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A Solution for the Pay for Play Dilemma of College Athletes: A Novel Compensation Structure Tethered to Amateurism and Education

Roger M. Groves·

Assume that a football team was so collectively incensed by the inaction of the university president that they vowed not to play again for the university until the president resigns or is fired by the university's governing body. Indeed the president resigned and the events became a national story.

What if certain players or the team collectively then wrote a book, or created a TV documentary or recorded a song about their stand against the president? Should they be allowed to put the profits from the use of their own name, image and likeness into a trust fund to be paid out after they can no longer play for the university?[1]

INTRODUCTION

The above scenario is already partly true. The University of Missouri football team so vowed.[2] The president did in fact resign.[3] What is not yet a fact is whether the team or players will attempt to profit from the use of their own names, images and likeness ("NIL") in telling their story.

In the opening scenario, this author claims the answer depends on how those profits would be used. If the profits the players receive can be used for any purpose, the most recent case in America on these issues says "No." If, however, the funds are to be used solely for educational purposes, this author says, "Yes."

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1. These athletes may seek to protect their product through common law and statutory intellectual property law, (e.g. copyrights and trademarks), or even through the creation of separate business entities as owners of that intellectual property. The NCCA rules, however, prohibit scholarship athletes from receiving any remuneration from their own name, image, and likeness. The issue would likely therefore be the same. *See* 2015-2016 NCAA DIV. I MANUAL [hereinafter NCAA BYLAWS] § 12 at 12.5.2.1.

2. On or about November 7, 2015 the Missouri football team announced that they would not continue to practice or play football for the university unless the president of the university was terminated or resigned. *See* Roger M. Groves, *The Missouri Football Team Standoff Is Why Athletics Is More Than A Game*, FORBES' SPORTSMONEY (Nov. 9, 2015), http://onforb.es/1PkNwyx.

3. The president, Tim Wolfe, announced his retirement within hours of the highly publicized boycott. The issue was a major news story across the nation. *See* Roger M. Groves, *Historic Resignation of University of Missouri President Sends A Signal to University Boards*, FORBES' SPORTSMONEY (Nov. 9, 2015), http://onforb.es/1GTUyra.

No case has determined whether a trust fund is legally permissible in the manner proposed in this article. It is one level of solution to the pay for play conundrum that haunts college sports at the highest level and the court system at the federal level.

Another example is based in reality and embellished by what is not yet reality. It involves football players at The Ohio State University ("OSU"). OSU won the National Championship in football for the 2014 season in dramatic, storybook fashion.[4] With 16-returning players for the 2015 season, OSU entered the 2015 season with more hype than any other Division-1 school in America. OSU was the first unanimous preseason number 1 ranked team in history.[5]

With team accolades came high-octane publicity for its players. One such player was Braxton Miller. He had already been voted the Big Ten Player of the Year for two consecutive years in the position with the highest profile in the sport - quarterback.[6] The first game of the 2015 season was the much-anticipated rematch of OSU and Virginia Tech (because VT beat OSU 35-21 the prior year).

In that nationally televised game, Miller evaded an opposing group of defenders with an eye-popping 360-degree spin. That spin move was repeatedly replayed on national networks, and was even the subject of an ESPN/YouTube video entitled "Sports Science: Braxton Miller's Spin Move."[7] In fact, the ESPN voice over stated Miller had "video game-moves."[8] In scientifically describing the angular and linear velocity displayed by Miller in that run, the spin move was stated to have "a peak angular velocity of 676 degrees per second." The announcer further stated: "That's nearly fifty percent faster. . . than 2015 Top 10 draft pick Kevin White."[9] One can reasonably label that acrobatic maneuver as Miller's "signature" move, not for the science per se, but because of the notoriety attributable to his skill and creativity. That signature move is what is legally labeled as Miller's "likeness". As will be discussed in this article, federal courts have agreed at a level, that Miller has legally protectable rights to his own likeness.

Another OSU player of great notoriety entering the 2015 season was Ezekiel Elliott. He was a high school 110-meter high hurdle champion in the state of Missouri.[10] As just a sophomore at Ohio State, he became the primary running back on the 2014 national championship team. Elliott entered the 2015 season as a preseason first-team All-American.[11] During several games during the 2015 season, Elliott used his track skills to hurdle would-be defenders. Several of Elliott's hurdling exploits came in nationally televised games, and

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4. For the schedule, record, and national championship notation see *Team Media Guide, 2015 Ohio State Football,* OHIO STATE UNIVERSITY ATHLETICS at 19, http://grfx.cstv.com/schools/osu/graphics/pdf/m-footbl/2015/2015_guide.pdf (last visited Apr. 21, 2016).

5. *See* Kevin Trahan, *Ohio State is the First Unanimous Preseason No. 1 in the History of the AP Top 25,* SB NATION (Aug. 23, 2015), http://www.sbnation.com/college-football/2015/8/23/9194091/ap-poll-top-25-2015-ncaa-football-rankings.

6. Braxton Miller Bio, OHIO STATE BUCKEYES, http://www.ohiostatebuckeyes.com/sports/m-footbl/mtt/braxton_miller_758495.html (last visited Apr. 21, 2016).

7. The video was part of ESPN regular programming and included an analysis of Miller's angular and linear velocity while running that play. *See* TheMagicMan, *Sports Science: Braxton Miller's Spin Move,* YOUTUBE (Sept. 9, 2015), http://youtu.be/b-h1g0CG8qI.

8. *Id.*

9. *Id.*

10. *See* Stacie Elliott-Mohammad, *Ezekiel Elijah Elliott Wins the 110 Hurdles,* YOUTUBE (May 25, 2013), https://www.youtube.com/watch?v=O9SscEY00w8.

11. Team Media Guide, *supra* note 4, at 5.

produced at least 10 YouTube video clips of him topping bewildered opponents.[12] Like Miller's spin move, the hurdles could be directly identifiable with and attributable to "Zeke" Elliott.[13] And like Miller, Elliott would also have a claim that his hurdling exploits are part of his legally protectable likeness.

Now imagine an entrepreneurial video game maker that develops a sports video game that includes the Miller spin and the Elliott hurdle. The game has the spins and hurdles performed by players with the same complexion, height, weight, body type, and mannerisms of the real Miller and Elliott. Assume as fact that a video game maker even stipulates that the depictions are replicas of Miller and Elliott, with jerseys much like the OSU jerseys they wore in games. Assume as well that players Miller and Elliott are on scholarship to play football at OSU, and signed agreements with OSU to abide by rules established by the National Collegiate Athletic Association ("NCAA") and incorporated by reference into their contractual relationship with OSU. Those rules prohibit a scholarship athlete from receiving compensation from his name, image and likeness ("NIL").[14]

This is comparable to the circumstances that gave rise to a lawsuit by a former scholarship athlete, Ed O'Bannon against the NCAA and its business partner the Collegiate Licensing Company ("CLC"), among other lawsuits by other former scholarship athletes at NCAA institutions.[15] The claim of those players was that the defendant NCAA and video game manufacturers usurped their names, images, and likenesses ("NIL") without the permission of or compensation to the athletes.[16]

What if Miller and Elliott wanted to prevent the NCAA and/or the manufacturer from using their NIL without compensation at an agreed upon price? Would they lose their scholarship if they were paid "any" sum of money from the video games? Would Miller and Elliot be able to require payment of some amount after their eligibility expired or would they be barred from ever receiving a dime of revenue from their NIL?

That is essentially the issue facing the federal courts in America. The most recent decision has come from the Ninth Circuit Court of Appeals.[17] In that case, *O'Bannon v. Nat'l*

12. Nasseh257, *Ezekiel Elliott Highlights "Legend in the Making,"* YOUTUBE (May 16, 2015) https://www.youtube.com/watch?v=xfKd_tWxg0w (hurdling notoriety did not lessen throughout the year; Many OSU games were nationally televised. This author still heard television commentators note the Elliott hurdles during a replay of an impressive Elliott run against Rutgers on Oct. 24th, 2015. OSU won the game 49-7).

13. Other collegiate athletes have also taken to hurdling, so arguably the Elliott hurdle may not be sufficiently distinctive to make a right of publicity claim solely because of the hurdle. This author's facts included other identifiable attributes such as height, weight, jersey, physical appearance, and complexion. Video game makers purposefully made virtual identical depictions of the players in order to simulate the real game setting. See facts of *Hart* and *Keller* cases. The totality of those facts about Elliott are substantially similar to the very facts in *Hart* and *Keller* where the court found that the athlete had rights of publicity that were violated in the associated in video games. The distinction between cases rooted in antitrust law (the *O'Bannon* line of cases) and the publicity rights cases (*Hart* and *Keller*) will be discussed in greater detail in Section II below.

14. *See* NCAA BYLAWS, *supra* note 1.

15. The first published antitrust opinion in this five-year litany was O'Bannon v Nat'l Coll. Athletics Ass'n, No. C 09-3329 CW, 2009 U.S. Dist. LEXIS 122205 (N.D. Cal. Dec. 11, 2009). The Federal District Court decision in 2014 ruled in favor of plaintiffs, holding that the NCAA compensation prohibition violated the Rule of Reason under antitrust law. *See* O'Bannon v. Nat'l Coll. Athletics Ass'n, 7 F. Supp. 3d 955 (N.D. Cal 2014). The other cases of federal court significance are Keller v. Electronics Arts, Inc., 724 F.3d 1268 (Ninth Cir. 2013), and Hart v. Electronic Arts, Inc., 717 F.3d 141 (3d Cir. 2013).

16. *O'Bannon*, No. C 09-3329 CW.

17. O'Bannon v. Nat'l Coll. Athletics Ass'n, 802 F. 3d 1049 (Ninth Cir. 2015).

Collegiate Athletic Assoc., the Court rejected plaintiff's entitlement to a payment of up to $5,000 for others' use of the student athletes' NIL while eligible to play for a school.[18]

The Ninth Circuit left some questions unanswered and provided potential means for scholarship athletes to receive compensation from their own NIL.[19] Those nuances form the subject matter of this article. The intent of this article is to set forth circumstances where former NCAA scholarship athletes could actually prevail and be compensated for the use of their NIL under the rule of law established by the Ninth Circuit. This author's method includes the creation of new NCAA rules that are consistent with the Ninth Circuit's holding and directives.

The proposed scheme however has multi-layered safeguards against player-abuse of any NIL received by the players. It is a scheme, therefore, designed to cure the most fundamental ill discovered by the Ninth circuit. As stated by the Court:

"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."[20]

Accordingly, the proposed scheme is designed to tether the receipt of NIL to amateurism and education.

I. CLARIFICATION FOR LEGAL THEORIES IN OVERALL PAY FOR PLAY LITIGATION

There is a need to clarify issues when examining whether the school for which athletes perform athletic services should pay these student-athletes. There are two forms of compensation at issue, and there are two primary legal theories in play. Both the forms of compensation and the legal theories are interrelated, yet distinct.

A. PAY FOR PERFORMANCE (I.E. THE SCHOLARSHIP)

The legal terms are now settled in some respects regarding the relationship of student-athletes to their respective schools. A student-athlete who receives a scholarship is now described in recent case law as receiving "compensation" in exchange for his services of playing the sport at the Division 1 level.[21] In *O'Bannon*, the NCAA argued that antitrust law does not apply to NCAA affairs because the Sherman Act only applies to "restraint[s] of trade or commerce";[22] and that NCAA's rules regarding scholarships are merely "eligibility rules" that are not designed to regulate commercial activity.[23]

The Court devoted several pages of the opinion to emphatically conclude otherwise, holding that the NCAA's argument was "not credible."[24] In the Court's view, the relationship between student-athletes and the NCAA and member-institutions is "commerce," not

18. *Id.* at 1076.

19. The opinion identifies several factual deficiencies in the plaintiff's proofs. Those will be discussed with particularity in the body of this article. The article will then introduce facts that may cause the Ninth circuit to reach the opposite conclusion – allowing the player to retain NIL compensation. *Id.* at 1075-78.

20. *Id.* at 1079.

21. *Id.* at 1076 (recognizing that Division 1 is the highest level of college sports based primarily on size).

22. *Id.* at 1052 (acknowledging limitations of the Sherman Act in prohibiting "[e]very contract, combination. . .or conspiracy, in restraint of trade or commerce").

23. *See id.* at 1065-66 (summarizing the NCAA's argument).

24. *Id.* at 1064.

otherwise exempt by virtue of being part of higher education.[25] In the Court's words, ". . .the modern legal understanding of 'commerce' is broad 'including almost every activity from which the *actor* anticipates economic gain.'"[26] (emphasis in original).

The Court then clarified the term "actor" for the purpose of the above relationship.

> That definition surely encompasses the transaction in which an athletic recruit exchanges his labor and NIL rights for the scholarship at a Division 1 school because it is undeniable that *both* parties to that exchange anticipate *economic gain* from it. (emphasis added).[27]

The Court then distinguished cases that opined that certain NCAA rules were not commercial in nature. The basis of the distinction was that some NCAA rules do not directly involve payments to players (e.g. credit hour requirements). The rules at issue, however, *directly* rather than indirectly concern actual "payments to athletic recruits."[28] The Court then concluded that regardless of the amateurism foundation for the NCAA rules as a whole,

> "The intent behind the NCAA's compensation rules does not change the fact that the exchange they regulate – labor for in-kind compensation – is the quintessentially commercial transaction."[29]

The Court's repeated refrain that the student-athlete relationship with the NCAA institution is an exchange of labor for what it terms "in-kind compensation" leaves little doubt that *scholarships* are financial vehicles for schools to "pay for play." The court's careful distinction is that while some NCAA rules are not commercial in nature, the scholarships are just that—a means of exchanging economic gain.

This aspect of commercial activity is not to be conflated with the overall goal of maintaining and promoting amateurism. Many other NCAA rules are designed to that end, which the Court endorses as having a pro-competitive effect and authorized under antitrust law.[30]

It is important to clarify that while many rules promote amateurism, rules specifically relating to scholarships are fundamentally still an economic relationship of providing labor in exchange for compensation. It is therefore legally accurate to view the student-athlete's receipt of a scholarship as "compensation" in a "commercial transaction" for antitrust purposes.[31]

There could be a retort that scholarships only provide an *opportunity* to play without guarantees, and only after several other academic conditions are met. The conclusion then could be that scholarships are something less than an actual right to play and be paid.

It is probable the Ninth Circuit would echo its earlier statement that "the substance of the compensation rules matters far more than how they are styled."[32] For the purpose of determining whether the NCAA "compensation rules" are going to be exempt from antitrust

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25. *Id.*

26. *Id.* [internal citations omitted].

27. *Id.* at 1065.

28. *Id.* at 1066.

29. *Id.*

30. *Id.* at 1063-64. The discussion of procompetitive effects such as the promotion of amateurism will be discussed below as part of the case summary.

31. *Id.* at 1065.

32. *Id.*

law, the Court would likely determine that even if scholarships only provide a conditional opportunity to play, that opportunity is still borne out of the economic gain both parties seek from the relationship—that the scholarship is the economic exchange regardless of whether the student actually plays at some future time.

The intent of this section is to clarify that scholarship rules and the relationship of student-athlete to the institution is fundamentally and legally a pay-for-play scenario.

B. STUDENT-ATHLETE NIL

While the scholarship represents compensation for playing the sport, the athletes assert that they are owed compensation from another source. Money obviously is made from the sale of merchandise, from video games, and from endorsements by advertisers and sponsors.[33] That revenue is not from playing the sport but from the residual marketing of the sport. This leads to the less obvious legal question of whether student athletes should be entitled to that indirect and secondary source of income.

The NCAA certainly cannot credibly claim that a student-athlete does not have a name, image or likeness. Rather, the NCAA has asserted throughout the O'Bannon cases that the student-athlete's NIL is to be valued at zero.[34] The NCAA argument has been that the athlete cannot be rewarded economically from his NIL because the NCAA terminated its contracts with the video game maker. Accordingly, it argues, there is no lost income because the income source (the video game maker) was already cut off from generating the income.[35] Similarly, the NCAA argues that its rules no longer permit video games to be created that use the athlete's NIL, so there in effect is no value to that NIL.[36]

The Ninth Circuit, and the lower federal district court, rejected both of those contentions. As to the first claim, the Court noted that but for the NCAA's rules, the video game manufacturers would be negotiating directly with student athletes.[37] The Court made the obvious observation that the student-athletes have NIL rights. If the NCAA rules did not exist, the implicit assumption is that the students could be paid by the manufacturer of video games who desired to use the NIL in its products.

The Court had a much easier time dismissing the other primary NCAA claim. The Court opined that just as the NCAA decided to sever the relationship with the video game manufacturer, it could renew those relationships.[38] Impliedly, the Court realizes there is value in the player's NIL that would provide compensation to those athletes if the NCAA rule did not exist.

Those Court findings are highlighted here to establish that the NIL is a separate and distinct type of compensation from the scholarships. The scholarships are payments for the

33. Universities report to the United States Department of Education on revenue gained from the sale of its merchandise, which has often included the names and jersey numbers of current popular student-athletes. *See* Alicia Jessop, *The Economics of College Football: A Look At The Top-25 Teams' Revenues And Expenses*, FORBES (Aug. 21, 2013), http://www.forbes.com/sites/aliciajessop/2013/08/31/the-economics-of-college-football-a-look-at-the-top-25-teams-revenues-and-expenses/.

34. *O'Bannon*, 802 F. 3d at 1069.

35. *Id.* at 1066-67.

36. *Id.*

37. *Id.* at 1057.

38. *Id.* at 1068 (agreeing with the District Court's finding that the video game relationship was long-standing and that the NCAA may begin working with EA, or another video game company in the future).

chance to play the sport. The NIL rights are a reward for the value added to products. The NIL therefore is only a residual and accumulated value with compensation paid on that accumulated value. That is very different from being a pay–as-you-go scheme for actually playing the sport.

This distinction is relevant to this article because the proposed rules asserted herein focus only on the NIL compensation, severed from the scholarship pay-for-play scheme. That distinction is also valuable because from a policy standpoint, the NCAA decision makers and public sentiment has been resistant to the pay-for-play concept.[39] Even without empirical evidence or sophisticated surveys it appears that the NCAA or legislators would more readily accept an indirect form of payment (NILs after the eligibility expired) than an increase in the pay-as-you-go scheme via scholarships.[40]

The chart below summarizes these two types of compensation for scholarship athletes, the reason or basis for the compensation and the differences in when the athlete receives the compensation.

