.

[34] *See infra* notes 55–80 and accompanying text.

[35] *See infra* notes 81–103 and accompanying text.

[36] *See infra* notes 104–126 and accompanying text.

[37] Glen Weissenberger, *The Supreme Court and the Interpretation of the Federal Rules of Evidence*, 53 OHIO ST. L.J. 1307, 1319 (1992).

[38] *See id.* at 1319–20 (recounting the fairly tenuous history of the drafting and passage of the Federal Rules of Evidence, a process in which many critics actually believed the Court had exceeded its power under the Rules Enabling Act).

several years of back-and-forth debate, President Gerald Ford signed the Rules into law in 1975.[39]

Significantly, the Federal Rules of Evidence, on which many states base their own rules of evidence, draw primarily from common law rules of evidence to create uniform evidentiary rules of exclusion that encourage fairness and efficiency in the courts.[40] Fed. R. Evid. 404, which generally prohibits the use of character evidence or evidence of a person's conduct to show that a person has a propensity to act in conformity with that character, did not stray from this ideological background.[41] In fact, the common law equivalent of Fed. R. Evid. 404(b) operated similarly to the contemporary other acts rule and allowed evidence to be admitted in

[39] *Statement on Signing a Bill Establishing Rules of Evidence in Federal Court Proceedings*, Public Papers of the Presidents, Gerald R. Ford; *see also* Weissenberger, *supra* note 37, at 1320 (explaining that the version of the Rules as passed by Congress and signed by President Ford maintained much of the same content and structure that were proposed by the Advisory Committee).

[40] *See* FED. R. EVID. 102 (explaining that the purpose of the Rules is to construe them as aiming to administer fair proceedings without unduly wasting expenses or time). For an example of a state's rules of evidence similar to the Federal Rules of Evidence, see generally KY. R. EVID. 101–1104 (displaying the same format and essentially the same content as the Federal Rules of Evidence). Further, some states had their own uniform rules of evidence before federal courts had theirs. *See* FED. R. EVID. 102 advisory committee's note (citing New Jersey and California rules of evidence for similar provisions to Fed. R. Evid. 102).

[41] *See* FED. R. EVID. 404 (stating that evidence of a person's character or evidence of a person's crimes, wrongs, or other acts are not admissible to prove a person's character so that the factfinder may infer that on a particular occasion that person acted consistent with his or her character); *see also* David P. Leonard, *The New Wigmore: A Treatise on Evidence: Evidence of Other Misconduct and Similar Events*, at § 3.1, 74 (2009) (explaining that early American law, following British precedent, did not allow the admission of uncharged misconduct against a criminal defendant for the purpose of showing that the defendant had a propensity to commit crimes). Fed. R. Evid. 404 permits the use of character evidence to show the propensity of an individual in limited purposes. *See, e.g.*, FED. R. EVID. 404(a)(2)(A) (allowing a criminal defendant to offer evidence of his or her pertinent trait, and if admitted, the prosecutor may offer evidence to rebut it). Still, this article focuses primarily on how other acts may be admitted against a criminal defendant to show non-propensity purposes. FED. R. EVID. 404(b)(2).

order to prove a person's state of mind which includes motive and intent.[42]

Today, Rule 404(b) has emerged as one of the most frequently appealed evidence rules in criminal cases.[43] One possible explanation for the prevalence of Rule 404(b) appeals is that evidence admitted under Rule 404(b) seems a lot like otherwise inadmissible character evidence.[44] Some commentators view the non-propensity purposes under which courts may admit certain acts or conduct of the defendant as a way to circumvent the character evidence ban.[45] For example, when courts admit other acts evidence to show either motive or intent and not propensity, some commentators worry that this requires factfinders to think about whether the defendant had a propensity to carry out their motive or intent.[46] As this article will explain in Section D, general societal perceptions of rap music heighten this concern.[47] Typically, prosecutors

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[42] *See* Leonard, *supra* note 41, at § 3.3, 101 (explaining that early nineteenth century cases in the U.S. and in Great Britain admitted uncharged conduct not to show propensity, but instead to show a person's mental state).

[43] *See* FED. R. EVID. 404(b) advisory committee's note to 1991 Amendment (stating that Rule 404(b) has become arguably the most cited Rule and that the prosecution regularly relies on other acts evidence as an integral part of proving their case); *see also* MUELLER, *supra* note 17, at 730 (explaining that an observer could fairly call the use of other acts evidence a rule of inclusion as opposed to a rule of exclusion because of how frequently it is used at trial); Dennis, *supra* note 8 at 8 n.34 (citing MUELLER, *supra* note 17 (explaining that as of 2002, forty-two states had fashioned their rules of evidence from the Federal Rules of Evidence).

[44] *See* FED. R. EVID. 404(b) (explaining the close relationship between inadmissible and admissible other acts evidence). Subsection (1) of Rule 404(b) explains that other acts evidence is inadmissible to prove a person's character, but subsection (2) of Rule 404(b) explains that other acts evidence can still be admissible if offered for a non-character purpose. *Id.*

[45] *See, e.g.*, Imwinkelried, *supra* note 19, at 578 (laying out the article's argument, which aims to show how the non-exclusive list of permissible uses in Rule 404(b) threatens the integrity of the character evidence prohibition).

[46] *See, e.g.*, Wigmore, *supra* note 23, at § 103 at 1156 (recognizing that there are instances where we mask otherwise inadmissible character evidence as non-character evidence just by calling it something else); Imwinkelried, *supra* note 19, at 583 (arguing that evidence admitted under Rule 404(b) runs the serious risk that it will be used for improper purposes and thus have a prejudicial effect); *see also Skinner*, 95 A.3d at 238 (denying the admission of defendant-authored rap lyrics because such lyrics risked unfairly swaying the jury against the defendant).

[47] *See infra* notes 104–126 and accompanying text.

move to admit defendant-authored rap lyrics against a defendant by arguing that the lyrics show motive or intent—whether under Rule 404(b) or for their relevance generally under Rules 401 and 402.[48]

At common law, and with codified rules of evidence, all admissible evidence also must be relevant.[49] Relevant evidence must have probative value in that it furthers an inquiry, but it does not need to sufficiently prove the particular point at issue.[50] Intent is relevant where it constitutes the specific element of a crime, and both motive and intent can be relevant where they are generally probative of the crime charged.[51] And, as a further limitation on evidence admitted to show motive or intent, a court may exclude otherwise relevant evidence under Rule 403 or its state equivalents if the unfair prejudice of that evidence substantially outweighs its probative value.[52] Unfair prejudice means the unsupported inclination of the factfinder to make their decision on an improper basis,

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[48] *See, e.g.*, *Heartsman*, 2015 WL 2400736, at *11 (explaining how the trial judge suggested that if a rap video was shown to the jury, then a limiting instruction should be given to explain that the video is probative of defendant's motive and not his propensity to commit violent acts).

[49] *See* FED. R. EVID. 401 (defining relevant evidence as evidence that has probative value, or legal relevance, and factual relevance to the case at hand); FED. R. EVID. 402 (stating that all relevant evidence is admissible, with some exceptions, while all irrelevant evidence is inadmissible); *see also McCormick on Evidence*, Sixth Edition, § 184, 728, § 185, 733 (2006) (explaining that the admissibility of all relevant evidence—meaning evidence that has probative value—unless certain rules say otherwise is an "axiom" of common law evidentiary rules).

[50] *See* McCormick, *supra* note 49, at § 185, 733, 736 (even if the evidence does not prove the ultimate point, a court may not exclude that evidence on the basis of relevance since sufficiency and relevance are not the same thing). The bar for relevance is low, just as long as a piece of evidence "has any tendency to make a fact more or less probable" than without that evidence and the evidence has some sort of probative value in determining the action. FED. R. EVID. 401.

[51] McCormick, *supra* note 49, at § 185, 733, 736.

[52] *See, e.g.*, FED. R. EVID. 403 (explaining that a court may exclude otherwise relevant evidence if its unfair prejudice substantially outweighs its probative value); KY. R. EVID. 403 (explaining the same proposition as Fed. R. Evid. 403); N.J. R. EVID. 403 (explaining the same proposition as Fed. R. Evid. 403); *see also* McCormick, *supra* note 49, at § 185 at 736–37 (2006) (explaining that relevant evidence is not automatically admissible because Rule 403 of the Federal and Uniform Evidence Rules asks whether the probative value of relevant evidence is worth the unfair prejudice it may cause to the person the evidence is offered against).

typically an emotional one.[53] Thus, like most appeals of a trial court's evidentiary determination, defendant-authored rap lyrics admitted to show motive or intent typically are appealed on Rule 403 grounds.[54]

B. The Evidentiary Framework for Admitting Defendant-Authored Rap Lyrics into Trial

Defendant-authored rap lyrics, like all other evidence, must meet all evidentiary standards to be admissible in court.[55] Frequently, courts admit defendant-authored rap lyrics for reasons other than simply to show motive or intent under Rule 404(b).[56] While some courts have questioned whether the act of writing lyrics or the act of producing a rap video constitutes an "other act" that shows motive or intent under Rule 404(b), other courts nevertheless admit the lyrics to show motive or intent because of their probative value in showing something other than the defendant's character.[57] Still, beyond Rule 404(b), courts have admitted defendant-authored rap lyrics on the following grounds: as non-hearsay admissions of a party opponent, as the basis for an expert opinion, as authenticated writings, and as relevant evidence.[58]

For example, courts admit defendant-authored rap lyrics as non-hearsay admissions of a party opponent.[59] The Court of Appeals of Michigan

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[53] *See* FED. R. EVID. 403 advisory committee's note.

[54] *See* Dennis, *supra* note 8, at 8–13 (explaining that courts admit as evidence defendant-authored rap lyrics on several grounds, which usually include Rule 404(b) and Rule 403).

[55] *See, e.g.*, FED. R. EVID. 101 (explaining that all of the federal rules of evidence apply in particular types of United States court proceedings).

[56] *See* Dennis, *supra* note 8, at 8–9 (introducing the evidentiary framework under which courts admit defendant-authored rap lyrics).

[57] *See, e.g.*, United States v. Dore, No. 12 Cr. 45 x(RJS) 2013 WL 3965281 at *7–9 (S.D.N.Y. July 31, 2013) (holding that the defendant's rap lyrics questionably constituted other act evidence under Rule 404(b), but even assuming the lyrics do fall under 404(b), the lyrics were probative of the defendant's intent); *see also* State v. Davis, No. 2 CA-CR 2015-0224, 2016 WL 4376412 at *5 (Ct. App. Ariz. Div. 2 Aug. 16, 2016) (assuming without explicitly recognizing that the defendant's rap lyrics constituted an "other act" under Ariz. R. Evid. 404(b), the court held that the trail judge's admission of the lyrics was proper because they had been admitted for the limited purpose of showing consciousness of guilt).

[58] *See infra* notes 59–80 and accompanying text.

[59] *See* FED. R. EVID. 801(c) (defining hearsay as an out-of-court statement offered for the truth of the matter asserted); FED. R. EVID. 801(d)(2)(A) (defining an admission of

upheld the admission of a defendant's rap lyrics where the content of his lyrics constituted admissions of his second-degree murder.[60] The court found that the defendant's rap lyrics, "I got ragged hollow tips that's gone spit yo dome," sufficiently constituted an admission of the defendant's shooting because the defendant shot the victim in the "dome," another word for head.[61] The defendant's lyrics also mentioned "fake n[***]as," which correlated with witness accounts of the defendant calling the victim a "fake-ass Eminem ass n[***]er."[62] The court held that the defendant's lyrics represented his own reflection of the truth, particularly since the lyrics shed light on the defendant's motive and intent.[63] Further, the Seventh Circuit has left open the possibility that the prosecution could classify defendant-authored rap lyrics as admissions of a party opponent under Fed. R. Evid. 801(d)(2)(A).[64]

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a party opponent as a non-hearsay statement made by a party to the trial against that party's position at trial); *see also* Dennis, *supra* note 8, at 8–9 (explaining how defendant-authored rap lyrics are admitted as non-hearsay evidence because courts can view such lyrics as admissions of a party opponent and thus exempt the lyrics from the hearsay bar altogether).

[60] *Williams*, 2006 WL 3682750, at *1.

[61] *Id.*

[62] *Id.* While the court did not specifically mention it, the defendant wrote the rap lyrics presumably after he shot and killed the victim. *See id.* (explaining that the lyrics were found in the defendant's duffle bag and that they refer to many of the circumstances surrounding the crime). Although the court does not specifically address the significance of when the lyrics were written, one can assume that the fact they were written after the crime increases the probative value of the lyrics. *See id.* at *1–2 (holding that the lyrics had probative value that was not outweighed by prejudicial effect, particularly in light of all the other evidence).

[63] *See id.* at *1 (holding the defendant's rap lyrics admissible under Michigan Rules of Evidence 801(d)(2)—functionally equivalent to Fed. R. Evid. 801(d)(2)—because they were written statements against the defendant made by the defendant in which he "manifested an adoption of belief in its truth").

In another example, a California Appellate Court held that a defendant's rap lyrics that narrated the sequence of that defendant's case—and even included the line "I tell the real life, I tell the real shit, nothing fake in my raps"—constituted an admission such that the lyrics were admitted under the admission of a party opponent exemption to the hearsay rule. People v. Daniels, No. A113184, 2009 WL 568918, at *8, *15 (Cal. App. First, March 6, 2009).

[64] United States v. Foster, 939 F.2d 445, 455 n.13 (7th Cir. 1991) (mentioning though not addressing the possibility that the prosecution likely could have admitted defendant's rap lyrics as an admission of a party opponent under Fed. R. Evid. 801(d)(2)).

Next, courts sometimes admit defendant-authored rap lyrics as the basis for an expert opinion.[65] In one case, a California Appellate Court rejected an appellant-defendant's argument that an expert improperly relied on rap lyrics as a basis to form an opinion that the defendant had the requisite mens rea to commit a first degree murder that involved torture.[66] The appeals court held that a police officer could use the extremely profane lyrics as the basis for his expert opinion that the defendant harbored disturbing thoughts about murder such that the PCP in his bloodstream would not necessarily have precluded his specific intent.[67] Interpretation of rap lyrics through the opinion of an expert or lay witness can ultimately affect whether a court admits lyrical evidence for its substantive value as an admission of a party opponent, or just to show a defendant's motive, for example.[68] Relatedly, courts also have admitted defendant-authored rap lyrics on authentication grounds.[69] Law enforcement officers typically find

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[65] Dennis, *supra* note 8, at 13.

[66] People v. Singleton, No. B171718, 2005 WL 699307 at *13 (Ct. App. 2d Dist. March 28, 2005).

[67] *Id.* at *5–6, *15–16. The police officer testified that the defendant's rap lyrics, which referred to serial killers and fictional characters from horror movies—and included language such as "I will force another person to play tug-of-war with barbed wire and set them on fire, and then put the fire out, take the pus from the fire and put it into the person's mouth, break their jaw"—showed that he had contemplated committing homicide. *Id.* at 5–6. The police officer also testified that the negative thoughts displayed in the defendant's raps would not have gone away just because the defendant had smoked a small amount of PCP. *Id.* at 15–16.

[68] *See* FED. R. EVID. 701(b) (stating that when opinion testimony is offered by a lay witness, it must be helpful to a fact at issue); FED. R. EVID. 702 advisory committee's note (establishing that proper use of an expert opinion depends upon whether the opinion can assist the trier of fact).

Nevertheless, despite the willingness of some courts to admit defendant-authored rap lyrics as the basis of an expert opinion, one federal court denied the opportunity for a defense expert witnesses to testify about their interpretation of rap lyrics that would have been favorable to the defendant. *See* United States v. Wilson, 493 F.Supp. 2d 484, 489 (E.D.N.Y., 2006) (holding that no court in the Second Circuit has allowed an expert in hip hop culture to testify as to the meaning of rap lyrics that would dispute a theory that rap lyrics are based on true events). Interestingly, the United States District Court for the Eastern District of Louisiana allowed an expert witness to testify as to the meaning of certain terms in hip-hop songs in a copyright case. Positive Black Talk, Inc. v. Cash Money Records, Inc., No. Civ.A. 02-0425, 2013 WL 3965281, at *3 (April 21 2003, E.D.La.).

[69] *See, e.g.*, People v. Olguin, 31 Cal. App. 4th 1355, 1372 (1994) (holding that rap lyrics offered at trial were properly authenticated where the lyrics were found in the

the written product either on the defendant's person, in the defendant's house or car, and (more recently) rap videos are found on YouTube.[70] Most significantly though, defendant-authored rap lyrics are admitted as relevant evidence.[71] In fact, many issues arise on the question of relevance when it comes to rap lyrics admitted at a criminal trial.[72] According to Professor Andrea Dennis, courts find rap lyrics to be relevant either as inculpatory statements of the defendant or as evidence of the defendant's motive or intent.[73] In cases where rap lyrics are determined to be relevant as inculpatory statements by the defendant, courts have reasoned that such evidence is admissible because it is probative of motive or intent.[74]

As a final consideration, the Supreme Court has held that when a judge makes a preliminary determination on the admissibility of extrinsic other acts evidence, a judge must ask whether that evidence is conditionally

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defendant's home and the contents of the lyrics matched defendant's gang-related activities).

[70] *Id.*; *see Skinner*, 95 A.3d at 240–41 (explaining that police officers located defendant-authored rap lyrics in defendant's car); *see also* United States v. Graham, Case No. 15-20652-05, 2017 WL 6523641, at *1 (E.D. Mich. Dec. 21, 2017) (explaining that videos of the defendant rapping his own lyrics, which were the subject of a motion to suppress, were found because they were posted on YouTube).

[71] *See* FED. R. EVID. 401 (defining relevant evidence as evidence that has probative value, or legal relevance, and factual relevance to the case at hand); FED. R. EVID. 402 (stating that all relevant evidence is inadmissible and all irrelevant evidence is inadmissible); *see also* McCormick *supra* note 49, at § 185, 733, 728 (explaining that all relevant evidence ought to be admissible).

[72] *See, e.g.*, *Skinner*, 95 A.3d at 238 (holding that defendant-authored rap lyrics can be highly prejudicial and therefore the admissibility of those lyrics relies heavily on the relevance of that evidence); *see also* Dennis, *supra* note 8, at 9–10 (2007) (explaining how courts find defendant-authored rap lyrics relevant); Sean-Patrick Wilson, *Rap Sheets: The Constitutional and Societal Complications Arising from the Use of Rap Lyrics as Evidence at Criminal Trials*, 12 UCLA ENT. L. REV. 345, 358-59 (2005) (explaining that defendant-authored rap lyrics are typically considered relevant to the specific charges against the defendant-rapper).

[73] Dennis, *supra* note 8, at 9; *see also* Parks, *supra* note 31, at 230–33 (adopting Andrea Dennis's two-pronged approach).

[74] *See, e.g.*, *Greene*, 197 S.W.3d at 87 (holding that a defendant's rap video filmed after an alleged murder, which constituted an inculpatory statement, was admissible under KY. R. EVID. 404(b) to show that defendant premeditated the murder and had a motive); *Williams*, 2006 WL 3682750, at *1 (holding that a defendant's rap lyrics, which constituted an inculpatory statement, were admissible to show the defendant's intent to commit murder).

relevant under Fed. R. Evid. 104(b).[75] Under Rule 104(b), a judge may admit evidence if there is enough evidence for a jury to find the fact exists.[76] On the other hand, under Rule 104(a), a judge may admit evidence if there is enough evidence for the judge to find the fact exists.[77] Consequently, Rule 104(b) gives the trial judge less deference to admit the evidence than under Rule104(a), which applies to the vast majority of preliminary questions of admissibility.[78] If a court admits defendant-authored rap lyrics to show motive or intent under Rule 404(b), then Rule 104(b) applies.[79] If a court admits the lyrics just to show they are relevant to prove motive or intent generally, Rule 104(a) applies.[80]

C. Evidence Admitted to Show Motive or Intent Illustrated in a Venn Diagram

Fed. R. Evid. 404(b)(1) and its state equivalents stand for the proposition that evidence of crimes, wrongs, or other acts are not admissible to show a person's character in order to invite the factfinder to infer that a person acted in conformity with that character.[81] Nevertheless, Fed. R. Evid.

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[75] *See* FED. R. EVID. 104(b) (where evidence depends on whether a fact exists, courts may admit such evidence on the condition that proof of that evidence is later introduced); *see also* Huddleston v. United States, 485 U.S. 681, 688–90 (1988) (holding that trial judge must make their preliminary consideration of the admissibility of other acts evidence under Fed. R. Evid. 104(b) and not Fed. R. Evid. 104(a)).

[76] *See* FED. R. EVID. 104(b) (explaining that a judge may admit evidence for the jury to consider even if that evidence depends on another fact existing).

[77] *See* FED. R. EVID. 104(a) (explaining that a judge may admit evidence by deciding its admissibility as a preliminary question).

[78] *See Huddleston*, 485 U.S. at 689–90 (explaining that with a 104(b) determination, unlike a 104(a) determination, a judge must determine whether a jury could reasonably find a conditional fact as opposed to whether the judge could reasonably find a conditional fact).

[79] *Id.* at 688–90.

[80] *See* FED. R. EVID. 104 (explaining that a judge makes the preliminary determination if evidence is relevant and should be admitted).

[81] *See, e.g.*, FED. R. EVID. 404(b) advisory committee's note (highlighting the concern that character evidence is susceptible to being used circumstantially to show a person's propensity to do something or not to do something). Some courts that admit defendant-authored rap lyrics as other acts evidence consider the act of writing the lyrics as an "other act" admissible to show something other than character. *See, e.g.*, *Bryant*, 802 N.E.2d at 499 (holding that the defendant's act of writing rap lyrics detailing a specific crime constituted a bad act admissible under Indiana's Rule 404(b)). Other courts that admit defendant-authored lyrics as other acts evidence consider the rap lyrics to be

404(b)(2) and its state equivalents provide a non-exclusive list of permissible uses of other acts evidence.[82] Some commentators believe that the non-exclusive list of permissible uses laid out in Rule 404(b)(2) constitutes an attempt to circumvent the propensity bar that Rule 404(b)(1) aims to protect.[83] Regardless, evidence admitted under Rule 404(b)(2) often constitutes an important and strong part of a prosecutor's case due to the potentially high probative value of such evidence.[84]

In practice, a prosecutor offering other acts evidence against a criminal defendant must establish that the other acts evidence is offered in a way other than to show the defendant's propensity to commit a crime.[85] Put another way, Rule 404(b) bans the use of other acts evidence to show that a defendant acted consistently with that other act.[86] If the prosecutor successfully admits the other acts evidence to show something other than propensity, defense counsel must make a timely request for a limiting instruction under Fed. R. Evid. 105 and its state equivalents ("Rule 105") if the defendant wishes to have the other acts evidence admitted for the limited purpose for which it was offered.[87] Even if that evidence is admitted

forms of self-expression about certain bad acts or crimes. *See, e.g.*, *Heartsman*, 2015 WL 2400736, at *14 (citing *Skinner*, 95 A.3d at 238) (interpreting *Skinner* to mean that defendant-authored rap lyrics may constitute the expression of a defendant's actions).

[82] FED. R. EVID. 404(b)(2).

[83] *See, e.g.*, Imwinkelried, *supra* note 19, at 578 (laying out the article's argument, which aims to show how the non-exclusive list of permissible uses in Rule 404(b) threatens the integrity of the character evidence prohibition); Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 777 (1981) (arguing that other acts evidence, or specific acts evidence, plainly allows the trier of fact to make assumptions about a person's character and propensity).

[84] *See* FED. R. EVID. 404(b) advisory committee's note to 1991 amendment (stating that Rule 404(b) has become arguably the most cited Rule and that the prosecution regularly relies on other acts evidence as an integral part of proving their case); Imwinkelried, *supra* note 19, at 577 (citing various collections of cases on the subject).

[85] FED. R. EVID. 404(b); *see also* 3 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE 234–36 (8th ed. 2016) (summarizing the procedure for admitting evidence for non-propensity purposes under FED. R. EVID. 404(b)).

[86] FED. R. EVID. 404(b).