COMPENSATION TYPE	BASIS	RECEIPT TIMING
Scholarship	Pay for Play	During College During Eligibility
Royalties, License Agreement Income	Pay For NIL	After College After Eligibility Expires

C. DISTINGUISHING THE ANTITRUST CLAIMS FROM RIGHT OF PUBLICITY CLAIMS

Within the above NIL compensation claims, as opposed to the scholarship play-for-pay theory, there are two distinct legal theories utilized to justify the ability of a student athlete to receive NIL compensation and prevent others from using said NIL without a player's permission: Antitrust Claims and Right of Publicity claims.

Two primary federal cases involved claims that former collegiate athletes have a common law a right of publicity that trumps the First Amendment rights of video game makers; and that the right of publicity can prevent the video manufacturers from profiting

39. For an example of pay-for-play concept distain, see Theodore Ross, *Cracking the Cartel: Don't Pay NCAA Football and Basketball Players*, NEW REPUBLIC (Sept. 1, 2015), https://newrepublic.com/article/122686/dont-pay-college-athletes.

40. Sports economists contend that the schools could afford to pay student athletes without "devastating effects" but others say "bidding wars" would "ruin college sports." *See* Maxwell Stachen, *NCAA Schools Can Absolutely Afford To Pay College Athletes, Economists Say*, HUFFINGTON POST (Mar. 2, 2015), http://www.huffingtonpost.com/2015/03/27/ncaa-pay-student-athletes_n_6940836.html. The so-called bidding wars relates to paying recruits initially, not NIL payments once eligibility expires. Many high profile coaches have publicly supported some form of increased compensation to student athletes though stopping short of actually advocating NIL compensation.

from their NIL without permission.[41]

The definition of the "right of publicity," its legal source, and its purpose, are very different from those of the antitrust claim, though they both were part of the athletes' arsenal in protecting and asserting the right to profit from their NILs. The right of publicity is borne out of a "right to exploit commercially one's celebrity [that] is primarily an economic right."[42] Conversely, the antitrust lawsuits so not focus on the individual's rights of student athletes. The antitrust focus is on agreements of the parties who deal with those athletes. Specifically, the antitrust law prohibits agreements that create an unreasonable restraint on trade, including price-fixing. *O'Bannon* primarily concerns the antitrust claims, particularly whether agreements between the NCAA and its member-institutions that deny student-athletes *any* of their own NIL is price fixing in violation of antitrust law.[43]

The prior compensation chart is therefore supplemented below to reflect these two theories of the cases and how they fit within the overall structure of the athletes' claims.

COMPENSATION TYPE	BASIS	RECEIPT TIMING	LEGAL THEORY
Scholarship	Pay for Play	During College During Eligibility	Antitrust
Royalties, License Agreement Income	Pay For NIL	After College After Eligibility Expires	Antitrust and Right of Publicity

These distinctions help explain why this loosely termed "pay for play" issue really is not so simplistic. The distinctions also help understand the strategy within the proposed solution to the problem of revenue sharing between student athletes and the institutions with which they exchange labor for economic benefits. The strategy is to focus on the NIL rather than the scholarship aspect of overall compensation. The above discussion is designed to clarify the difference both in the type of compensation and the legal theories associated therewith. The Ninth Circuit decision in *O'Bannon* is the most recent opinion and therefore is selected to provide a workable framework for the solution proposed herein.

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41. *See Keller*, 724 F.3d at 1273; and *Hart* 717 F.3d at 149.

42. In re NCAA Student-Athlete Name & Likeness Litig., 724 F.3d 1268,1289 (Ninth Cir. 2013) (quoting Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d 307, 318 (Cal. Ct. App. 2001)).

43. On August 8, 2014, Federal District Court Judge Claudia Wilken issued a ninety-nine page opinion holding that the NCAA cannot form agreements with its member institutions to prohibit players from receiving *any* money from their NILs while playing for the school. *O'Bannon*, No. C 09-3329 CW http://i.usatoday.net/sports/!Invesitgations-and-enterprise/OBANNONRULING.pdf [http://perma.cc/HA63-PKYE]. This opinion was appealed to the Ninth Circuit Court of Appeals. That court issued an opinion that is the primary case analyzed in this article.

II. THE O'BANNON CASE SUMMARY

A. FACTS OF DECISIONAL SIGNIFICANCE

Ed O'Bannon is a former All-American Basketball player at UCLA who observed a replica of himself playing basketball in a video game produced by Electronic Arts (EA).[44] Though EA's depiction of O'Bannon closely resembled his physical and immutable attributes, jersey colors and number, O'Bannon neither consented to nor was compensated for EA's use of his NIL.[45]

O'Bannon sued the NCAA and its licensing arm ("CLC") in federal district court. His claim was that the agreement between the NCAA and its member institutions preventing student-athletes from receiving any compensation from their own NIL was an unreasonable restraint of trade or commerce in violation of Section 1 of the Sherman Antitrust Act.[46]

One of the preliminary rulings by the federal district court is particularly relevant to sports law jurisprudence and litigants in this area. The Court granted the plaintiffs' motion for class action certification for all of the following categories of student-athletes:

> (1) all *current* and former student-athletes
>
> (2) who are competing on or have competed on D-1 men's basketball or football teams
>
> (3) with NIL that "may be, or have been, included or could have been included. . .in game footage or in videogames licensed or sold by Defendants, or their co-conspirators or their licensees.[47]

Therefore, a final decision in *O'Bannon* could establish a new legal and economic relationship for thousands of athletes in the two most dominant collegiate sports, D-1 football and basketball. The proposed rules in this article are accordingly designed to be of practical value to current student athletes.

To avoid duplicative discussion, the federal district court holding and rationale will be discussed below as part of the Court of Appeals review.

B. AFFIRMANCE OF DISTRICT COURT ON ALL BUT ONE ISSUE

The Ninth Circuit affirmed the District Court on the four major legal principles below:

- Antitrust laws apply to the NCAA.[48]

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44. EA is a very profitable software company that produced video games of near-identical recreations of well-known football and basketball players from the late 1990s until approximately 2013 when O'Bannon and similar litigation challenged the right of EA and the NCAA to profit without consent from the athletes' NIL. *See O'Bannon*, 802 F. 3d at 1055.

45. *Id.* at 1054.

46. *Id.* at 1055. As noted above, the statute is deceptively simple, prohibiting "[e]very contract, combination. . .or conspiracy, in restraint of trade or commerce." Sherman Antitrust Act, 15 U.S.C. § 1 (1890).

47. *O'Bannon*, 802 F. 3d at 1054-55.

48. The NCAA argued that its amateurism laws are valid "as a matter of law" since they do not regulate "commercial activity" as the antitrust laws are designed to regulate. *See id.* at 1059. If that were the case, NCAA rules would be effectively exempt from antitrust laws. The court stated that argument "is not credible." *Id.* at 1064. Rather, commerce for antitrust purposes includes "almost every activity from which the actor anticipates economic

- The Rule of Reason is the standard for the antitrust analysis.[49]
- Under the Rule of Reason, the NCAA player compensation rules had:
    - significant *anticompetitive* effects within the college education market (fixing the price recruits pay for college),[50]but also
    - served *procompetitive* purposes of integrating academics with athletics by promoting amateurism.[51]
- One of the less restrictive alternatives to the harshness of the NCAA player compensation rule is to provide scholarships up to the full cost of attendance.[52]

As noted above, the Ninth Circuit did find fault in one area. The district court endorsed a second, less-restrictive alternative. The Ninth Circuit, however, disagreed. The discussion of that alternative is central to the thesis of this article. The plaintiff's fatal flaw in that second alternative can be cured by a new rule and facts consistent with that new rule. The flawed alternative is described immediately below, followed by the proposed cure.

C. THE FAILED ALTERNATIVE IS THE FAILURE TO PASS THE "VIRTUALLY AS EFFECTIVE" TEST

The district court faced the question of whether there is any other less restrictive alternative to NCAA rules than to create a zero-value for the student-athlete NIL. That Court's answer was "yes" in the form of a $5,000 payment. The rationale leading to that conclusion starts with the plaintiff's proposal, which the Court summarized as the following:

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gain. . .[including] the transaction in which an athletic recruit exchanges his labor and NIL rights for a scholarship. . .because it is undeniable that both parties to that exchange anticipate economic from it." *Id.* Since there is an economic exchange between the student-athlete and the school, commerce is involved which the antitrust laws regulate. The NCAA rules that limit that scholarship and NIL therefore are not exempt from antitrust law.

49. The Court admitted that the NCAA player compensation rule effectively sets the value of the student-athletes' NIL at zero, which "in another context" would clearly be price fixing that violates a *per se* standard under Section 1 of the Sherman Act. *Id.* at 1055-57. The *per se* standard is used when the outcome is so obviously a violation no further analysis is required. *Per Se,* BLACK'S LAW DICTIONARY (10th ed. 2014). In this case, the court stated that because "certain degree of cooperation is necessary" to amateur athletics, including rules that restrain commerce – i.e. regulating scholarships. *O'Bannon*, 802 F. 3d at 1055-57.. Accordingly the Court decided to use the in-depth analysis of the benefits and burdens of the NCAA rule. That standard is known as the Rule of Reason. *Id.*

50. The party challenging the rule, plaintiff O'Bannon in this case, has the burden of proof to establish the adverse effect of the rule, termed "anticompetitive effects." *Id.* The Court reached the rather obvious conclusion that a rule that treats a student-athlete's NIL is "worth nothing" causes harm to the athlete's economic gain that is part of antitrust "commerce;" as such the rule has an anticompetitive effect on commerce. *Id.* at 1058-59.

51. When anticompetitive effects are established by the plaintiff, the burden shifts to the defendant to prove positive impacts of the disputed rule on commerce, termed "procompetitive effects." *Id.* at 1058-59. In this case, the Court agreed with the District Court that the rule advances two procompetitive justifications: promoting amateurism and secondly, "integrating student-athletes with their school academic community." *Id.* at 1059.

52. Once the defendant proves procompetitive effects, the burden shifts back to the plaintiff to establish that there are alternatives to the rule that are substantially less restrictive and that still promote the same legitimate objectives of the rule. *Id.* at 1074. The Court agreed with the District Court on one of two alternatives. The Ninth Circuit accepted the District Court finding that scholarships often did not cover the full cost of attendance, and that a rule increasing the institution's payment to cover those costs furthers the legitimate objective of promoting amateurism. The Court said increasing the scholarship cap to cover the cost of attendance "would have virtually no impact on amateurism. . .[since it] "would be only going to cover their legitimate costs to attend school." *Id.* at 1075-76.

> The NCAA could permit its schools to hold in trust limited and equal shares of its licensing revenue to be distributed to its student-athletes after they leave college or their eligibility expires.[53]

The Court took note of the failure of the NCAA and its key witnesses to reject or even discuss "a system of holding payments in trust. . ."[54] The Court concluded that "none of these witnesses provided a persuasive explanation as to why the NCAA could not implement a trust payment system like the one Plaintiffs propose."[55]

The district court was also convinced that the plaintiffs' alternative trust payment system was "narrowly tailored" since the trust would only be funded by NIL revenue. So presumably no other types of revenue could create an unearned windfall to the student-athlete. Under the Plaintiffs' plan each student would have "equal shares."[56]

In essence, the district court's view was that the only narrow tailoring required was the assurance that only NIL revenue would enter the trust, so that only NIL revenue would be disbursed to the student-athletes. The requisite link was between the trust and the student-athletes.

Upon review, the Ninth Circuit found that the "narrow[ly] tailored" plan instead lacked the necessary link between the NIL revenue received by the student-athletes and the way in which that revenue would be used. The Ninth Circuit required that the use of the NIL revenue must be linked, or "tethered" to education-related amateurism. That is a different link than the assurance that only NIL income was distributed to the student athletes. As most succinctly stated by the Court:

> In our judgment . . . the district court clearly erred in finding it a viable alternative to allow students to receive NIL cash payments *untethered* to their education expenses.[57]

The graphic illustration of this difference is noted below:

DISTRICT COURT LINK		COURT OF APPEALS LINK	
CORPUS	Revenue From Player NIL Only	CORPUS	Revenue From Player NIL Only
Linked To	Athlete For *Any* Purpose	Linked to	Athlete For *Educational* Purposes Only (i.e. Amateurism)

53. *O'Bannon*, 7 F. Supp 3d at 1005.
54. The NCAA witness was Dr. Noll. *See id.* at 1006.
55. *Id.* at 1006.
56. *Id.* at 1007.
57. *O'Bannon*, 802 F. 3d at 1076.

III. THE CLARIFYING BASIS OF THE NINTH CIRCUIT DECISION AND DISPELLING POTENTIAL RELATED FALSE NARRATIVES

It defies common sense to conclude that the names, images, and likenesses of nationally admired athletes have zero value when that NIL helps generate billions of dollars to the college sports market, the NCAA and the schools for which the players perform.[58]

The current media rights agreement illustrates the vast sums accruing to the NCAA. The NCAA receives $10.8 billion from CBS Sports and Turner Broadcasting over a fourteen-year term, which has been adjusted upward for future years.[59] Two compelling facts underscore the value of student-athlete generated NIL.

That $10.8 billion in revenue to the NCAA is for the rights to broadcast one event – The Division 1 Men's Basketball Tournament. The revenue has represented over 80% of *all* NCAA revenue each year since 2006.[60]

The student-athletes that are most responsible for success of the tournament are a few star players on scholarship. Their signature moves, likenesses, and names are part of the very NIL that the NCAA considers worthless.

The Ninth Circuit opinion allows the reality-defying finding of NIL to be worthless, albeit by default of an acceptable alternative.[61] So importantly, the Ninth Circuit did not hold that it is legally impossible for student-athletes to ever receive NIL compensation. Rather, the Court was confined to the facts and legal theories presented to it. Those facts did not contain a link between the proposed alternative of paying athletes $5,000 to approximate the value of the NIL *and* education. Instead, the Ninth Circuit only saw a "no-strings-attached" payment, with no link to education.

A. Curing the Factual Inadequacy

The Ninth Circuit found a number of fatal flaws in the evidence relied upon by the district court. The district court relied upon evidence submitted by the plaintiffs, who were the prevailing parties. The Ninth Circuit, however, focused on the NCAA's key expert witness, Neal Pilson.[62] Pilson testified about the point at which paying players "crosses the line" from amateurism to professional status. The Pilson response in part was that it was a matter of degree. In his words, "I haven't thought about the line. . . I tell you that a million dollars would trouble me and $5,000 wouldn't."[63]

It is no coincidence that the District Court concluded a $5,000 payment would qualify as a less-restrictive alternative compared to a rule that valued the NIL at zero. The District Court found Pilson's testimony key to selecting that particular sum.

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58. *Id.*

59. *See Revenue*, NCAA, http://www.ncaa.org/about/resources/finances/revenue (last visited Apr. 15, 2016).

60. *Id.*

61. That is the effect of the Court's rejection of the District Court's allowance of up to $5,000 to compensate student-athletes for their NIL, the rejection being due to the lack of evidentiary support for that figure. *See O'Bannon*, 802 F. 3d at 1078.

62. Mr. Pilson is a television sports consultant. *Id.* at 1077.

63. *Id.* at 1078.

The Court of Appeals, however, found Pilson's testimony factually insufficient to support the $5,000 payment, characterizing Pilson's $5,000 declaration to be nothing more than a "casual comment" from Pilson.[64] The Court then noted Pilson was not asked specifically to render an opinion on a particular sum as adequate compensation for student-athlete NIL.[65] Accordingly, the Ninth Circuit concluded Pilson's proofs did not justify the District Court's $5,000 NIL conclusion:

> ". . .that he [Pilson] would not be troubled by $5,000 payments is simply not enough to support the district court's far-reaching conclusion that paying students $5,000 per year will be as effective in preserving amateurism as the NCAA's current policy.[66]

The Ninth Circuit viewed the $5,000 figure as being a casual comment that was not the issue the key witness was called upon to decide. The Court therefore characterized the Pilson testimony as "meager evidence in the record" and an "arbitrary limit imposed by the district court."[67]

The lack of evidentiary proofs was a point of emphasis. The Ninth Circuit again chastised the district court for relying on "threadbare evidence" to find "that small payments of cash compensation will preserve amateurism as well as the NCAA's rule forbidding such payments."[68]

This author envisions a time when the evidentiary proofs and facts add what *O'Bannon* lacked. Rather than an arbitrary basis for a fixed payment amount, the plan does not attempt to fix a particular amount. The amount would be determined by the NIL generated. As long as the sums are linked to educational use, the antitrust requirements are satisfied i.e. the education-linked NIL is an alternative that meets the procompetitive purpose of amateurism.

B. CORRECTING THE IMPRESSION THAT CASH COMPENSATION IS INHERENTLY FATAL TO AN ANTITRUST ALTERNATIVE TO THE NCAA RULE

The literal language of the Ninth Circuit's opinion appears to establish a bright-line rule that *cash* compensation to student-athletes cannot be part of amateur athletics.[69] The Court's analysis of the district court error includes this passage:

> But in finding that paying students cash compensation would promote amateurism as effectively as not paying them, the district court ignored

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64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *See id.* at 1077. However, the dissent vigorously disputed these characterizations of the sufficiency of evidence relied upon by the district court; *cf. Id.* at 1080-84 (Thomas, C.J. dissenting) (stating that the district court relied on four experts; some of the facts elicited from their testimony included the fact that Division I tennis recruits are allowed to earn up to $10,000 per year in prize money from their sports performances prior to matriculation to the school; and, thus money does not jeopardize the ability to receive scholarships).

69. The author italicized "cash" to distinguish NIL cash payments from scholarships, a non-cash form of compensation for playing the sport. At this point in the opinion, the Ninth Circuit had already agreed that an increase in scholarships up to the full cost of attendance was an acceptable alternative to the NCAA compensation rules under the Rule of Reason. In the Court's words" "We hold that the district court did not clearly err in finding that raising the grant-in-aid cap would be a substantially less restrictive alternative. . ." *Id.* at 1074.

> that not paying student-athletes is *precisely what makes them amateurs*." (emphasis original).[70]

In a companion footnote, the Ninth Circuit highlighted a particular sentence from the extensive testimony of NCAA expert Neal Pilson. When discussing the difference between amateurs and professionals, the sentence was presumably powerful in its simplicity: ". . . if you're paid for performance, you're not an amateur."[71]

The Ninth Circuit has one final statement that suggests an inimical relationship between cash compensation and amateur status. As a preface to discussing the insufficiency of evidence for the District Court's acceptance of the $5,000 cash compensation, the Ninth Circuit said, "Aside from the self-evident fact that paying students for their NIL rights will vitiate their amateur status as collegiate athletes, the court relied upon threadbare evidence . . ."[72]

The response is two-fold. First, the court unwittingly created a false dichotomy. The context here involves whether an antitrust remedy exists to an NCAA rule. Specifically the real issue is whether eventual cash payments for appreciated value in one's name, image and likeness is inherently illegal as a type of alternative to an NCAA rule that considers the NIL worthless. More importantly, does the cash remedy fail simply because it comes in the form of cash? The Ninth Circuit, if its language is taken literally, says "yes." This author respectfully disagrees, and asserts that the district court got it right.

1. FALSE INHERENT DIFFERENCE BETWEEN CASH AND SCHOLARSHIPS

The student-athlete NIL compensation is not from pay for play. It is not a quid pro quo payment for services as an exchange of value on a real-time basis. Rather, it is a payout of an accumulated value, created over time based on one's own name, image and likeness. Cash from scholarships is a pay-as-you-go form of cash. NIL is instead an asset from accumulated value. That is why the Article spent significant time making distinctions in the form of compensation at the outset of this article. The Ninth Circuit abhorrence to paying for performance is actually what the scholarship does, not what NIL payments do once the player is no longer on scholarship.[73]

There is another reason why an emphasis on "cash" is a problematic basis for decision-making. Should the difference between "cash" as a form of payment for athletic services be so different than another form of payment for athletic services like, say, a scholarship? Both are tangible pieces of paper. Both entitle the recipient to benefits. In the case of a scholarship, the benefit is the ability to play for the school that year. An NIL payment is a different type of cash equivalence. The NIL benefit is the right to collect on accumulated value of

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70. *Id.* at 1076.

71. *Id.*

72. *Id.* at 1077.

73. The author realizes that, at first blush, this article would appear to have contradictory discussions of the distinction between scholarships as compensation and NIL income as compensation. The early discussion focused on the difference between the two. This section concerns the commonality of the two. The reason these narratives are harmonious is because of context. It is important to separate the types of compensation to understand why there is acceptance of one form, but not necessary the other. They have different purposes and different rules apply. On the other hand, it is necessary to see the common elements of cash and scholarships to expose the fallacy of a claim that just because compensation is "cash" it can eliminate all antitrust remedies, especially when juxtaposed against the NCAA's harsh price fixing rule that treats NIL as worthless.

intellectual property rights associated with appreciation in the athlete's name, image and likeness.

If the Court therefore had just made the distinction between a pay-for-play type of cash and an accumulated NIL payment that is not pay-for-play, it could have easily concluded that its entire analysis should not hinge on a whether a payment was simply cash. Not all cash payments are invidiously a cancer to amateurism. The scholarship is in direct exchange for actually *playing* the game in that year. A pay-for play scheme is antithetical to amateurism. An accumulated asset indirectly developed from playing does not interfere with the educational pursuit, and therefore is not inimical to amateurism.

2. CLARIFYING THAT THE FOUNDATION OF THE DECISION IS THE FAILURE TO LINK CASH TO EDUCATION - NOT THE PURE EXISTENCE OF CASH ITSELF

There is ample evidence from the Ninth Circuit opinion that the underlying reason for rejecting the plaintiffs' cash alternative was not just because it was cash, but rather because the cash was "untethered" to promoting amateurism. As noted earlier, the Court repeatedly noted that the plaintiffs' alternative allowed the NIL cash to be used for *any* purpose, without being linked to amateurism. Like many cases, the structure of the opinion leaves the most important part of the rationale for last, and reiterates the underlying basis for the conclusion. At the end of Ninth Circuit analysis, the court made its signature rule statement:

> 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. [Citation omitted]. Once that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point.[74]

The court therefore has two elements to the rule that created the fatal flaw. It was not just that cash was the method of compensation. It was also because that cash was untethered, without a link, to amateurism. That passage was reiterating the same point made at the beginning of the Ninth Circuit's analysis of this precise issue.[75] The Court started that section with the same dual-basis for rejection: "In our [judgment]. . . the district court clearly erred in finding it a viable alternative to allow students to receive NIL *cash* payments *untethered* to their educational expenses."[76]

The continual use of this "cash-plus-untethered" rule as a guidepost for this issue leads to the conclusion that the Court intended this two-pronged rule statement to be the controlling factor. The analysis would be too shallow if it only stated that "cash" is inherently inimical to amateurism. Indeed, it would be a disservice to the otherwise thoughtful and analytically precise opinion to simply state that no remedy could ever exist to an admittedly harsh NCAA rule just because the remedy involved "cash."

C. DEMYSTIFYING THE SLIPPERY SLOPE

74. *Id.* at 1078.

75. The Court entitled this section "Allowing students to receive cash compensation for their NIL." *Id.* at 1076.

76. *Id.*

The Ninth Circuit states that a student-athlete's receipt of "cash sums *untethered* to educational expenses" means amateurism ends and professionalism begins. The Court then stated: "Once that line is crossed, we see no basis for returning to a rule of amateurism and *no defined stopping point*."[77] (emphasis supplied).

In other words, where there are no strings attached to the NIL revenue, there is no way to keep the NIL payments tied to amateurism. This is a restatement of the obvious. An athlete who is free to use funds for any purpose means the funds have no required nexus to educational expenses. Therefore, there is nothing stopping the student athlete from using the money to buy a house or car, just like a professional athlete uses money gained from his athletic services to buy a house or car.

The proposal is that if the athlete can only receive the NIL with strings attached to education-related expenses, then the rest of the analysis performed by the Ninth Circuit is unnecessary. There is no slippery slope because the tethered nature of the payments cabins-in the NIL revenue so that it is only connected to amateurism.

The Court then forecasts the slippery slope in a follow-up sentence. Once payments start to be paid, "we have little doubt that plaintiffs will continue to challenge the arbitrary limit imposed by the district court until they have captured the *full value* of their NIL."[78]

The Ninth Circuit recognizes that student-athlete NIL exists and that it has value. But it cannot be disbursed because of the arbitrariness of the $5,000 limit. That limit is deemed arbitrary because the proofs did not support a link to amateurism. Again, the Court viewed Pilson's testimony as "simply not enough" to show that a $5,000 payment "will be as effective in preserving amateurism as the NCAA's current policy."[79]

The proposal does not need to assert a particular sum to preserve amateurism. The link is not based on a small or large amount of funds. The important link is between the funds and a required use for education-related expenses. The proposed model rule accomplishes that link both at the time of receipt and upon any finding of improper use.

D. THE NINTH CIRCUIT'S LIMITED SCOPE PROVIDES OPPORTUNITIES TO STRUCTURE A CONFORMING ALTERNATIVE

The Court's summation gave the leeway to create a better balance. The balance is between promoting amateurism without creating agreements that unreasonably restrain commerce. The Court invites future parties to continue that quest in the first sentence of its summary paragraph: "By way of summation, we wish to emphasize the *limited* scope of the decision . . . and the remedy we have approved."[80](emphasis supplied). The Court then reminded us that antitrust laws apply to the NCAA, and while the Court has an obligation to endorse pro-competitive effects, it also has the obligation "not [to] shy away from requiring the NCAA to play by the Sherman Act's rules."[81]

77. *Id.* at 1078.
78. *Id.* at 1079.
79. *Id.* at 1078.
80. *Id.* at 1079.
81. *Id.*

If a future Court faced a truly educationally tethered form of deferred compensation, the Ninth Circuit's admonition would likely lead that future court to authorize the less restrictive alternative rather than "shy away" from its antitrust obligation.[82]

IV. CREATING A RULE THAT COMPLIES WITH THE TETHERED "VIRTUALLY AS EFFECTIVE" TEST

The proposal generated in this article has three tiers: (1) a threshold eligibility for NIL compensation based on compliance with NCAA eligibility rules to receive and maintain a scholarship during the student-athlete's playing days at the university. This is not an entitlement to receive NIL funds during undergraduate school. It is only a minimum standard with conditions to follow; (2) post-graduate entitlement to NIL funds based on certain contractual promises to only use the funds for educational expenses consistent with the Ninth Circuit opinion; (3) after receipt of NIL compensation, the rule would authorize a recapture (i.e. clawback) of any NIL funds found to have been used for unauthorized non-educational purposes. Those aspects of the proposal will be discussed in detail below.

A. THRESHOLD ELIGIBILITY FOR NIL COMPENSATION DURING UNDERGRADUATE SCHOOL

The first level of the three-tiered model is to set a standard by which student athletes initially qualify for future NIL payments. The NCAA's rules for eligibility for scholarships already provide the requisite link between student-athletes and amateurism. It has been evolving its eligibility rules for scholarships on that basis since its inception in 1910.[83]

There is no need to reinvent the amateurism wheel now. A recent and insightful representation of those rules was on display when Northwestern University defended those rules against student-athletes who sought "employee" status before the National Labor Relations Board ("NLRB").[84] Although the current plaintiffs' request a different form of relief, both that case and the current scenario seek relief from NCAA amateurism rules and the defendants in both instances assert that those rules are the appropriate test for determining which students qualify as amateurs in athletics.

The discussion below therefore highlights the university's arguments as to why those rules provide the test for amateurism. That is the threshold argued herein before a student-athlete can reach level two entitlement to NIL funds after his playing career is over.

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82. A forthcoming article by this author will focus on another alternative to the harsh NCAA rule of zero value. That alternative will detail a model rule for the Power 5 conferences, allowing them to compete with each other for the services of recruits using NIL compensation as a carrot in certain circumstances.

83. The NCAA was actually founded a few years earlier under the name of a 62-member Intercollegiate Athletic Association by educators and President Roosevelt to reform intercollegiate football rules and curb the spat of athletic-related deaths. *See* Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 12 (2000).

84. The initial filing was heard by an administrative law judge, Regional Director Peter Sung Ohr. *See* Northwestern Univ. v. Coll. Athletes Players Ass'n, No. 13-RC-121359 (March 26, 2014).

1. THE ANALOGOUS EDUCATION LINK VIA NORTHWESTERN UNIVERSITY

Scholarship athletes at Northwestern brought the action before the NLRB seeking the right to be declared "employees" under the relevant Act governing private employers.[85] Part of the test to make that determination includes whether the activities in question are predominately for educational purposes, or rather a primarily economic relationship.

Northwestern asserted that the relationship between student-athletes and the university was primarily educational. To support that conclusion, Northwestern made several arguments. They first argued that eligibility rules justify the way to establish and maintain amateur status of the student athletes. The ALJ in the preliminary hearing cited many of those rules, including the following requirements in order to be eligible to play football at Northwestern:

1) Full-time student status;
2) Make adequate progress toward a degree, with a growing percentage of completed credits each year toward the degree (e.g. 40% of degree credits entering the third year);
3) Maintain threshold grade point averages for each of those years.[86]

At the NLRB hearing, the university also emphasized that the Student-Athlete Handbook states that academics were to be prioritized over athletics, and consistent therewith, study tables, tutorial programs, prohibitions against missing more than five classes per quarter were instituted.[87] The football players are also prohibited from being off campus 48 hours prior to final exams.

The NCAA and Northwestern University accept these eligibility-related rules. In their collective view, a student-athlete who abides by these rules and others can retain his scholarship and play football. In other words, the compliant student has *ipso facto* maintained a preeminence of academics over athletics.[88]

Those same assertions justify this author's claim that NIL compensation should be allowed as a threshold entitlement to NIL compensation. Northwestern, the NCAA and its other member-institutions cannot have it both ways. They cannot claim the player relationship is predominately educational when fighting employee claims, while denying the link to education when trying to refuse the NIL rights that flow from the very same activity—playing football. Rather, if the eligibility rules determine amateurism during his playing days, the same rules are sufficient to establish amateurism for the same period for the purpose of a future entitlement to NIL compensation.

Stated differently, if the athlete complied with eligibility rules that were guideposts of amateurism while in school, then compliance with those rules at the successful completion of his amateur career ought to be enough for initial eligibility for NIL payments. The student

85. *Id.*

86. Northwestern Univ. *and* Coll. Athletes Players Ass'n, 362 N.L.R.B. No. 167 app. at 12 (August 17, 2015). The full Board appended the hearing officer's opinion to the end of its final decision. So the citation is to the Appendix of the final reported NLRB decision entered by the full Board, which is the appellate level within the NLRB. The full Board appended the hearing officer's opinion to the end of its final decision.

87. *Id.* app. at 13.

88. There were many other facts elicited at hearing that shed doubt on the university's claim that academics was prioritized over athletics. The students for example had 50-60 weeks of football during the season, beyond a typical 40-hour week by other university staff that were already clearly "employees."

has paid in full as he would for a certificate of deposit or savings bond. Once paid for in total, he is entitled to an accumulated and appreciated sum upon maturity of the note subject to further conditions imposed on the student after undergraduate school. Those conditions will be discussed in Section XIII below.[89]

2. CONTINUING THE LINK TO AMATEURISM BEYOND UNDERGRADUATE SCHOOL

While the above section concerns a link to amateurism during his playing days, this author's theory concerns continuing the link between athletics and amateurism *beyond* the playing career of the athlete. The theory is further discussed below.

To the credit of the university and the NCAA, there are several well-designed rules that on balance have achieved a high level of success in keeping student-athletes within an educationally focused regimen. As established above, if the student-athlete did all that was required of him to maintain his eligibility *while playing under scholarship*, the link with amateurism is already there. He should have to do no more to also be in the *initial* pool of athletes that are eligible to receive NIL income after he no longer plays for the school.

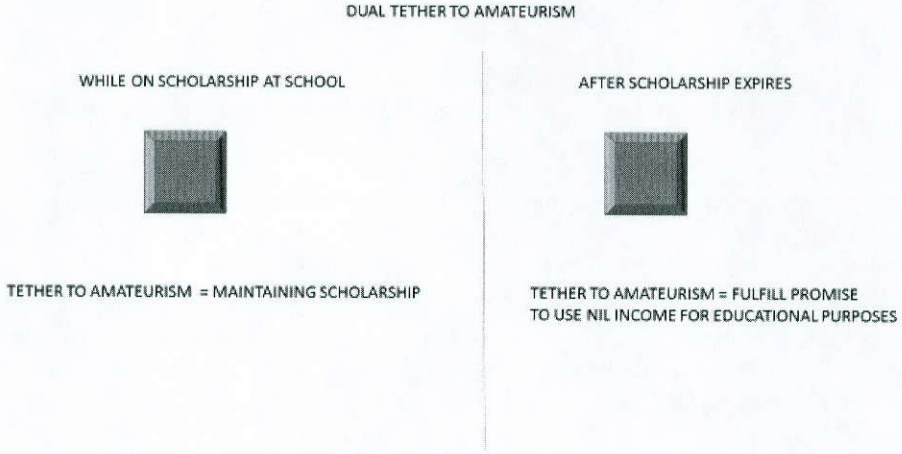
Thus, after the athlete is no longer on scholarship, his right to receive NIL income should continue and only be discontinued if he fails to use NIL income in furtherance of educational purposes. Only then is the link to amateurism severed. And consequently only then would the former scholarship athlete lose his NIL income.

The Ninth Circuit ruled that a less restrictive alternative to the NCAA compensation rule must promote education-related amateurism.[90] It held that providing a $5,000 payment with no strings attached is not sufficiently linked to amateurism. In other words, though the plaintiff athlete maintained eligibility to receive his scholarship throughout his playing days at UCLA, he did not advocate a continued link of income to amateurism after his college tenure expired. It was only that lack of continued linkage that the Ninth Circuit found fatal to his claim for NIL income.

The chart below is the simplistic illustration of this theory.

89. The NLRB adjudication is not directly relevant to this antitrust case. It was asked to determine whether the student-athletes qualify as "employees" under the National Labor Relations Act ("Act"), which has no impact on whether an alternative to an NCAA rule prohibiting NIL compensation is permitted under antitrust law. The final decision of the NLRB was that it did not retain jurisdiction over the subject matter, since it was unconvinced that Congress intended to have the NLRB decide whether scholarship football players were employees of a university. *Id.* at 6.

90. *O'Bannon*, 802 F. 3d at 1078.



Northwestern University has already provided certain facts and arguments that evidence a linkage between athletics and education, albeit viewed through a different lens.[91] Those facts and arguments can be summarized as follows:

This assertion should not be confused with claims made by athletes in prior cases that a scholarship is a constitutionally protected "property right." Several cases have rejected that claim and need not be reasserted here.[92] Rather, the assertion merely adds facts that would change the result using the very same standard used by the Ninth Circuit Court of Appeals. This is therefore still an antitrust case, interpreting the NCAA rules as applied to NIL rights of student athletes.

Conversely stated, compliance with the NCAA eligibility rules should afford scholarship student athletes an initial eligibility, a threshold authorization to their NIL benefits. Failure to comply with eligibility rules while still in school would operate to deny those athletes the opportunity to receive the benefits of their NIL at a later time. The chart below provides the overview of the linkage from that vantage point.

The reason for this threshold requirement is that there must be compliance with the Ninth Circuit's holding that no NIL compensation is authorized if it is not linked (i.e. tethered) to education-related amateurism.[93] The requirement that a student-athlete maintain eligibility is wholly consistent with that opinion.

Such a threshold is also wholly consistent with the Ninth Circuit's rule that student athletes have the burden to establish that there is reasonable alternative to the harshness of

91. The issue in the Northwestern case was whether scholarship athletes in football met the requirements to be legally declared "employees" of the university, and therefore entitled to employee benefits associated with collective bargaining. One such benefit could be a right to receive NIL income. The issue posed in this article is whether those athletes can receive NIL income based not upon employment law, but through antitrust law. The O'Bannon opinion from the Ninth Circuit would be the gateway for the authorization. The required tethering of the sport to education could be an approved alternative to the existing NCAA rule.

92. For several cases and scholarly articles denying the constitutional property right claims, see MATTHEW J. MITTEN & JEREMI DURU, ET AL, SPORTS LAW AND REGULATION, CASES, MATERIALS, AND PROBLEMS 129-35 (Wolters Kluwer 2013).

93. *O'Bannon*, 802 F. 3d at 1079.

the capped benefits at the cost of a scholarship, and zero value for NIL rights.[94] The alternative is to use the existing eligibility rules as the requisite link to amateurism.[95]

In sum, the athlete should be able to retain NIL income if he continues the link to amateurism both during *and after* he played for the school. The link to amateurism and education is maintained during this school tenure by maintaining his eligibility. The link is maintained after he leaves the school by fulfilling the new commitment to only use the NIL income for educational, and thus amateurism purposes. Nothing else should be required of him. The income would be sufficiently "tethered" to amateurism.