[87] *See* FED. R. EVID. 105 (explaining that the court on a timely request must give the jury a limiting instruction if evidence is admissible against a party for one purpose but not admissible against a party for another distinct purpose); *see also* Graham, *supra* note 85, at 428, 436 (explaining that on defendant's request, a jury should be a given a limiting instruction under Fed. R. Evid. 105 when a court admits evidence under Rule 404(b)).

to show motive or intent under Rules 401 and 402 (instead of under Rule 404(b)), the same propensity dangers and Rule 105 limiting instruction apply.[88]

Arguably, when a court admits evidence to show motive or intent, a heightened concern exists that the trier of fact will use that other acts evidence improperly as character evidence.[89] A Venn Diagram, with inadmissible character evidence to show propensity on one side and other acts evidence to show something other than propensity on the other side, can serve as a helpful visual tool.[90] Motive and intent fall in the overlapping middle section because, while they are not plainly character evidence, they do both require the trier of fact to ask whether a person's state of mind—substantiated by a person's motive or intent—caused them to do or not do something.[91]

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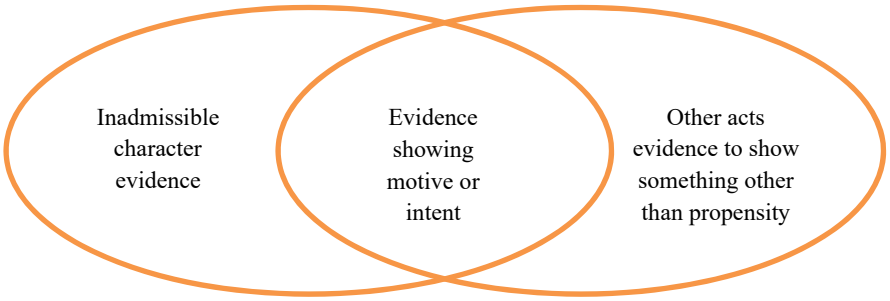
[88] *See* FED. R. EVID. 401 (defining relevant evidence as evidence that has legal and factual relevance to the case at hand); FED. R. EVID. 402 (stating that all relevant evidence is admissible, with some exceptions, while all irrelevant evidence is inadmissible); *see also* FED. R. EVID. 105 (explaining that the court should give a limiting instruction for any type of evidence admissible for one purpose but not admissible for another purpose).

[89] *See* Andrew F. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181, 189 (1998) (arguing that courts regularly admit other acts evidence that hinge upon propensity reasoning, particularly those cases in which a court admits evidence to show intent or motive); *Id.* at 200 n.74 (doubting that a limiting instruction would necessarily eliminate the possibility that a jury would use other acts evidence as propensity evidence).

[90] *See id.* at 200 n. 74 (arguing that that there is an overlap between inadmissible character evidence and other acts evidence to show a non-character purpose). I was first introduced to this idea of a Venn Diagram from an Evidence Law course with Professor Michael Cassidy at Boston College Law School. With the approval of Professor Cassidy, I am expanding on the idea here to illustrate a point about evidence offered to show motive or intent. The Venn Diagram relates mostly to evidence admitted to show motive or intent under Rule 404(b), but for the purposes of this article, evidence admitted to show motive or intent—whether admitted under Rule 404(b) or under Rules 401 and 402—falls in the Venn Diagram.

[91] *See* Morris, *supra* note 89, at 192 (arguing that we are inherently skeptical of someone who has committed a prior bad act because that prior bad act tells us something about a person's character); *see also* Slough, *supra* note 21, at 328 (defining intent and motive as describing states of mind and explaining how emotions and desires typically provide requisite motives and intents).



Take, as an illustrative example, the Seventh Circuit case *United States v. Cunningham*.[92] Here, a nurse appealed her conviction on various charges for stealing Demerol, which the government claimed she stole in order to feed her addiction to the drug.[93] The Seventh Circuit affirmed the trial court's admission of evidence of the nurse's addiction to Demerol as probative of her motive to steal Demerol.[94] Even though the court acknowledged that motive and propensity can completely overlap (effectively illustrating the middle part of the Venn Diagram), the court held that no complete overlap exists because the nurse had an addiction to *using* Demerol and not *stealing* Demerol.[95] If the nurse had an addiction to stealing Demerol, then evidence of her addiction to stealing Demerol admitted under Fed. R. Evid. 404(b) would completely overlap with propensity evidence and thus be inadmissible.[96] Still, a jury may very well use propensity reasoning when they realize that the nurse had an addiction to Demerol, and that maybe her addiction caused her to steal the drug.[97]

Just as *Cunningham* illustrates the close relationship between inadmissible character evidence to show propensity and evidence admitted to show motive, John Henry Wigmore's treatise explains that a close relationship

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[92] 103 F.3d 553 (7th Cir. 1996).
[93] *Id.* at 555.
[94] *Id.* at 557.
[95] *Id.* (emphasis added).
[96] *Id.*
[97] *See id.* (elaborating on the close call concerning whether or not a jury would use the nurse's drug addiction as propensity evidence); *see also* Morris, *supra* note 89, at 191–92 (arguing that drug history is only relevant because it shows the character of the defendant, and the admission of drug history invites a jury to infer that in the case at hand the defendant acted in accordance with that character).

exists between inadmissible character evidence to show propensity and evidence admitted to show intent.[98] Wigmore explains that intent refers to an individual's mindset, which means that an admission of evidence to show intent indicates that there is a possibility the individual acted in accordance with that intent.[99]

In sum, the Venn Diagram serves to illustrate that when a court admits evidence to show motive or intent—whether under Rule 404(b) or under Rules 401 and 402—it runs the risk of inviting the trier of fact to use propensity reasoning more so than if that court admitted evidence for a different permissible purpose.[100] Of course, this should not preclude the fact that evidence admitted under Rule 404(b) or Rules 401 and 402 can serve a critical purpose to help the prosecution prove its case.[101] Nevertheless, the potential danger that the trier of fact will use evidence offered to show motive or intent in order to draw upon a person's propensity to commit a crime may be heightened in the case of the admission of defendant-authored rap lyrics.[102] Defendant-authored rap lyrics, unlike other pieces of evidence, come from a genre and culture that society generally looks upon negatively and often misperceives.[103]

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[98] *See* Wigmore, *supra* note 23, § 103 at 1668 (explaining how one's intent sheds light on one's mental state or condition as opposed to one's actions).

[99] *Id. See also* Leonard, *supra* note 41, § 7.2.1 at 428–29 (2009) (explaining how courts widely disagree on whether Rule 404(b) and its state equivalents should be used to show a defendant's intent in general intent crimes).

[100] *See* Morris, *supra* note 89, at 192 (arguing that we are inherently skeptical of someone who has committed a prior bad act because that prior bad act tells us something about a person's character); *see also* Slough, *supra* note 21, at 328 (defining intent and motive as describing states of mind and explaining how emotions and desires typically provide requisite motives and intents).

[101] *See* FED. R. EVID. 404(b) advisory committee's note to 1991 amendment (stating that prosecutors regularly rely on other acts evidence as an integral part of proving their case); *see also* FED. R. EVID. 401 advisory committee's note (explaining that courts should not waste time considering the relevance of every piece of non-controversial evidence because Rule 401 does not aim to exclude helpful evidence).

[102] *See, e.g.*, Dennis, *supra* note 8, at 27 (arguing that the admission of defendant-authored rap lyrics is a "back door" way of admitting otherwise impermissible propensity evidence).

[103] *See infra* notes 104–126 and accompanying text.

D. Societal Perceptions of Rap Music Tend to Influence a Factfinder to Use Those Lyrics for Impermissible Propensity Purposes

Rap music as the world knows it today most likely started in the Bronx, New York in the early 1970s.[104] The Supreme Court has adopted the Norton/Grove Concise Encyclopedia of Music's definition of rap music as "a style of black American popular music consisting of improvised rhymes performed to a rhythmic accompaniment."[105] Nevertheless, rap music itself cannot be separated from the hip-hop culture that surrounded its beginnings.[106] Early hip-hop culture incorporated song and dance as a way to communicate what was going on in African-American communities.[107] "Rapper's Delight," released in 1979 by the Sugarhill Gang, was the first rap song to find significant success on a mainstream level.[108]

Gangsta rap, a subgenre of rap music and the type that typically gets admitted as evidence at trial, emerged in the late 1980s and early 1990s.[109] Gangsta rap represented a more provocative reflection of the sometimes-violent lifestyle that affected poor African-American communities suffering from drugs, gang violence, and police brutality.[110] The emergence

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[104] Henry A. Rhodes, *The Evolution of Rap Music in United States*, YALE-NEW HAVEN TCHRS. INST. (1993), www.yale.edu/ynhti/curriculum/units/1993/4/93.04.04.x.html.

[105] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 572 n.1 (1994) (quoting THE NORTON/GROVE CONCISE ENCYCLOPEDIA OF MUSIC (1988)).

[106] Rhodes, *supra* note 104. This section refers to rap and hip-hop interchangeably. Even though they constitute two distinct musical genres (and some would argue rap is a musical genre whereas hip-hop embodies a culture that includes rap among other elements), many combine the two together. Shaka Shaw, *The Difference Between Rap & Hip-Hop*, EBONY (Sept. 19, 2013), http://www.ebony.com/entertainment-culture/the-difference-between-rap-hip-hop-798#axzz56Wn8Bn8J. Courts do not seem to make a distinction between rap and hip-hop, and this article combines the two to explain the background of the genre as it relates to the admissibility of defendant-authored rap lyrics. *Id. See, e.g.*, Strange Music, Inc. v. Strange Music, Inc., 326 F. Supp. 2d 481, 485 (S.D.N.Y. 2004) (defining rap and hip-hop as one unified genre in a trademark dispute).

[107] Rhodes, *supra* note 104.

[108] Elizabeth Blair, *"Rapper's Delight": The One-Take Hit*, NPR MUSIC (Dec. 29, 2000), https://www.npr.org/2000/12/29/1116242/rappers-delight.

[109] Greg Tate, *Gangsta Rap*, Encyclopedia Britanica, https://www.britanica.com/art/gangsta-rap.

[110] Leola Johnson, *Silencing Gangsta Rap: Class and Race Agendas in the Campaign Against Hardcore Rap Lyrics*, 3 TEMP. POL. & CIV. RTS. L. REV. 25, 25 (1994) (defining gangsta rap as a genre of music established in the 1980s that came from black men

of gangsta rap produced songs like "F*** the Police" by the West Coast's N.W.A. (N[****]z Wit Attitudes) and "What's Beef" by the East Coast's Notorious B.I.G.[111] Houston's Geto Boys also produced popular gangsta rap songs, the lyrics of which contained perhaps some of the more profane, violent, and sexual language ever heard in the music industry.[112] One consequence of the wide commercialization of rap and gangsta rap, however, is that record labels can control what gets produced and as a result the lyrics are not necessarily truthful.[113]

As gangsta rap has evolved, the American public has started to associate the violent and profane lyrics of gangsta rap with the genre of rap and hip-hop culture in general.[114] Today, rap/hip-hop has become one of if not the most popular genre of music in the United States.[115] But the current wide-spread knowledge and societal perceptions of rap music present a predicament: rap music enjoys success in the mainstream, but the mainstream perception of rap music is generally negative.[116] Jurors and judges, even if they know what rap music is, may not know whether to interpret rap lyrics as bravado or as an autobiographical account.[117] If

involved in the emerging hip hop culture but who were also in touch with gang and street life); Tate, *supra* note 109.

[111] Johnson, *supra* note 110, at 29; Tate, *supra* note 109.

[112] Tate, supra note 109109. For a further discussion on the history of rap, hip hop culture, and the emergence of gangsta rap, see Tibbs, *supra* note 31, at 46–49.

[113] Dennis, *supra* note 8, at 17.

[114] *See* Leslie Larson, *Ben Carson Blasts hip-hop for hurting African-American Communities*, BUSINESS INSIDER (Apr. 6, 2015, 3:32pm), http://www.businessinsider .com/ben-carson-blasts-hip-hop-2015-4 (explaining Ben Carson's suggestion that rap music and hip-hop culture are destroying the African-American community); *see also* Kelefa Sanneh, *Don't Blame Hip-Hop*, N.Y. TIMES, Apr. 25, 2007 (pointing out the various media attacks from Don Imus, Oprah, and Anderson Cooper on 60 Minutes, which generalized the rap industry as inappropriate and something that needed to be fixed).

[115] *2017 U.S. Music Year-End Report*, Nielsen (Jan. 3, 2018), http://www.nielsen.com /us/en/insights/reports/2018/2017-music-us-year-end-report.html (explaining that in 2017, R&B/Hip-Hop as a genre accounted for seven of the ten most-consumed albums and experienced a seventy-two percent increase from 2016 in on-demand audio-streaming).

[116] *See, e.g.*, Erik Nielson & Charis E. Kubrin, *Rap Lyrics on Trial*, N.Y. TIMES, Jan. 13, 2014 (explaining that rap, as a mainstream musical genre, is still widely misunderstood).

[117] *See* Dennis, *supra* note 8, at 15-16 (arguing that courts often incorrectly assume defendant-authored rap lyrics depict autobiographical accounts); *see also* Nielson &

jurors and judges interpret rap lyrics as the latter, the potential for those factfinders to use defendant-authored rap lyrics as impermissible character evidence becomes apparent.[118]

Two psychological studies help to put the problem in context.[119] In the first and perhaps earliest psychological study on the effects of rap lyrics on jurors, the author found that jurors exposed to inflammatory defendant-authored rap lyrics might be more likely to find a defendant guilty.[120] Stuart Fischoff, the author, had previously served as the expert witness retained by a defendant tried for murder who had his rap lyrics admitted as evidence.[121] Specifically, he found that "defendant-image-impairing lyrics" made jurors more confident in their guilty verdict because of the negative personality traits brought up in the rap lyrics.[122]

The second and much more recent study provided participants with a set of violent lyrics.[123] One group was told the lyrics came from a country music song, the other group was told the lyrics came from a rap song.[124] Participants who were told that they were listening to rap lyrics were more likely to find that the lyrics were based on the writer's real-life experience

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Kubrin, *supra* note 116 (arguing that rap music, unlike other forms of fictional expression, is exploited by courts that assume rap lyrics are autobiographical).
For a case example, see *Wilson*, 493 F. Supp. 2d at 489 (disallowing an expert to testify on the defendant's behalf that rap lyrics are not based on true events because no court in the Second Circuit has allowed such an expert witness and the defendant had not provided an adequate basis for the expert's opinions); *but see, e.g.*, State v. Hanson, 731 P.2d 1140, 1144 n.7 (Wash. App. 1987) (explaining, in dictum, that the act of producing writings – while not always admissible – may be admissible under Washington's Rule 404(b) where the writings are logically relevant to show a non-propensity purpose).

[118] Nielson & Kubrin, *supra* note 116.

[119] Adam Dunbar, Charis E. Kubrin, & Nicholas Scurich, *The Threatening Nature of "Rap" Music*, 22:3 PSYCHOLOGY, PUBLIC POLICY, AND LAW 280 (2016); Stuart P. Fischoff, *Gangsta' Rap and a Murder in Bakersfield*, 29:4 JOURNAL OF APPLIED SOCIAL PSYCHOLOGY 795 (1999).

[120] Fischoff, *supra* note 119, at 797.

[121] *Id.* at 795.

[122] *Id.* at 797. "Defendant-image-impairing lyrics" are lyrics written by the defendant that might be related to the particular crime, but also suggest negative characteristics of the defendant. *Id.*

[123] Dunbar *supra* note 119, at 4-5.

[124] *Id.*

and that the lyrics were more threatening, among other findings.[125] Finding rap lyrics more autobiographical in nature and more threatening than country music was consistent amongst participants, regardless of gender, ethnicity, education level, political ideology, or music preference.[126]

III. HOW COURTS HAVE PROPERLY AND IMPROPERLY ADMITTED DEFENDANT-AUTHORED RAP LYRICS TO SHOW MOTIVE OR INTENT

In 2014, the New Jersey Supreme Court in *State v. Skinner* held that courts should approach the admissibility of violent and profane rap lyrics to show motive or intent cautiously.[127] The New Jersey Supreme Court explained that when courts admit those lyrics, they encounter the danger that a jury will use those lyrics improperly as character evidence in order to show that a defendant acted in accordance with that character.[128]

In *Skinner*, the court found that Vonte Skinner's rap lyrics—for example, "I'm the n***a to drive-by and tear your block up, leave you, your homey and neighbors shot up, chest shots will have you spittin' blood clots up"—did not bear a close enough relation to the alleged gang-related shooting at the scene of a drug sale.[129] As a result, Skinner's lyrics could not be probative of his motive and intent to commit murder, and the trial court's admission of such lyrics constituted reversible error.[130] If no "strong nexus" existed between the specific details of the lyrics and the circumstances of the charged offense, then the lyrics constituted unfairly prejudicial evidence such that a jury would use them for an improper purpose.[131] The New Jersey Supreme Court held that absent such a "strong

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[125] *Id.* at 5-6.
[126] *Id.* at 6.
[127] State v. Skinner, 95 A.3d 236, 253 (N.J. 2014).
[128] *Id.*; *see also* N.J. R. EVID. 404(b) (courts may not admit evidence of other crimes, wrongs, or acts if they are offered to prove the character of a person in order to show that a person acted in accordance with that character).
[129] *Skinner*, 95 A.3d at 239–40, 253.
[130] *Id.* at 253–54.
[131] *Id.* at 251–53. Interestingly, but not relevant to this article, the New Jersey Supreme Court applied this holding to other forms of written artistic expression. *Id.* at 253. The unfair prejudice holding was incorporated in the court's analysis of N.J. R. Evid. 404(b), but the court's language makes that holding applicable to N.J. R. Evid. 403 and its federal as well as state equivalents. *See id.* at 247, 249 n.5 (suggesting that if rap lyrics

nexus," defendant-authored rap lyrics could not be admitted to show motive or intent.[132]

Skinner's influence reached courts, law academia, and the media.[133] The court's detailed analysis, coupled with cited amicus curiae from the ACLU New Jersey chapter and the New Jersey Attorney General, seemed to change the discussion about the parameters of admitting defendant-authored rap lyrics to show motive or intent.[134] Nevertheless, courts vary in deciding whether they want to adopt *Skinner*.[135] Still, *Skinner* serves as a useful starting point for this article's discussion because of its explicit reasoning on the admissibility of defendant-authored rap lyrics to show motive or intent.[136] The following discussion aims to show the proper and improper admissions of defendant-authored rap lyrics as a lead up to the article's analysis, which argues that *Skinner* should serve as a starting point for further guidelines.[137]

Section A of this Part analyzes the cases that led up to the "strong nexus" test promulgated by the New Jersey Supreme Court in *Skinner* and how those cases laid the foundation for the admissibility of defendant-authored

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did not fall under New Jersey's traditional N.J. R. Evid. 404(b) analysis, which incorporates a probative value vs. unfair prejudice balancing test, then admission of rap lyrics could be analyzed under N.J. R. Evid. 401 and N.J. R. Evid. 403).

[132] *Skinner*, 95 A.3d at 254.

[133] *See, e.g.*, United States v. Sneed, 3:14 CR 00159, 2016 WL 4191683, at *6 (M.D. Tenn. Aug. 9, 2016) (citing *Skinner*); Michael Gregory, Note, *Murder Was the Case That They Gave Me: Defendant's Rap Lyrics as Evidence in a Criminal Trial*, 25 B.U. PUB. INT. L.J. 329, 332 (2016) (arguing that courts should apply the New Jersey Supreme Court's approach in *Skinner* when faced with the admissibility of defendant-authored rap lyrics); Toni Messina, *Rap-Crimination*, ABOVE THE LAW, Aug. 28, 2017, https://abovethelaw.com/2017/08/rap-crimination/ (citing *Skinner* as an example of what the author dubs "Rap-Crimination").

[134] *See Skinner*, 95 A.3d at 244–45 (citing amicus curiae from the ACLU and the New Jersey Attorney General).

[135] *Compare* United States v. Bey, CRIMINAL ACTION NO. 16-290 2017 WL 1547006 at *7 (E.D. Penn. April 28, 2017) (adopting *Skinner*'s holding that defendant-authored rap lyrics tend to inflame the jury's emotions); *with* People v. Minnifield, Nos. 1-11-3778, 1-12-1521, 2014 Ill App (1st) 113778-U, at *8 (Nov. 24, 2014) (declining to uphold *Skinner*'s holding).

[136] *Skinner*, 95 A.3d at 253–54.

[137] *See infra* notes 141–219 and accompanying text.

rap lyrics to show motive or intent.[138] Section B of this Part analyzes cases where, as the article argues, courts improperly admit defendant-authored rap lyrics to show motive or intent.[139] Courts that improperly admit defendant-authored rap lyrics to show motive or intent typically do so because they fail to explain how lyrics are sufficiently relevant to show motive or intent, and they fail to weigh adequately the unfair prejudice and probative value of the lyrics.[140]

A. How the pre-Skinner Case Law Laid the Foundation for Skinner's Strong Nexus Test

In 1987, the Washington Court of Appeals reversed a jury verdict of first degree assault because the lower court had improperly admitted the defendant's fictional writings.[141] Here, the prosecutor on cross-examination of the defendant (who also happened to write fictional stories in his spare time) rebutted defendant's testimony that he was a non-violent person by admitting the subjects of some of his fictional writings, such as a story where a man becomes violent after his wife turns on him.[142] The court reversed and remanded due to the highly prejudicial nature of the writings, which likely prejudiced the jury to think of the defendant as a violent person.[143] The defendant's writings could only be probative if the court accepted that one reasonably can judge a person's character by the contents of a book he or she authors.[144]

While the prosecutor permissibly could rebut the defendant's testimony that he had a non-violent disposition, the prosecutor could not rebut that testimony by admitting writings that had no probative value beyond suggesting that the defendant's character was in line with his writings.[145] Further, the unfair prejudice of the fictional writings outweighed any

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[138] *See infra* notes 141–174 and accompanying text.
[139] *See infra* notes 175–201 and accompanying text.
[140] *See infra* notes 175–201 and accompanying text.
[141] State v. Hanson, 731 P.2d 1140, 1142–43 (Wash. Ct. App. 1987).
[142] *Id.* at 1143 n.3.
[143] *Id.* at 1145.
[144] *Id.*
[145] *Id.* at 1144.

probative value those writings may have had.[146] Significantly, the court held that even though the prosecutor did not argue that the writings were so similar to the alleged offense as to show motive or intent, it suggested that a defendant's writings may be admissible as non-character evidence under Washington Rules of Evidence 404(b).[147]

Based largely on the Washington Court of Appeals' suggestion that a defendant's writings may be admissible for a non-character purpose under the other acts rule, the Seventh Circuit became the first federal appellate court to affirm the admission of defendant-authored rap lyrics to prove motive or intent.[148] In *United States v. Foster*, the Seventh Circuit affirmed the District Court's admission of a defendant's rap lyrics, which stated in relevant part: "Key for Key, Pound for pound, I'm the biggest Dope Dealer and I serve all over town."[149] Derek Foster, the defendant charged with possession and intent to distribute cocaine and phencyclidine (PCP), put his knowledge and intent directly at issue when he argued that he was unaware of the contents of his Amtrak luggage containing a kilogram of cocaine and a five-gallon container of liquid PCP.[150] The government sought to admit the aforementioned lyrics for their substantive value, but the District Court instead admitted the lyrics under the government's back-up Rule 404(b) argument.[151] Accordingly, the judge at the District Court gave a jury instruction on how the lyrics should be admitted for the limited purpose of showing knowledge and intent under Fed. R. Evid. 404(b).[152]

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[146] *Id.* The Washington Court of Appeals came to this conclusion by analyzing Wash. R. Evid. 403, which is functionally equivalent to Fed. R. Evid. 403. *Id.*; *see also id.* at 1144 n.6 (citing Wash. R. Evid. 403) (otherwise relevant evidence may be excluded if its unfair prejudice substantially outweighs its probative value).

[147] *See Hanson*, 731 P.2d at 1144 n.7 (citing Wash. R. Evid. 404(b), which is functionally equivalent to Fed. R. Evid. 404(b), and suggesting that writings may be admissible as evidence of other crimes, wrongs, or acts to show motive or intent).

[148] United States v. Foster, 939 F.2d 445, 456 (7th Cir. 1991) (citing *Hanson*, 731 P.2d at 1140).

[149] *Id.* at 449–50. The admitted lyrics go on: "Rock 4 Rock Self 4 Self. Give me a key let me go to work more Dollars than your average bussiness [sic] man." *Id.* at 449. The government offered testimony that "key" and "rock" were words commonly used in cocaine trafficking. *Id.* at 449 n.1.

[150] *Id.* at 449.

[151] *Id.* at 455.

[152] *Id.* As the District Court explained to the jury: "The [rap lyrics are] not received to establish that the defendant, is, in fact, the biggest dope dealer . . . It is received for a

While the Seventh Circuit focused more on how the lyrics were probative of Foster's knowledge—surely the more clear-cut issue—the Seventh Circuit held that when a defendant denies having the requisite intent to commit a particular crime, the government may rebut that denial with Rule 404(b) evidence.[153] Yet, here the Seventh Circuit departs from *Hanson*.[154] When a court applies the same reasoning to affirm the admission of evidence to show knowledge and evidence to show intent, a problem arises.[155] On the one hand, the court explains that rap music "describes the reality around its author."[156] On the other hand, the court accepts the proposition that Foster was rapping about a fictional character (let's call this fictional character "The Biggest Dope Dealer") and that the District Court correctly limited the admission as not probative that Foster was The Biggest Dope Dealer.[157] While Foster's rap lyrics demonstrate knowledge of drugs and the distribution of drugs, the court's explanation of Foster's rap lyrics as describing "the reality around [Foster]" seems much more probative of Foster's character than of his intent.[158] In the

limited purpose [under Rule 404(b)] . . . The limited purpose for which [the rap lyrics are] received is only as to evidence of knowledge and intent." *Id.*

[153] *Id.* at 455–56 (citing United States v. York, 933 F.2d 1343, 1350 (7th Cir. 1991)). Though the opinion does not focus so much on how the defendant's rap lyrics fall under the other acts rule, it does suggest in a footnote that the government could have admitted the statement as an admission of a party opponent—a hearsay exemption under Fed. R. Evid. 801(d)(2)(A). *Id.* at 455 n.13.

[154] *See Foster*, 939 F.2d at 455–56 (admitting Foster's rap lyrics to show both knowledge and intent without distinguishing clearly between the two purposes of admission).

[155] *See id.* at 456 (explaining that the District Court correctly admitted the rap lyrics as probative of the defendant's knowledge of the drug trade); *see also* M.C. Slough and J. William Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325, 327 (1956) (arguing that many judges incorrectly treat evidence to show motive and intent and evidence to show knowledge as having the same evidentiary functions); Slough, *supra* note 155, at 329 (distinguishing knowledge from motive and intent because knowledge signifies awareness and assumes that the doing of the act is not disputed).

[156] *Foster*, 939 F.2d at 456.

[157] *Id.*; *See also* Andrea Dennis, *Poetic (In)justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 14 (2007) (citing *Foster* as an example of a case where the court acknowledges that outside influences can impact a defendant's rap lyrics but fails to give those influences any weight in its analysis of the admissibility of those lyrics).

[158] *Foster*, 939 F.2d at 456 (holding that admission of the rap verse was not the equivalent of admitting "The Pit and the Pendulum" as evidence that Edgar Allen Poe had tortured someone, but it would be the equivalent of admitting "The Pit and the Pendulum" against Poe to show he had knowledge of torture techniques); *but see*

end, the Seventh Circuit deferred to the District Court's evidentiary determination that the rap lyrics were not unduly prejudicial, and affirmed Derek Foster's conviction.[159]

Twenty years later, the Arkansas Supreme Court admitted defendant-authored rap lyrics under a Rule 404(b) analysis to show a defendant's intent, using similar reasoning to the Seventh Circuit in *Foster*.[160] In *Cook v. State*, the Arkansas Supreme Court held that a defendant's rap lyrics—written documents that described aggravated robbery and were found in the co-conspirator's car—were probative of the material issue of whether the defendant had the intent to commit aggravated robbery.[161] Without establishing a date as to when the rap lyrics were written, the court reasoned that the lyrics' general description of aggravated robbery was probative of the defendant's intent to commit aggravated robbery.[162] The

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CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 4.30, p. 762 (4th ed. 2013) (explaining that evidence demonstrating the defendant may have previously committed acts closely resembling the act alleged presents a high risk because it tempts a jury to use that evidence for impermissible character purposes).

[159] *Foster*, 939 F.2d at 457–58.

[160] Cook v. State, 45 S.W.3d 820, 823 (Ark. 2001) (holding defendant-authored rap lyrics admissible as probative of the defendant's intent to commit aggravated robbery). Of note, Ark. R. Evid. 404(b) is functionally equivalent (almost the same verbatim) to N.J. R. Evid. 404(b) and also Fed. R. Evid. 404(b). *See id.* (citing Ark. R. Evid. 404(b)).

[161] *Id.* The rap lyrics were quoted, in relevant part, as follows: "Look out 4 this muthaf* *n killa, on the realla n* *a, you bets give up the strilla [money], or getta, muthaf* *n slug assigned to yo a* * or you can do the s* * the easy way, give up the cash." *Id.* at 822

[162] *Id.* at 822–23. A note should be made here about the point in time when defendant's pen their rap lyrics: no clear dividing line exists in courts across the country between lyrics written before the alleged crime and lyrics written after the alleged crime. Compare *Foster*, 939 F.2d at 457–58 (admitting defendant-authored rap lyrics as probative of the defendant's intent to distribute narcotics where the rap lyrics were found on the defendant's person at the time of arrest and therefore written before commission of the crime) with State v. Cheeseboro, 552 S.E.2d 300, 312 (S.C. 2001) (admitting defendant-authored rap lyrics written by the defendant while the defendant awaited trial in prison as probative of the defendant's motive to commit murder); *see also* State v. Skinner, 95 A.3d 236, 238, 240 (N.J. 2014) (not admitting defendant-authored rap lyrics to show motive or intent in part because the defendant wrote his potentially incriminating rap lyrics well before the alleged crime). While this article will mention the time of authorship when necessary, this article does not further address the issue and argues that the time at which the rap lyrics are written is just another factor that courts consider when determining the probative value of those lyrics. *See, e.g.*, Greene v.

court's analysis here, like that of the Seventh Circuit, is troubling because the lyrics themselves did not directly describe the alleged crime other than talking about the alleged crime in general terms.[163] Further, the court cited to six different jurisdictions that also admitted defendant-authored rap lyrics when it reasoned that the prejudicial effect of those lyrics did not substantially outweigh the probative value under Ark. R. Evid. 403.[164]

Still, leading up to *Skinner*, two courts in particular admitted defendant-authored rap lyrics to show motive and intent in a way that would have been permissible under *Skinner*'s close nexus test.[165] In *Greene v. Commonwealth*, the Kentucky Supreme Court affirmed the admission of defendant-authored rap lyrics to show motive because the lyrics closely resembled intricate details of the alleged crime.[166] According to the facts established at trial, the defendant murdered his wife by slicing her neck with a turkey knife, left Kentucky to move to Chicago, and then recorded a seven-minute rap video with friends in which he made inculpatory statements about killing his wife and cutting her neck with a "sword."[167]

Commonwealth, 197 S.W.3d 76, 84-85 (Ky. 2006) (admitting a rap video in which the defendant made several inculpatory statements in his rap lyrics where the video was recorded after an alleged murder and the lyrics had probative value because they rebutted a defense that the defendant had no motive to commit murder); *see also* Clifford S. Fishman and Anne T. McKenna, *Jones on Evidence*, Seventh Edition, § 17:70 (explaining that courts generally admit a defendant's prior threats against the victim of the alleged offense to show intent or motive).

[163] *See Cook*, 45 S.W.3d at 822 (citing the lyrics, which describe aggravated robbery generally without alluding to any specifics of the charged crime).

[164] *See id.* at 823, n.2 and accompanying text (holding that the defendant-authored rap lyrics were probative of the defendant's intent to commit aggravated robbery, and the trial court did not abuse its discretion in part because other courts have also admitted defendant-authored rap lyrics as probative of intent). Ark. R. Evid. 403 also is functionally equivalent to N.J. R. Evid. 403 and also Fed. R. Evid. 403. *See id.* (citing Arkansas Rule of Evidence 403 to show that the probative value of the rap lyrics outweighed any unfair prejudice to the defendant).

[165] *See Skinner*, 95 A.3d at 252 (distinguishing *Greene v. Commonwelath* and *Bryant v. State* from the facts of *Skinner* because the defendant-authored rap lyrics in both *Greene* and *Bryant* signified "an unmistakable factual connection" to the alleged crimes in those cases).

[166] *Greene*, 197 S.W.3d at 87.

[167] *Id.* at 79–80, 86–87. The relevant rap lyrics were "B—made me mad, and I had to take her life. My name is Dennis Greene and I ain't got no f— wife…I knew I was gonna be givin' it to her…when I got home…I cut her motherf—in' neck with a sword." *Id.* at 86.

Similarly in *Bryant v. State*, the Court of Appeals of Indiana affirmed the admission of defendant-authored rap lyrics to show intent because the lyrics described intricate details of the alleged crime.[168] Here, the defendant had been charged with murdering his stepmother (whose body police officers found in the trunk of a car that the defendant claimed to have owned), and later wrote rap lyrics about the incident and hiding the body.[169] Unlike the courts in *Foster* and *Cook*, the courts in *Greene* and *Bryant* admitted defendant-authored rap lyrics to show motive and intent because the lyrics bore a close and direct relation to intricate details of the alleged crime.[170]

Despite the varying fact patterns and analyses, *Hanson*, *Foster*, *Cook*, *Greene*, and *Bryant* all dealt generally with the logical relationship between specific defendant-authored rap lyrics and a specific alleged crime.[171] Consequently, they laid the foundation for *Skinner* to create the "strong nexus" test.[172] The strong nexus test, a starting point for this article's suggested guidelines to admit defendant-authored rap lyrics, correctly analyzes the factual resemblance between the defendant-authored rap lyrics and the alleged crime.[173] The court in *Skinner* also suggests defendant-authored rap lyrics should be admitted where they provide direct proof of a defendant's motive or intent.[174]

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[168] 802 N.E.2d 486, 499 (Ind. App. 2004), *transfer denied*, 822 N.E.2d 968 (Ind. 2004).
[169] *Id.* at 498. The relevant rap lyrics were "Cuz the 5-0 won't even know who you are when they pull yo ugly ass out of the trunk of my car." *Id.*
[170] Compare *Greene*, 197 S.W.3d at 85, 87 (affirming the admission of the lyrics "B— made me mad, and I had to take her life. My name is Dennis Greene and I ain't got no f— wife") and *Bryant*, 802 N.E.2d at 498 (affirming the admission of the lyrics "Cuz the 5-0 won't even know who you are when they pull yo ugly ass out of the trunk of my car") with United States v. Foster, 939 F.2d 445, 449–50 (7th Cir. 1991) (affirming the admission of the rap lyrics "Key for Key, Pound for pound, I'm the biggest Dope Dealer and I serve all over town") and Cook v. State, 45 S.W.3d 820, 822 (Ark. 2001) (affirming the admission of the rap lyrics "Look out 4 this muthaf* *n killa, on the realla n* *a, you bets give up the strilla [money], or getta, muthaf* *n slug assigned to yo a* * or you can do the s* * the easy way, give up the cash").
[171] *See supra* notes 141–170 and accompanying text.
[172] *Skinner*, 95 A.3d at 251–52.
[173] *Id.* at 253.
[174] *See id.* at 249 n.5 (precluding the holding that defendant-authored rap lyrics should be inadmissible in all circumstances and explaining that defendant-authored rap lyrics

B. How Cases Decided After Skinner Continued to Improperly Admit Defendant-Authored Rap Lyrics to Show Motive or Intent

In the almost five years proceeding *Skinner*, courts in various jurisdictions have continued to use questionable reasoning similar to *Foster* and *Cook* in two important respects: first, courts questionably have held that defendant-authored rap lyrics are sufficiently relevant to show motive or intent.[175] Second, courts questionably have held that the unfair prejudice of those lyrics does not substantially outweigh their probative value.[176]

1. Improperly Admitting Defendant-Authored Rap Lyrics as Relevant to Show Motive or Intent

In *People v. Singh*, a California Appellate Court recently affirmed the admission of defendant-authored rap lyrics that supported a first degree murder conviction where the rap lyrics "eerily describe[ed]" the alleged first degree murder.[177] The defendant had allegedly murdered the victim in revenge for a prior drive-by shooting in which the victim shot at defendant's house and shot the defendant's cousin and dog.[178] According to evidence adduced at trial, the defendant shot the victim four times: in his face, in his belly, in his groin, and in his penis.[179] According to both the trial court and the affirming appellate court, the rap lyrics—such as "two to the gut, watch your eyes shut slow"—were relevant as to the defendant's intent, which was at issue.[180]

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which provide direct proof against that defendant should be analyzed under a Rules 401 and 402 analysis).

[175] *See infra* notes 177–189 and accompanying text.

[176] *See infra* notes 190–201 and accompanying text.

[177] 221 Cal. Rptr. 3d 308, 315–16 (Cal. Ct. App. 2017).

[178] *Singh*, 221 Cal. Rptr. 3d at 310.

[179] *Id.*

[180] *Id.* at 313–14. As for the other inflammatory lyrics admitted at trial: "shot before I could shoot my gun…I shoot for fun just to watch n***as shake like they goin' dumb. Put two in your chest, now you goin' numb…The clip holds about a million. Put it in your face and melts in your mouth like an M&M." *Id.* at 313. Interestingly, though not analyzed here, a strong argument could be made that the rap lyrics were unfairly prejudicial to show intent since the prosecution presumably had already shown intent by admitting evidence about the drive-by shooting one year prior to the alleged crime. *See* Old Chief v. United States, 519 U.S. 172, 184–85 (1997) (holding that if there is an evidentiary alternative that makes the same evidentiary point to the proffered evidence,

Yet, the court's reasoning that "two to the gut, watch your eyes shut slow" actually "eerily describe" the alleged crime because the defendant shot the victim in the stomach seems like an abuse of discretion by the trial court where the lyrics are offered as circumstantial evidence of the defendant's intent and motive to kill.[181] Unlike the defendant-authored rap lyrics in *Greene v. Commonwealth* and *Bryant v. State*, the defendant's rap lyrics in *Singh* do not describe intricate details of the alleged crime such as the identity of the victim or specific details of the actual crime.[182] If anything, evidence of the defendant's rap lyrics in *Singh* is eerily close to character evidence, which would allow the jury to use impermissible propensity reasoning in its determination of the defendant's guilt.[183]

Similarly, the Court of Special Appeals of Maryland affirmed the trial court's admission of rap lyrics—lyrics the court admitted may not have been written by the defendant—to show the defendant's intent in possessing marijuana.[184] The court held that the lyrics, which refer only generally to drugs and the drug trade without once mentioning marijuana, constituted a sufficient basis for the expert witness' opinion that the defendant intended to possess marijuana.[185] In fact, the court held that the

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then it may be unfairly prejudicial to admit more damaging evidence to make that same point).

[181] *Singh*, 221 Cal. Rptr. 3d at 315–16; *see also* MUELLER, *supra* note 158, at § 4:30, 762 (evidence that the defendant may have committed acts strikingly similar to the act alleged presents a high risk because it tempts a jury to use that evidence for impermissible character purposes).

[182] *See supra* notes 165–170 and accompanying text (analyzing the admitted defendant-authored rap lyrics in *Greene v. Commonwealth* and *Bryant v. State*).

[183] *See* Dennis *supra* note 157, at 27–29 (arguing that defendant-authored rap lyrics that somewhat resemble the alleged crime constitute impermissible character evidence).

[184] Brown v. State, No. 1302, 2016 WL 5720590, at *8–9 (Md. Ct. Spec. App. Sept. 30, 2016). The court allowed a detective to use the rap lyrics as a basis for his expert opinion that the defendant intended to possess the marijuana found on his person. *Id.* at *10.

[185] *Brown*, 2016 WL 5720590 at *10. The rap lyrics found on the defendant's person (only some of which were admitted by the trial court) read as follows:

> These snitches wanna hold me back mad at me cuz I got dat sack cuz I be living large from pumping out them traps moving hard molly or dat pack these [expletives] start telling like they working at bank these streets [expletive] up I don't who 2 thank this [expletive] getting real can't tell who ain't these [expletive] copping deals on they [expletive] mans. Like DAM! Whatever happened to the street codes they play the role till that cell close then everybody falling like dominos I swear on my kids I rather die slow than ratting on any

facts in *Brown v. State* resembled the facts of *United States v. Foster*, the Seventh Circuit decision.[186] Yet, the court in *Brown* suggested that its holding would be the same even if the defendant did not pen the rap lyrics found on his person.[187] On the other hand, the connection between the content of the defendant-authored rap lyrics and the circumstances of the alleged crime was a controlling fact in the Seventh Circuit's holding in *Foster*.[188] In sum, the courts in both *Singh* and *Brown* admitted defendant-authored rap lyrics as relevant despite the lack of a direct connection between the lyrics and the details of the alleged crime.[189]

2. Improperly Admitting Defendant-Authored Rap Lyrics Under a Rule 403 Probative Value vs. Unfair Prejudice Analysis

Two courts have suggested a rule that arguably circumvents the balancing test inherent in Fed. R. Evid. 403 and its state equivalents ("Rule 403") that allows courts to deny the admission of otherwise relevant evidence where the unfair prejudice of that evidence substantially outweighs the prejudicial effect.[190] Only a few months after the New Jersey Supreme Court decided *Skinner*, an Illinois Appellate Court held that a defendant's rap lyrics to show motive and intent were not unfairly prejudicial because the vulgar content of the lyrics was "not more inflammatory" than the charged crimes.[191] Similarly, and more recently, the Eastern District of Michigan

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> [expletive] cuz the life I chose cuz it's in my soul to ride benzo's, get big money, and rock designer clothes.

Id. at *2 n.1.

[186] *Id.* at *8–9.

[187] *See id.* at *8 (explaining that the trial court did not abuse its discretion by admitting the rap lyrics in part because the expert spoke about the lyrics in a generic sense and not as to the defendant's connection to the lyrics).

[188] *Foster*, 939 F.2d at 449, 456; *see also* MUELLER, *supra* note 158, at § 4:34, 806–07 (explaining that to be probative, other acts evidence must be similar to the charged crime).

[189] *See supra* notes 177–188 and accompanying text.

[190] *See* United States v. Graham, 293 F. Supp. 3d 732, 740 (E.D. Mich. 2017) (holding that a YouTube video of the defendant rapping his own lyrics was not unfairly prejudicial evidence because the content of the video was not "more inflammatory than the charged crimes"); People v. Minnifield, 2014 Ill App (1st) 113778-U, ¶¶ 36–37 (Nov. 24, 2014) (holding that the defendant's rap lyrics were not unduly prejudicial since the song "was not more inflammatory" than the charged crimes).

[191] *Minnifield*, 2014 Ill App (1st) 113778-U, ¶ 36. The rap lyrics contained messaging that was probative of the defendant's intent to kill rival gang members. *See id.* at ¶¶ 11,

denied a defendant's motion to suppress defendant-authored rap lyrics and YouTube videos featuring the defendant rapping to show motive and intent because the content of the lyrics and videos was not "more inflammatory than the charged crimes."[192]

This is particularly troubling since the defendants in both cases never claimed the lyrics were autobiographical, and in *United States v. Graham*, the defendant specifically argued that the lyrics do not describe actual events.[193] True, the "not more inflammatory" analysis may be short-hand for the notion that the unfair prejudice does not *substantially* outweigh the probative value of the lyrics or YouTube videos.[194] Nevertheless, the two courts seemingly are analyzing whether the contents of rap songs are "not more inflammatory" than murder or drug charges.[195] It is difficult to imagine anyone, let alone a reasonable jury, who would find that the contents of a song not necessarily depicting autobiographical events is "not more inflammatory" than murder or drug charges.[196] Thus, "not more

16. Specifically, the lyrics referenced "GDK," which a co-conspirator testified stood for Gangster Disciple Killer (Gangster Disciples was a rival gang of the defendant), and also included the phrases "you better be totting your gun and real recognize real so don't be faking" as well as "your heart gone to stop, that is a flat line" and "I got the chrome." *Id.* at ¶¶ 7, 11.

[192] *Graham*, 293 F. Supp. 3d at 740. The district court provided lyrics from songs titled "Murda" and "Not Runnin' from Shit." *Id.* at 734. For example, the district court pointed to lyrics such as "ain't nobody seen but they all heard it … not guilty was the damn verdict," "we are quick to shoot," and references to "trap" houses as supporting the government's argument that the defendant's rap lyrics describe actual events. *Id.* at 736. The defendant, with co-defendants being tried separately, had been charged under RICO and various drug charges. *Id.* at 738. The prosecutor wanted to admit the rap songs as relevant to the drug charges, particularly since the defendant rapped under the pseudonym "Cocaine Sunny." *Id.* at 735. The district court used *Skinner*'s strong nexus test to hold that the videos, which include "real media coverage" of the enterprise charged under RICO, depicted actual events that were not "more inflammatory" than the alleged drug charges and RICO charge. *Id.* at 740.

[193] *See id.* at *2 (explaining that the defendant and his co-defendants specifically argued that the rap lyrics do not reflect actions they actually did); *Minnifield*, 2014 IL App (1st) 113778-U, at *7-9 (assuming because of references to gang membership that the rap lyrics constitute an autobiographical account).

[194] FED. R. EVID. 403.

[195] *Graham*, 2017 WL 6523641 at *6; *Minnifield*, 2014 Ill App (1st) 113778-U, at *7.

[196] *See Graham*, 2017 WL 6523641 at *6 (holding without much explanation that defendant-authored rap lyrics are not unfairly prejudicial because they are not more

inflammatory" than the charged crime, in practice a low bar to overcome unfair prejudice, seems like an attempt to circumvent the Rule 403 balancing test.[197]

People v. Minnifield and *Graham* contrast from *United States v. Mills*, where the court did not focus its Rule 403 analysis on whether the defendant-authored rap lyrics were more inflammatory than the charged crime.[198] Instead, the court rejected the Rule 403 challenge because the rap lyrics in question tended to establish key elements of the racketeering charge, and the defendant failed to explain (beyond conclusory statements) how particular lyrics would have caused a jury to decide the case on an improper basis.[199]

Finally, when both probative value and unfair prejudice are high—as was apparent in *Minnifield* and *Graham*—the Supreme Court has held that trial courts should consider evidentiary alternatives.[200] This is particularly so in the context of defendant-authored rap lyrics that tend to prejudice juries against the defendant.[201]

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inflammatory than the crime charged); *Minnifield*, 2014 IL App (1st) 113778-U, at *7 (same holding).

[197] *See* Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove* Mens Rea: *The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 OHIO ST. L.J. 575, 584 (1990) (arguing that other acts evidence admitted to show intent both creates unfair prejudice and also invites the jury to overestimate the probative value of that evidence).

[198] *See United States v. Mills*, No. 16-cr-20460, 2019 WL 1075607, at *15–19 (E.D. Mich. Mar. 7, 2019).

[199] *Id.* at *16–18.

[200] *See Old Chief v. United States*, 519 U.S. 172, 184–85 (1997) (holding that when probative value and prejudicial effect are both high, a court should consider evidentiary alternatives).

[201] *See* Dennis, *supra* note 157, at 29–30 (arguing that the admission of defendant-authored rap lyrics biases jurors against rap music and against those who listen to or associate with rap music); *see also* Stuart P. Fischoff, *Gangsta' Rap and a Murder in Bakersfield*, 29:4 JOURNAL OF APPLIED SOCIAL PSYCHOLOGY 795, 797 (1999) (arguing that jurors are more likely to have negative thoughts about a defendant if they hear defendant-authored rap lyrics at trial).