V. THE TETHER: POST-UNDERGRADUATE RECEIPT OF NIL BENEFITS WITH EDUCATIONAL LINKAGE

This article proposes a way to meet the requirements of the Ninth Circuit opinion in O'Bannon. The article therefore does not discuss contentions that the Ninth Circuit erred.[96] The Ninth Circuit clearly required that NIL compensation must be linked, i.e. tethered to "education expenses."[97] That begs the question: "What falls within the definition of education-related expenses"? Once defined, the article suggests an NCAA rule that codifies that term. The resultant rule creates an alternative to the current NCAA rule that meets the Ninth Circuit's requirements under the antitrust law's Rule of Reason analysis.

We start with the definition of education expenses below.

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94. *Id.* at 1074.

95. It is worth reiterating that no viable distinction should be made between advancing "amateurism" and advancing the educational goals of the NCAA member institution. No party in any of the primary cases has advocated such a distinction and this author sees no reason create one.

96. One argument is that there is no need for a link to amateurism once the athlete is no longer an amateur. In some future case, I suspect there will be surveys admitted into evidence asserting that fans of college football will not lose interest in the sport just because a former player received money after playing for school. The Ninth Circuit was not convinced based on the proofs on this occasion. But the quality of proofs may improve. Alternatively, another circuit may conclude that the Ninth Circuit amateurism link post-amateur status was simply wrong; that post-amateur status receipt of NIL compensation does not harm to amateurism, and is therefore an acceptable alternative to the harshness of the NCAA rule.

97. *O'Bannon*, 802 F. 3d. at 1078-80.

A. WHAT CONSTITUTES EDUCATION-RELATED EXPENSES?

As noted above, any alternative to the NCAA compensation rule must be "virtually as effective" as the existing NCAA rule at promoting amateurism. Therefore any payment of NIL must also promote amateurism as effectively as a rule that does not pay any NIL because currently no NIL income is distributed.

Payments made only for education-related expenses promote amateurism. The Ninth Circuit said as much when announcing the need to "tether" the NIL payments to "their education expenses."[98]

The following should be accepted as representative examples of qualifying uses of NIL compensation for education expenses:

1) to complete undergraduate education,
2) to pursue post-undergraduate education
3) to pursue trade schools, (e.g. coding, paralegal institutions) that are accredited within an industry, and
4) to pay off pre-existing student loan debts.

Beyond these traditionally acceptable education expenses, there are qualitative policy reasons why a liberal definition should be used. It is good public policy to allow the person who earned the income for education to share it with his family for the same purposes. The link to amateurism is preserved whether the former student-athlete is learning in academia or his spouse or children are gaining that benefit. This society values the effort to pay for the education of others. Parents are allowed to borrow money for their children's education consistent with that value.[99] So "education expenses" should be broad enough to allow a player's immediate family to benefit from the NIL compensation.

The expanded list should therefore include payments that arise from the following circumstances:

- Injury followed by a loss of scholarship that creates a gap in payment for the remainder of undergraduate education;
- Application fees for scholarships and grants;
- Unreimbursed expenses beyond the school's determination of the "full cost of attendance" if reasonably incurred or arising out of extraordinary circumstances (e.g. temporary transportation due to stolen vehicle, or housing expenses due to fire or other Act of God, even mental health counseling if family tragedies affect the ability to remain in school or to function);
- Opportunity cost recapture. For example,
    - The school is put on probation and penalized severely without any wrongdoing by the NIL-requesting student-athletes, causing an

98. *Id.* at 1075-76.

99. *See* Robert Farrington, *Parents: Stop Taking Out Loans For Your Child's College Education,* FORBES (July 14, 2014), http://www.forbes.com/sites/robertfarrington/2014/07/14/parents-stop-taking-out-loans-for-your-childs-college-education/#79a317cf55b1.

involuntary loss of scholarship or other increased educational expense arising from or related to that circumstance.

- A head coach leaves the program despite promises he would stay; the athlete establishes detrimental reliance on those representations coupled with a lost scholarship by action of a new coach or other increases educational expenses arising or related to that circumstance.

- Repayment to third parties who provided loans or other educational benefits authorized by NCAA rules that assisted in the student-athlete's education while under scholarship at the institution.

Admittedly, the expanded list is subject to potential abuse. Inserting a cap on sums used for this purpose could minimize that potential. Clawback provisions would also have to be built into the rule, as will be discussed in Section IX (B) of this article.

Those expenses should include payments to cover the full cost of attendance just as the Ninth Circuit affirmed in *O'Bannon*.[100] That covers the expenses incidental to actual tuition, room and board, books and university fees.

Finally, the rule should address which entities have decision-making authority. The NCAA is composed of its member-institutions. The internal decision may be that each individual D-1 institution has that authority, without a uniform NCAA rule. Or there could be some combination of authority based on certain stipulated factors. Certainly the severed Power 5 Conferences have an interest in maintaining their homogeneity without compromising their interests for the benefit of other D-1 institutions.

There is reason to be optimistic about the above NIL payment opportunities. There is even reason for the NCAA to adopt a rule consistent to what is proposed below. That reason flows from pending case law. There are federal consolidated cases where plaintiffs are skillfully developing evidence to comply with the *O'Bannon* tethering requirements.[101] Importantly, the court has already granted class action status for the antitrust case. With statutory treble damages as part of the prayer for relief, there is sustainability to the plaintiffs' action because the financial rewards are worth the plaintiffs' counsel's financing of the litigation. Therefore, there is little risk of acquiescence to a settlement by plaintiffs just to avoid protracted litigation.[102]

B. THE PROPOSED RULE

Assuming that NIL compensation must be linked to amateurism, an NCAA rule could be established to do just that. Former scholarship athletes could be required, for example, to use those NIL funds to complete their education if they did not gain an undergraduate degree once their scholarship expired. That often occurs when the player is injured or misses too many practices, and the one-year scholarship is not renewed.[103]

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100. *O'Bannon*, 802 F. 3d at 1068-69.

101. *See* In re Nat'l Coll. Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig., Case No. 4:14-md 02541-cw (N.D. Cal. Dec. 4, 2015).

102. Order Granting Motion For Rule 23(b)(2) Class Certification, 311 F.R.D. 532 (2015).

103. *See* NCAA 2012-2013 DIV. I MANUAL §15.02.7 (allowing one or multi-year renewable scholarships up to five years at the sole discretion of that institution). While injury alone is not a basis to deny the renewal of a scholarship, there are several other reasons that could easily be a pretext for injury-related denials. Northwestern

The existing NCAA rules could be revised to establish clear linkage between receipt of post-play NIL and amateurism through education-related expenses. The amended rule could essentially state the following:

> Scholarship student-athletes with no remaining eligibility, who otherwise do not violate the clawback and recapture provisions of this agreement,[104] will be eligible to receive their allocated portion of compensation from the use of their own name, image and likeness ("NIL") only upon compliance with the following conditions:
>
> - That the student athlete remain in compliance with NCAA, conference, and institution rules regarding eligibility for grant-in-aid scholarships, as determined and certified by the scholarship-granting institution;
> - That the student athlete hereby agrees to receive NIL only if that NIL is used for one or more of the qualifying purposes [noted above];
> - That if the student athlete seeks to use NIL funds for educational purposes not described in Section 2, a waiver may be requested under reasonable conditions established by the institution;
> - That the institution may establish reasonable annual audits of used funds, and that any misuse of said funds shall subject the former student-athlete to the clawback and recapture provisions of this agreement.

This proposed provision only authorizes NIL compensation to former scholarship student-athletes if they comply with two requirements. First, they must have maintained eligibility for educational purposes during their amateur career. Second, they must thereafter use the NIL *only* for education-related purposes. A failure to do either means the former student-athlete is ineligible to receive NIL compensation.

A third aspect of the rule is that even upon initial eligibility or receipt of NIL compensation, the institution would be able to recapture any erroneous payment through clawback provisions. Those provisions are discussed in Section IX below.

VI. PROPOSED RULE COMPLIANCE WITH THE "VIRTUALLY AS EFFECTIVE" TEST

A. NO SIGNIFICANT INCREASE IN COST TO NCAA MEMBER INSTITUTIONS

The Ninth Circuit has clearly required that to pass antitrust scrutiny any NIL compensation alternatives to existing NCAA compensation rules must be "virtually as effective" at maintaining amateurism as the disputed NCAA rule.[105] Any "significant" increase in cost would not be virtually as effective.[106] The court did not provide any other parameters or subsidiary tests to determine what constitutes a "significant" added cost. Nor did the court articulate the appropriate method to use to make that determination. In a footnote, the court only states that the plaintiffs have the burden to prove that the alternative

players in the NLRB case provided several chilling examples. *See Northwestern Univ.*, 13-RC-121359 at 11-12.

104. This author's proposed clawback and recapture provisions are discussed in detail in Section IX.

105. *O'Bannon*, 802 F. 3d at 1074.

106. *Id.*

does not significantly increase cost to the institution.[107] As part of that same footnote the Ninth Circuit reiterated that the plaintiffs' failure, and the District Court's error, was in the inadequacy of proofs. The Ninth Circuit said, ". . . the district court here failed to make any findings about whether allowing schools to pay students NIL cash compensation will significantly increase costs to the NCAA and its member institutions."[108]

First, there is a question underlying the premise. Why should a right so fairly based in equity–allowing a person to profit from their own name–be limited or eliminated just because the exploiter may have to pay a high price for the use? One of the core purposes of the law is to protect people's interest in what they own.[109] A rule that protects the user more than the owner of that right should be void as a matter of public policy. At the very least, the court's equitable powers ought to be fully invoked and actively used to benefit the owner of the NIL in making these determinations.

B. SMALL VS. LARGE PAYMENTS [A LESS DESIRABLE STANDARD THAN THE PROPOSED RULE ALTERNATIVE]

Part of the district court's support for the plaintiff's $5,000 payment alternative was because it was a small payment. On review, the Ninth Circuit focused on the testimony of Mr. Pilson. Particular attention was placed on his testimony about whether small sums received would be harmonious with amateurism where large sums would not. The Ninth Circuit's codification of that testimony was that Pilson "was asked only whether big payments would be worse than small payments [i.e. not when do small payments become large payments that cross the line of amateurism]."[110]

Even in the Ninth Circuit summation on this issue, the smallness of the payments contributed to its rationale: ". . .it is clear the district court erred in concluding that *small* payments in deferred compensation are a substantially less restrictive alternative."[111]

The small vs. large distinction is a false dichotomy. If there is adequate linkage between receipt of NIL and education-related amateurism there is no need to analyze whether the NIL compensation is large versus small.

The difficulty of creating a standard that uses the size of the payments to determine when amateurism ends becomes apparent when noting the Ninth Circuit's focus on "whether making small payments to student-athletes served the same pro-competitive purposes as making no payments"[112] More particularly stated, the issue was "whether paying these student-athletes will preserve amateurism and *consumer demand*."[113] (emphasis added).

With that codification of the issue, it is difficult to avoid having to answer what amount of NIL compensation received after a player's eligibility expires will cause consumers to view the event as professional rather than amateur sport? That inquiry would require attorneys on

107. *Id.* at 1073 n.17.

108. *Id.* at 1076 n.19.

109. That is the underlying premise for why the related rights of publicity protect the NIL of student athletes against the First Amendment rights of NIL users. *See, e.g., Keller*, 724 F.3d 1268; *Hart*, 717 F.3d 141.

110. *O'Bannon*, 802 F. 3d at 1077-78.

111. *Id.* at 1079.

112. *Id.* at 1076-77.

113. *Id.* at 1077.

both sides of the issue to elicit evidentiary proofs about public perceptions. That, in turn, would inalterably force savvy lawyers to engage experts to use artificial intelligence to predict human behavior, also termed predictive analytics.[114] The attempt would be to measure the intensity of emotion, sentiments, and attitudes among the vast array of fandom for the college education market.[115]

Such evidence is indeed possible. A study to ascertain sentiments about tobacco relied upon 7,362 tobacco-related Twitter posts. That study was admitted in court.[116] As stated in a related article, "If words and Twitter posts can be analyzed for emotion and be accepted by a court as relevant evidence, then written surveys can be evidence of consumers' emotions about an athlete."[117]

But what is possible is not always practical or workable as a standard for application in real cases. The context for this discussion is whether antitrust law should allow NIL compensation, and if so, under what circumstances. For that question, it is more workable to simply view whether the payments are used for educational purposes than to ascertain the sentiments of a broad college football market.

C. SUBSTANTIALLY REQUIREMENT

The Ninth Circuit established an additional required element if a purported less restrictive alternative is to pass antitrust scrutiny under the Rule of Reason. The alternative must not only be less restrictive, it must be substantially less restrictive than the disputed restraint.[118] The Ninth Circuit concluded, ". . .we think it is clear the district court erred in concluding that small payments in deferred compensation are a *substantially* less restrictive alternative restraint.[119] (emphasis added).

In noting this substantiality requirement, two factors guided the court: (1) there was only "meager" evidence in the record supporting the $5,000 NIL compensation package and (2) the court should leave "ample latitude" to the NCAA to oversee student-athletes.[120]

The author is not confined to the plaintiff's proofs. The testimony of experts before the *O'Bannon* district court brought the $5,000 guesstimate of an NIL payment that could still preserve amateurism in the mind of the college football fan base. The district court selected that figure only because that was what the testimony and evidence provided. That appears as the only reason why "small payments" were part of the alternative restraint.

There will likely be evidence about the consumer market sentiment from experts in future cases. A plaintiffs' expert will attempt to establish that the consumer market for college football or basketball will be just as inclined to watch games if the players receive say

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114. For discussion of predictive analytics to flag board of director behaviors that may lead to a breach of fiduciary duties, see Roger M. Groves, *The Implications of a Jeopardy! Computer Named Watson: Beating Corporate Boards of Directors at Fiduciary Duties*, 45 CREIGHTON L. REV. 377, 387-94 (2012).

115. Roger M. Groves, *Can I Profit From My Own Name And Likeness As A College Athlete?" The Predictive Legal Analytics Of A College Player's Publicity Rights vs. First Amendment Rights Of Others*, 48 IND. L. REV. 369, 407 (2015).

116. *See* Groves, *supra* note 115.

117. *See* Groves, *supra* note 115.

118. *O'Bannon*, 802 F. 3d at 1079.

119. *Id.*

120. Language to that effect was indeed the precursor to the substantiality rule statement. *See id.*

$100,000 or more, than if he only receives $5,000, as long as the funds were (1) used for educational purposes and (2) were only received after his playing days are over. If convincing evidence exists for large sums of NIL compensation with predictive analytics stating the intensity of the consumer market is unaffected, then the difference between the alternative (i.e. a large NIL payment) and the disputed NCAA rule, (zero payment) would indeed be substantial.

Additionally, a standard that is based on large or small characterizations without methods of computation is ambiguous and vague at best. Courts in many areas have refused to endorse rules that are vague or unworkable.[121]

Instead, the acceptance or rejection of a proposed alternative is not hinged on the basis of the payments' smallness. The more tangible evidentiary standard is to simply view whether the NIL compensation is used for educational purposes. This article views this approach as a more practical means to ascertain whether the Rule of Reason can accept an NIL compensation alternative.

VII. METHOD OF NIL DISBURSEMENT

A. OPTIONS

The District Court endorsed plaintiffs' plan that the trust have equal shares for all the scholarship students. The Ninth Circuit rejected the plan, but not because of any inherent problem with a trust as a vehicle to deliver NIL compensation. The error, in the Ninth Circuit's view, was the failure to link the NIL pay to amateurism.[122]

There are other possibilities that were not proposed to the Court, and therefore not ruled upon. There are essentially four options: (1) equal distributions to the entire team, scholarship and non-scholarship student-athletes alike; (2) equal distributions to just scholarship student-athletes; (3) equal distributions to either scholarship athletes or jointly with non-scholarship student-athletes with some form of bonus for individual student-athletes, or (4) only individual allocations of NIL.

In *O'Bannon*, the non-scholarship student-athletes were not included as plaintiffs because they were not subject to the disputed NCAA rule. The alleged illegal agreement prevents only scholarship student-athletes from the full economic benefit of the exchange of their labor for the scholarship. Without the scholarship there is no exchange value. An institution could nonetheless allocate funds to non-scholarship student-athletes. But the school would not be compelled to do so through antitrust law. This article therefore only addresses NIL compensation of scholarship student-athletes.

Under any of the options noted above, there will be NIL funds from numerous transactions. There are schemes utilized in analogous circumstances with far more transactions to account for than would be required in the college football market. Two of those schemes are discussed below.

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121. An obscure yet profound example is in the manner in which the United States Supreme Court decided how to best allow states to tax companies with business in more than one state without authorizing an unconstitutional tax on interstate commerce under the Commerce Clause. The court ultimately determined that a former standard should be overruled in part because it "has been stripped of any practical significance." *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 288 (1977).

122. *O'Bannon*, 802 F. 3d at 1075.

B. POOLED FUNDS THROUGH A NONPROFIT CLEARINGHOUSE

As noted above, an institution could distribute NIL compensation in a variety of ways. Under any of those schemes, there is a model already well established for collection and disbursement of income for another group of performers in the entertainment industry – musicians. The process used to collect performance royalties for millions of musical artists is an international clearinghouse.

The clearinghouse model is a good choice because of its analogous purposes. It bears repeating that both athletes and musicians are performers. For those who doubt the connectivity of musical artists and athletes, consider the fact that rap mogul Jay Z has an entity that represents athletes and connects professional athletes with NIL opportunities.[123]ESPN College Game Day regularly invites various musical artists, like highly successful hip-hop artist Rick Ross, and comedian Baylor alumnus Jeff Dunham to pick winning college teams for their fanatical sports viewership.[124] Musicians already receive royalty income from other entities that take advantage of their talents. The athletes would collect NIL royalty payments as well. Given legal authorization, college student-athletes would do the same.

In the music industry there are two primary clearinghouses, American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc. ("BMI").[125] They are termed professional rights organizations.[126] They are well established and successful at revenue sharing, allocating song rights between copyright owners and performer royalties. The United States Supreme Court succinctly stated why ASCAP and BMI were created:

> "[they] originated to make possible and to facilitate dealings between copyright owners and those who desire to use their music. Both organizations plainly involve concerted action in a large and active line of commerce . . ."[127]

Saliently, both organizations were formed as clearinghouses for the same reasons that student-athletes would need such an entity – practical necessity.

> In 1914, Victor Herbert and a handful of other composers organized ASCAP because those who performed copyrighted music for profit were so numerous and widespread, and most performances so fleeting, that *as a practical matter it was impossible for the many individual copyright*

123. The entity, "Roc Nation," claims at least 10 high profile athletes, including CC. Sabathia, Dez Bryant and Kevin Durant. *See Sports*, ROCNATION, http://rocnation.com/sports/ (last visited Apr. 21, 2016). The burgeoning agency signed Durant to an endorsement deal with Nike for up to $300 million. *See* Tony Manfred, *Kevin Durant's Monster Nike Deal Is A Huge Win For Jay-Z*, BUSINESS INSIDER (Sept. 4, 2014), http://www.businessinsider.com/kevin-durant-nike-jay-z-roc-nation-2014-9.

124. On November 7, 2015, Ross, one of the most business savvy and profitable rappers in modern years, made his Alabama selection over LSU. Peter Berkes, *Rick Ross Went On 'College GameDay' To Pick Bama And Receive Pears*, SB NATION (Nov. 7, 2014), http://www.sbnation.com/college-football/2015/11/7/9687984/rick-ross-college-gameday-alabama. On November 14, 2015, Dunham's ventriloquist "Walter" roasted each announcer on set, everyone else in sight, and half the teams in the games he had to select – and was a big hit. @CollegeGameDay, TWITTER (Nov. 14, 2015), https://twitter.com/CollegeGameDay.

125. ASCAP and BMI are performing rights organizations the collect royalties for musicians, and are even working on establishing license agreements for internet music. *See* David Balaban, *Music in the Digital Millennium: The Effects of Digital Millennium Copyright Act of 1998*, 7 UCLA ENT. L. REV. 311, 312 (2000).

126. *See* Broad. Music, Inc. v. Columbia Broad. Sys., 441 U.S. 1 (1979).

127. *Id.* at 10.

> *owners to negotiate* with and license the users and to detect unauthorized uses. ASCAP was organized as a 'clearing-house' for copyright owners and users to solve these problems" associated with the licensing of music. [Citation Omitted] (emphasis added).[128]

Student-athletes are NIL owners akin to musicians as copyright owners or statutory royalty payments. The clearinghouse would also license users and detect unauthorized uses, and structure payments.

Scale is important in any business plan. ASCAP alone handles licensing and distribution of royalties for 22,000 copyright owners, tracking the type of performance royalties and the amounts of use for their music.[129] Even more impressive is the fact that "almost every domestic copyrighted composition is in the repertory either of ASCAP, with a total of three million compositions, or of BMI, with one million."[130]

The scale of the collegiate athletic system is much smaller. Despite 115 D-1 programs, there are only about 250 student-athletes drafted in the NFL each year, about 7 percent of all the players.[131] Since there is no historical data about NIL activity for student-athletes, presumably those with NFL potential are the most likely candidates for NIL value and compensation. A system of national royalty distribution involving college athletes would also be simpler and more scalable than what already exists in the music industry.

Under the musical clearinghouse system, the user of the performance is required to report its use to the clearinghouse. Then the clearinghouse makes payments to the musicians. That system has worked for over a century in the music industry. Ironically, ASCAP and BMI have survived claims that they engaged in price-fixing agreements in violation of antitrust law.[132]

The fundamental relationships are sufficiently similar in the sports industry to make it a viable and tweakable method for athletes. The NIL clearinghouses would have sufficient independence from the institutions and the athletes. They would extract a fee from the transactions, not directly from just one of the parties. There could be efficiency and audit-flags build into this structure. The entity would gain expertise in the types of NIL income, the forms uniformly used by the NCAA and member institutions.

ASCAP sends a royalty check to musicians. The NIL entity equivalent would do the same for athletes. They would issue appropriate tax statements for both the athletes and the institution, just as they do for the musician currently.

C. DIRECT DISBURSEMENT

A secondary process would be an exemption for small de minimis payments. The intent is to allow small profit and not-for-profit entities to avoid unduly burdensome administrative costs and resources. The entity would just pay the former student-athlete directly.

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128. *Id.* at 4-5.

129. *Id.* at 5.

130. *Id.* at 5-6.

131. *See Odds of Getting In*, SHMOOP, http://www.shmoop.com/careers/football-player/odds-of-getting-in.html (last visited Apr. 21, 2016).

132. *Broad. Music, Inc.*, 441 U.S. 1.

There are two circumstances that necessitate a secondary method of NIL disbursement. First, the reality is that every user of the athlete's NIL will not always comply with an NCAA-imposed requirement to report the athlete's name, type of transaction, and amount of income due the athlete in every instance. Second, there would be a de minimis exception for smaller entities with a minimal amount of NIL transactions with former collegiate athletes. Securities and Exchange Commission rules recognize that expensive and time consuming reporting requirements for the sale of securities is overly burdensome on small issuers. The athlete clearinghouse should allow exemptions from reporting as well in analogous circumstances.

Accordingly, there should be a catchall backup method for athletes to directly collect NIL from entities that either inadvertently forgot to connect with the clearinghouse, or from entities that fall within the exemption from clearinghouse registration.

D. NCAA ENFORCEMENT

For uniformity purposes, the NCAA would have to pass a rule to make each D-1 member institution contract with the clearinghouse. The clearinghouse would be contractually obligated to provide the collection and distribution services to each of the institutions on a uniform basis, with the same forms and process.

As will be discussed below, the athlete only receives a disbursement if he agrees to use those funds for education-related purposes. The clearinghouse would catalog the athlete contracts, with each member institution. This dual system of reporting would provide greater accountability and efficiency.

The clearinghouse would also facilitate the reimbursement of funds back to the university if the athlete failed to comply with the various educational uses for that income. That reimbursement scheme is detailed in Section IX that involves holdbacks and clawbacks to recapture NIL.

E. LIMITATIONS ON ENDORSEMENT AND IP DEVELOPMENT ACTIVITY

The NCAA has an important role to play if an NIL system is to be effective. The NCAA has many gatekeeping roles, where rules are established to keep the athlete within appropriate parameters of amateurism.

Obviously, a rule does not promote education-related amateurism if it allows a player to spend more time in a recording studio or on a television commercial set than he does in school. The *O'Bannon* Court also affirmed that a procompetitive effect is the goal of integrating the athlete into the greater academic environment.[133] So a rule that allowed endorsements or other NIL and intellectual property pursuits for athletes must be placed in that context. That means the NIL must be compatible with the athletic-academic integration.

Based on the significant discretion given the NCAA in prior cases, it is likely the courts would allow the NCAA broad latitude in restricting the proportion of NIL activity relative to academic pursuits. *O'Bannon* protects the NCAA promotion of amateurism from an antitrust challenge. The Courts have not spoken directly to whether the rights of publicity as a matter

133. The court labeled this most succinctly as "integrating academics with athletics." *See O'Bannon*, 802 F. 3d at 1073.

of law are free from major restriction. But it is already well established that student-athletes do not have a constitutional right to a scholarship.[134] So a school would likely be able to withdraw a scholarship for a student-athlete's failure to abide by the limits set on NIL developmental activities.

VIII. NIL DENIAL THROUGH CLAWBACK PROVISIONS

The macro view of NIL compensation is that the NCAA, its member institutions, and the video game manufacturers that profit from the players' NIL are not all philosophically opposed to *some* form of revenue sharing with players. That is evidenced from the fact that video game makers have publicly admitted that but for the NCAA compensation preclusion, they would negotiate directly with the student-athletes.

The NCAA has also capitulated at a level. It agreed to allow the Power 5 top-level football conferences to engage in a form of quasi-free market economics. They have greater independence from other schools to decide how they will compete amongst themselves. The competition may take the form of offering compensation to recruits, even a share of NIL if they are so inclined, beyond a set amount of scholarship funds.[135]

Perhaps all of those entities would be even more inclined to share NIL revenue if they had assurance that the NIL form of revenue sharing would not open the door to rampant abuse. To avoid a slippery slope the model rule includes safeguards, known in the business sector as "holdbacks" and "clawbacks". Holdbacks are preconditions before receipt by the intended recipient.[136]Clawbacks involve recovery or recapture of revenue or benefits already received by the intended recipient.[137]

The new standard would have provisions to prevent rewarding those who lost scholarships due to criminal activity or other violations of law, ethics, or policies of the university. The "clawback" or recapture provision is designed to prevent any form of unjust enrichment by a player.[138] Similar to other equity principles in the law, institutions should have flexible means to prevent rewarding those who do not deserve a benefit.[139]The holdback and clawback/recapture provisions are discussed below.

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134. *See* Nat'l Coll. Athletic Ass'n v. Yeo, 171 S.W.3d 863, 869 (2005) (rejecting the claim that a student-athlete had a property interest in her reputation as a world-class athlete).

135. The D-1 Board of Directors adopted this restructuring by a 16-2 vote, headlined by the comment of its Chair, Nathan Hatch that the new structure will allow the power conferences to "focus more intently on the well-being of our student-athletes." *See* Michelle Brutlag Hosick, *Board Adopts New Division I Structure,* NCAA (August 7, 2014), http://www.ncaa.org/about/resources/media-center/news/board-adopts-new-division-i-structure.

136. A *holdback* is "an amount withheld from the full payment of a contract pending the other party's completion of some obligation. . ." *Holdback,* BLACK'S LAW DICTIONARY (10th ed. 2014).

137. *Clawback options* are defined as "The right to require repayment of funds earmarked for a specific purpose if the funds are disbursed. . .in a manner inconsistent with the document governing the specific purpose." *Clawback Options,* BLACK'S LAW DICTIONARY (10th ed. 2014). As will be discussed below, clawbacks are more extensively used in the securities arena.

138. *Unjust enrichment* is "A benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense." *Unjust Enrichment,* BLACK'S LAW DICTIONARY (10th ed. 2014).

139. *Equitable estoppel* is a remedy "preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way" *Equitable Estoppel,* BLACK'S LAW DICTIONARY (10th ed. 2014).

A. HOLDBACKS

The holdbacks in the model rule are the NCAA eligibility rules. A student-athlete must comply with those rules during undergraduate school in order to be eligible later for NIL compensation after he no longer plays for the school.

B. CLAWBACKS

This is a final assurance that the NIL would remain linked to education. Under this model rule, a former student-athlete who uses the NIL for any non-education purpose would have to return those funds to the scholarship-granting institution.

1. RULE AND STATUTORY MODELS FOR NIL CLAWBACK PROVISIONS

There is a Securities and Exchange Commission ("SEC") proposed rule and three primary federal statutes that provide an ample basis for modeling an appropriate clawback provision. Those clawback model authorities ("CMAs") are:

- SEC Proposed Rule 10D-1("Rule 10D-1")[140]
- Sarbanes-Oxley Act of 2002 ("SOA")[141]
- Dodd-Frank Wall Street Reform and Consumer Protection Act ("DFA");[142] and
- Emergency Economic Stabilization Act of 2008 ("EESA")[143]

These CMAs have specific provisions that address the primary issues that arise in any qualitative compensation recovery scheme. These federal authorities will foster the most comprehensive model rule for NIL compensation recapture to be published to date.

2. CORRELATION WITH THE SEC PROPOSED RULES

Among the CMAs, SEC's proposed rule 10D-1 illustrates the model for requisite correlation. The rule is a clawback method to curb unwarranted excess compensation. The

140. The proposed rules were released July 1, 2015 as 2015-136, and were designed to comply with the requirements of Section 954 the Dodd-Frank Wall Street Reform and Consumer Protection Act.

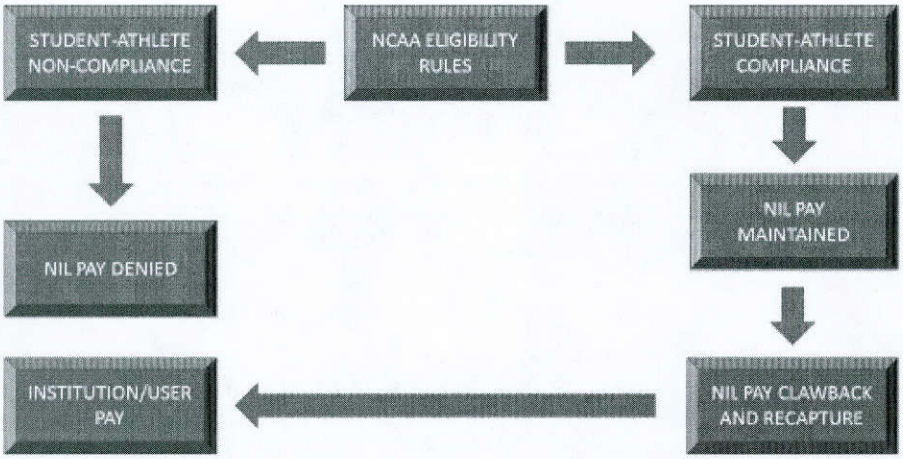
141. Section 304 (a) in total states: Additional compensation prior to noncompliance with Commission financial reporting requirements. If an issuer is required to prepare an accounting restatement due to the material noncompliance of the issuer, as a result of misconduct, with any financial reporting requirement under the securities laws, the chief executive officer and chief financial officer of the issuer shall reimburse the issuer for—(1) any bonus or other incentive-based or equity-based compensation received by that person from the issuer during the 12-month period following the first public issuance or filing with the Commission (whichever first occurs) of the financial document embodying such financial reporting requirement; and (2) any profits realized from the sale of securities of the issuer during that 12-month period. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C. and 18 U.S.C.).

142. DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT (2010), https://www.sec.gov/about/laws/wallstreetreform-cpa.pdf.

143. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (2008).

proposal in this article also concerns potential excess compensation, only by athletes rather than corporate executives.

The SEC's proposed rules, dated July 1, 2015, mandate that companies establish policies that "require executive officers to pay back incentive-based compensation that they were awarded erroneously."[144] NIL payments by athletes post-eligibility are also incentive based. The more productive and popular they are during their amateur career the more valuable their NIL post-career. The incentive to play well, gain goodwill and develop a "brand" with the public translates into a greater NIL allocation.[145] Obviously, the parallel too



is that NIL awards, like executive compensation can be erroneously awarded and would need to be recaptured. The cycle of NIL payments is graphically illustrated below.

C. DETAILED ANALYSIS OF CLAWBACK FACTORS

The above four sources lead to the incorporation of the following factors into creating a clawback scheme:

- A Triggering Event
- Scope of Persons Covered

144. The Proposed Rules are entitled *Proposed Rules Designed to Improve Quality of Financial Reporting and Enhance Accountability Benefiting Investors. See SEC Proposes Rules Requiring Companies to Adopt Clawback Policies on Executive Compensation,* SECURITIES AND EXCHANGE COMMISSION (July 1, 2015), http://www.sec.gov/news/pressrelease/2015-136.html.

145. The question of just how to monetize NIL "value" and then allocate that value is beyond the scope of this article. There could be an equally shared allocation among all scholarship athletes, all athletes regardless of scholarships, or gradations based on performance criteria. Under all models there is an incentive to play well, gain notoriety and establish an individual brand. Even without a granular allocation among individual players, there is vitality in the old axiom that "a rising tide floats all boats". More wins bring more value-added notoriety to the entire team. Presumably, more wins and bowl victories translate into more merchandizing sales, or other NIL-related revenue. The bigger the pot of NIL compensation, the bigger the allocation per player.

- Types of Compensation
- Method of Recovery
- Penalties
- Statute of Limitations[146]

Each of these factors will be customized for an NIL clawback provision. That provision would be incorporated into NCAA rules, and incorporated by reference into each agreement between the NCAA and its member-institutions.

1. THE TRIGGERING EVENT

There must be some prohibited act by the recipient of compensation that authorizes (i.e. "triggers") the recapture of that compensation by the institution.

The CMAs all have substantially similar terms to describe the error that would trigger the clawback. The SEC's Proposed Rule 10D-1 activates the clawback recovery upon a "material error" by current and former executive officers of public corporations.[147] The SOA requires "misconduct [leading to] material noncompliance of the issue . . . with any financial reporting requirement under the securities laws . . ."[148] Under the EESA, the clawback is triggered by "materially inaccurate" statements "of earnings, revenues, gains or other criteria."[149]

The CMAs all have dual requirements: a term for the transgression (e.g. material error, misconduct, or material inaccuracy) and a document to which the transgression relates. Corporate executives and their public corporations have financial reporting requirements imposed by the SEC and enforced through various securities laws.

When it comes to defining a triggering event, the substance rather than the label is most important. So to minimize any unintended loopholes the trigger can include all of those terms. A former student-athlete's act can be any of the above, i.e. a material error, misconduct, or material inaccuracy in the reporting of NIL income.

2. THE REPORTING REQUIREMENT

146. Some of these factors were used in analyzing the same federal statutes. *See* Joseph Bachelder, *Clawbacks Under Dodd-Frank and Other Federal Statutes*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND REGULATION (June 09, 2009), http://corpgov.law.harvard.edu/2011/06/09.

147. Proposed Rules Designed to Improve Quality of Financial Reporting and Enhancing Accountability Benefiting Investors, 80 Fed. Reg. 1446 (July 14, 2015) (to be codified at 17 C.F.R. pts 229, 240, 249, and 274.

148. *Sarbanes-Oxley Act of 2002 § 304, states: § 304. Forfeiture of certain bonuses and profits* "[i]f an issuer is required to prepare an accounting restatement due to the material noncompliance of the issuer, as a result of misconduct, with any financial reporting requirement under the securities laws, the chief executive officer and chief financial officer of the issuer shall reimburse the issuer for— (1) any bonus or other incentive-based or equity-based compensation received by that person from the issuer during the 12-month period following the first public issuance or filing with the Commission (whichever first occurs) of the financial document embodying such financial reporting requirement; and (2) any profits realized from the sale of securities of the issuer during that 12-month period). 15 U.S. Code § 7243 (a)(1).

149. Emergency Economic Stabilization Act § 111(b)(2)(a).

The model's primary collection method is to establish a clearinghouse. That clearinghouse would collect NIL compensation from users of the NIL much like ASCAP and BMI collect sums from users of musicians' work product and distributes performance royalties to the musicians and copyright owners.

The secondary collection method is to have small-scale entities pay NIL compensation directly to the athlete. In the college NIL context, corporate-styled financial reporting requirements would likely be unduly burdensome for former college athletes. Most of them would be 21 to 22 years old with no practical financial reporting experience or the financial acumen to comply with documents that comply with Generally Accepted Accounting Principles ("GAAP"). It would therefore be problematic to impose requirements on *all* athletes that are likely to be beyond their general capability to meet. Nor would it be wise to assume that most have the acumen to hire competent experts, though the few professional athletes may have the money to do so.

There is a better solution for the majority of the NIL fund recipients. A more appropriate reporting obligation could include:

- the athlete's individual federal income tax returns (1040 plus Schedule C if appropriate),
- any business entity tax return; and
- a separate document with categories for types of compensation, the sources of the NIL income, the amount and date received or earned (e.g. commercials showing video clips of a signature move from which payments are received by the athlete from the advertiser).