IV. BUILDING OFF OF *SKINNER*'S STRONG NEXUS TEST, GENERAL GUIDELINES AND A PROPOSED THREE-PRONGED ANALYSIS COULD SERVE AS A USEFUL TOOL GOING FORWARD

The strong nexus test from *Skinner* serves two important functions: first, it draws a line of distinction between cases where courts properly admit defendant-authored rap lyrics to show motive or intent, and cases where courts admit such lyrics improperly as relevant evidence and at the expense of substantial unfair prejudice.[202] Secondly, it provides insight into how courts might deal with unfair prejudice as it relates to the particular situation of defendant-authored rap lyrics.[203]

Nevertheless, the test also fails to address two other issues: first, it fails to account for the unique societal perceptions and biases surrounding rap lyrics.[204] Secondly, the strong nexus test does not lay out clear parameters for the admissibility of defendant-authored rap lyrics to show motive or intent.[205] In more recent cases post-*Skinner*, some courts have provided further guidance as to the unique situation of rap lyrics and the clear parameters for their admissibility.[206]

In particular, a recent grant of a defendant's motion to suppress in the Eastern District of Pennsylvania provides some helpful analysis.[207] Here,

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[202] *See State v. Skinner*, 95 A.3d 236, 252–53 (N.J. 2014) (analyzing various cases in which courts have either properly or improperly admitted defendant-authored rap lyrics to show motive or intent); *see also Bryant v. State*, 802 N.E.2d 486, 498–99 (Ind. Ct. App. 2004), *transfer denied*, 822 N.E.2d 968 (Ind. 2004) (holding that a defendant's rap lyrics—"[c]uz the 5-0 won't even know who you are when they pull yo ugly ass out the trunk of my car"—were relevant in proving his intent in murdering his stepmother who was found dead in the trunk of the defendant's car).

[203] *See Skinner*, 95 A.3d at 253 (holding that absent a strong nexus or direct connection between the lyrics and the charged offense, the apparent prejudice of those lyrics substantially outweighs the probative value of those lyrics).

[204] *See supra* notes 104–126 and accompanying text (explaining and arguing that defendant-authored rap lyrics have a strong tendency to bias factfinders against a defendant).

[205] *See Skinner*, 95 A.3d 236, 252 (holding that fictional writings generally, and not defendant-authored rap lyrics specifically, should not be admitted to show motive or intent absent a strong nexus between the writings and the charged crime).

[206] *See, e.g.*, *United States v. Bey*, No. 16-290, 2017 WL 1547006, *4–7 (E.D. Pa. April 28, 2017) (analyzing *Skinner* in depth and addressing societal perceptions of rap music).

[207] *Id.*

the court suppressed the defendant's own rap lyrics to show intent because being a felon in possession of a firearm (the crime charged) does not require specific intent.[208] As a result, the court moved to the Rule 403 balancing test and decided that in light of the low probative value of the defendant's rap lyrics, the prejudicial effect of multiple rap videos featuring the defendant (including one entitled "Criminal") substantially outweighed their probative value.[209] Significantly, the court analyzed rap music in the broader context of art and music generally.[210] Holding that it is inappropriate for the prosecution to take probative rap lyrics out of context and say they are similarly situated to the circumstances of the case, the court recognized that rap lyrics are not always autobiographical in nature.[211] This decision recognizes that societal perceptions of rap music—in particular the notion that rap music per se reflects autobiographical events and not bravado—can potentially affect how a factfinder would interpret defendant-authored rap lyrics admitted as evidence at trial.[212]

Consequently, and for the sake of putting the arguments together, this article lays out a potentially useful three-pronged analysis that could guide courts when they are admitting defendant-authored rap lyrics. First, motive or intent should be directly at issue.[213] Second, in light of the first prong, a court could employ *Skinner*'s strong nexus test before it even moves to the Rule 403 balancing test between probative value and unfair prejudice.[214]

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[208] *Id.* at *4.
[209] *Id.* at *6–7.
[210] *Id.* at *6.
[211] *See id.* at *6–7 (explaining that rap-music is a well-recognized musical genre that uses bravado, exaggeration, and metaphor as a means of artistic expression).
[212] *See Bey*, 2017 WL 1547006, at *6–7 (granting a motion to suppress in large part because of the unfair prejudice inherent in rap lyrics that likely would inflame jurors).
[213] *See* Andrew F. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181, 191–92 (1998) (arguing that using evidence of prior acts to circumstantially show motive or intent in drug cases, for example, inevitably invites the factfinder to use impermissible character evidence). This would include situations where the defendant has put their motive or intent at issue by raising a defense of not having a motive or intent, and it would also include situations where intent is directly at issue due to the mens rea element of the charged offense. *Id.*
[214] *See State v. Skinner,* 95 A.3d 236, 253 (N.J. 2014) (laying out the strong nexus test). As a further note, this article suggests that courts should not employ the "not more inflammatory" than the crime charged Rule 403 analysis employed by an Illinois

Finally, courts could issue a jury instruction (upon request) clarifying, for example: "you can accept that the act of writing these particular rap lyrics is probative of the defendant's motive or intent only if you accept that the motive or intent expressed in the lyrics is autobiographical in nature."[215]

The admission of defendant-authored rap lyrics at that defendant's trial to show motive or intent is a timely and important issue.[216] As the popularity of rap music and gangsta rap music increases, the issue of whether to admit defendant-authored rap lyrics to show motive or intent will continue to arise.[217] In fact, some mainstream rappers today rap explicitly about their

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appellate court and the Eastern District of Michigan. *See supra* notes 190–201 and accompanying text.

[215] *See* Andrea Dennis, *Poetic (In)justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 15 (2007) (arguing that courts often incorrectly assume defendant-authored rap lyrics depict autobiographical accounts).

[216] *See People v. Minnifield,* 2014 IL App (1st) 113778-U, at *8 (Nov. 24, 2014) (recognizing that the admission of defendant-authored rap lyrics is a current and relevant issue in both state and federal courts, citing twelve different cases on point from varying jurisdictions).

[217] *See 2017 U.S. Music Year-End Report*, Nielson (Jan. 3, 2018), http://www.nielsen.com/us/en/insights/reports/2018/2017-music-us-year-end-report.html (explaining that in 2017, R&B/Hip-Hop as a genre accounted for seven of the ten most-consumed albums and experienced a 72% increase from 2016 in on-demand audio-streaming); *see also* Jay-Z, *The Criminal Justice System Stalks Black People Like Meek Mill*, N.Y. TIMES, Nov. 17, 2017 (arguing that Meek Mill, a world-famous rapper from Philadelphia, fell victim to stereotypes about criminality and rappers when a judge found he recently violated parole after being involved in an altercation at an airport (those charges were dropped) and drove recklessly on a motorcycle while filming a music video (those charges were dismissed)). This of course is not to say that all admissions of defendant-authored rap lyrics into evidence aim to reflect negatively on that defendant. *See, e.g.*, Elizabeth Chuck, *"Slippin" Played in Court Before Rapper DMX Gets a Year in Prison for Tax Evasion*, NBC NEWS, Mar. 29, 2018, https://www.nbcnews.com/pop-culture/pop-culture-news/slippin-played-court-rapper-dmx-gets-year-prison-tax-evasion-n861121 (explaining how a rapper DMX's defense attorney played one of DMX's rap songs illustrating his traumatic childhood at DMX's sentencing hearing for tax evasion in hopes of getting a lenient sentence—the judge gave DMX a one year sentence against the prosecution's recommendation of five years). In fact, some popular rap lyrics have a profound influence in today's society. *See* Neil Shah, *Kendrick Lamar's Pulitzer Signals Hip-Hop's Growing Cultural Clout*, WALL ST. JOURNAL, April 17, 2018 (reporting how Kendrick Lamar's recent Pulitzer Prize win, the first of a non-jazz or non-classical musician, is a sign that rap and hip-hop's influence and respect around the world is increasing).

own legal issues, past and present.[218] While no uniform framework ought to exist for such a fact-intensive determination as admitting defendant-authored rap lyrics into evidence at trial, following certain guidelines that give credence to the problems inherent in admitting such lyrics can prevent the admission of sometimes extremely prejudicial evidence.[219]

V. CONCLUSION

Defendant-authored rap lyrics present unique problems that most other forms of evidence do not encounter. They can be highly prejudicial and tend to arouse the emotions of jurors. Courts also have difficulty classifying them under evidentiary rules. In some cases, the defendant has penned lyrics so similar in substance to the crime charged that prosecutors should offer those lyrics into evidence, and courts should admit those lyrics as inculpatory statements. Nevertheless, the case law demonstrates that those instances are rare, and courts should err on the side of caution when admitting defendant-authored rap lyrics to show a defendant's motive or intent.

As a potential solution, this article lays out a three-pronged analysis that courts could use when considering whether or not to admit defendant-authored rap lyrics as evidence of motive or intent. First, motive or intent should be directly at issue, either as an element of the crime charged or because the defendant affirmatively placed his or her motive or intent at issue. Secondly, courts could employ *Skinner*'s strong nexus test before moving onto a Rule 403 analysis. Finally, courts could employ a jury instruction (upon request) clarifying that the jury should consider defendant-authored rap lyrics as probative of the defendant's motive or intent only if the jury finds that the rap lyrics are autobiographical in nature.

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[218] *See, e.g.*, 2 CHAINZ, *Statute of Limitations*, *on* RAP OR GO TO THE LEAGUE (2019) ("Statute of limitations, I ain't made a play since 2011, Can I talk my shit now?"); TEE GRIZZLEY, *First Day Out*, *on* MY MOMENT (2017) ("You ever been inside a federal court room? . . . The feds trying to build a case, I can't move wrong").

[219] *See supra* notes 202–217 and accompanying text.

THE CHANGE THE NCAA DOES NOT KNOW IT NEEDS: A PROMOTION/RELEGATION STRUCTURE FOR COLLEGE FOOTBALL

By: Jack Noonan[*]

ABSTRACT

After each college football season, the talking heads debate which team missed out on the College Football Playoffs. Each year it is a different school who everyone says should have made the playoffs. There are a multitude of reasons for or against each team every year, but the main point remains that the NCAA will always have this problem on their hands.

This article proposes the solution of a promotion/relegation style structure which will completely change the dynamic of the conference layout. It will give an opportunity to the best teams outside of the 'Power 5' or FBS to make the College Football Playoffs. There may be many questions still needed to be answered if this format is adopted, but this article provides the building blocks. The NCAA has a chance to build more passionate fan bases while breaking out of its mold by trying something new and exciting. Under this system, anything can happen.

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I. INTRODUCTION

At the end of the college football season each year, the national media and talking pundits across the country argue about the one team that did not have a chance to make it to the College Football Playoffs.[1] In 2017, it was the University of Central Florida (UCF) who went undefeated;[2] the year before, it was Western Michigan who only lost once;[3] and in earlier years, before the playoff format, it was Boise State who always had people clamoring that they should have a chance to play in the National Championship.[4] Each year it is a different school, and each year it is the same conversation.[5]

One reason these schools are disregarded is that they are not in a "Power Five" conference.[6] The classification of "Power Five" conference is in relation to the status of the top five conferences that seem to be the dominant conferences in the NCAA.[7] These five are: the Atlantic Coast Conference (ACC), the Big Ten, the Big 12, the Pac 12, and the Southeastern Conference (SEC).[8] The remaining conferences in the Football Bowl Subdivision of Division I are referred to as the "Group of Five" which includes the American Athletic Conference (AAC), Conference USA (C-USA), the Mid-American Conference (MAC), the Mountain West Conference (MW), and the Sun Belt Conference.[9] This, in turn, hurts the school's strength of schedule because their competition

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[1] *See* Zac Al-Khateeb, *Four Years Later, College Footbal Playoff has Solved no Controversy from BCS Era*, SPORTING NEWS (Dec. 4, 2017), http://www.sportingnews.com/us/ncaa-football/news/college-football-playoff-controversy-vs-bcs-era-alabama-ohio-state-conference-champions/1n3costjh2wbq16y2s85i2uh8o.

[2] *See 2017 College Football Rankings- Postseason,* ESPN, http://www.espn.com/college-football/rankings/_/week/1/year/2017/seasontype/3 (last visited Sept. 23, 2018).

[3] *Id.*

[4] *See* Joe Posnanski, After Undefeated Season, Why Can't Boise State be National Champion?, SPORTS ILLUSTRATED (Jan. 05, 2010), https://www.si.com/more-sports/2010/01/05/fiesta-bowl.

[5] Al-Khateeb, *supra* note 1.

[6] Bill Bender, *Power 5 vs. Group of 5*, SPORTING NEWS, http://www.sportingnews.com/us/ncaa-football/news/power-5-conferences-autonomy-ncaa-group-of-5-nick-saban-mike-slive-division-iv-split/1l51s8k6rrjvi1gph46mditvr8 (last updated Dec. 29, 2016).

[7] *Id.*

[8] *Id.*

[9] *Id.*

is weaker throughout the year.[10] Even as UCF went undefeated during the season, it did not matter because they played against weaker competitors than the powerhouses of college football. This does not seem right to many people, prompting the arguments each year. The team is punished for lacking conference prestige which is out of their control as conference realignment in the major conferences does not happen often.[11] The team can only win the games they are told to play each year. The format is not fair to smaller schools who want their chance to play against the most successful teams in college football. This article proposes an interesting solution for this problem centered around the restructuring of college football into a promotion/relegation system.

In short, the promotion/relegation system is a model used across many soccer leagues around the world.[12] Teams transfer between divisions and leagues based on their performance in the previous season.[13] Many countries have multiple leagues for clubs to jump back and forth between. The United States is one of the countries that has never used this type of model for any sport; including the Major League Soccer (MLS).[14]

This would add to the United States' standard sports model by having dominant, big market teams threatened with the possibility of dropping to a lower division following a bad season. On the other hand, the reverse could also happen with a less prominent team rising through the divisions to compete in the championship of the top league.

This article will breakdown both of these possibilities. In addition, it will explain and illustrate how this format could work in college football,

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[10] Matt Baker, *Strength of Schedule an Issue for Group of Five Teams*, TAMPA BAY TIMES (Jan. 2, 2018, 4:00 PM), https://www.tampabay.com/sports/college/Like-it-or-not-strength-of-schedule-an-issue-for-Group-of-Five-teams_164131647.

[11] *See generally* Greg Wallace, *College Football Realignment Moves That Need to Happen*, BLEACHER REPORT (May 7, 2017), https://bleacherreport.com/articles/2708353-college-football-realignment-moves-that-need-to-happen#slide0.

[12] *See* Mike Steere, *Explainer: How relegation works,* CNN (May 18, 2009), http://edition.cnn.com/2009/SPORT/football/05/18/relegation.explainer/index.html.

[13] *Id.*

[14] *See* J.S., *Why is there no promotion and relegation in the United States?*, THE ECONOMIST (Nov. 23, 2016), https://www.economist.com/blogs/gametheory/2016/11/football-pyramid-america.

discuss advantages and disadvantages, and give context using examples of how the model has brought success to different parts of the world.

The goal is to open the conversation to a new way of thinking. It is to bring in a possible new solution for this age-old problem of conference hierarchy that no one wants to change. The best teams should play with the best teams no matter the market size or the alumni contributions. Under this system, anything can happen.

II. HISTORY AND EXPLANATION OF THE ENGLISH FOOTBALL SYSTEM

Before describing how the promotion/relegation system would work with college football, it is important to understand how the system works in soccer today. This article will only refer to the English Football system. There are many leagues throughout the world but all have similar formats.

A. The Structure

The English Football system is set up as a nine-level pyramid.[15] The top five levels are the called "The League" and have one league for each level.[16] Levels six through nine are a bit more complex and have multiple leagues and sections within each level.[17] Because of this, the focus of this explanation only focuses on the top five levels. The idea to restructure college football in this manner works best with the simplistic nature of the five-level setup.

The top level of the English Football system is the Premier League.[18] This is the league most familiar and popular throughout the world, featuring teams such as Manchester United, Chelsea, and Liverpool.[19] The next league down (second level) is the League Championship which has teams who may have played in the Premier League recently such as Aston Villa and Stoke City.[20] The next three leagues below the League Championship

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[15] *See* Paul Gerald, *A Guide to the Leagues and Cups of English Football*, ENGLISH SOCCER GUIDE, Dec. 25, 2017, http://englishsoccerguide.com/guide-leagues-cups-english-football/.
[16] *Id*.
[17] *Id*.
[18] *Id*.
[19] *See Teams*, BBC, https://www.bbc.com/sport/football/teams (last visited Oct. 15, 2018).
[20] *Id*.

are League One (third level), League Two (fourth level), and the National League (fifth level).[21]

The key thing to remember while thinking about these leagues and levels is how they are all interconnected. If two teams are relegated for poor performance, two teams from the league below are promoted to take their place. With that in mind, each league has a set number of teams that are promoted and relegated each season. For example, the League Championship has three teams that are promoted to the Premier League each year and three teams that are relegated to League One each year.[22] It does not have to be an equal number of teams moving leagues for each, but it does have to be equal with the other leagues the teams are being sent to. Consequently, the Premier League would be relegating three teams and League One would be promoting three teams to the League Championship.[23] Leagues must keep the same number of teams each year.[24]

To better visualize this concept with American teams, if this process was applied to baseball standings, in 2017 the Detroit Tigers and the San Francisco Giants were the worst two teams in the major leagues.[25] With the promotion/relegation system, these two teams would fall to the lower Triple-A league and be replaced with the Memphis Redbirds and the Oklahoma City Dodgers which were the two best teams in Triple-A in 2017.[26]

B. The Points System

Switching back to the English Football system, another unique aspect of this style is the way in which a champion is determined. The Premier League is the only league in this system that has a champion with no upward mobility attached for following season.[27] For the Premier League, there is no playoff round to see who becomes the champion as is

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[21] *Id*.
[22] Gerald, *supra* note 15.
[23] *Id*.
[24] *Id.*
[25] *See Standings*, MLB ONLINE, http://mlb.mlb.com/mlb/standings /index.jsp#20171001 (last visited Oct. 31, 2018).
[26] *See Standings,* MLB ONLINE, http://www.milb.com/standings/index.jsp?lid=117 (last visited Oct. 31, 2018).
[27] Although the top four teams do qualify for the Champions League tournament which is Europe's biggest football tournament of the year.

traditional in American sports. As an alternative, a season long contest takes place with each team playing every other team, once at home and once away, to determine the best team.[28] The standings are based off a points system, three points for a win, one point for a draw, and the team with the most points at the end of the season wins the championship.[29]

While this does not appear to be the most exciting way to determine a champion, the English Football system still appreciates a good playoff bracket. For all other leagues using the promotion system, it is not as simple as top three seeds advance. Instead, the first and second place team in the league are locked, but the three through six seeds in the league must compete in a four-team playoff to earn that last spot for promotion.[30] The drama of these games are at an all-time high because of the stakes in play. Some of these clubs who are fighting for promotion have a whole English city cheering them on to victory.

Even as that describes the basics of the system, this structure goes throughout all nine levels of the pyramid, with all building off one another. A League Two team could win the Premier League in four years. It is not likely to happen, but the possibility is there. Also, in theory,[31] a team from the eighth level could move up to the Premier League after earning a promotion each year over a whole decade. The formula thrives off its unpredictability. Even as it is very unlikely, it gives faith to the players, and more importantly the fans, that there is hope to move up to the next league and compete for the championship.

C. The Valuation of the Leagues

Another notable feature of the English Football system is the value associated with being promoted or relegated. The discrepancy in the value of the leagues is important to focus on while discussing a comparable college football model. The consulting firm Deloitte calculated that a promotion from League Championship to the Premier League is worth about £120 million of extra revenue for the club.[32] The

[28] Gerald, *supra* note 15.
[29] *Id.*
[30] *Id*.
[31] As alluded to before, the details and team placements become a bit messier in regard to the lower four levels. Nonetheless, teams can find a vertical move up for playing well.
[32] *See* Collins, Paul, *Hull set for 120m pound cash windfall if they win promotion to Premier League*, DAILY MAIL ONLINE (April 26, 2013, 9:08 AM),

buying and selling of player rights is the crux of English football, which does not have a cap limit in place. The closing weeks of the season and the four-team promotion playoff creates incredible drama regarding what is at stake for these clubs. If a club, and the city of supporters, can make this jump, it will pay dividends well beyond the game itself.

The first five levels of the promotion/relegation system are mostly straightforward. It is a system that American sports has not yet accepted because of the owner's voice in all of the decisions. Even if there were multiple leagues of American football, the owner of the Cleveland Browns, Jimmy Haslam, would never vote to approve this system. His team would lose out on millions of dollars after the Browns were relegated out of the National Football League. Outweighing this disapproval is the fact that the drama surrounding each season would be extraordinary and the city/team pride would be brought to another level. This system needs to have some place in American sports.

III. HOW THIS CHANGE WOULD AFFECT COLLEGE FOOTBALL

The way most professional sports in the U.S. are currently set up does not fit well with a promotion/relegation model, even outside of the owner's influence on this matter. The MLS is one of only a few American sports that could change their structure into this model. It is not feasible for American football or for basketball. With baseball and hockey, the multiple league structure is there, but it gets complicated with player rights and the main team owning their minor league affiliate.[33] With most professional options thrown out, the collegiate structure could adapt to this type of change. It has the tiers of divisions already in place and all of the players are only committed to one team. The NCAA should be open to this type of shake up. As previously alluded to, the NCAA's structure has faced some criticism, so seemingly any type of change could be good for their image.

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http://www.dailymail.co.uk/sport/football/article-2315255/Hull-set-make-extra-120m-win-promotion-Premier-League.html.

[33] When the Boston Red Sox draft a player, they have the option of keeping him in the minor leagues while still owning his rights. He can play on their Triple-A team in Pawtucket, Rhode Island which is still owned by the Red Sox. In contrast, most lower league English football clubs are self-sufficient which makes jumping up and down divisions easier to deal with. Baseball could not have the Boston Red Sox and Pawtucket Red Sox playing in the same league.

Currently, the NCAA has a structure of four major divisions of college football. The four divisions are: the Football Bowl Subdivision (FBS), the Football Championship Subdivision (FCS), Division II, and Division III.[34] However, the only mobility schools have between divisions is if conferences are added or if an existing conference adds teams. This does not happen often, nor does it happen with many schools at once. The last time it took place was in the summer of 2017 when the Coastal Carolina Chanticleers jumped from FCS to FBS.[35] They were inserted into the Sun Belt Conference and have no plans to leave the FBS level.[36]

The biggest discrepancy with the English Football system is that college football has conferences within the division. In contrast, all 20 teams in the Premier League are grouped together with no separation between them, which is also true with the other leagues. In college football, multiple conferences make up all four divisions because it better cuts the teams down into a smaller number for each conference. Since college football only has twelve regular season games a year, the conferences help with scheduling purposes as well.

The new college football model would relatively build off what is already in place with only a few major changes. The goal is to replicate the pyramid structure of the English Football system. It would require breaking up all divisions and making them all smaller, so mobility is easier. Right now, there are 130 teams in the FBS, 124 in FCS, 169 in Division II, and 249 in Division III, for a total of 672 teams.[37] Comparatively, the first five levels of the English Football system have 116 clubs, and levels one through nine have 687 clubs involved.[38] With the large numbers of teams involved in Division II and Division III, these two divisions will be left off for simplicity.[39]

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[34] *See College Football Conferences,* ESPN, http://www.espn.com/college-football/conferences (last visited Oct. 22, 2018).

[35] *See* Patterson, Chip, *Coastal Carolina's move to Sun Belt will result in 130 FBS teams for 2017*, CBS SPORTS, (September 1, 2015) , https://www.cbssports.com/college-football/news/coastal-carolinas-move-to-sun-belt-will-result-in-130-fbs-teams-for-2017/.

[36] *Id*.

[37] *See supra* note 34.

[38] *See* Gerald, *supra* note 15.

[39] If the NCAA is serious about this, they can administer a similar structuring of levels six through nine which are quite complex. A good way of thinking about it is the same pyramid model which an extra wide base at the bottom.

A. Division Realignment

The first major change is to restructure all divisions. The FBS and FCS would be wiped away completely and instead, would be formed into 5 divisions. The first two divisions would be the teams in the "Power Five" conferences (Division I) and the "Group of Five" conference (Division II). The next three divisions would all come from the thirteen conferences in the current FCS. Division III would be made up of the Colonial Athletic Association (CCA), the Missouri Valley Football Conference (MVC), the Ohio Valley Conference (OVC), the Patriot League, and the Southern Conference. Division IV would have the Big Sky, the Mid-Eastern Athletic Conference (MEAC), the Northeast Conference, and the Southland Conference. Finally, Division V includes the Big South, the Ivy League, the Pioneer Football Conference, and the Southwestern Athletic Conference (SWAC). One thing to note is that the schools that are currently independents would be required to join a conference. The chart below illustrates the new changes with the number of teams in parentheses.

Division I (65)	**Division II (65)**	**Division III (47)**	**Division IV (42)**	**Division V (35)**
ACC (15)[40]	AAC (14)[41]	CCA (12)	Big Sky (13)	Big South (6)
Big 12 (10)	C-USA (14)	MVC (10)	MEAC (11)	Ivy League (8)
Big Ten (14)	MAC (12)	OVC (9)	Northeast (7)	Pioneer (11)
Pac-12 (12)	MW (13)[42]	Patriot League (7)	Southland (11)	SWAC (10)
SEC (14)	Sun Belt (12)	Southern (9)		

[40] Notre Dame was grouped with the ACC.
[41] Army and Massachusetts were grouped with the AAC.
[42] BYU was grouped with the MW.

B. Conferences

With this new structure, there are two options to approach the conferences. The first option is that the conferences do not change at all. It will keep the teams in order and continue to help with scheduling. Since there are so many teams still in each division, geographical problems could arise with traveling across country. Keeping the conferences helps to alleviate the geographic difficulties. The only major difference is the conferences will change constantly. The number of teams in each conference will change each year, which could hurt the concept "conference pride." A downside is the number of teams in Division I and II will be top heavy compared to the other divisions with 65 teams each. It is unfortunately unavoidable with the goal of keeping the conferences intact.

The second option is to start from scratch and do a major overhaul of all the teams and their conferences. This option would lead to more chaos. It would change the landscape of all of college football, but it may be necessary for this to work. All of the divisions would have a similar number of teams even with the possibility of adding more divisions to spread the teams out further. Most leagues around the world have anywhere from 20-30 teams in each level. That number is where this model could thrive and promote incredible drama year to year.

Regardless of the option that is picked, conference pride will be at the forefront of the debate. Fan bases love their conference pride, and anything that appears to take that away from them will cause an uproar. The system will be sustainable with either option as both have their positives and negatives. It all comes down to how much the NCAA wants to rock the boat. For purposes of this article, the first option will be chosen, and conferences will still be intact.

C. Promotion/Relegation

Now that the divisions for the pyramid structure are in place, it is now time to see how this system would work each year. The number of teams that will be promoted and relegated in each division each year will need to be selected. As seen with the English Football system, that number corresponds with the other leagues to maintain the same number of teams in each league per year. In the new structure of college, the number of teams promoted and relegated across the divisions will be five. For example, after each year, five teams will be relegated from Division I

down to Division II and five teams will be promoted from Division II up to Division I.

This new structure will also adopt the promotion playoff that was described with English football. The playoff will only apply to the teams moving up into the division above them. After the season is over, the one through four seeds will be locks to be promoted, but the fifth seed will have to fight their way in. The setup would be a four-team playoff with the fifth seed playing the eighth seed and the sixth seed playing the seventh seed with the winners playing each other for promotion. The stakes would be at an all-time level. Similar to English football, rising into Division I would be a huge payday for the school.

Another aspect to note is the change of conference that will be necessary when these teams rise or fall throughout the system. Each team will need a new conference in their new division. This could be a major drawback of the system, but there is no other option if the conferences are kept. For instance, UCF, being currently in the AAC, would have been promoted based on last season's performance. The question would then become what conference in Division I would UCF join. The answer would be how the conferences are set up by geography. UCF, located in Orlando, Florida, would be eligible for the SEC or ACC. On the other hand, Oregon State, part of the Pac-12, would have been one of the teams relegated this past season, so next year they would be joining the Mountain West.[43] Choosing a conference for a team would be a very difficult task because of everything at stake with this decision. A committee, similar to the current one used for the rankings, could be responsible for all these decisions.

D. Determining a Champion

The biggest downside to the English Football system is the way they determine the champion of their leagues. The clubs play 38 games to avoid a playoff of any kind. Occasionally, the league comes down to the last day, but more times than not, the eventual champions have been leading the league for most of the season, and the last five or so matches

[43] Another idea that has been floated out there by SB Nation's Bill Connelly is to have all the conferences linked with each level. In other words, each conference would be tied to another conference in the level above. AAC is tied to the ACC, Sun Belt is tied to the SEC, etc. https://www.sbnation.com/college-football/2017/6/6/15724156 /college-football-relegation-promotion-simulation

hardly even matter to determine the champion. This feature would not be adopted in this new college football system.

In the new structure, all post-season competitions including conference championships, bowl games, and the College Football Playoff are the same. The College Football Playoff will still be the pinnacle of the season for all teams. Of course, only Division I teams qualify, but this is how the current NCAA structure has worked out most of the time. Bowl season, with all the sponsorships and TV deals, will stay untouched through all of this. Finally, even with the conferences ever-changing, conference championships can still go on in the same format. The best two teams would still face off for a conference title before the playoffs. It is crucial to keep some semblance of the old version of college football.

Importantly to some, the ranking system would be a vital part for how this whole system operates. It has been a major concern throughout the years to find the best way to rank the teams. For the new version of college football, there are another two choices. Option one is the process that is currently in use. It is the ranking system that uses a committee to rank the Top 25 each week and for the playoffs. The major difference is that their duties will have to expand to also rank the Top 25 of every other division as well. In addition, the committee will have to rank a Bottom 10 for every division, which may be the toughest task yet. This ranking will directly affect who is promoted each year and has major consequences.

The other option is to use a version that is similar to the English system. This option contains a system that compares records at the end of the season. There, of course, would be multiple teams with the same record. The English settle tie breakers by goal differential throughout the season. College football would use point differential. The main drawback of this system is a problem the NCAA sees today. Some teams have easier schedules than others, and that will still be the case even with the conferences condensed. In English football, teams play each other twice, eliminating any controversy. Even with the problems it may raise, fans may find it thrilling to watch a team run up the score for the purpose of improving point differential, or how fascinating the league would be on the last weekend, watching a team plan around this tie breaker to make the playoff or avoid relegation. It could bring a whole new element to the game.

That being said, the primary issue that matters is finding a ranking system that works and that is fair to all teams. In this system, teams could never have one bad year. Their one bad season could cost them a place in Division I, even only for a year. It would add an intriguing wrinkle to the season. Every game that the bottom teams play will mean so much more than they previously did. Similar to the Premier League, the value of the jump from Division II to Division I in this system would be a huge reward for a great season.

E. Scheduling

Formation of this new structure of college football requires scrapping the four major divisions; however, it is not necessary to lose the conferences. The conferences will still be used for scheduling purposes. On account of there being too many teams for everyone to play twice, this format may not flow the same as English football, in which it is much easier to play 38 games a year having a home and away series with each team. This just is not possible for the "student-athletes" who have classes throughout the week. Plus, American football is not a sport designed for 38 games each year. While it may not go along with their system exactly, tweaks have been made to perfect it as best as possible.

The new scheduling process will be similar to what is employed currently. However, each team must schedule teams within its same division. Each schedule will still feature twelve games of regular season,[44] conference games, and strong nonconference play. Several basic changes must be made in order for this process to work. First, teams will no longer be able to schedule smaller schools for "warm-up games." The scheduling will be much more focused on matching teams with similar skill levels. This will keep the strength of schedule for all teams around the same level. Second, scheduling will not occur until the spring or summer before the season because the movement between divisions will not be determined until after the promotions and relegations each season, so teams will not know who is in their division or conference until the dust has settled from the previous year. College football is known for scheduling games years in advance, but most professional leagues in American sports release the schedules in the offseason immediately before the regular season begins. As a result, the scheduling between

[44] This number could change to thirteen regular season games depending on post-season success.

intraconference divisions would not be essential anymore. With the fluctuation of teams amongst divisions, the divisions themselves may not be able to hold up after a few years. The scheduling will reflect that as it is best to think geographically for ease in travel.

Nothing will change about the physical strain on athletes. The only tangible change in responsibility is that schools and athletic administrations will have to put together a new schedule each year, though it will also allow them to make it an event when they reveal the schedules as we see now with the NFL. The new scheduling process will keep fan bases locked in to games throughout the year because teams will not be playing against far inferior teams from different divisions.

The success of making such drastic changes requires scrapping the old way of thinking about college football matchups. The proposed promotion/relegation system would not change how the game of college football is actually played. The potential issue with the teams that have great seasons but are ignored for a chance at the national championship. It also affects the teams who struggle each year without major penalty of dropping out of the FBS or FCS. With this system, all of these issues could change for the better.

IV. ADVANTAGES AND DISADVANTAGES OF THE PROPOSED SYSTEM

College football involves a massive amount of details. Not all of these details will be addressed in this article. The system in no way can cover every thought people will have in response to this. As a result, many aspects were not discussed in the explanation and breakdown of how the system works. It is important to lay out the advantages and disadvantages of how this restructuring will change the game.

A. Advantages

One of the best parts about this system is the parity it would deliver for the smaller schools. The historic bluebloods have dominated college football for decades. The new structure would give smaller schools a chance to play with the big teams, as seen above in the UCF scenario. Another example is with North Dakota State (NDSU) located in Fargo, North Dakota. NDSU is an FCS school that deserves the chance to play at the highest level. The NDSU Bison have won six of the past seven FCS

Championships.[45] Not only do they have one of the most dominant football programs in the FCS, they have a rabid fanbase as well. In fact, College Gameday has visited Fargo multiple times in the past few years.[46] Opportunities for NDSU to play the best teams in college football are not available in the current system. FBS National Championship hopes are restrictive to teams such as NDSU, who have no other choice but to play, and beat, the teams they are scheduled against in a weaker conference or division. The new system gives these teams the opportunity to play teams that are more competitive, allowing them to prove that they belong in the national championship conversation.

Along these lines is the concept of team pride and school spirit increasing tremendously with these new opportunities. Fanbases that have never had a shot at a national title will now have their chance to cheer on their team. As mentioned in the context of NDSU, the team pride that Fargo has for North Dakota State University is at an all-time high and they are not the only small school in that position. The new structure could give even more to cheer about. Even if the school is in Division III to start, there is still technically a possibility they could move up over the course of a few years. Plus, in this new system, it is not national championship or nothing. These teams and fan bases can have smaller goals and reasonable expectations to just be promoted for a certain year. It will bring more opportunities for fans to get behind their teams.

In English football, fan bases are just as passionate, or possibly more so, as the die-hard fans of college football. The stakes these fans bring to each game when their team is facing either promotion or relegation is remarkable. For example, last year, Huddersfield won the League Championship four-team playoff.[47] The championship match was 120 minutes of nerve-wracking football that came down to a penalty shootout to see which team would move on to the Premier League.[48] The scene

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[45] *See In epic title game, North Dakota State edges James Madison to win back FCS throne,* ESPN (Jan. 6, 2018), http://www.espn.com/college-football/story/_/id /21985266/north-dakota-state-edges-james-madison-win-fcs-championship.
[46] *See ESPN College GameDay comes to North Dakota State,* USATODAY (Sept. 17, 2013), https://www.usatoday.com/story/sports/ncaaf/2013/09/17/north-dakota-state-espn-college-gameday-fargo-theatre/2829479/.
[47] *See* Ian Woodcock, *Huddersfield 0, Reading 0. Huddersfield Town win 4-3 on penalties*, BBC (May 29, 2017), https://www.bbc.com/sport/football/39995791.
[48] *Id*.

was absolutely electric. This is what this new structure of college football could bring to schools across the country.

Even if these clubs have no realistic shot at taking down the top clubs in England, fans still relish the moment in the hopes of being promoted. Rivalries also take the game to another level with pure hatred for a close intown club.[49] These rivalries formed within each league in previous decades. College football already has some bad blood within its ranks, but adding a chance for promotion would bring it to a whole new level. Promotion means everything to the English, and with a system of multiple championships and playoffs at each level, college football could tap into the passion that it lacks among the smaller schools who do not have a shot at competing.

Another advantage to this system is the thrill of the unknown. The promotion/relegation system has never been brought to the United States before. There has not been a need to think of better ways to improve it for American sports. In applying the system to college football, people will have the opportunity to tweak the way it is implemented to get peak performance, and top dollar, out of it. The NCAA could use this breath of fresh air to avoid scrutiny, and bring peoples' ideas together in an innovative new model that has never been seen before.

For the teams themselves, restructuring would shake some programs to their core demanding each team to have renewed urgency to compete instead of settling for last in the conference each year. These teams will have a new threat of relegation which will affect their annual revenue each season. School administrators will have to put more thought into their football programs. Top teams would likely stay the same, which is significant because the bulk of money in college football comes from these programs and these primetime games. That money will not be adjusted or diminished with this new system.

Admittedly, a small quirk of this system is that demotions could be used as a punishment for infractions. This could be turned into a positive for the NCAA to have another harsh punishment to use. A team that committed a certain level of NCAA violation could be subject to a

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[49] *See* Nick Miller, *Premier League rivalries unraveled: a history of English football derbies,* THE GUARDIAN, July 11, 2016, https://www.theguardian.com/sport /2016/jul/12/premier-league-rivalries-unravelled-a-history-of-english-football-derbies.

demotion to a lower division. This large of a penalty would be felt much more than vacating awards or taking away scholarships.

The idea originated from Italy's Serie A. In 2006, the highest level in Italian football uncovered a scandal involving a network of club managers and referees rigging games by selecting favorable referees to officiate their matches.[50] The league called for the three clubs, including the league champion Juventus, to be forcefully demoted to Serie B, the league below.[51] The scandal was the first time that a team was demoted because of a punishment in league history.[52] Even though these circumstances are completely different from college football, there have been instances where a punishment this severe was needed, especially in the recruiting realm. This penalty may not be used all the time, but the option is there if the NCAA needs to resort to it.

These foregoing lists only a few of the many advantages of the proposed system. The real impact would come from the new pride the players and fans could take on with the joys of promotion and the threat of relegation. It means just a little bit more for the teams who normally play meaningless games in December.

B. Disadvantages

Any promotion/relegation system proposal will have some serious blowback. While the idea seems great in theory, criticism is inevitable. There are many rich, influential people who want things to stay as they are. The biggest dilemma with the whole system is making the change worth it for the schools and administrators. Each disadvantage can be traced back to one thing—money.

One of the hardest things to predict is how the existing revenue streams would react to a change like this. Billions of dollars are put into college football across all current divisions, considering all the money from sponsorships, TV deals, and the like. It is a huge beast, but money oftentimes is the biggest factor behind any decision made.

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[50] *See* Clayton, Lee, *Juve, Lazio and Fiorentina relegated,* DAILY MAIL ONLINE, http://www.dailymail.co.uk/sport/football/article-395629/Juve-Lazio-Fiorentina-relegated.html. (last visited Oct. 21, 2018).
[51] *Id*.
[52] *Id*.

The first disadvantage is that the system puts all the money into the top level of play. Currently, this top level is made up of 130 FBS schools, but with the new system it would be cutting that number in half. Middle to end-of-the-pack schools may not be satisfied with being split up in smaller divisions. For example, the discrepancy between the Premier League and the League Championship is stark. So, the question then becomes what will divisions one through five be worth, and is that disparity between divisions too much for the schools? If the new divisions do not make profitability from the league as valuable or more valuable, schools may not be interested.

Granted, this may be how the system is working already. In 2017, The Wall Street Journal published a report that ranked college football programs on value alone.[53] It showed that, outside the independents Notre Dame and BYU, the top sixty most valuable programs were all in a "Power Five" conference.[54] The first "Group of Five" program to be listed was UCF at number sixty-one overall.[55] These numbers paint a clear picture; all the money is in the "Power Five" already. The lower conferences do not have much of an economic impact to the landscape of college football. Splitting the two groups into their own divisions may not make much of a difference that is not already prominent. It may actually incentivize teams to aim for Division I, thereby increasing the programs' values.

The next disadvantage of this system is yearly conference realignments. Teams moving in and out of the conference poses a challenge to TV deals and revenue shares amongst the conferences each year. If a conference were to add another team, the conference's existing schools will have their shares cut. Schools would not be happy about that change. Or, in the extreme, what if four teams were promoted which were all southeastern schools? Then, the current schools in the SEC would presumably have to split the revenues with four more schools.

Additionally, the committee choosing which conference the new team goes to may cause problems. Even if the simple solution is assignment based on geography, problems would still arise regarding time. For

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[53] *See* Ryan Brewer, *College Football Value Rankings,* WALL ST. J., https://graphics.wsj.com/table/COUNT_09212017. (last visited Oct. 21, 2018).
[54] *Id*.
[55] *Id*.

example, if UCF entered into the SEC, and Western Michigan were promoted to the Big 10, the SEC would have to deal with gaining a better team in their conference while the other conference received a weaker team. Both of these dilemmas are smaller problems in the grand scheme, and they could be ironed out over time once the system was put in place.

Finally, the last disadvantage to explore is the simple fact that this system may not change anything for the better. The argument could be made that while this system would most definitely change the structure, Alabama and Clemson could still win every year. In other words, the top teams could still run college football and nothing might be able to stop that from happening. On top of that, these top schools may be aided by the new scheduling rules. There would be an incentive for teams to schedule weaker competition since that would now be in their control

All in all, the disadvantages boil down to whether the money will continue to come in for these schools as it had before. Some schools may miss out on certain benefits they receive now if they fall down to Division II. That will not be feasible for many administrations making the decisions.

V. CONCLUSION

Eventually, the NCAA will have to address the yearly concerns about the mid-majors and "Group of Five" schools that never make the playoffs. The committee's answer that these schools do not play tough enough competition should not work anymore under the system proposed in this article. These schools cannot do much about who they play if they beat their conference competition on a regular basis. It is impossible for these teams to get a seat at the table when everyone looks down on them from the start. This promotion/relegation system would help give all teams a way to play against the best the college football has to offer, and to get there by earning the spot.

If the NCAA were to implement on this system in college football, it would change the way of thinking about the game as a whole. Each season would bring in more drama than other seasons in the past. The skeleton of the old model would still be in place with the blueblood programs on top, but there would likely be some new faces competing. The teams that have been profiting off of being "bottom of the barrel" for years would be in jeopardy of losing their "Power Five" (Division I)

status. It could put programs with real administrative decisions to make which could give the fans a better product.

There are many questions that are still left unanswered with this system, and it will take many opinions and voices to perfect it before it can be implemented. But the concept is there, along with and the potential for even greater passion and pride in fan bases than ever before. The NCAA can break out of its mold and try something new and exciting. Under this system, anything can happen.

PAID TO PLAY? – THE CANADIAN HOCKEY LEAGUE PLAYERS CLASS ACTION LITIGATION

By: Kenneth Wm. Thornicroft[*]

ABSTRACT

In 2014, the National Labor Relations Board's Regional Director ruled that scholarship football players at Northwestern University were "employees". Subsequently, in 2015, the full board, and without deciding the players' status, declined to assert jurisdiction effectively ending the dispute. There are parallels between this dispute and lawsuits currently before the Canadian courts involving the Canadian Hockey League ("CHL"). The CHL is nominally an "amateur" league and is the principal development league for players hoping to pursue a career as a professional hockey player. The players claim they are "employees" under provincial employment standards statutes. The CHL maintains that the players are "student athletes", akin to NCAA Division I scholarship athletes. This article examines the similarities and distinctions between CHL players and NCAA Division I athletes, discusses the CHL litigation, the probable outcome, and the possible ramifications of this litigation for the CHL and its players.

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I. INTRODUCTION

Men's collegiate athletics in the United States, specifically football and basketball programs in the National Collegiate Athletic Association ("NCAA") Division I schools, is a large and profitable business (although, as an unincorporated non-profit organization, the NCAA is exempt from federal income tax[1]). In 2017, the NCAA's gross revenues exceeded $1 billion and it reported an operating surplus of approximately $104 million.[2]

NCAA coaches are paid, as are the athletic directors, trainers, referees, event sales staff and many other individuals associated with a major university's athletic program but not for the individuals who are the principal focus of attention, the players.[3] NCAA universities characterize the players as "student athletes" and, as such, they are not paid "wages" (in the form of an hourly rate or salary) for their "work" (*i.e.*, training, practicing and playing their particular sport). Scholarship players usually receive an athletic scholarship that covers tuition, room and board, required textbooks and fees and some incidental expenses, but players are not paid "wages" for the hours they commit to the university's athletic

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[1] I.R.C. § 501(c)(3). On March 14, 2019, Congressional Representative Mark Walker introduced HR 1804 (the Student-Athlete Equity Act) which would eliminate the NCAA's tax exempt status unless it allows student athletes to profit from their name, image and likeness. This bill was referred to the House Committee on Ways and Means.

[2] *See* NCAA Consolidated Financial Statements for year ending August 31, 2017, available at: https://www.ncaa.org/sites/default/files/2016-17NCAAFin_ FinancialStatement_20180129.pdf. The NCAA will receive approximately $14.7 billion from 2018 to 2032 under its current broadcast agreement with CBS/Turner Broadcasting. The NCAA's broadcast contract with ESPN will pay it nearly $294 million from 2018 through 2024. These figures are separate from the revenues earned by member colleges and universities – in 2017, 27 universities had athletic program revenues exceeding $100 million, the highest being Texas A&M at $182.1 million. Cork Gaines, *The 27 Schools that Make at Least $100 Million in College Sports*, BUSINESS INSIDER (Nov. 25, 2017, 2:42PM), http://www.businessinsider.com/schools-most-revenue-college-sports-texas-longhorns-2017-11.

[3] The very high salaries paid to elite NCAA college coaches may be justified by the value they create for their organizations. *See* Randall S. Thomas & R. Lawrence Van Horn, *College Football Coaches' Pay and Contracts: Are They Overpaid and Unduly Privileged?*, 91 IND. L.J. 189 (2016). The very same argument, of course, could justify high pay for elite college athletes.

program. If the players were legally characterized as "employees" offering their services in a competitive labor market, it is likely that many could generate an income well above the actual dollar value of their athletic scholarships.[4]

On March 17, 2014, and in response to an application filed with the U.S. National Labor Relations Board ("NLRB") by Northwestern University football players, the NLRB Regional Director for Region 13 (Chicago) ruled that the players were "employees" for purposes of the National Labor Relations Act ("NLRA")[5] and, as such, ordered that a certification election be conducted.[6] However, in a review decision issued August 17, 2015, the NLRB *en banc*, and without deciding the key question of whether the players were "employees," declined to assert jurisdiction in the dispute, effectively bringing the players' claim to an abrupt halt.[7]

Some parallels exist between the Northwestern University football players dispute and three class action lawsuits that are currently before the Alberta, Ontario and Québec courts involving the Canadian Hockey League ("CHL"; the "CHL Litigation") and its three constituent leagues – the Western Hockey League ("WHL"), the Ontario Hockey League ("OHL") and the Québec Major Junior Hockey League ("QMJHL"). The CHL consists of sixty franchises, all but eight of which are in Canada.[8]

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[4] *See* Commission on College Basketball, *Report and Recommendations to Address the Issues Facing Collegiate Basketball*, NAT'L COLLEGIATE ATHLETIC ASS'N (Apr. 2018), http://www.ncaa.org/sites/default/files/2018CCBReportFinal_web_20180501.pdf.

[5] 29 U.S.C. § 152(3) (2019).

[6] Northwestern Univ. & Coll. Athletes Players Ass'n, 362 N.L.R.B. 167, No. 13-RC-121359 (2015).

[7] Northwestern Univ., 362 N.L.R.B. No. 167 (2015). For a comprehensive analysis of the NLRB's decision, *see* Sheldon D. Pollack & Daniel V. Johns, *Northwestern Football Players Throw a "Hail Mary" but the National Labor Relations Board Punts: Struggling to Apply Federal Labor Law in the Academy*, 15 VA. SPORTS & ENT. L.J. 77 (2015).

[8] *About the CHL*, CHL (last visited Mar. 24, 2019), http://chl.ca/aboutthechl. The WHL has a five-team U.S. Division consisting of four teams in Washington and one in Oregon. The OHL has two teams in Michigan and one in Pennsylvania. There are currently no U.S. teams in the QMJHL, although two U.S. cities have in the past had QMJHL franchises (Plattsburgh, New York, during the 1984-85 season and Lewiston, Maine from 2003-2011). *About the WHL*, WHL (last visited Mar. 24, 2019), http://whl.ca/about.