The items should be reported to the institution, and provide enough information for audits and record keeping for the institution and the athlete.

The third item requires more discussion. As noted above the transgression, or error, relates to an error in filing accurate NIL income. If the amount was from a royalty payment from the institution, the institution would have already sent a tax statement to the athlete. Form 1099-MISC would be sent to non-employees such as independent contractors.[150] And like other recipients of 1099 income, the player would be required to report that income on the applicable federal income tax return.

And just as already exists in our federal tax system, the 1099 process allows a method for the IRS, and in this case the NCAA and its member institutions to track the failure to declare income or track the underreporting of that income. Obviously, the IRS could perform its own audits and be a source for the institution to discover those errors and omissions.

A former scholarship student-athlete would be required to report to the IRS any NIL income, as would any other taxpayer receiving royalties. The current definition of "gross income" is certainly a broad umbrella and the former student athlete recipient of NIL fits comfortably under it.[151] There is no current exemption or exclusion for NIL income. The

150. Form 1099-MISC requires royalty payments over $10 and non-employee compensation. *See* 2016 IRS INSTRUCTIONS FORM 1099-MISC, https://www.irs.gov/pub/irs-pdf/i1099msc.pdf (last visited Apr. 21, 2016).

151. Section 61(a) of the internal revenue code defines "gross income" as *all* income *from whatever source derived*, including but not limited to. . .(1) compensation for services, including fees, gross income. . .income derived from business; *royalties*. . ." I.R.C. § 61(a)(1)(2)(6) (2012). There are no exclusions from gross income specifically for NIL of former student athletes. There are specific exclusions for such items as income from the discharge of indebtedness. *See* I.R.C. § 108(a) (2012). NIL income is not included. If the IRS has intended the exemption or

trigger as proposed in this article does not advocate amending the internal revenue code to make post-playing NIL income exempt from taxation or excluded from the definition of taxable gross income.[152]

The filing of a separate document with the institution whenever institution-sourced NIL revenue is generated is an extra administration burden. But if a form is well-drafted and avoids unnecessary clutter, it can be just a few pages and not overly burdensome.

In the same interest of administrative ease and uniformity, the NCAA could generate and distribute this form to all of its member institutions based upon a vote of those member-institutions. Since the NIL compensation is likely to be generated from the Power 5 Conference schools, the roll out of the forms and scheme would logically be to those schools. The amounts may be so de minimis at any other level that the effort may not be worth the cost.

3. THE SCOPE OF PERSONS COVERED

A well-drafted clawback rule should clearly identify those who are covered by the rule. The obvious parties are the former student athlete who receives NIL compensation and the institution that granted the scholarship. Less obvious are several other entities. Some are potential recipients of the athlete's NIL income. Others are potential recipients of the recovered or recaptured clawback NIL.

Those less obvious entities are noted below categorized in the same matter as described above.

Entity	NIL Status
Agent or Assigns of the Athlete on Athlete's Behalf	NIL Income Recipient
Company of which Athlete has a "Substantial" Financial Interest	NIL Income Recipient
Video Game Manufacturers or other Content Creators Generating Revenue From Athlete's NIL	NIL Income Recipient
NCAA	NIL Clawback Recipient
Top 5 Conference in which Athlete Played	NIL Clawback Recipient

A well-drafted rule minimizes loopholes that can generate unintended consequences. A former student-athlete should not be able to avoid reporting NIL income by simply transferring the income to any of the above NIL Income Recipients. Without such a broad scope of covered entities, a player could simply agree with a video game maker, orally or in writing, to allow the entity to report the income and then have a side contract to deliver

exclusion for NIL income it would have already so stated.

152. There are no exclusions from gross income specifically for NIL of former student athletes. There are specific exclusions for such items as income from the discharge of indebtedness. *See* § 108(a). NIL income is not included. If the IRS has intended the exemption or exclusion for NIL income it would have already so stated.

equivalent goods or services to the athlete as a bartered exchange of value without the former player reporting any NIL to the institution. The model rule includes such service providers within the reporting structure. As a result a loophole is closed. Similarly, of course, any entity that fraudulently transfers NIL income to avoid clawback recapture would be covered and subject to whatever penalties imposed under the rule.[153]

Clawback case law already supports piercing the entity labels to avoid artificial loopholes. In SEC v. Jenkins, the court analyzed whether clawback provisions can apply to the *issuer* of securities even without "misconduct" of the corporate executives.[154] The court held that "text and structure of Section 304 require only the misconduct of the issuer, but do not necessarily require the specific misconduct of the issuer's CEO or CFO."[155] In noting the "text and structure" of the clawback provision, the court was mindful not to create an unwitting exemption due to a lack of misconduct by the CEO or CFO.

The court again applied this principle when it rejected the argument that the formation of a wholly-owned subsidiary to alter the obligation. That would have allowed a subsidiary to essentially exempt itself from the clawback provisions simply by changing its corporate organizational structure.[156] The specific argument was that the clawback provision applies only to an "issuer," of the securities and that the new entity (the subsidiary) is not currently an issuer.[157] The court noted that the original entity was still an issuer at the time the misstated financial statements were filed. The court required the application of clawback provisions despite the creation of a new entity subsequent to the misconduct.

Similarly, the athlete will not be able to hide the NIL income through cleverly disguised shell games with other entities. If the misconduct or material reporting error is performed by or in conjunction with business entities that effect clawback avoidance, the model's definitions are sufficiently broad to enforce the clawback reimbursement. Instead of the target being the executives of a company that issues securities, the target is the former athlete or any entities he creates or partners with to avoid a recapture of unwarranted NIL.

4. TYPES OF COMPENSATION – AUDIT DETERMINATIONS TO AVOID MISCHARACTERIZATIONS

If history teaches us anything about human nature, it is that some of us will attempt to re-characterize income to avoid losing it, be it through taxes or, in this case, a reimbursement or recapture through clawback provisions. For example, taxpayers and the internal revenue service ("IRS") have long-standing disputes about what shall be characterized as "ordinary income" with higher tax rates or "capital gains" with lower tax rates.[158] Obviously, taxpayers seek creative ways to choose the latter.

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153. Penalties are discussed below in section IX (C).

154. SEC v. Jenkins, 718 F. Supp 2d 1070 (2010).

155. *Id.* at 1074.

156. *Id.* at 1079.

157. *Id.*

158. *See* I.R.C. § 64 for the definition of "ordinary income," and I.R.C. § 1222 for a better understanding of capital gains tax on the profit from a sale of a capital asset. For the characterization battle, see WILLIAM A. KLEIN, ET AL, FEDERAL INCOME TAXATION 665 (Aspen, 14th ed. 2006). Neither type of income is relevant for this article. Those terms are only used to demonstrate that re-characterizations are engrained in the psychic of American taxpayers. We should not expect a different mindset from some former student athletes.

Former athletes are not genetically immune from the same temptations to creatively claim that the compensation is somehow not NIL income. For some athletes, as with any other taxpayer the moral and ethical obligation to tell the truth may not be enough. A former student-athlete may claim, for example, that certain income was from services or a gift, not sourced in his NIL when in fact it was NIL income. There may be an unemployed or underemployed former athlete who succumbs to the temptation to claim that the money he received was from his uncle's janitorial company when in fact the income was from sweatshirts with his name on it. And of course there are the unintentional errors with no intent to avoid or evade the recapture of NIL compensation.

Income characterizations are relatively sophisticated matters often discovered only upon audit of the books and records of the suspect. So, like the IRS, the institutions or the NCAA should be provided audit options.

5. METHOD OF RECOVERY

A two-tiered method for disbursements to the former collegiate athlete could include a threshold eligibility to receive NIL compensation, which only occurs if eligibility was maintained during his amateur playing days in undergraduate school (i.e. holdback). The full entitlement does not occur until the athlete also agrees to use, and in fact uses the NIL only for educational purposes. Failure to so use the NIL entitles the repayment to the institution (i.e. clawback). If the athlete fails either test he would fail to receive or keep the income.

After the athlete receives NIL income in what appeared to be consistent with the educational conditions, the clearinghouse, the NCAA or the institution may discover noncompliance with those educational requirements. The circumstance is akin to the IRS performing an audit after the taxpayer filed and received a refund. The clearinghouse and institutional clawback discussed here is akin to the IRS recapturing the previously granted refund and demanding more taxes based on subsequently discovered facts.

The clearinghouse is in the better position than the NCAA or the schools to oversee collection. This would be its only business, and should therefore be more skilled and focused than the institutions or the NCAA, which have a myriad of other priorities and a plethora of other functions in the education of all students. The clearinghouse would only function to handle collection and disbursements of NIL income.

The clearinghouse, at a minimum, would have the following:

- A record of each institution, and each entity that provided NIL income to the athlete.
- Designated employees with the sole or primary function of reviewing transactional detail to see if the payments were indeed NIL income, as opposed to a gift or fee for services unrelated to an athlete's name, image or likeness (e.g. fee for painting houses with no connection with his fame).
- Investigative team, much like the NCAA has for the discovery and enforcement of athlete violations.
- A process to make recommendations for action by the NCAA, or the independent power to make findings of fact and conclusions of law with due process safeguards to any athlete subject to the loss of NIL income.

The exact working relationship between the clearinghouse, the NCAA, the member-institutions, and the athlete would be established through a series of contracts. This contractarian model is preferred over a heavily regulated approach through state of federal entities. State or federal legislation introduces a mix of political and bureaucratic obstacles that are unnecessary. Private market players can perform the collection functions described in this proposal. Only if the privatized system appears to materially harm the public should there be oversight of governmental regulators.

6. PENALTIES

Penalties in this model would be used as a deterrent. The size of the "stick" should be sufficient to cause a change in behavior by a recalcitrant or evasive athlete or party acting on his behalf. Studies should be conducted of comparable circumstances to see what penalty amounts or percentages have been effective in changing behavior from noncompliant to compliant.

Comparable circumstances may again be found in examining cases rooted in the four clawback statutory authorities discussed above. And of course, since this involves the recapture or forfeiture of income, the IRS experience in imposing penalties would need to be explored.

7. STATUTE OF LIMITATIONS

American jurisprudence appropriately limits the ability of an entity to assert claims against another. There are of course exceptions for such extreme matters as murder or certain sex-related felonies.[159] But the pursuit of NIL income transgressions does not rise to that level. A reasonable period of time for discovery of ill-gotten gains can be sourced in the general limitations periods for the analogous circumstance of federal income tax collection, where there is no statutory limit on civil penalties for failing to file an income tax return, but a six-year limitation on criminal prosecutions.[160] The taxpayers subject to the limitations periods include the athletes that would be entitled to NIL income and subject to conditions of recapture.

D. CLAWBACK POLICY CONSIDERATIONS

This model NIL scheme pays significant attention to allowing institutions or NIL users the opportunity to recapture NIL compensation. The proposed holdback and clawback provisions are points of emphasis for several reasons.

159. The limitations periods vary by state. For a summary chart of statutes, see *Time Limits For Charges: State Criminal Statutes of Limitations*, FINDLAW, http://criminal.findlaw.com/criminal-law-basics/time-limits-for-charges-state-criminal-statutes-of-limitations.html (last visited Apr. 21, 2016).

160. See I.R.C. § 6501(c)(3) for civil limitations on IRS action, and I.R.C. § 6531 for the limitation on criminal prosecutions.

First, these methods are medicinal efforts to cure the college sports industry's discomfort with the entire concept of revenue sharing with college athletes. When faced with a strong adverse impression of a fundamental change in the legal relationship, it is wise to have a poison pill against overzealous plaintiffs. In this case, those holdbacks and clawbacks provide safeguards against abuse, and ways to ameliorate the extent of lost NIL to the institutions.

Second, the reality of D-1 football is that it subsidizes most of the other sports programs at the institution.[161] In light of that fact, there is even more economic pressure and more of a policy imperative that institutions retain the revenues generated from the football program. Several of the top D-1 football programs generate millions in royalties and fees from the use of intellectual property. Revenue sharing with former student-athletes diminishes the institution's share that is used to subsidize those programs. So any revenue sharing model should provide assurances against abuse for that reason as well.

Third, there is a need for stability and consistency in any regulatory scheme. Certainty and stability leads to acceptance by all stakeholders, particularly the institutions. The NCAA and its member-institutions already have the NIL benefits, and are logically most resistant to change to their collective detriment. Those particular stakeholders now have enough federal court holdings, rules, and even dicta as discussed above to know that NIL revenue sharing is inevitable. It is just a matter of how much and on what terms.

Fourth, there needs to be a system that is understandable and workable for all parties to the regulation or transaction. In the case of NIL revenue sharing, the NCAA, its collection agents, the member institutions, and the athletes are all stakeholders. If the scheme has gaps in procedures or does not cover certain scenarios, or if there are loopholes that swallow the rule, there is a likelihood of inconsistent application or unintended consequences or awards. Thus, the NIL revenue sharing scheme has the greatest chance of acceptance by all stakeholders if there is clarity and workability on key elements of the plan, including but not limited to (1) NIL definitions (2) the formula for valuing the NIL, and (3) the scope and methods of holdbacks and clawbacks to retain the NIL.

E. NIL INCOME INCLUDES INCOME FROM OTHER INTANGIBLE ASSETS.

A fair system of recapture should first give appropriate notice of what constitutes NIL income so it can be equally clear when there is a mischaracterization of it. Only then will the student athletes know the full range of what must be claimed, and what other income is outside the definition.

The NCAA bylaws broadly state that a scholarship is lost if a student athlete receives *any* remuneration from commercial endorsements or commercial products. The relevant bylaw states:

> Subsequent to becoming a student-athlete, an individual shall not be eligible for participation in intercollegiate athletics if the individual (a) accepts any remuneration for or permits the *use of his or her name or picture* to advertise, recommend or promote directly the sale or use of a

161. For a breakdown of profits for D-1 football and basketball programs compared to deficit operations for other programs, see Kristi Dosh, *Does Football Fund Other Sports At College Level?*, FORBES SPORTSMONEY (May 5, 2011), http://www.forbes.com/sites/sportsmoney/2011/05/05/does-football-fund-other-sports-at-college-level/#1e8608b9563e.

> commercial product or service of any kind, or (b) receives remuneration for endorsing a commercial product or service through the individual's use of such product or service.[162]

The italicized portion of the bylaw reveals a clear intent to address the players NIL rights, since both involve the "use of his or her name or picture." Thus the rule certainly prohibits actual receipt of NIL compensation while still on scholarship. That bylaw does not address the receipt of NIL after the player is no longer on scholarship.

The bylaw was established prior to *O'Bannon* and prior to the refined claims of several plaintiffs who are current and former student athletes. Those claims involve the compensation to be received after the player is no longer on scholarship. The case law now establishes that those athletes have NIL rights. As stated by the Ninth Circuit, the athlete exchanges "his labor and NIL rights for a scholarship . . ."[163]

The athlete's post-participation receipt is also possible. The Ninth Circuit case does not expressly prohibit a possible receipt of NIL by former athletes. The only prohibition was against NIL compensation that was "untethered" from amateurism.[164]

Having established the possibility of post-participation receipt of NIL compensation, it is necessary to define NIL itself before it is proper to state what income is derived from it. NIL is rooted in the common law definition of publicity rights.[165] Publicity rights have been used to prevent others from profiting from the use of a player's NIL without his permission. The permission could presumably be granted through a license agreement with payments made to the athlete for said use. That is a privately negotiated determination of value between the user of the NIL and the owner of it. As noted by the Ninth Circuit in *O'Bannon*, video game manufacturers would be negotiating directly with the student-athletes if it were not for the NCAA.[166]

An athlete's ownership of publicity rights is therefore distinguishable from the same athlete's ownership of intangible assets such as copyrights, trademarks and patents. Those intangible assets are primarily protected under statutory protections in federal law. [167]The NCAA compensation rules provide little guidance on (1) whether the student athlete has the right to own intangible assets (e.g. copyrights and trademarks) and saliently, (2) whether the income received from other intellectual property rights and owned intangible assets is prohibited under NCAA rules post NCAA eligibility.

The above discussion establishes that no NCAA rule directly prohibits a current student athlete from creating intangible assets related to his sport. Accordingly a student-athlete could conceivably own assets protected through copyrights, trademarks, and patents without violation of NCAA rules.[168]

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162. *See* NCAA BYLAWS, *supra* note 1.

163. *O'Bannon*, 802 F. 3d at 1064.

164. *Id.* at 1075.

165. *See* Groves, *supra* note 115 (discussing publicity rights as a property interest).

166. *O'Bannon*, 802 F. 3d at 1057.

167. *See* copyright registration at 17 U.S.C. § 408.

168. A *copyright* is a "property right in an original work of authorship . . . fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform, and display the work." *Copyright*, BLACK'S LAW DICTIONARY (10th ed. 2014). A *trademark* is "a word, phrase, logo, or other sensory symbol used by a manufacturer or seller to distinguish its products or services from those of others." *Trademark*, BLACK'S LAW DICTIONARY (10th ed. 2014). A detailed analysis of the application of these intellectual property protections to collegiate athletes is beyond the scope of this article. College coaches have taken advantage of the

However, no income can be derived from his own NIL while he is a scholarship athlete (even if he does own assets). Those conclusions then support the thesis: a student athlete may legally receive *post-scholarship* NIL of both types of NIL (from right of publicity and from owned intangible assets). The crux of the matter is how the NIL compensation is used. If used for educational expenses, the model rule would pass the standards of the Ninth Circuit in *O'Bannon*.

IX. RULE APPLICATION – THE BRAXTON MILLER ENDORSEMENT ILLUSTRATION

High-profile football player, Braxton Miller, endorsed AdvoCare, a nutritional product on his Instagram post,[169] then quickly removed it. The Ohio State Athletic department issued a statement that the post was an NCAA violation, but was deemed to be minor. Neither OSU nor the NCAA penalized Miller, and there were no adverse consequences to Miller's eligibility.[170] Thus, Braxton Miller was prohibited from endorsing a product, even if he had not profited from it. Of course the scope of this article is confined to the receipt of NIL income after the student is no longer eligible for a scholarship. If the model rule and scheme was in force, Miller would have been able endorse the product, provide notice to OSU and the NCAA of his claim to future NIL. He would agree to use any future NIL compensation solely for the prescribed educational purposes. Upon receipt of that compensation after his eligibility expires, Miller would also be obligated to submit the forms acknowledging said receipt, subject to audit by the NCAA or the institution.

Unless subject to a small business reporting exemption, the entity using Millers NIL would be required to report the transaction to a nonprofit clearinghouse. This would be akin to how bars and restaurants must report use of copyrighted music to ASCAP or BMI, the licensed clearinghouse for royalties in the music industry.