The CHL is nominally an "amateur" league[9] and is the foremost development league for players, aged sixteen to twenty years, hoping to pursue a career in professional hockey.[10] In common with NCAA Division I athletic programs, the CHL's general managers, coaches, trainers and other team personnel are all paid, but the players are not. The CHL Litigation is predicated on the assertion that CHL players are "employees" under various provincial employment standards statutes and, accordingly, entitled to statutory benefits including payment of at least the minimum wage for all hours worked, overtime pay, vacation pay, statutory holiday pay and termination pay (the statutory foundation for these claims is discussed in greater detail, below). The CHL's position is that the players are not employees but, rather, "student athletes" akin to men's scholarship athletes attending NCAA Division I universities.

This article examines the similarities and distinctions between CHL players and NCAA Division I athletes, offers insights into the CHL Litigation, compares this litigation with U.S. university scholarship athletes' claims and also offers some thoughts regarding the probable

[9] The CHL considers itself to be an amateur league, although the players receive small weekly stipends during the season (ranging from about $50 for first year players to $150 for players in their final year of CHL eligibility). However, the NCAA considers the CHL to be a professional league and thus former CHL players are ineligible to play NCAA hockey. Some CHL players aged 18 to 20 years old – particularly those who have been drafted into the National Hockey League ("NHL") – will have signed NHL entry-level contracts, and while they are not paid salaries under those contracts (unless they played some NHL games before being reassigned back to their major junior team), they usually will have been paid a (sometimes quite significant) signing bonus (such bonuses are capped at 10% of the annual salary fixed for each year of the mandated contract). For more information, *see NCAA College Hockey vs. CHL Major Junior*, COLLEGE HOCKEY INC. (last visited Mar. 24, 2019), http://collegehockeyinc.com/ncaa-college-hockey-vs-chl-major-junior.php; *see also From Both Sides of the Aisle: CHL vs. NCAA*, NEUTRAL ZONE (last visited Mar. 24, 2019), https://www.neutralzone.net/mens/2017/05/12/23680/. For an excellent overview of both professional and amateur hockey in Canada and the United States, *see* Berg v. Canadian Hockey League, 2017 ONSC 2608, at paras. 26-46.

[10] *See* THE CANADIAN HOCKEY LEAGUE, http://chl.ca/article/78-chl-players-selected-in-2018-nhl-draft. In the 2017 NHL entry draft, 89 players were CHL players (41% of the 217 players selected in the 7-round draft); 14 of the 31 players selected in the first round were drafted from the CHL and 48% of the first and second round draftees were from the CHL. In the 2018 draft, 78 CHL players were selected, including 13 players in the first round and 12 in the second round (40% of the players selected in the first two rounds).

outcome, including its ramifications for the CHL and its players. Two of the three CHL class action claims have now been certified,[11] but this highly contested litigation will not likely conclude for several years.

II. THE CHL LITIGATION

The CHL is an unincorporated association of the WHL, OHL and QMJHL; the three constituent leagues are separately incorporated. The three league champions (as well as a host city club) compete annually for the Memorial Cup, first awarded in 1919. The CHL franchises are operated through various business corporations, ordinary partnerships (with corporate partners) and limited partnerships and these entities, along with the three leagues, are named in the separate class action lawsuits.

Three class actions have been filed, one in the Alberta Court of Queen's Bench (the "WHL Action"), another in the Ontario Superior Court of Justice (the "OHL Action"), and a third in the Québec Superior Court (the "QMJHL Action"). In each action, the representative plaintiffs are former CHL players (Travis McEvoy and Kyle O'Connor for the WHL Action; Samuel Berg and Daniel Pachis in the OHL Action; the proposed representatives for the QMJHL Action are Lukas Walter and Thomas Gobeil).[12]

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[11] Class actions must first be "certified" under provincial class proceedings legislation in order to proceed. A superior court trial judge will issue a certification order provided certain statutory criteria are satisfied; *see, e.g.*, Alberta Class Proceedings Act, S.A. 2003, c. C-16.5, § 5. BridgePoint Global Litigation Services/BridgePoint Indemnity Company (Canada) Inc. is funding the litigation under a third-party funding agreement. This agreement was approved in the WHL Action on April 11, 2016 (and the record relating to this matter is now sealed); the funding agreement does not yet appear to have been approved in the OHL Action. *See* Berg v. Canadian Hockey League, 2016 ONSC 4466.

[12] Although Lukas Walter is named as the lead plaintiff the WHL Action, the court refused to allow him to be a representative plaintiff because he never played for a Canadian WHL team; Daniel Pachis was removed as a representative plaintiff in the OHL action because he did not fall within the certified class. Further details regarding the CHL class action can be found at the class counsel's website: Charney Lawyers, http://www.chlclassaction.com (last visited March 23, 2019) and at the CHL's class action defense website: Charney Lawyers, http://chldefence.com (last visited March 23,2019).

The three actions are fundamentally similar. Notwithstanding the various legal claims that have been pleaded, the CHL Litigation is principally predicated on two claims: the CHL players are "employees" for purposes of provincial employment standards legislation and, as such, they are entitled to the statutory benefits provided under employment standards statutes including payment of minimum wage for all hours worked, vacation pay, statutory holiday pay, overtime pay and termination pay. In addition to the claims arising under employment standards legislation, there are also various other legal claims including breach of the duty of fair dealing, conspiracy, negligence, misrepresentation, unjust enrichment and waiver of tort. The remedies sought include recovery of unpaid wages under provincial employment standards legislation, disgorgement of the leagues' and teams' profits, injunctive relief and punitive damages.

The WHL Action is limited to the WHL and its Canadian member clubs; the OHL Action originally named the CHL, all three constituent leagues and their member clubs but is now only proceeding against the CHL, the OHL and the seventeen Ontario-based OHL clubs; the QMJHL Action names only the QMJHL and its member clubs. The Alberta and Ontario actions have been certified to proceed whereas the QMJHL Action has seemingly been placed in abeyance.[13] The Ontario Supreme Court initially allowed only the employment standards and unjust enrichment

[13] The OHL Action was certified on April 27, 2017 as against the CHL, the OHL, and the 17 Ontario-based franchises but only with respect to the employment standards and unjust enrichment claims (Berg v. Canadian Hockey League, 2017 ONSC 2608). On appeal to the Ontario Divisional Court, the certification order was amended to allow all of the pleaded claims to proceed (Berg et al. v. Canadian Hockey League et al., 2019 ONSC 2106; the "OHL Certification Decision"). By a consent order dated July 22, 2015, the claims against the WHL and the QMJHL, and their respective member clubs, were stayed. On November 16, 2017, an appeal regarding the certification judge's refusal to include the OHL's U.S. franchises in the OHL Action was dismissed (Berg v. Canadian Hockey League, 2017 ONSC 6719). The WHL Action was certified on June 15, 2017, but only against the seventeen western Canadian franchises operating in the provinces of British Columbia, Alberta, Saskatchewan and Manitoba. The franchises operating outside Alberta attorned to the jurisdiction of the Alberta courts. The certification judge allowed all of the pleaded legal claims to proceed (Walter v. Western Hockey League, 2017 ABQB 382; the "WHL Certification Decision"). On May 15, 2018, the Alberta Court of Appeal confirmed the certification order: Walter v. Western Hockey League, 2018 ABCA 188.

claims[14] to proceed although this decision was overturned on appeal and now all pleaded claims are proceeding; the WHL Certification Decision allowed all pleaded claims to proceed and the Alberta Court of Appeal confirmed that decision.[15]

The defendants in the CHL Litigation maintain that the CHL is an amateur developmental hockey league and that the league's purpose is to provide guidance, supervision, development and education for its players. The CHL asserts that the players are not, nor were they ever intended to be, employees either under employment standards legislation or at common law. Although, by contract, the players are paid a modest monthly stipend, the CHL maintains that this payment is not a "wage" for purposes of employment standards legislation, but rather a form of expense allowance.[16]

Although not a lawful defence to the players' unpaid wage claims, the CHL and its member leagues and teams also maintain that if the players' action succeeds, there will be severe adverse financial ramifications and

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[14] The elements of an unjust enrichment claim under Canadian common law are: i) an enrichment of, or benefit to, the defendant, ii) a corresponding deprivation of the plaintiff, and iii) the absence of a juristic reason for the enrichment (*see* Kerr v. Baranow, [2011] 1 S.C.R. 269). The players' unjust enrichment claim is inextricably linked to their employment standards claim – the players assert that the CHL clubs were enriched – and the players concomitantly deprived – by the CHL teams' failure to meet their obligations to the players under employment standards legislation.

[15] *See* OHL and WHL Certification Decisions, *supra* note 13.

[16] The legal characterization of the players' compensation is a matter of contention between the parties. Sometime between 2012 and 2014, CHL clubs were instructed to change the language contained in the standard player agreement ("SPA"); teams were instructed "not to use any language in referring to the players and their Clubs that would imply an employment relationship" (*see* Canadian Hockey League Players' Association v. Ontario Hockey League, 2017 CanLII 62584 (O.L.R.B.), at para. 9). Thus, for example, SPAs formerly referred to "statutory withholdings and deductions" (only required if the compensation is taxable employment income), "salary" and "remuneration" for "services" whereas, for example, the WHL SPA in current use specifically states that the agreement "is not a contract of employment", "the parties specifically agree that this Agreement does not create an employer-employee relationship such that the Player's amateur athlete status would thereby be placed in jeopardy", and that "any and all amounts received by the Player under this part shall be strictly and solely provided for and related to the reimbursement of travel or training expenses".

some teams will be unable to continue operating.[17] In the WHL Action, the defendants argue "that they cannot afford to pay minimum wages, and they threaten that, if they are required to do so, benefits to the players will be cut, and teams will go out of business."[18]

III. EMPLOYMENT STANDARDS LEGISLATION AND STATUTORY EXEMPTIONS

Canada is a confederation consisting of one federal and ten provincial jurisdictions. Under the Constitution Act, 1867,[19] employment is neither an exclusively provincial or federal matter. Depending on the nature of the employer's operations, either federal or provincial employment and labor legislation will apply.[20] However, the Supreme Court of Canada has stated that provincial jurisdiction is the "dominant presumption" and approximately ninety percent of the Canadian workforce falls under provincial jurisdiction. The provinces and the federal government have all enacted employment standards statutes, akin to the United States' Fair Labor Standards Act ("FLSA"),[21] that define basic terms and conditions of employment including a minimum wage, overtime pay, vacation pay and statutory holiday pay, permitted (unpaid) leave and termination pay. These statutes typically establish a complaint and dispute resolution process administered by an independent administrative tribunal. Employment standards legislation only applies if there is an underlying

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[17] OHL Certification Decision, *supra* note 13, at para. 11.

[18] WHL Certification Decision, *supra* note 13, at para. 83. In Walter v. Western Hockey League, 2016 ABQB 608, the court made a wide-sweeping order for the production of the clubs' financial records because (at para. 16): "The Defendants obviously consider that this evidence of financial difficulties is key to their opposition to the certification of this action as a class action. Having placed the clubs' and the leagues' financial viability squarely into issue, the CHL, the WHL and the clubs must produce their financial documents as potentially proving their position, or placing their evidence into dispute." Although the alleged serious deleterious financial consequences of a successful claim does not constitute a valid defence, this argument has resonated with several provincial governments that have granted the CHL teams in their jurisdictions exemptions from employment standards statutes (discussed in greater detail, *infra*).

[19] 30 & 31 Vict., c. 3d.

[20] *See*, *e.g.*, Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters, [2009] 3 S.C.R. 407; Tessier Ltée v. Quebec (Commission de la santé et de la sécurité du travail), [2012] 2 S.C.R. 3.

[21] Fair Labor Standards Act of 1938, 29 U.S.C.A. § 201.

employment relationship. If the CHL players are "employees", their employment would presumptively be governed by provincial employment standards legislation. However, even if there is an employment relationship, certain classes of employees are exempted from these statutes.

This latter point is particularly relevant to the CHL Litigation. While the CHL argues that the players are not employees, even if a court rules against the CHL on that issue, all but one Canadian jurisdiction where CHL teams operate have excluded the players from the governing employment standards regime. Eight Canadian provinces[22] and the states

[22] *See* British Columbia Employment Standards Regulation, B.C. Reg. 396/95, § 37.16; Saskatchewan Employment Standards Regulations, R.R.S. c. S-15, Reg. 5, § 3(1)(c); Manitoba Employment Standards Regulation, Man. Reg. 6/2007, § 2.1; New Brunswick Employment Standards Act, General Regulation, N.B. Reg. 85-179, §§ 2.1, 3(1)(p), 3.1 and 3(2)(c); Nova Scotia General Labour Standards Code Regulations, N.S. Reg. 298/90, § 2(4A); and Prince Edward Island Employment Standards Act Exemption Regulations, P.E.I. Reg. EC74/17, §§ 1-2. In September 2016, and again in June 2017, the Québec government announced that it would be enacting a similar exemption regarding QMJHL players in Québec. On June 12, 2018 the Québec National Assembly assented to Bill 176 (An Act to Amend the Act Respecting Labour Standards and Other Legislative Provisions Mainly to Facilitate Family-Work Balance, 2018, c. 21) that effectively exempted major junior hockey players from the province's labor standards statute (the statute no longer applies "to an athlete whose membership in a sports team is conditional on his continued participation in an academic program"). On November 15, 2018, following a change from a center-left to a center-right government, the province of Ontario exempted OHL players from the province's employment standards statute (*see* Non-Application of Act, O. Reg. 477/18). The Ontario premier issued a press release justifying the exemption citing "onerous regulations [that] could jeopardize the future of many teams in the OHL" and stating that by "cutting red tape and excluding the OHL from unnecessary and impractical employment legislation, Ontario is protecting the long-term sustainability of local junior hockey teams" (*see* "Ontario's Government for the People Protecting Amateur Hockey," available at: https://news.ontario.ca/opo/en/2018/11/ontarios-government-for-the-people-protecting-amateur-hockey.html. The Alberta provincial government now stands alone as having refused to exempt the five WHL teams operating in the province from its employment standards statute.

of Washington[23] and Michigan[24] have exempted CHL players from their employment standards statutes. A similar exemption was introduced in the Oregon State Legislature but was not enacted.[25] These legislative initiatives were all triggered by the CHL Litigation.[26] While the specific exemption language varies by jurisdiction, the effect in each case is to exclude major junior hockey players (and, in some jurisdictions, all amateur athletes[27]) from the province's employment standards statute. In British Columbia, the exemption reads as follows:

> Ice hockey players
> 37.16 (1) The Act does not apply to a player on a major junior ice hockey team if the player is entitled, in respect of each of the first 5 hockey seasons the player completes, to receive a scholarship from the team, or the league of which that team is a member, in an amount equal to or greater than the eligible cost of an academic year of a post-secondary educational program in Canada of the player's choice…
> [*Note*: "eligible cost" is defined in subsection 2][28]

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[23] Minimum Wage Act, WASH. REV. CODE § 49.46.010(3)(p) (2019).
[24] *See* Workforce Opportunity Wage Act, 2014 Mich. Pub. Acts 6, § 408.420(5) (2019) (players 16 to 20 years of age). *See also* Youth Employment Standards Act, MICH. COMP. LAWS § 409.118 (2018) (players under age 18).
[25] House Bill 4093 would have amended Oregon's "hours and wages," "enforcement of wage claims," and "minimum wage" laws so that they would not apply to "an individual who is an amateur athlete." 2018. H.R. Res. 4093, 79th Leg. Assemb. (Or. 2018); Workers' Compensation Coverage, OR. REV. STAT. § 656.027(13) (2018). "An employee who is at least sixteen years of age and not older than twenty-one years of age and who plays for a junior ice hockey team, when the individual is playing for the team." Hours; Wages; Wage Claims; Records, OR. REV. STAT. § 652.210(2) (2018). The Bill was passed by the Oregon House on February 20, 2018 but the Senate, in the face of stringent opposition from various labor groups and the Oregon Trial Lawyers' Association, referred the bill to the Senate Committee on Rules where it died when the Oregon Legislative Assembly's 2018 Regular Session, adjourned *sine die* on March 3, 2018.
[26] CHL CLASS ACTION, http://www.chlclassaction.com/ (last visited March 16, 2019).
[27] For example, the Saskatchewan exemption broadly applies to all "athletes while engaged in activities related to their athletic endeavour;" similarly-worded exemptions apply in New Brunswick, Nova Scotia and Prince Edward Island. The Manitoba and Ontario exemptions are similar to that in British Columbia, *see infra* note 28.
[28] Employment Standards Regulation, S.B.C. Reg. Pt. 4, § 37.16(1)–(2) (2018).

It appears that this exemption was included in the Employment Standards Regulation following lobbying by several British Columbia WHL team owners[29] and the exemptions in other jurisdictions followed similar lobbying efforts.[30]

Since the unpaid wage claims of players who played for teams in eight Canadian jurisdictions are now presumptively barred, those players will either have to challenge the exemption legislation or restrict their claims to wages that were earned or became payable in the pre-exemption period, although such claims are likely time-barred in any event.[31] Of course, if the players are not "employees," any issues regarding the statutory exemptions are moot. As previously noted, the CHL maintains that its players are not employees but, rather, "student athletes" not markedly dissimilar from NCAA Division I athletes.[32]

IV. THE NORTHWESTERN UNIVERSITY SCHOLARSHIP FOOTBALL PLAYERS CASE

The principal defence raised in the CHL Litigation, echoing arguments advanced in the Northwestern University football players case, is that the players are amateur athletes, not employees.[33] Among other defenses, the defendants say that CHL teams provide extensive educational benefits to

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[29] *See* John Hernandez, *Western Hockey League Exempt from Paying Players Minimum Wage as CHL Lawsuit Looms*, CBS NEWS (Oct. 21, 2016, 7:01 PM), http://www.cbc.ca/news/canada/british-columbia/western-hockey-league-exempt-from-paying-players-minimum-wage-as-chl-lawsuit-looms-1.3816287.

[30] *See, e.g.,* Rick Westhead, *Nova Scotia Becomes Third Province to Change Labour Code to Accommodate CHL Teams*, TSN (July 11, 2016), https://www.tsn.ca/nova-scotia-becomes-third-province-to-change-labour-code-to-accommodate-chl-teams-1.525136. The Ontario exemption was granted about one week after the OHL sent an "open letter" addressed to the provincial Premier and the Minister of Culture and Sport. Letter from David Branch, Comm'r, Bd. of Governors, Ont. Hockey League, to Premier Ford and Minister Tibollo (Nov. 6, 2018), available at http://ontariohockeyleague.com/article/open-letter-to-premier-ford-and-minister-tibollo.

[31] In British Columbia, an unpaid wage complaint must be filed within six months following the end of the employment relationship; similar limitation periods are found in other provinces' employment standards statutes. Employment Standards Act, R.S.B.C. Reg. Pt. 10, § 74(3) (2018).

[32] *See* Berg v. Canadian Hockey League, *supra* note 13.

[33] Northwestern Univ., *supra* note 7.

the players.[34] In both the WHL and OHL actions, the defendants assert that the training given to the players is "similar to that which would have been provided to him in an educational environment."[35]

The Northwestern University football players case originated as a petition for a union representation vote filed by the College Athletes Players Association ("CAPA"),[36] a union seeking to represent scholarship football players at Northwestern University. Northwestern University opposed the petition arguing: i) relying on *Brown University*,[37] the players were not "employees" as defined in subsection 2(3) of the NLRA;[38] ii) alternatively, the players were "temporary employees" not

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[34] Statement of Defence at 32, Berg v. Canadian Hockey League et al., CV-14-514423 (Can. Ont. May 19, 2016).

[35] *Id.* at 76.

[36] CAPA is financially supported by the United Steelworkers union and its goals, among other things, include "increasing athletic scholarships and allowing players to receive compensation for commercial sponsorships." *What We're Doing*, COLL. ATHLETES PLAYERS ASS'N (last visited March 16, 2019), https://www.collegeathletespa.org/what.

[37] *See generally* Brown Univ. & Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., 342 N.L.R.B. 483 (2004). In Columbia University, the NLRB overruled Brown University. Columbia Univ. & Grad. Workers of Columbia, 364 N.L.R.B. No. 90, 1 (2016). Columbia University announced that it intended to appeal this decision to the Federal Court of Appeals, but in November 2018, it reversed course and opened negotiations with its graduate student union. *See* Daniel Moattar, *How Graduate Unions are Winning—and Scaring the Hell Out of Bosses—in the Trump Era*, IN THESE TIMES (Nov. 29, 2018, 4:05 PM), http://inthesetimes.com /working/entry/21602/graduate_student_unions_trump_nlrb_columbia_brown.

[38] N.L.R.A § 2(3), 29 U.S.C. §§ 151–69. Subsection 2(3) states:

> When used in this Act [subchapter] . . . The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

eligible for collective bargaining;[39] iii) the proposed bargaining unit was not an "appropriate unit"[40] because it excluded non-scholarship players (so-called "walk-ons"); and iv) CAPA was not a "labor organization" under the NLRA.[41]

The NLRB's Regional Director for Region 13 (Chicago) ruled against Northwestern University on all four issues. First, citing the substantial measure of control exercised by the coaching staff over the players and their significant time commitment both during and outside the football season, the Regional Director held that the scholarship players (but not the non-scholarship "walk-on" players) were "employees" for purposes of the NLRA. The Regional Director distinguished *Brown University*,[42] where students receiving graduate assistantships were held to be "primarily students" and not employees because their relationship with the university was principally an academic one since the students' work was supervised by academic faculty. By contrast, the football players were not "primarily students" because their athletic scholarships essentially represented compensation for athletic performance rather than a form of student financial aid designed to assist them with the costs of tuition, books, food and shelter, and other expenses.

Distinguishing the NLRB's decision in *San Francisco Art Institute*,[43] the Regional Director concluded that the scholarship players were employed for a finite duration in accordance with the terms of their scholarship offers, provided services year-round and did not have merely a "tenuous secondary interest" in their employment as scholarship football players.

Further, the Regional Director rejected the university's position that the walk-ons shared a strong "community of interest" with the scholarship players and, in any event, the latter group could not be characterized as "employees" under the NLRA and thus "a fractured unit cannot exist."

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[39] *See, e.g.*, Bos. Med. Ctr. Corp. & House Officers' Ass'n/Comm. of Interns & Residents, 330 N.L.R.B. 152, 23 (1999). The NLRB's most recent decision regarding temporary employees is Miller & Anderson, Inc. 364 N.L.R.B. No. 39 (2016).
[40] *See* NLRA, § 9(b) (2012).
[41] *Ibid.*, § 2(5).
[42] *Supra* note 37.
[43] 226 N.L.R.B. 1251 (1976).

Finally, the Regional Director held that CAPA was a "labor organization" given that the evidence showed it was established to bargain on the players' behalf regarding health and safety, financial support and other terms and conditions of employment. The Regional Director noted that "a substantial portion of the Employer's scholarship players have also signed authorization cards seeking to have [CAPA] represent them for the purposes of collective bargaining."[44]

The Regional Director ordered that a representation election be conducted. The vote was held on April 25, 2014 but the ballots were impounded and have never been released, although several close observers have publicly stated that the vote probably went against the union.[45]

The NLRB granted the university's request for a review of the Regional Director's decision and on August 17, 2015, issued a decision quashing his order.[46] Interestingly, the NLRB did not address the four issues decided by the Regional Director; rather, it concluded "that asserting jurisdiction in this case would not serve to promote stability in labor relations." The NLRB did *not* decide whether the players were "employees" but noted that even if they were, Northwestern University was a member of an NCAA conference where all other schools were state-funded universities to which the NLRA could not apply. By reason of this jurisdictional asymmetry, certification of the Northwestern

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[44] *See* N.L.R.A., § 9(c)(A) (2012) – a "labor organization acting in their behalf alleging that a *substantial number of employees*" (my *italics*) may wish to be represented, may petition the NLRB for a secret ballot representation election. Canadian collective bargaining statutes fix a numerical threshold before a labor board can order a representation election – for example, the Alberta Labour Relations Code, R.S.A. 2000, c. L-1, § 33 requires the union to demonstrate that 40% of the proposed bargaining unit employees have authorized the union to apply for certification; the same threshold applies under the Ontario Labour Relations Act*, 1995*, S.O. 1995, c. 1, Sch. A, § 8(2). In British Columbia, there is a 45% threshold: Labour Relations Code, R.S.B.C. 1996, c. 244, § 18(1).

[45] *See* Rohan Nadkarni, *Kain Colter's Union Battle Cost Him More Than He Ever Expected*, DEADSPIN (Aug. 18, 2015), https://deadspin.com/kain-colters-union-battle-cost-him-more-than-he-ever-ex-1724831203 (several reports claim that the players overwhelmingly voted against unionization, a position also held by the CAPA local president, team quarterback Kain Colter).

[46] Northwestern Univ., *supra* note 7.

University players would undermine uniformity and stability of labor relations. The NLRB specifically noted that its decision should not be taken as a harbinger for any future case, particularly if the application concerned an appropriate employer group consisting of private colleges and universities.

On January 31, 2017, the NLRB's Office of the General Counsel issued a memorandum[47] stating that "scholarship football players in Division I FBS [Football Bowl Subdivision] private sector colleges and universities are employees under the NLRA, with the rights and protections of that Act…and that they therefore have the right to be protected from retaliation when they engage in concerted activities for mutual aid and protection" (for example, if they were to "advocate for greater protections against concussive head trauma and unsafe practice methods, reform NCAA rules so that football players can share in the profit derived from their talents, or self-organize"). However, in a later memorandum issued on December 1, 2017 by the NLRB's new General Counsel,[48] the January 31st memorandum was rescinded. The General Counsel's later memorandum did not comment on the question of whether university scholarship football players were employees under the NLRA, but the effect of the memorandum is that such individuals will not be permitted to organize nor will they be protected by section 7 of the NLRA[49] regarding other concerted activities.

[47]Memorandum GC 17-01 from Richard F. Griffin, Jr., Gen. Counsel, N.L.R.B., to all Regional Directors, Officers-in-Charge, and Resident Officers (Jan. 31, 2017), https://www.nlrb.gov/reports-guidance/general-counsel-memos.

[48] Memorandum GC 18-02 from Peter B. Robb, Gen. Counsel, N.L.R.B., to to all Regional Directors, Officers-in-Charge, and Resident Officers (Dec. 1, 2017), https://www.nlrb.gov/reports-guidance/general-counsel-memos.

[49]*See* N.L.R.A., § 7 (2012) ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)").

V. UNIVERSITY ATHLETICS AND THE FLSA

Northwestern University was decided under the NLRA, however, there have been a few other labor decisions concerning university athletes under the FLSA.[50] For example, *Berger v. NCAA*[51] was an action filed by former University of Pennsylvania ("Penn") women's track and field student athletes against Penn, the NCAA and 123 other NCAA Division I universities and colleges. The claimants asserted they were "employees" under the FLSA and thus entitled to be paid the prescribed minimum wage for all hours worked. The U.S. District court dismissed the claim against all defendants other than Penn on jurisdictional grounds, and dismissed the claim against Penn on the ground that the athletes were not "employees" under the FLSA. The Seventh Circuit affirmed the District Court's decision, holding that student athletes, *as a matter of law*, were not "employees":

> Student participation in collegiate athletics is entirely voluntary. Moreover, the long tradition of amateurism in college sports, by definition, shows that student athletes – like all amateur athletes – participate in their sports for reasons wholly unrelated to immediate compensation. Although we do not doubt that student athletes spend a tremendous amount of time playing for their respective schools, they do so – and have done so for over a hundred years under the NCAA – without any real expectation of earning an income. Simply put, student-athletic "play" is not "work," at least as the term is used in the FLSA. [52]

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[50] *See* Charlotte S. Alexander & Nathaniel Grow, *Gaming the System: The Exemption of Professional Sports Teams from the Fair Labor Standards Act*, 49 U.C. DAVIS L. REV. 123 (2015) (reviewing the FLSA caselaw regarding professional athletes).

[51] 162 F. Supp. 3d 845 (S.D. Ind. 2016), affd. 843 F.3d 285 (7th Cir. 2016). A request for an *en banc* rehearing of the case was refused on Jan. 4, 2017.

[52] 843 F.3d 285, 293 (7th Cir. 2016). It should be noted that the claimants were not *scholarship* athletes like the Northwestern University football players, and, in addition, they participated in a "non-revenue" sport. Justice Hamilton, in a concurring opinion, cautioned: "I am less confident, however, that our reasoning should extend to students who receive athletic scholarships to participate in so-called revenue sports like Division I men's basketball and FBS football. In those sports, economic reality and the tradition of amateurism may not point in the same direction. Those sports involve billions of dollars of revenue for colleges and universities. Athletic

In *Dawson v. NCAA*,[53] the U.S. District Court (Northern District of California) applied *Berger* in dismissing an "FLSA minimum wage" class action claim filed by a former University of Southern California scholarship football player. The court held that Dawson was not an "employee" and also rejected his alternative claim that he was an "employee" under the California Labor Code.[54] The court was not persuaded that *Berger* was distinguishable because USC's football program generated substantial revenues for the university.

Although not an FLSA case, *O'Bannon v. NCAA*[55] raises important questions regarding the relationship between scholarship athletes and their universities. Edward Charles O'Bannon, Jr., a former UCLA basketball star (who later played two seasons in the NBA), filed an antitrust claim[56] against the NCAA challenging its rule prohibiting players from individually profiting from the use of their name, image and likeness ("NIL"). O'Bannon, whose likeness was used in an electronic video game without compensation to him, argued that this rule constituted an illegal restraint of trade. The U.S. District Court (i) permanently enjoined the NCAA from enforcing this rule; (ii) ordered that Division I schools be entitled to offer athletic scholarships representing the full cost of the student's education; and (iii) held that Division I schools could pay their scholarship football and basketball

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scholarships are limited to the cost of attending school. With economic reality as our guide, as I believe it should be, there may be room for further debate…." These comments will perhaps be further explored in a class action claim filed by Lawrence "Poppy" Livers, a former scholarship football player at Villanova University, in U.S. District Court. Mr. Livers is seeking minimum wage recovery under the FLSA. On May 17, 2018, the U.S. District Court for the Eastern District of Pennsylvania dismissed Mr. Livers' claim, but with leave to amend as against Villanova University and the NCAA (Civil Action No. 17-4271). An amended claim was subsequently filed against the latter two bodies and on July 25, 2018, Justice Baylson refused the defendants' application to dismiss the amended claim. Mem. RE: Mot. To Dismiss Am. Compl. at 12, Livers v. NCAA, Civil Action No. 17-4271 (D. E. Dist. Pa. filed July 25, 2018), https://images.law.com/contrib/content/uploads/documents/402/23922/Livers-v-NCAA-Ruling-on-Amended-Complaint.pdf.

[53] 250 F. Supp. 3d 401.

[54] *Id*. at 409.

[55] O'Bannon v. Nat'l Collegiate Athletic Ass'n , 7 F. Supp. 3d. 955 (N.D. Cal. 2014, *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016).

[56] O'Bannon, *id.* at 963 (N.D. Cal.).

players up to $5,000 per annum in deferred compensation for use of the NILs, payable after their university playing careers ended. On appeal, the Ninth Circuit upheld the lower court's decision save for the "NIL deferred compensation" ruling. The majority observed: "But in finding that paying students cash compensation would promote amateurism as effectively as not paying them, the district court ignored that not paying student-athletes is *precisely what makes them amateurs*" (italics in original).[57] The majority also noted: "The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap."[58]

VI. NCAA STUDENT ATHLETES AND MAJOR JUNIOR HOCKEY PLAYS – SIMILAR CLAIMS; DIFFERENT OUTCOMES?

Apart from geography and the sport in question, there are two other fundamental distinctions between the claims filed by the Northwestern University football players and Canadian major junior hockey players. First, the former sought recognition under labor law (*i.e.*, the football players sought *collective* protection), while the latter seek recognition under employment standards legislation (*i.e.*, the hockey players are seeking *individual* protection). Second, while many CHL players *are*

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[57] O'Bannon, *id.* at 1076 (9th Cir.).

[58] Id. at 1078. In a partial dissent, Chief Judge Thomas would have upheld the trial judge's decision in all respects including permitting deferred NIL payments of up to $5,000 annually largely because, in her view, there was a sufficient evidentiary record before the trial court on that matter and thus the appeal court should not have disturbed the trial judge's order. The O'Bannon class action claim was settled in February 2017 for approximately $209 million. See Scott Phillips, NCAA asks for court delay in case for student-athlete compensation, NBC SPORTS (Apr. 14, 2018), https://collegebasketball.nbcsports.com/2018/04/14/ncaa-asks-for-court-delay-in-case-for-student-athlete-compensation/. In a separate but related class action, NCAA student athletes successfully challenged the NCAA's revised limits on total compensation that may be paid to student athletes (see In re: National Collegiate Athletic Association Athletic Grant-in-aid cap Antitrust Litigation Court Docket Sheet, https://www.docketbird.com/court-cases/In-re-National-Collegiate-Athletic-Association-Athletic-Grant-in-aid-cap-Antitrust-Litigation/cand-4:2014-md-02541 (last visited Mar. 27, 2019); see also In re NCAA Athletic Grant-in-Aid Cap Antitrust Litigation: The Future for NCAA Athletes, NYU J. INTELL. PROP. & ENT. L. BLOG (Jan. 2, 2019), https://blog.jipel.law.nyu.edu/2019/01/in-re-ncaa-athletic-grant-in-aid-cap-antitrust-litigation-the-future-for-ncaa-athletes/.

students, the various defendants in the CHL Litigation are not educational institutions but, rather, for-profit businesses.[59] Although the principles governing whether an employment relationship exists are broadly similar if the claim arises under common law, labor law or employment standards legislation, advancing a claim under labor law raises the additional hurdle of having to demonstrate majority support in the bargaining unit. Thus, in the latter case, even if there is an employment relationship, there may be no remedy due to an inability to win a representation vote (a problem the Northwestern University football players' organizing drive apparently faced).[60]

Prior to the CHL Litigation, several attempts were made by an organization known as the Canadian Hockey League Players' Association ("CHLPA")[61] to organize CHL players; however, these efforts were singularly unsuccessful.[62] Given that the prospects for a

[59] In McCrimmon Holdings Ltd. v. M.N.R., [2000] T.C.J No. 823, discussed in greater detail, *infra*, the Tax Court of Canada rejected the WHL's position that it was offering "private education scholarships" to the players; the court held that there was an employment relationship between the team and its players.

[60] Recall that following Northwestern University, *supra* note 6, a vote was undertaken but the results were permanently sealed; the consensus view is that CAPA likely did not succeed.

[61] This organization no longer exists, at least in its original form. The former CHLPA is now subsumed within an organization known as the "World Association of Ice Hockey Players Unions" that includes several European hockey players' associations as well as a "North American" division.

[62] The CHLPA attempted to organize the WHL's Alberta clubs but it appears that it never filed a formal application for certification (*see* In re Canadian Hockey League Players' Association, Local 99, 2012 CanLII 64182 (Alta. Lab. Rel. Bd.)). In 2012, the CHLPA filed a certification application with the Nova Scotia Labour Board regarding the QMJHL's Cape Breton Screaming Eagles franchise but this application was withdrawn only a few days after it was filed. No further application was ever made to the board (see Canadian Hockey League Players' Association v. Cape Breton Major Junior Hockey Club Limited, 2012 NSLB 197 (N.S. Lab. Bd.)). More recently, in 2017, the CHLPA filed an application with the Ontario Labour Relations Board alleging that the OHL and various other parties had committed several unfair labor practices. The Board noted that CHLPA "is not a trade union that has been recognized by the Board" and the application was dismissed based on unreasonable delay in filing, and because the complaint did not establish, even on a *prima facie* basis, that the respondents committed any unfair labor practices (*see* Canadian Hockey League Players' Association v. Ontario Hockey League, 2017 CanLII 62584 (Ont. Lab. Rel. Bd.)). Neither the CHLPA, nor its successor the North American division of the World

successful union organizing drive appear to be highly uncertain at this juncture, the CHL Litigation represents the only practical avenue available to the players in their quest for greater compensation from the CHL. Of course, these individual claims critically turn on whether the players are "employees" for purposes of employment standards legislation.

A. Are CHL Players "Employees"?

Although the CHL and its member leagues and franchises are not educational institutions — a critical distinction between the CHL Litigation and the U.S. cases dealing with NCAA student athletes — the defendants in the CHL Litigation nonetheless maintain that the players are amateur student athletes. The defendants have specifically pleaded that the players receive "training [that is] similar to that which would have been provided to [them] in an educational environment."[63] The latter assertion raises the key question in CHL Litigation – are CHL players primarily students who happen to play hockey, or are they primarily employees who may also happen to be students?[64]

There is some judicial support for the players' position that they are, as a matter of law, employees while under contract with their major junior clubs. The seminal decision in support of this argument is *Toronto*

Association of Ice Hockey Players Unions, has ever filed a further application of any kind with a labor relations board in any Canadian jurisdiction. In 2017 the QMJHL and its commissioner obtained an injunction and a $15,000 monetary judgment against the CHLPA's "self-styled founder" (so described in the court's reasons for decision) for defamation (*see* Ligue de hockey junior majeur du Québec inc. c. Gumbley, 2017 QCCS 3446). This latter individual was actively involved in the Washington state investigation into alleged child labor law violations involving the WHL's four Washington franchises (discussed in greater detail, *infra*). This investigation was terminated shortly after the state legislature granted the WHL a statutory exemption from its labor standards laws in July 2015.

[63] Statement of Defence of the Ontario Hockey League at 13, available at: http://chl.uploads.s3.amazonaws.com/app/uploads/top-prospects/2016/05/26165139/OHL-Statement-of-Defence.pdf.

[64] In this regard, it must be noted that while all CHL high-school aged players are enrolled in a local secondary school, players 18 years of age and older are frequently not enrolled in any post-secondary program or are only enrolled on a part-time basis.

Marlboro Major Junior A Hockey Club v. Tonelli,[65] a dispute that arose in the mid-1970s when the World Hockey Association ("WHA"), a then newly-formed (and short-lived) professional league that competed directly with the NHL, allowed its teams to sign players who were under contract to major junior clubs.[66] John Tonelli, while still a minor, signed an SPA to play for the OHL's Toronto Marlboros. Upon reaching adulthood, he repudiated that contract and immediately signed a 3-year contract to play for the Houston franchise in the WHA.[67] The Marlboros sued Tonelli for breach of contract and sought an interlocutory injunction to prohibit Tonelli from playing for Houston.[68] The Marlboros' injunction application failed, and the club later lost at trial and again in the Ontario Court of Appeal.[69] While *Tonelli* principally addressed whether the Toronto Marlboros contract was invalid at common law because it was an infant's contract that was not in his best interests, the main concern for present purposes is the court's (and the parties') characterization of the relationship between Tonelli and the Marlboros as a "contract of service" (that is, an employment contract).[70]

Although *Tonelli* dates back to the 1970s, the fundamental relationship between major junior hockey players and their respective teams has not materially changed in the intervening years. Although the CHL's SPAs once referred to "salary" and "remuneration," more recently the SPAs have been amended to remove any language that might suggest that there is an employment relationship between the parties. The WHL SPA, for example, states "[t]he parties agree that this Agreement is not a contract of employment between the Club and the Player."[71] The *form* of the agreement, however, is not determinative of whether the parties have an employment relationship because, in law, courts and employment

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[65] Toronto Marlboro Major Junior A Hockey Club et al. v. Tonelli et al., (1975), 11 O.R. 2d 664 (Ont. S.C.) (application for interim injunction refused); *action dismissed*, (1977) 18 O.R. 2d 21 (Ont. S.C.), *appeal dismissed*, (1979) 23 O.R. 2d 193 (Ont. C.A.).

[66] For an entertaining history of the WHA, *see* ED WILLES, THE REBEL LEAGUE – THE SHORT AND UNRULY LIFE OF THE WORLD HOCKEY ASSOCIATION (2004).

[67] Toronto Marlboro Major Junior A Hockey Club et al., *supra* note 65.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] Western Hockey League Standard Player Agreement § 1.1(a).

tribunals must examine the *substance* of the parties' actual relationship. As the Supreme Court of Canada observed in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*:

> …there is no universal test to determine whether a person is an employee or an independent contractor…The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
>
> It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.[72]

In *McCrimmon Holdings Ltd.*, the Tax Court of Canada ruled that WHL players were employees for purposes of federal employment insurance and pension legislation.[73] The court observed:

> . . . the business of the Wheat Kings [a WHL franchise] is simply the business of hockey. It is a commercial organization – albeit beloved by the citizens of Brandon – carrying on business for profit. *The players are employees* who receive remuneration – defined as cash – pursuant to the appropriate regulations governing insurable earnings."[74]

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[72] [2001] 2 S.C.R. 983, 1005.
[73] McCrimmon, *supra* note 59.
[74] *Id.*, at para. 19 (emphasis added).

CHL players play a 68-game regular season plus additional pre-season and (for some teams) post-season playoff games. The season commences with training camps in August and ends with the Memorial Cup in May of the following year. During the season, the players' time commitment is at least as extensive as NCAA Division I football players, maybe even more so given CHL players travel exclusively by chartered bus.[75] CHL teams direct their players to undertake extensive off-season strength and conditioning programs, and often exercise an equivalent or greater measure of control over the players compared to NCAA Division I football teams.[76]

In the Northwestern University football players case,[77] the NLRB did not rule that the players were not employees but rather, based its decision on policy grounds. While CHL clubs do provide educational benefits to the players, they are certainly not educational institutions.[78] At least half, if not more, of the CHL players are of high school age and, of course, both they and (critically) their parents, depend on the clubs to ensure that high school aged players continue their education while playing major junior hockey; the CHL's business model hinges on ensuring that a player's education will not be compromised.[79] The CHL's post-secondary

[75] The evidence gathered in the Washington State child labor investigation (*see infra* note 85) was that the players' time commitments (including practices, games, team and individual player meetings, off-ice training and travel) likely averaged 50 hours per week. The CHL's financial expert, Dr. Norm O'Reilly, made the following observation about the typical player's in-season time commitment: "An average work commitment of 40 hours/ week (range of 30 to 50 hours) is assumed, without any provision for overtime (considered a conservative estimate since CHL players, with travel time, playoffs and other responsibilities, would likely incur overtime)." *See infra,* note 106.

[76] *See generally* McCrimmon, *supra* note 59, at para. 3 (explaining training obligations of WHL players).

[77] *See supra*, note 7.

[78] There are a number of hockey academies across Canada, operated by both public school districts and independent schools (*see About the CSSHL,* CAN. SPORT SCH. HOCKEY LEAGUE, http://www.csshl.ca). Students enrolled in these academies clearly are not "employees" under either common law or employment standards legislation.

[79] The vast majority of CHL players relocate from their home communities during the playing season; the players are "billeted", at the team's expense, with local families who serve as the players' surrogate parents during the season; indeed, in many cases, close bonds are formed since many players return to their "billet families" each ensuing season.

scholarship program allows the CHL to more effectively compete with NCAA schools for players who view hockey as a route to a university education, but it does not make CHL franchises functionally equivalent to NCAA Division I schools. As noted in *McCrimmon*:

> While there is an educational component attached to the contract between the Wheat Kings and the players – and that is commendable – the players are paid to play hockey for the team in the WHL. They are entitled to one year's books and tuition at a post-secondary educational institution for each year they have played for a WHL team. It is the completion of the playing time that gives rise to the educational entitlement. The payment for playing hockey is modest but all their expenses are covered, including room and board. However, the requirement to play hockey is not inextricably bound to a condition of scholarship as may be the case with a university since attendance at a post-secondary educational institution was not mandatory for remaining on the roster.[80]

Given the nature of the CHL's operations and the high degree of control exercised by the CHL clubs over their players — all equipment is owned by clubs, the teams play in arenas directly or indirectly controlled by the clubs, the clubs maintain disciplinary authority over the players, the players have little, if any, opportunity to profit from their service to the clubs, and the clubs are commercial organizations carrying on, as was noted in *McCrimmon*, "the business of hockey" — it appears that the players meet all of the relevant legal criteria to be characterized as employees under the common law.[81]

The CHL players do not claim wages under a contract of employment but rather pursuant to employment standards legislation. Thus, the players must meet the statutory definition of "employee" found in the various

[80] McCrimmon, *supra* note 59, at para. 19.

[81] *See also* Andrew C. Harmes, *Forecheck, Backcheck…Paycheck? Employment Status of the Quasi-Professional Athlete: A Case Study of the CHL and the Major Junior Hockey Player*, 7 HARV. J. SPORTS & ENT. L. 235, 246–48 (2016); Andrew Steadman, *Getting An Icy Reception: Do Canadian Hockey League Players Deserve To Be Paid?*, WILLAMETTE SPORTS L. J. 39, 40–49 (2016).

provinces' employment standards laws. These definitions are at least as broad, if not broader, than the common law test for employment.[82]

For example, the British Columbia *Employment Standards Act* defines "employee" and other related terms as follows:

> "employee" includes
>
> (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
>
> (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee…
>
> "employer" includes a person
>
> (a) who has or had control or direction of an employee…
>
> "wages" includes
>
> (a) salaries, commissions or money, paid or payable by an employer to an employee for work…
>
> but does not include…
>
> (h) allowances or expenses…
>
> "work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.[83]

In light of the above inter-related definitions, and the substantial control exercised by team personnel over the players, the players might well be "employees", not only under the common law, but under the employment standards laws of British Columbia and other provinces.[84] If the players were so clearly *not* employees, why did the CHL and its member clubs embark on such an extensive lobbying campaign to have the players

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[82] *See*, *e.g.*, Zip Cartage, BC EST # D109/14*, reconsideration refused*; BC EST # RD005/15 (regarding the British Columbia statute).

[83] R.S.B.C. 1996, c. 113.

[84] Substantially similar statutory definitions are contained in other Canadian provinces' employment standards statutes.

excluded from provincial (and state) employment standards legislation?[85] The CHL *et al.*'s resolute lobbying activities suggest that the member leagues and teams considered that it was at least arguable the players were employees.

A. Major Junior versus "Professional" Hockey Players

Other than the age of the players — and, of course, the lack of meaningful compensation — there is little to differentiate the life of a professional hockey player (and particularly a *minor* league player in either the American Hockey League or the ECHL[86]) from a CHL player. In terms of league schedule, travel, practices, individual and team meetings, off-ice training and control over the player's life (during and even outside the playing season),[87] the CHL closely resembles professional hockey. CHL players, just like their professional colleagues, can be and frequently are traded during or outside the playing season.[88] CHL games closely mimic NHL games, from the arenas in which they are played (essentially scaled-

[85] Prior to the Washington State Legislature granting the WHL a labor standards exemption (effective July 24, 2015), the Washington State Department of Labor and Industry was conducting an investigation regarding whether major junior hockey players were "employees" under the state's employment standards laws and whether any child labor laws had been violated. The investigation, very nearly completed, was formally terminated on August 12, 2015 following the legislative exemption being granted. During the course of the investigation, the department obtained a legal opinion from the state's attorney general that "there was a solid basis for determining that the players are employees," and on March 5, 2015, the department's chief investigator issued the following recommendation: "…the minor hockey players of the WHL should be treated as employees for purposes of the Child Labor Laws in Washington state." *L&I Child Labor Investigation WHL* (Wash. State Dep't of Labor & Indus. Research, Working Paper, Section A), https://www.documentcloud.org /documents/4347228-L-amp-I-CHILD-LABOR-INVESTIGATION-WHL-1.html.

[86] The American Hockey League is the professional hockey equivalent of Triple A baseball and the ECHL (formerly known as the "East Coast Hockey League") is comparable to Double A baseball.

[87] The CHL teams' extensive control over the players is discussed in greater detail in a June 15, 2016 report filed in the CHL Litigation prepared by Chester Hanvey, Ph.D. *See generally* Chester Hanvey, *Canadian Hockey League Player Study*, BERKELEY RESEARCH GROUP (2016), https://www.chlclassaction.com/wp-content/uploads /2016/06/Tab-7-with-exhibits.pdf.

[88] *See, e.g., WHL Transactions*, WHL (2009), http://whl.ca/whl-transactions#2017---18. During the 2017-18 WHL season, there were 100 separate player movement transactions involving 163 players.

down NHL arenas, or in some cases, actual NHL arenas) and pre-game festivities to the post-game "three stars" selection.