CONCLUSION

The Article first asserts that there needs to be an alternative to disbursing no NIL income to student-athletes based on a hypothetical zero value when millions of real NIL income is made annually. The *O'Bannon* courts were not given a full range of options for judicial determination. They only had to answer one question: Can student-athletes receive NIL compensation with no strings attached to amateurism as an alternative to the NCAA rule that values the NIL as worthless?

The federal district court said "Yes". The Ninth Circuit Court of Appeals said "No".

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legal protection for such intangible assets. Ohio State football coach Urban Meyer gave his permission to The Ohio State University to trademark his name. I fully expect the university paid him for that permission. The "Urban Meyer" mark was issued on July 7, 2015 for "clothing items for men, women, and children, namely, hats, caps, shirts, and T-shirts". *See* Jess Collen, *Why On Earth Did Ohio State's Urban Meyer Have To Register His Name With The Trademark Office?*, FORBES/ENTREPRENEURS (Aug. 3, 2015), http://www.forbes.com/sites/jesscollen/2015/08/03/why-on-earth-did-ohio-states-urban-meyer-have-to-register-his-name-with-the-trademark-office/.

169. The NCAA reinstated Miller after Ohio State self-reported the violation, deemed minor. *See* Sam Cooper, *Ohio State Self Reports 6 Minor Violations, Including Braxton Miller Instagram Post*, YAHOO!SPORTS (Oct. 29, 2015), http://sports.yahoo.com/blogs/ncaaf-dr-saturday/ohio-state-self-reports-6-minor-violations--including-braxton-miller-instragram-post.

170. *Id.*

The result is that the NCAA rule is allowed to stand for the nonsensical notion that the NIL is valued at zero when we all know the NIL is indeed very valuable and used to generate billions of dollars in the college football market.

The Ninth Circuit was not called upon to decide whether an NCAA rule authorizing NIL benefits to former scholarship student-athletes *conditioned on solely educational uses upon receipt* provide a less restrictive means of promoting amateurism than the current NCAA rule.

The positive answer to this precise issue is indeed a middle ground solution to the conundrum. But beyond solving for the legal issue is the need to have a workable alternative to the current NCAA rule. After dispelling the false narrative that NIL payments are part of pay-for-play, this article offers a middle ground. The model rule and scheme meets each element of the multi-layered standard established by the Ninth Circuit. Saliently, it creates the tether between the NIL payments and amateurism so that the payments have the true character of "education-related expenses."

This model goes beyond the technical requirements of the Ninth Circuit standard. Cognizant of the reticence that exists to paying college student-athletes in the broad sense, this proposal provides additional safeguards against abuse so NIL payments would not be used for non-educational purposes and not be re-characterized as another form of income without a remedy for the institutions.

The protections are multi-layered. First, the method of collection and disbursement of NIL compensation is based on a system that already works in an analogous circumstance – the performing rights clearinghouse system to collect and disburse performance royalties for music performers. Second, the model rule includes clawback provisions crafted from securities law sources. The customized scheme should provide more sophistication against abuse than any payment schemes existing in college sports. Third, the model rule protects against a slippery slope of invidious or unwitting NIL-creep. This is accomplished in part by clarity of terms, thus reducing ambiguity. Penalties would be imposed to deter intentional mischaracterizations of NIL income or intentional or negligent non-reporting of NIL compensation.

In sum, the model rule has multi-faceted elements that should pass the Ninth Circuit's standard for a less restrictive alternative to the existing zero value attributable to student-athletes' NIL. It also has moderating aspects to appease those uncomfortable with student-athlete revenue sharing. More importantly, the law would be applied in a way that allows those who deserve a return on the accumulated value of their own name, image, and likeness to actually and eventually receive it.

"School's Out": A Coach's Tortious Instructions to his Players to Harm Others is Beyond the Scope of Employment for Imputing Liability to the Employer-Schools

Joshua D. Winneker* & Philip Schultze

Unfortunately, in contact sports, a coach instructing his players to intentionally harm other players, or even the referees, is something that occurs at the professional, collegiate, and interscholastic levels.[1] Whether it is a win-at-all-costs mentality or simply getting caught up in the moment, several coaches have resorted to this ordered violence, which ultimately could result in civil liability for the player, coach, and even the the school, as the coach's employer.[2]

The most famous example of a coach demanding that his player physically attack another player dates back to 2005 when the former Temple University men's basketball coach, John Chaney, sent a third-string player (who Chaney referred to as his "goon") into the game.[3] Chaney's instructions resulted in the broken arm of an opposing player from Saint Joseph's University, ending his senior season.[4] In the fall of 2015, this same behavior occurred at the high school level when a Texas High School assistant football coach from John Jay High School ordered two of his players to hit the referee as payback for his alleged racial comments.[5]

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1. The New Orleans Saints were involved in an incident that led to the suspensions of Head Coach Sean Payton, Defensive Coordinator Greg Williams, and players Jonathan Vilma, Anthony Hargrove, Will Smith and Scott Fujita following the 2011 season. Many still refer to this incident today as "Bounty-Gate", where Williams, under Payton's supervision, was instructing his players to intentionally harm the opposing players as a part of bounty system where the players were paid for the malicious hits. Chris Burke, *NFL hammers Sean Payton, Saints, Gregg Williams for bounty scandal,* SPORTS ILLUSTRATED (Mar. 21, 2012), http://www.si.com/nfl/audibles/2012/03/21/nfl-hammers-saints-gregg-williams-for-bounty-scandal; Jake Simpson, *4 BountyGate Players Suspended: What It Means for the Future of Football*, THE ATLANTIC (May 3, 2012), http://www.theatlantic.com/entertainment/archive/2012/05/4-bountygate-players-suspended-what-it-means-for-the-future-of-football/256714/. Although this instance fits into the paradigm discussed herein, this paper focuses only on college and high school level coaches and whether those coaches' actions can be imputed to their employer-schools.

2. Certain intentional torts committed by a player or coach may also result in potential criminal violations. *Former John Jay coach pleads guilty in assault on blindsided official; charges against players to come*, USA TODAY HIGH SCHOOL SPORTS (Dec. 14, 2015), http://usatodayhss.com/2015/former-john-jay-coach-pleads-guilty-in-assault-on-blindsided-official-charges-against-players-to-come (reporting how a high school football coach was charged with misdemeanor assault charges after ordering his players to intentionally hit a referee). Any criminal issues, however, are beyond the scope of this paper.

3. Joshua D. Winneker, *Re-living "Goon-Gate" and its Potential Legal Consequences for Universities and Colleges*, COLLEGE SPORTS BUSINESS NEWS (Feb. 1, 2011), http://collegesportsbusinessnews.com/issue/february-2011/article/re-living-goon-gate-and-its-potential-legal-consequences-for-universities-and-colleges.

4. *Id.*

5. James Dator, *Texas high school coach admits he ordered players to hit referee for alleged racist remarks*,

There are numerous other examples of coaches instructing their players to intentionally harm others; these coaches deserve to be fired or even to face a civil lawsuit.[6] The issue, however, is that the coaches, as employees of the schools, could subject the schools to civil liability even though the schools were not part of the tortious conduct. Because the coaches are committing a civil tort by instructing their players to harm others, the schools could be vicariously liable as the coaches' employer through the doctrine *respondeat superior* ("let the master answer").[7] This article argues that even though the coaches are committing reckless or intentional torts when engaging in this type of behavior and even though employers are typically liable for the torts committed by their employees (fairly or unfairly), in this circumstance, the coaches would be acting outside the scope of their employment. Therefore, the causal chain imputing liability to the school should be broken.

Part I of this article details the many examples of coaches instructing their players to intentionally harm another player or referee at both the collegiate and high school level. Part II discusses participant and coach liability in contact sports. Part III examines the law of vicarious liability and Part IV argues that the employer-schools should not be vicariously liable for the actions of their coaches when they act outside the scope of their employment by ordering their players to attack another player or referee.

I. COACHES INSTRUCTING PLAYERS TO HARM OTHERS

An unfortunate incident gave rise to the moniker "Goon-Gate" occurred during a Temple University vs. Saint Joseph's University men's basketball game in 2005.[8] John Chaney, the Hall of Fame Temple coach, sent his "goon" (Chaney's words) a third-string player named Nehemiah Ingram, into the game.[9] Ingram was instructed to "send a message" (again, Chaney's words) by purposefully fouling the opposing players because Chaney was upset that his players were victims of illegal screens.[10] Ingram fouled out in four minutes and along the way hit St. Joe's John Bryant, breaking Bryant's arm and ending Bryant's senior season.[11] After the game, Chaney was unapologetic, stating:

> I'm a mean, ornery, son of a bitch . . . And when I see something wrong, I try to right it. I'm going to do the same thing they do to me. I'm going to send in what we did years ago - send in a goon. I'm from the old school, I try to play it right, but no more, no more.[12]

SB NATION (Sept 23, 2015, 9:41 AM), http://www.sbnation.com/2015/9/23/9382017/john-jay-high-school-football-coach-players-hit-referee-alleged-racist-remarks.

6. *See infra* Parts I, II.B.

7. *Respondeat Superior,* BLACK'S LAW DICTIONARY (10th ed. 2014).

8. *Coach apologizes for sending in 'goon' vs. St.* Joe's, ESPN (Feb. 25, 2005), http://espn.go.com/ncb/news/story?id=1998200; David Pincus, *2/22/2005 – John Chaney sends in the goon*, SB NATION (Feb. 22, 2010, 3:45 PM), http://www.sbnation.com/2010/2/22/1078805/2-22-2005-john-chaney-sends-in-the.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

Chaney's actions were universally detested but resulted only in his subsequent apology, along with a three-game suspension.[13] Bryant never filed a lawsuit against Ingram, Chaney, or Temple.

In the fall of 2015, two San Antonio, Texas high school football players from John Jay High School were filmed tackling a referee.[14] The two players hit the referee because the referee allegedly made racial slurs during the game and a John Jay assistant coach, Mack Breed, said to the players in response, "[t]hat guy needs to pay for cheating us."[15] In less than four days, the video had over 8 million views and the incident received national attention.[16] The two players were suspended from school for three days.[17] The players stated that Breed told them, "you need to hit him . . . you need to hit the ref. He needs to pay the price."[18]

Breed eventually folded under the intense national media scrutiny and resigned his assistant coach position.[19] In his resignation letter, he came just short of admitting that he ordered the attack, stating, "[s]uccumbing to the racially charged atmosphere, Coach Breed let his anger get the best of him and he made some regrettable comments."[20] Subsequent to his resignation, Breed pleaded guilty to criminal charges stemming from this violent attack, but again fell short of actually admitting to ordering the hits, despite pleading guilty.[21] While reports stated that Breed admitted to the principal of John Jay High School that he gave the violent orders, Breed later recanted his admission, instead acknowledging that he made comments that "may have unintentionally instigated the hit."[22]

John Jay High School is not the only high school with incidents of coaches instructing players to attack another person. In Georgia, a player for the Ware County High School football team, junior Ronnie Adams, was also caught on video hitting a defenseless Glynn Academy kicker.[23] Adams was flagged on the play and ejected from the game, and resulted in an automatic one-game suspension.[24] Adams responded on social media, saying "My coach told me to do that so I did it. I'm the hit man for Ware County. Hit me up if you wanna know more."[25] He then listed a phone number.[26]

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13. *Id.*

14. Greg Botelho, *Officials: Texas high school football players hit referee after alleged slur*, CNN (Sept. 8, 2015, 9:07 PM), http://www.cnn.com/2015/09/08/sport/texas-football-official-hit/.

15. *Id.*

16. *Id.*

17. Eliott C. McLaughlin and Chris Lett, *Texas coach accused of ordering players to hit referee resigns*, CNN (Sept. 24, 2015, 6:28 PM), http://www.cnn.com/2015/09/24/us/high-school-players-hit-texas-football-official-hearing/.

18. *Id.*

19. *Id.*

20. *Id.*

21. Calily Bien, *John Jay High coach pleads guilty to assault after hit on referee,* KXAN (Dec. 14, 2015, 10:53 PM), http://kxan.com/2015/12/14/john-jay-high-coach-pleads-guilty-to-assault-after-hit-on-referee/.

22. *Ex-John Jay assistant admits saying ref 'needs to pay,' denies ordering players to make hit*, ESPN (Oct. 15, 2015), http://espn.go.com/moresports/story/_/id/13893522/former-john-jay-hs-assistant-coach-mack-breed-denies-ordering-players-hit-referee; *John Jay assistant recants, resigns and barred from coaching elsewhere for now*, USA TODAY High School Sports (Sept. 24, 2015), http://usatodayhss.com/2015/john-jay-assistant-coach-reportedly-recants-that-he-told-players-to-hit-ref.

23. *Georgia player alleges coach directed him to make illegal hit on kicker*, USA TODAY HIGH SCHOOL SPORTS (Oct. 15, 2015), http://usatodayhss.com/2015/georgia-player-alleges-coach-directed-him-to-make-illegal-hit-on-kicker.

24. *Id.*

25. *Id.*

Coaches that instruct players in contact sports to hit another player or referee are not limited to male sports. In Oklahoma, Cache High School girls basketball coach, Kenny White, created a plan weeks prior to a high school basketball game against neighboring Elgin High School to have his players throw an inbounds pass off a rival star player's face to knock her out of the game.[27] The plan was eventually carried out and the ball was whipped into the opposing player's face.[28] An investigation revealed, and two players admitted, that White directed them to do this. White conceded that he said to throw the ball but not at anyone's face, but was eventually suspended for only three games.[29]

Another coach in Oklahoma suffered a worse fate for engaging in similar behavior.[30] In 2014, Doug Bond, the boys basketball coach for Bray-Doyle High School, was fired for instructing his players to undercut opponents when they dunked.[31] Fortunately, no one was ever injured, but merely teaching the players these vicious tactics was enough to terminate the coach's employment.[32]

These are only the reported examples of coaches recklessly or intentionally trying to harm opposing players or referees. This is a problem that spans all contact sports and does not discriminate between genders. The coaches who engage in this behavior have put their players and themselves at risk, but is it right to impute the employer-schools as well? These over-the-top and out-of-bounds malicious antics are certainly not something that these coaches did within their "scope of their employment".

II. PARTICIPANT AND COACH LIABILITY IN CONTACT SPORTS

A. PARTICIPANT LIABILITY

Participant liability is simply liability that results from actually participating in a sporting event.[33] When it comes to contact sports and participant liability, courts have generally rejected the theory of negligence.[34] A negligence action does not suffice in contact sports such as football, hockey, basketball and soccer because unintentional contact, the basis for a negligence lawsuit, is merely a part of the game.[35] If negligence lawsuits were allowed in contact sports then there would be a viable lawsuit after almost every play in a

26. *Id.*

27. Jacob Unruh, *High school basketball: Cache players say their coach tried to injure opponent*, NEWSOK (Oct. 14, 2015), http://newsok.com/article/5453623.

28. *Id.*

29. *Id.*

30. Jenni Carlson, *Commentary: Cache players say their coach tried to injure an opponent; believe them*, NEWSOK (October 14, 2015), http://newsok.com/article/5453624.

31. *Id.*

32. *Id.*

33. *See, e.g.*, Nabozny v. Barnhill, 334 N.E.2d 258 (Ill. App. Ct. 1975) (finding the defendant not liable for injuries arising during a soccer game where one participant injured a co-participant in a participant liability suit).

34. *See, e.g.*, Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516, 524 (10th Cir. 1979) (holding that recklessness is the minimum standard for liability to a co-participant in professional football); Knight v. Jewett, 834 P.2d 696, 710–12 (Cal. 1992) (concluding that there is no liability against a co-participant for ordinary, careless or negligent conduct); *Nabozny*, 334 N.E.2d at 261 (rejecting negligence as the appropriate standard and holding that a player is liable for injury to a co-participant only when his conduct is deliberate, willful or reckless).

35. *Knight*, 834 P.2d at 708.

game.[36] This would create a "chill" on participants playing those sports and would completely re-shape and change the sports themselves.[37] It would likely result in an unwillingness to play and an eventual fading away of those sports.[38] In our society where football and basketball are the most popular and most lucrative sports, the court system would never allow for these sports to be subjected to too many lawsuits.

The problem is that there were plenty of injured players left with no recourse; the courts had to reach a compromise. Instead of banning all lawsuits arising from contact sporting events, the courts allowed participants to maintain lawsuits in certain situations. These situations are when the participant can allege that he/she was injured because of reckless or intentional conduct on the part of another participant or the participant acted outside the realm of the sport.[39]

This recklessness/intentional conduct compromise protects the integrity of contact sports, but at the same time allows for injured parties to recover for the injuries they sustained at the hands of someone who was acting beyond what was expected in the sport.[40] When playing a contact sport, or any sport for that matter, the participants assume the risks that are inherent in that sport.[41] Risks like being tackled, checked, boxed out or bumped are well-known and understood aspects of playing contact sports. Participants, however, do not assume the risks of reckless/intentional conduct or conduct outside the realm of the sport.[42] No one plays a sport assuming that they could be intentionally harmed or be the victim of reckless behavior. Those risks are simply not understood.

B. COACH LIABILITY

In a basic fact pattern, a player from one team is injured by a player from the opposing team during a contact sporting event, and responds by suing the opposing player and the opposing player's coach and school. The standard for suing the player was noted above.

In this fact pattern, courts have held that the injured player cannot maintain a cause of action in negligence against the coach.[43] The coach must have also committed a reckless or intentional act, typically by way of instructing his player to purposefully harm an opposing player.[44]For example, in *Kavanagh v. Trs. of Boston Univ.*, a member of the Manhattan

36. *See, e.g., Knight* 834 P.2d at 710 (stating that a participant's normal energetic behavior often may be accidently careless and holding a participant liable for such behavior may well alter the fundamental nature of a sport); *Nabozny*, 334 N.E.2d at 260 (opining that a negligence standard for participant liability cases in sport would result in "unwarranted judicial intervention" that would "inhibit the games vigor.").

37. *See Knight* 834 P.2d at 710; *Nabozny*, 334 N.E.2d at 260.

38. *See Nabozny*, 334 N.E.2d at 260 (finding that a negligence standard would place "unreasonable burdens on the free and vigorous participation" in sports).

39. *See, e.g., Hackbart*, 601 F.2d at 524 (holding that recklessness is the minimum standard for liability to a co-participant in professional football); Karas v. Strevell, 884 N.E.2d 122, 134 (Ill. 2008) (concluding that in full contact sports such as football and hockey the standard for participant liability should be intentional or conduct outside the realm of the sport).

40. *See Hackbart*, 601 F.2d at 524; *Karas* 884 N.E.2d at 134.