In any given CHL game, several players on the ice will have already signed NHL contracts (and received signing bonuses) and will be paid pursuant to the provisions of the NHL-NHLPA collective bargaining agreement while playing in the CHL.[89] Some of these players may have already played several NHL games (for which they were paid their NHL-level salaries) before being reassigned to their major junior club.[90] On what principled basis is such a player an "employee" while playing in the NHL but merely an "amateur" athlete while playing in the CHL? Indeed, the NCAA considers the CHL to be a professional league and thus players who play even a single game in the CHL or sign a CHL SPA become ineligible to play NCAA college hockey.[91]

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[89] In addition, CHL SPAs provide that a player otherwise eligible to play in the CHL is not released to play professional hockey until the professional club pays the CHL team the sum of $500,000. In the Washington State investigation (*supra* note 85), the state Attorney General reported, likely referring to this contractual obligation: "The NHL has an agreement with the CHL where the NHL 'grants' the CHL approximately $10 million per season, which may indicate a subsidy for player development…." Apart from each team's ticket sales, corporate sponsorships and related concession and jersey memorabilia sales, the CHL has a lucrative television contract with the Canadian broadcaster TSN. *See CHL and Sportsnet Announce 12-Year Multiplatform Rights Extension*, CHL (Feb. 18 2014), http://chl.ca/chl-and-sportsnet-announce-12-year-multiplatform-rights-extension.

[90] Under the terms of the current NHL/NHLPA Collective Bargaining Agreement ("CBA"), a CHL-eligible player who has signed a professional contract may play up to 9 NHL games before being returned to his major junior club without any of those games counting toward an NHL season; after 10 games, the player may still be returned to his junior club but the 10-plus games would count as the first year of the player's entry level NHL contract. Players returned by their NHL team to their major junior team cannot be recalled until their junior team's season (including any playoff games) is completed. For the 2018-19 season, the minimum NHL salary is $650,000 USD. *See* NHL CBA, Article 11.12. Major junior eligible players are paid their NHL salary on a pro-rated basis for each day that they are on an NHL roster.

[91] *See NCAA College Hockey vs. CHL Major Junior*, C. HOCKEY INC. (n.d.), http://collegehockeyinc.com/ncaa-college-hockey-vs-chl-major-junior.php.

VII. THE ROAD AHEAD

The various CHL class actions are still in their infancy (only the WHL and OHL actions have been certified) and this highly contested litigation will not likely be resolved for several years. If these claims are to have any traction, the legislative exemptions will have to be directly confronted. Otherwise, the potential financial compensation available to the players will be very modest. There are two Supreme Court of Canada decisions concerning the Canadian Charter of Rights and Freedoms,[92] each addressing statutory exemptions in the collective bargaining context, that may be relevant.

Dunmore v. Ontario (Attorney General) [93] concerned the statutory exclusion of farm workers from Ontario's provincial collective bargaining regime. The court held that the provincial government had an affirmative obligation to provide some sort of statutory scheme that would enable farm workers to exercise their Charter-protected associational rights. The Supreme Court of Canada directed the Ontario government to establish a statutory regime — albeit not necessarily a "Wagner Act" model of collective bargaining[94] — that would allow farm workers to organize and give them the "freedom to assemble, to participate in the lawful activities of the association and to make representations, and the right to be free from interference, coercion and discrimination in the exercise of these freedoms."[95]

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[92] The Canadian Charter of Rights and Freedoms, The Constitution Act, 1982, Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, § 1-34 (the "Charter"), is broadly analogous the U.S. Bill of Rights inasmuch as it protects various fundamental rights such as freedom of speech, assembly and religion, freedom of the press and protection against unreasonable search and seizure.

[93] [2001] 3 S.C.R. 1016.

[94] *See* Ontario (Attorney General) v. Fraser, [2011] 2 S.C.R. 3, at para. 169. The Wagner Act model, a reference to the NLRA's statutory scheme and its Senate sponsor Robert F. Wagner, includes a union certification procedure, a duty to bargain, protections for strikes and lockouts, prohibitions of certain unfair labor practices and an administrative tribunal empowered to oversee the statute.

[95] *Supra* note 93, at para. 67. The Ontario government responded with a separate statutory scheme for farm workers – one that fell well short of the Wagner Act model of collective bargaining. Nonetheless, in a subsequent challenge to this legislation, the Supreme Court of Canada held that it was constitutional. *See* Fraser, *id*.

More recently, in *Mounted Police Association of Ontario v. Canada (Attorney General)*,[96] the Supreme Court of Canada, expressly overruling its 1999 decision in *Delisle v. Canada (Deputy Attorney General)*,[97] held that the denial of any form of collective bargaining rights for Royal Canadian Mounted Police ("RCMP") members was unconstitutional. As in *Dunmore*, the court did not direct that the RCMP be brought within the existing federal public sector collective bargaining statute (the Federal Public Sector Labour Relations Act[98]) but rather stated "Parliament remains free to enact any labour relations model it considers appropriate to the RCMP workforce, within the constitutional limits imposed by the guarantee enshrined in s. 2(d) and s. 1 of the Charter."[99]

The CHL Litigation is a claim for relief under provincial employment standards, rather than collective bargaining, legislation. There is no current legal impediment to CHL players forming an association and seeking certification under existing provincial labor laws. However, given the very short careers of CHL players and the difficulties associated with past union organization efforts, it seems unlikely that the players will succeed in the labor relations arena. Thus, the players' claims will inevitably default to those remedies available under employment standards statutes. However, CHL players are exempted from employment standard regimes in all but one of the provinces where the CHL operates.

Both *Dunmore* and *Mounted Police Association of Ontario* were Charter cases where statutory prohibitions regarding access to any form of collective bargaining were successfully challenged as infringing the workers' subsection 2(d) freedom of association rights. It seems highly

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[96] [2015] 1 S.C.R. 3.
[97] [1999] 2 S.C.R. 989.
[98] *See* SC 2003, c. 22, s. 2. The collective bargaining regime for RCMP members is now contained in Part 2.1 of this statute. The National Police Federation is currently seeking to represent a national unit of all RCMP members (*see* National Police Federation and Treasury Board of Canada, 2017 FPSLREB 34). The certification vote was completed on December 20, 2018 but the votes have been sealed pending a ruling regarding whether Quebec officers should be separately certified (*see also* Catharine Tunney, *Mounties wrap up vote today to select a new labour union*, CBC NEWS (Dec. 20, 2018), https://www.cbc.ca/news/politics/rcmp-union-drive-deadline-1.4952411.
[99] Mounted Police Ass'n of Ont., *supra* note 96, at para. 156.

doubtful that the Charter's freedom of association guarantee protects individual employees who are excluded from employment standards legislation. However, if a court were to accept that CHL players are a vulnerable group — a position that is, in the author's view, at least arguable — the various employment standards exclusions for CHL players might be challenged under the subsection 15(1) equality rights provision of the Charter.[100] It is also possible that subsection 6(2) (pursuit of livelihood) or subsection 7 (life, liberty and security of the person) could form the basis of a successful Charter challenge to the statutory exclusions.

A. Pucks, Politics & Payrolls

The current employment standards exemptions are the product of a political rather than judicial process. It is perhaps not a coincidence that in Alberta, which until April 16, 2019 had a center-left government, the legislature refused to exempt major junior hockey players from the Alberta employment standards law. The Ontario exemption was only promulgated when that province shifted from a center-left to a center-right government. Further, it is an open question whether British Columbia's current center-left New Democratic/Green Party coalition government will rescind the existing statutory exemption that was put into effect by the former center-right government.[101] Presumably, CHL player advocates could, and perhaps should, argue their case in the court of public opinion as well as in the superior courts.

Assuming the extant exemptions would withstand any sort of constitutional challenge, if the CHL Litigation were to succeed at least insofar as securing a declaration that the players are, in law, employees for purposes of employment standards statutes, one wonders how the

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[100] See, *e.g.*, Ont. Nurses' Ass'n v. Mount Sinai Hosp., 2005 CanLII 14437 (Ont. C.A.).

[101] While in opposition, then-Member of Legislative Assembly ("MLA") Shane Simpson strenuously protested the exemption. *See* Ken Campbell, *It's time to separate fact from fiction when it comes to how junior hockey players are treated*, THE HOCKEY NEWS (March 6, 2018), http://www.thehockeynews.com/news/article/it-s-time-to-separate-fact-from-fiction-when-it-comes-to-how-junior-hockey-players-are-treated. Both Simpson and the current Minister of Labor, when contacted by the author, refused to confirm or deny that the government intended to rescind the exemption.

WHL, for example, could operate with some franchises subject to employment standards legislation (the five teams in Alberta) and the rest of league exempt from those same standards?[102] Surely, the Alberta statute would constitute the minimum standard for all teams in the league regarding wages, hours of work, vacation pay and like matters.

The players maintain that the league's financial prospects would not be unduly harmed if they were paid in accordance with provincial employment standards laws.[103] The CHL maintains that requiring its teams to comply with employment standards laws (including paying at least minimum wage) would be financially ruinous, at least for some franchises.[104] In the OHL Action, the defendants maintained (clearly with no small measure of hyperbole) that if the action were certified, "they

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[102] As matters now stand, players on all CHL teams (save the five in Alberta) are exempted from employment standards laws. Presumably, however, the CHL would want all three of its leagues to operate on a common plane, and if the Alberta WHL teams were required to pay the minimum wage (and meet other statutory employment standards), undoubtedly the CHL would require all CHL teams to pay the minimum wage notwithstanding the statutory exemptions.

[103] Currently, the minimum wage varies in those provinces where the CHL operates from about $11 to $15 per hour. *Minimum Wage by Province*, RETAIL COUNCIL OF CANADA (n.d.), available at https://www.retailcouncil.org/resources/quick-facts/minimum-wage-by-province/.

[104] In an affidavit filed in the OHL Litigation, the principal of one franchise stated that if her team "were required to pay its players' [*sic*] minimum wage, the consequences of this additional expense item would be catastrophic" and that "there is also the risk that the team would have to be shut down if these additional payments were required." (*See* Affidavit of Denise Burke, Berg v. Canadian Hockey League et al., No. CV-14-514423 (Ont. S. Ct. sworn Nov. 14, 2015), http://assets.chl.ca.s3.amazonaws.com/app/uploads/chl-defence/2016/07/20162922/Affidavit-of-Denise-Burke.pdf.) In an interim decision in the WHL Litigation (Walter v. Western Hockey League, 2016 ABQB 606), the court observed: "Nowhere in that Statement of Defence does that Defendant maintain that it cannot afford to pay the players for their services beyond a stipend, or that the financial effect of such a finding would be deleterious to the team or league. Yet a great deal of focus in the Defendants' affidavits…is in respect of such an alleged deleterious financial effect. I can only conclude, therefore that this is an important aspect of the Defendants' response to the Certification application upcoming….The Defendants obviously consider that this evidence of financial difficulties is key to their opposition to the certification of this action as a class action. Having placed the clubs' and leagues' financial viability squarely in issue, the CHL, the WHL and the clubs must produce their financial documents as potentially proving their position…." Walter, at paras. 5–6; 16.

would either have to cease operations (fold some teams) or have to reduce the benefits they provide to their current or future players because the certification of the action would crystallize a $30 million contingent liability" and that current players would lose various benefits including travel expenses for road games, the educational and scholarship benefits, counselling programs, medical insurance and housing/food allowances.[105] The action was certified and none of these dire events has yet transpired.

In a report dated January 17, 2017,[106] one of the CHL's expert witnesses, Professor Norm O'Reilly of Ohio University, concluded that only two unnamed OHL/WHL teams were "very profitable" and that, on average, the teams operated on a "break even" basis. Professor O'Reilly concluded that "the overall financial health of the clubs in the CHL is not good,"[107] and if the OHL/WHL teams were required to comply with the various provincial employment standards statutes, the average team (leaving aside the two profitable outliers) would lose about $363,207 per year.[108] In the OHL Litigation, the league also filed a report, dated December 22, 2016, prepared by the Toronto office of KPMG Forensic Inc.[109] This anonymized report, based on admittedly incomplete information and unaudited financial statements (as was the case for the O'Reilly report), indicated that about one-half of the OHL teams were operating at a loss. Aside from these reports, the CHL and its member teams have steadfastly refused to publicly release any information regarding their finances. During the course of the Washington state child labor investigation, the four Washington state WHL teams refused to provide any data regarding team gross ticket sales stating that such information was "irrelevant" to the department's child labor investigation. Thus, it is difficult to discern what the true financial picture of the CHL and its member teams might actually be.

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[105] Berg v. Canadian Hockey League, 2017 ONSC 2608, at para 11.
[106] Expert Report of Norm O'Reilly (*prepared* January 17, 2017), available at http://chl.uploads.s3.amazonaws.com/app/uploads/chl/2017/01/19204628/Dr_Norm_O'Reilly_Report_CHL_2017.pdf.
[107] *Id.* at 25.
[108] *Id*. at 27.
[109] Affidavit of James McAuley (sworn Dec. 22, 2016), available at http://chl.uploads.s3.amazonaws.com/app/uploads/chl/2017/01/19204915/KPMG_Report_CHL_2017.pdf.

The financial reports filed on behalf of the players in the CHL Litigation paint a distinctly rosier picture. Professor Kevin Mongeon, a sports economist at Brock University, in a report dated June 14, 2016, estimated that in 2014 OHL/WHL teams' "average game level revenue," based solely on ticket sales, was $4 million (ranging from $2 million to $10 million). [110] Professor Mongeon noted that these estimates were conservative since other revenue streams (ticket sales likely represent only about one-half of total team revenues) were not taken into account and his analysis showed that paying minimum wage would not have any detrimental effect on league or team economic viability. In a subsequent report dated January 26, 2017, prepared after disclosure of the OHL and WHL member clubs' financial information, Professor Mongeon concluded that the O'Reilly and KPMG reports do "not substantiate their claims of wide-spread financial distress." [111] Professor Mongeon cautioned that the CHL's analyses did not account for revenues other than ticket sales.[112] He noted that CHL teams have several additional revenue streams including arena concessions, parking, merchandise, media sponsorship and broadcast rights as well as league-distributed revenues from NHL player development payments, player agent programs and import draft fees (the CHL and its member clubs do not publicly report these revenues and, of course, as private businesses, are not legally required to do so).[113]

There are two other publicly available financial reports, prepared by Smith Forensics Inc., a CPA firm commissioned by the players' legal counsel. These two reports, dated February 1, 2017 and February 28,

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[110] Kevin Mongeon, REPORT ON THE ECONOMICS OF THE CANADIAN HOCKEY LEAGUE AND ITS TEAM MEMBERS (*prepared* June 14, 2016), available at https://www.chlclassaction.com/wp-content/uploads/2016/06/Tab-8.pdf.

[111] The financial information was produced pursuant to a disclosure order issued in the WHL Litigation on October 28, 2016. *See* Walter, 2016 ABQB 608; *see also* KEVIN MONGEON, REPORT ON THE CHL WAGE CLASS ACTION CERTIFICATION: REBUTTAL AND POLICY ANALYSIS (Jan. 26, 2017), available at https://www.chlclassaction.com/wp-content/uploads/2017/02/2017.01.26-Mongeon-Rebuttal-Report.pdf.

[112] *Id*.

[113] According to the Smith Forensics OHL report, (*see infra,* note 114) for the year ending June 30, 2016, the CHL's gross revenues were about $24.5 million, including about $11 million paid by the NHL as "development fees" and another $8.5 million in "sponsorship and rights fees." The CHL, in turn, distributed approximately 48 percent of its total revenues to the three constituent leagues and their member clubs.

2017, address the finances of the WHL and the OHL, respectively.[114] The Smith reports were highly critical of the KPMG analyses, especially regarding methodology, and both reports concluded that there was no financial basis for the leagues' assertions that any of the WHL or OHL teams would be financially unable to comply with the obligations set out in employment standards laws if they were required to do so.

My (and admittedly rudimentary) financial analysis suggests that the CHL's assertion of league-wide financial Armageddon if the teams were required to comply with employment standards legislation is not tenable. A typical CHL team's operating budget is about $2.5 to $3 million (CAD) per season. As reported in the KPMG report for 2016, OHL teams' operating expenses ranged from $1.22 million to $5.46 million with most teams falling in the $3 million neighborhood. The average for all OHL teams was approximately $2.74 million. The WHL's own attendance figures for the 2017-18 regular season indicate that average attendance ranged from 2,050 to 8,154 per game with most teams in the 4,000 range over a 36-home game regular season (the WHL regular season is now 68 games including 34 home games). WHL ticket prices range from about $10 to $30 with most tickets in the $20 range. Thus, *based on ticket sales alone*, WHL franchise revenues ranged from about $1.5 million to $5.8 million. The OHL situation is much the same. The OHL schedule included 34 home games and average attendance ranged from 2,385 to 8,959 (with most teams in the 3,500 range) which, in turn, translates to a revenue range of $1.6 million to $6.1 million.[115] These revenue figures do not include the various other revenue streams that CHL teams have including pre-season and playoff ticket sales (where ticket prices are usually increased), concession and parking revenues, jersey and other

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[114] Lukas Walter et al. v. Western Hockey League et al., Certification of the Matter as a Class Action (*prepared* Feb. 1, 2017), available at https://www.chlclassaction.com /wp-content/uploads/2017/02/2017.02.01-Smith-Forensics-Report-Final.pdf; Samuel Berg et al. v. Can. Hockey League et al., Certification of the Matter as a Class Action (*prepared* Feb. 28, 2017), available at https://www.chlclassaction.com/wp-content /uploads/2017/02/2017.02.28-Smith-Forensics-Report-OHL-Final.pdf.

[115] *See Western Hockey League 2017-18 Attendance Graph*, HOCKEYDB.COM (n.d.), http://www.hockeydb.com/nhl-attendance/att_graph_season.php?lid=WHL1979&sid =2018; *Ontario Hockey League 2017-18 Attendance Graph*, HOCKEYDB.COM (n.d.), http://www.hockeydb.com/nhl-attendance/att_graph_season.php?lid=OHL1989&sid =2018.

team merchandise sales, corporate sponsorships and arena advertisements, television and other broadcast revenue and NHL development fees. These latter revenue streams contribute at least as much as, and likely more than, regular season ticket sales to the teams' overall revenues.

Further, if the CHL teams are generally unprofitable, how is one to explain the prices paid for new and existing franchises? In 2006, the Mississauga OHL franchise sold for about $10.7 million and in 2016 a U.S. OHL franchise sold for $8.4 million.[116] During the period from 2012 to 2015, there were five CHL franchise sales at prices ranging from $3.6 to $10.3 million.[117] Professor Mongeon estimated that WHL franchise values range from about $2 million to nearly $69 million and that OHL franchise values range from about $1 million to $55.5 million, with the modal WHL franchise value being about $6 million and the modal OHL franchise value being about $8 million.[118]

Minimum hourly wages vary by jurisdiction but are currently around $12. Assuming a 40-hour work week with 10 hours of overtime over the course of a 7-month regular season, the likely payroll cost per player would be about $19,200 including 4% vacation pay or less than $450,000 per team. Given the revenue streams involved, it is difficult to accept that an increase in operating costs of less than half a million dollars would significantly undermine the CHL teams' financial viability. Further, for those teams that would be adversely affected, there is no reason why the CHL could not institute a form of revenue sharing to protect its small-market financially weaker franchises (as is the case in the NHL[119]).

It must be reiterated, however, that whether or not the CHL teams can afford to pay their players wages and benefits is not relevant to the *legal* question of whether they are employees for purposes of provincial employment standards statutes. It has never been a defense for an employer to assert that it is relieved from having to pay minimum wage

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[116] Mongeon, *supra* note 110.
[117] *Id.*
[118] *Id.*
[119] *See* NHL/NHLPA Collective Bargaining Agreement, Article 49, available at http://www.nhl.com/nhl/en/v3/ext/CBA2012/NHL_NHLPA_2013_CBA.pdf.

because it cannot afford to do so. On the other hand, employers and, more particularly, employer organizations have had some success in convincing governments that their industry should be exempted from employment standards statutes or from certain provisions contained within these statutes because of costs concerns. For example, the hospitality and agricultural industries in some provinces have successfully lobbied for lower minimum wages for certain classes of employees in those sectors.[120] In some jurisdictions, employees in some sectors are either wholly excluded from the statute or are not entitled to such things as overtime and statutory holiday pay.[121] Undeniably, these exclusions and exemptions reflect lobbying efforts and, in turn, governments must justify any exclusions to the electorate so that there is a social licence to grant the exclusion or exemption in question. Thus, for example, a lower minimum wage for liquor servers has been consistently justified on the ground that these employees typically receive gratuities.

The CHL and its member leagues and clubs lobbied for employment standards exemptions based almost exclusively on the assertion that compliance with such legislation would be financially ruinous.[122] The principal defense to the class action claims is that the players are not employees and thus, assuming that to be legally accurate, the need for a statutory exemption is rendered moot. If the CHL and its members ultimately lose the "employee" argument, it becomes harder to justify the continuance of statutory exemptions unless the CHL can credibly demonstrate that losing the exemptions would cause financial hardship. This is likely the real reason why the defendants continue to stress potential financial hardship in the class action litigation even though, as noted above, financial hardship is entirely irrelevant to the legal issue

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[120] *See*, *e.g.*, British Columbia Employment Standards Regulation, B.C. Reg. 396/95, §§ 18 and 18.1.

[121] For example, in many provinces, licensed professionals such as lawyers and accountants are either wholly excluded from the employment standards statute (*see* British Columbia Employment Standards Regulation, *id.*, § 31) or from overtime and hours of work provisions (*see* Alberta Employment Standards Regulation, Alta. Reg. 14/1997, § 2(2)).

[122] *See*, *e.g.*, Joe Hernandez, *Western Hockey League exempt from paying players minimum wage as CHL lawsuit looms*, CBC (October 21, 2016), https://www.cbc.ca/news/canada/british-columbia/western-hockey-league-exempt-from-paying-players-minimum-wage-as-chl-lawsuit-looms-1.3816287.

regarding the true status of the players (*i.e.*, amateur student athletes or employees).

B. A New Ice Age for the CHL?

If the class actions proceed to trial, and the players are determined to be "employees" under provincial employment standards laws, that decision will likely have only limited financial ramifications for current major junior players. The class certification decisions defining the relevant class exclude most, if not all, current CHL players.[123] Although a judicial declaration that the former players were "employees" would equally apply to current players, the latter group's employment standards claims, save for those players in Alberta, are subject to statutory exclusions. The WHL might voluntarily agree to comply with employment standards laws so that all league teams would stand on an equal financial footing, and the OHL and QMJHL might follow so that all CHL teams faced the same cost structures. It is equally possible that a judicial decision in favour of the players could result in provincial governments rethinking the wisdom of granting statutory exemptions for major junior hockey players. Ontario justified its recent decision to grant an employment standards exemption on the premise that it would "level playing field" with teams in other jurisdictions; presumably, if a province rescinds its exemption, other provinces might feel compelled to follow suit.

The CHL Litigation has the potential to dramatically change the nature of major junior hockey. As it stands, the CHL effectively operates as a monopsony within the labour market for players hoping to pursue a professional career and, using its monopsony power, has severely limited compensation for the players and has eliminated any form of free market

[123] The class in the WHL Action excludes players who commenced playing for a British Columbia team on or after February 15, 2016, Alberta/ Manitoba players who commenced playing on or after April 19, 2017 and Saskatchewan players who commenced playing on or after April 29, 2014. The class in the OHL Action excludes players who commenced playing in the OHL after April 27, 2017. The proposed class in the QMJHL Action excludes all Quebec franchise players were who under 16 years of age as of October 29, 2011, all Prince Edward Island players who were under 18 years of age as of October 29, 2012 and all New Brunswick and Nova Scotia players who were under 19 years of age as of October 29, 2012.

for players' services among CHL teams.[124] If the players are "employees," highly gifted players could bargain for substantial compensation, a major junior hockey players' association might gain greater traction and a players' association could bargain for significant benefits beyond the minimum standards mandated by employment laws. If major junior players become paid professionals, the potential pool of players that move through the U.S. college system might be adversely affected. The puck has been dropped, the game is on, but we are a long way from the final buzzer.

[124] The CHL authorizes its member leagues to conduct player drafts (for 14-year old "bantam" age players) with each league drafting players from specified geographic regions. *See The WHL Bantam Draft: A Crash Course*, WHL (May 1, 2018), http://prospects.whl.ca/article/the-whl-bantam-draft-a-crash-course. The CHL also conducts an "import player" draft each year in which all three league members participate. Once drafted, a player can only play in the CHL for his drafted team, although a player's playing rights may be traded within each league.