41. *See, e.g.*, Richmond v. Employers' Fire Ins. Co., 298 So. 2d 118, 122 (La. Ct. App. 1974) (holding that being struck by a bat released by a co-participant is a foreseeable risk during a baseball practice).

42. *See Hackbart* 601 F.2d at 524 (ruling that the assumption of the risk defense applies to negligence and the recklessness standard overcomes the assumption of the risk defense).

43. *See* Trujillo v. Yeager, 642 F. Supp. 2d 86, 88, 91 (D. Conn. 2009).

44. *Id. at* 91.

College basketball team was punched by a Boston University player when trying to break up an on-the-court scuffle between players from the opposing teams.[45] The plaintiff alleged that the coach was negligent by influencing his player's violent conduct because the coach had expressed an "aggressive demeanor on the sidelines."[46] In finding for the defendant-coach, the Massachusetts Supreme Court held that it would be inappropriate to apply a mere negligence standard when assessing whether a coach should be liable for causing an opposing player to be injured by the coach's own players.[47] Instead, the Court held that the same standard of recklessness that is applied in participant liability cases should also apply to alleged coach liability.[48] The Court stated:

> [B]y their nature, competitive sports involve physical contact between opposing players, and that some degree of aggressiveness in play is essential to athletic competition. Just as players are entitled to play aggressively without fear of liability, a coach properly may encourage players to play aggressively. Indeed, a coach's ability to inspire players to compete aggressively is one of a coach's important attributes. The mere possibility that some players might overreact to such inspiration or encouragement should not, by itself, suffice to impose liability on a coach. As we do with players themselves, we must impose liability only where a coach's behavior amounts to at *least* recklessness (emphasis added).[49]

Following *Kavanagh,* the District of Connecticut in *Trujillo v. Yeager*, addressed a similar situation where a coach was sued when a player on his team struck an opposing player in the head during an NCAA Division III soccer match.[50] The injured opposing player alleged that the coach was negligent in failing to adequately train or educate his player, resulting in his player harming the plaintiff.[51] As this was a case of first impression for the Connecticut courts, the District Court looked to the *Kavanagh* decision.[52]

The *Trujillo* court found that having a negligence standard for coach liability "would unreasonably threaten to chill competitive play."[53] The court then reiterated the sentiment expressed in *Kavanagh*, and stated that "under the rules of any sport, fouls or other violations carry their own penalties, and it is up to the officials refereeing the competition to enforce those rules and impose those penalties," and the NCAA already has "a system of rules and discipline . . . to control the behavior of coaches and players alike. To impose an overlay of liability in tort for simple negligence over this internal system of regulation would run the risk of undermining that system and creating the flood of unwarranted litigation."[54] Ultimately, the court adopted *Kavanagh's* holding and required that a coach

45. Kavanagh v. Trs. of Boston Univ. 795 N.E.2d 1170, 1173 (Mass. 2003).

46. *Id.* at 1178.

47. *Id.* at 1178–79.

48. *Id.* at 1179 (citing Gauvin v. Clark, 537 N.E.2d 94 (Mass. 1989); Gray v. Giroux, 730 N.E.2d 338 (Mass. 2000). This reckless standard encompasses intentional acts as well. *Gray* 730 N.E.2d at 341 (quoting Manning v. Nobile, 582 N.E.2d 942, 946 (Mass. 1991)) ("willful, wanton, or reckless conduct has been defined as 'intentional conduct, by way either of commission or of omission where there is a duty to act, which conduct involves a high degree of likelihood that substantial harm will result to another.'"). In *Kavanagh*, there was no evidence that the coach instructed his players to harm anyone. Kavanagh, 795 N.E.2d at 1179.

49. Kavanagh at 1179.

50. Trujillo v. Yeager, 642 F. Supp. 2d 86, 86–87, 91 (D. Conn. 2009).

51. *Id.* at 86–87.

52. *Id. See also Kavanagh, supra* note 48.

53. *Trujillo* 642 F.Supp.2d at 91.

54. *Id.* at 90–91.

must commit a reckless or intentional act in order to be held liable for an opposing player's injuries.[55]

Without these rulings, coaches could be subjected to a lawsuit every time one of their players makes contact with another player. If that were the case, no one would ever want to become a coach. But, what about the lawsuit against the school?

III. VICARIOUS LIABILITY

A school may be civilly liable for the coach's actions by way of *respondeat superior*, which means "let the master answer."[56] This is also known as "vicarious liability."[57] The school, as the employer, is the master, and the coach, as the employee, is the servant. Essentially, the law of vicarious liability imposes tort liability on the employer for the torts committed by its employees against third parties.[58] This includes both negligence actions and intentional torts.[59] For coaches' actions during a contact sport, courts have held that the employer-school could be vicariously liable for reckless or intentional actions by the coach, but not for negligent ones.[60] This doctrine, however, only applies when the employee who committed the tort is acting within the "scope of his employment" for the employer.[61]

Jurisdictions may vary, but generally, the issue of whether an employee's reckless or intentional tort is outside the scope of their employment turns on whether that conduct was so atypical of the employee's job functions that the very act itself would sever the employment relationship.[62] When making a determination of how strongly connected an employee's conduct is to their job duties, seven factors, or a combination thereof, are generally analyzed. Those factors are:

(1) Foreseeable;

(2) Done in the furtherance of the employer's business;

(3) Directly or indirectly connected to or fairly and naturally incidental to the employer's business, or reasonably necessary or incidental to such employment;

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55. *Id.* at 91. *See also* Kahn v. East Side Union High School Dist., 75 P.3d 30, 43 (Cal. 2003) (applying the same standard for co-participant liability and coach liability, which is a standard of intentional or reckless conduct).

56. *Respondeat Superior,* BLACK'S LAW DICTIONARY (10th ed. 2014).

57. *Liability,* BLACK'S LAW DICTIONARY (10th ed. 2014).

58. *Id.*

59. 27 Am. Jur. 2d Employment Relationship §§ 360, 363 (2nd 2015).

60. *Trujillo* 642 F.Supp.2d at 91 ("The allegations against Trinity College are identical to those against [the coach] and fail for the same reasons. Because the college acts, in effect, through the coach in training or educating players, allowing negligence claims against colleges for a coach's failure to adequately train or educate a player would allow plaintiffs to evade the policy of not allowing negligence claims against coaches for injuries caused by their players."); Kavanagh v. Trs. Of Boston Univ., 795 N.E.2d 1170, 1179 (Mass. 2003) ("[N]either the university nor its coach had any reason to foresee that [the defendant] would engage in violent behavior. . . . Neither the university nor its coach had any duty to protect Kavanagh from a harm that they could not have reasonably foreseen.").

61. 27 Am. Jur. 2d Employment Relationship § 362 (2nd 2015).

62. *Id. But see* Estate of Anderson v. Denny's Inc., 2013 WL 6506319 (D.N.M. 2013) (applying New Mexico law and not finding the employer vicariously liable simply because employee committed an intentional tort).

(4) Of the kind that the employee was employed to perform;

(5) Substantially within the authorized 'time and space' limits of the employment;

(6) At least partly motivated by an intention to serve the employer; and

(7) Expectable in view of the employee's duties.[63]

Applying these factors to the coach's situation herein, it is clear that the employer-schools should not be vicariously liable.

IV. "SCOPE OF EMPLOYMENT"

When a coach specifically instructs his player to intentionally hit, harm, or attack an opposing player or referee, and the player carries out this directive, courts should hold that the coach is not acting within the scope of his employment. The coach would have broken the causal connection to his employer by deviating from his employment duties.[64] This, in turn, would curtail the employer's liability.

A. THE COACH'S CONDUCT IS NOT FORESEEABLE

Courts have held that conduct is foreseeable to an employer if an employee is acting within the duties and responsibilities that he or she is "expressly or impliedly" hired to perform.[65] For example, in *Kephart v. Genuity, Inc.,* the court held that an employee that intentionally ran another car off the road acted completely on his own volition and out of "personal malice."[66] The court found that this act of personal malice was outside of the scope of his employment even though the location of the accident took place where the employee was supposed to be conducting a "special errand business trip."[67] The court reasoned that the "conduct was not inherent in [the employee's] employment or typical of or broadly incidental to the business enterprise. [The employee's] conduct was unusual or startling, such that it would not be fair to include the harm caused by it in the company's cost of doing business."[68]

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63. 27 Am. Jur. 2d Employment Relationship § 360 (2nd 2015).

64. It is important to note the unique nature of a coach's job duties compared to other employees. Coaches manage and instruct players on how to compete to the best of their ability and win as many games as they can. In contact sports such as football, in order to win, players must commit acts of violence that are actually a part of the game that include tackling, pushing, and blocking. Coaches and commentators constantly make comments such as "they have to play physical out there" and players in football are applauded for issuing a "hard hit". In basketball, players are at times congratulated on committing a "good, hard, foul." There is a place for violence in contact sports, and this paper does not intend to argue that violence or physical play itself is not incidental or within the scope of a coach's employment. Rather, the issue is when a coach commits a reckless or intentional tort by encouraging or instructing players to inflict malicious violence on their opponents, with the sole intent to injure, which clearly is outside the realm of the sport and consequently outside the scope of their employment.

65. *See* Coleman v. United States, 91 F.3d 820, 824 (6th Cir. 1996). *See also* 27 Am. Jur. 2d Employment Relationship § 363 (2nd 2015).

66. Kephart v. Genuity, Inc., 38 Cal. Rptr. 3d 845, 848–850 (2006).

67. *Id.* at 280.

68. *Id.*

Thus, for conduct to be "foreseeable," it must stem from the duties and responsibilities that the employer entrusted in the employee.[69] A coach instructing a player to intentionally injure another player or referee would not only be acting outside the duties and responsibilities of a contact-sport coach, but would be acting in stark contradiction to them.[70] Generally, a high school or college coach is supposed to promote healthy competition, foster player development, and, of course, win games.[71] By instructing a player to intentionally injure another player, a coach would be creating unhealthy competition, hindering player development (because his players would be playing outside the confines of the rules and regulations of the sport), and jeopardizing team wins due to the increased player penalties, fouls, or ejections this type of behavior would cause.[72]

Furthermore, this conduct is directly analogous to the defendant's actions in *Kephart*, because it arises out of "personal malice" and is "unusual or startling."[73] Indeed, Chaney admitted that he sent in his "goon" in retaliation for what he perceived were bad calls against his team. Additionally, Goon-Gate and the attack on the referee by the John Jay football players received constant national media attention because they were so "unusual and startling". It is clear that this type of conduct does not arise from the duties and responsibilities entrusted in coaches of contact sports and consequently cannot be deemed foreseeable by the employer-schools.[74]

B. THE COACH'S CONDUCT IS NOT DONE IN FURTHERANCE OF THE EMPLOYER'S BUSINESS

Addressing the second factor, courts have stated: "Where the employee committed the tort 'solely for personal motives unrelated to the furtherance of the employer's business,'" vicarious liability would not apply.[75] Thus, when "'[the employee] step[s] aside from his employment to commit a wrong prompted by a spirit of vindictiveness or to gratify his personal animosity or to carry out an independent purpose of his own," this breaks the causal chain to the employer.[76] In *Clark v. Prince George's County*, an off-duty police officer shot two deliverymen who entered his home on a delivery.[77] The plaintiffs filed suit against the off-duty officer and the county, claiming that the county should be held vicariously liable as the officer's employer.[78] The court held that vicarious liability would

69. *See Coleman* 91 F.3d at 824–26.

70. *See, e.g.*, Rich Engelhorn, *Legal and Ethical Responsibilities of a Coach*, IOWA HIGH SCHOOL ATHLETIC ASSOCIATION, http://www.iahsaa.org/RichEngelhorn.html (explaining a coach's ethical responsibilities is to encourage the development of our youth into productive citizens to win, but to win the correct way; create a healthy and safe emotional environment, free of fear, discrimination, abuse and harassment; teach and, more importantly, model good citizenship and sportsmanship; respect the spirit of a rule as well as the letter of the rule; and respect the role of sport in the life of a child).

71. *Id.*

72. *Id.*

73. *Kephart*, 38 Cal. Rptr. 3d at 845.

74. *See Coleman* 91 F.3d at 824–26.

75. Dean v. City of Buffalo, 579 F. Supp. 2d 391, 411 (W.D.N.Y. 2008) (quoting Vega v. Northland Mktg. Corp., 735 N.Y.S.2d 213, 214 (N.Y. App. Div. 2011)).

76. Palmer v. U.S. Amateur Boxing, Inc., 4 F. Supp. 3d 779, 785 (E.D.N.C. 2014) (quoting Medlin v. Bass 398 S.E.2d 460, 463 (N.C. 1990)).

77. Clark v. Prince George's County, 65 A.3d 785, 789 (Md. Ct. Spec. App. 2013).

78. *Id.*

not apply because the defendant had acted outside the scope of his employment.[79] Specifically, the court stated:

> [W]hen an employee's actions are 'personal, or *when they represent a departure from the purpose of furthering the employer's business*, or when the employee is acting to protect his own interests,' the actions are outside the scope of employment. Therefore, whether or not Washington was acting to protect his home and family or was acting unprovoked, he was acting outside the scope of his employment (emphasis added).[80]

It is clear that when a coach instructs a player to intentionally injure another, such conduct is not in furtherance of the school's business. Two things primarily further the business of collegiate athletics: winning games and boosting the university's reputation.[81] Incidents such as Goon-Gate significantly hinder both of those goals.[82] These events can lead to coaches being suspended or fired and players being ejected or suspended, causing the team's performance to suffer immeasurably.[83] When a situation like this occurs, it negatively affects the school's reputation, which makes it a less attractive destination for future players, coaches, and students and hinders future alumni and donor financial support.[84]

C. THE COACH'S CONDUCT IS NOT CONNECTED TO, OR FAIRLY AND NATURALLY INCIDENTAL TO, THE EMPLOYER'S BUSINESS, NOR IS IT REASONABLY NECESSARY OR INCIDENTAL TO SUCH EMPLOYMENT, NOR IS IT THE TYPE OF EMPLOYMENT THE EMPLOYEE IS HIRED TO PERFORM

Regarding the third and fourth factors, courts have held that vicarious liability will only apply when the employee conduct in question is connected to, or is reasonably necessary or incidental to, the type of employment that the employee was hired to

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79. *Id.* at 802–03.

80. *Id.* at 802.

81. Michael L. Anderson, *The Benefits of College Athletic Success: An Application of the Propensity Score Design with Instrumental Variables* (The Nat'l Bureau of Econ. Research, Working Paper No. 18196), *available at* http://www.nber.org/papers/w18196.pdf (stating that winning collegiate athletic games "reduces acceptance rates and increases donations, applications, academic reputation, in-state enrollment, and incoming SAT scores."); Jeffrey Pauline, *Factors Influencing College Selection by NCAA Division I, III, and III Lacrosse Players*, 5 SYRACUSE J. RES. 62, 62, 64 (2010), *available at* http://files.eric.ed.gov/fulltext/EJ913334.pdf (explaining how the overall reputation of the university is the third most important factor in a college athlete's decision, after only career opportunities and academic reputation).

82. *See Coach apologizes for sending in 'goon' vs. St.* Joe's, ESPN (Feb. 25, 2005), http://espn.go.com/ncb/news/story?id=1998200; David Pincus, *2/22/2005 – John Chaney sends in the goon*, SB NATION (Feb. 22, 2010, 3:45 PM), http://www.sbnation.com/2010/2/22/1078805/2-22-2005-john-chaney-sends-in-the.

83. *Id.*

84. Michael L. Anderson, *The Benefits of College Athletic Success: An Application of the Propensity Score Design with Instrumental Variables* (The Nat'l Bureau of Econ. Research, Working Paper No. 18196), *available at* http://www.nber.org/papers/w18196.pdf; Jeffrey Pauline, *Factors Influencing College Selection by NCAA Division I, III, and III Lacrosse Players*, 5 SYRACUSE J. RES. 62, 62, 64 (2010), *available at* http://files.eric.ed.gov/fulltext/EJ913334.pdf. *See Otto: "Goon" player suffers most from Chaney's actions*, The Temple News (Feb. 22, 2005), http://temple-news.com/otto-goon-player-suffers-most-from-chaneys-actions/. *See also* David Pincus, *2/22/2005 – John Chaney sends in the goon*, SB NATION (Feb. 22, 2010, 3:45 PM), http://www.sbnation.com/2010/2/22/1078805/2-22-2005-john-chaney-sends-in-the.

perform.[85] For conduct to be directly or indirectly connected to employment, courts have held that the conduct must be "for the benefit of the employer."[86] However, "if the act performed is not in any way connected with the service for which he is employed, but for [the employee's] own particular and peculiar purposes, then the act is not within the scope of the employment."[87]

In *P.S. v. Psychiatric Coverage*, the plaintiffs alleged that an unlicensed psychologist was "negligent by becoming sexually involved with plaintiff P.S. under the guise of therapy" and sought to hold the doctor's employer-clinic liable under the theory of vicarious liability.[88] The Court held that the doctor's "intentional sexual misconduct was not psychological therapy and went beyond [the] scope of employment as a therapist," ultimately because the sexual misconduct was not reasonably incidental to his employment with the employer's clinic.[89] The Court further stated that it was irrelevant whether sexual misconduct actually does sporadically occur during or in connection with therapy because "it is not the general kind of activity a therapist is employed to perform."[90]

Instructing a player to intentionally injure another player or referee is not directly connected to or reasonably incidental to a coach's job responsibilities. As in *P.S. Psychiatrist Coverage*, these antics are not "the general kind of activity" that a coach is hired to perform and are therefore outside the scope of employment, regardless of the fact that such conduct may occur at times within the coaching profession.[91] Therefore, such outrageous and personally motivated actions would not be connected to or reasonably incidental to employment.

D. THE COACH'S CONDUCT IS WITHIN THE AUTHORIZED "TIME AND SPACE" LIMITS OF THE EMPLOYMENT

Regarding the fifth factor, a coach who delivers the order to attack another player or referee during a game appears to be acting within the "spatial and temporal limits" of his employment.[92] However, this factor is only one of several used to establish vicarious liability and is not sufficient on its own to establish such liability.[93]

If it is discovered that the directives were given prior to the game, with pre-meditation, and possibly in a location not related to the student-athlete's membership on the team (i.e., in the student's dormitory), then the coach was likely acting outside the spatial and temporal limits of his employment. For example, in the Goon-Gate incident, Chaney admitted that he concocted the idea of sending in a player to intentionally harm the opposing team *prior* to

85. 27 Am. Jur. 2d Employment Relationship § 360 (2nd 2015).

86. Morman v. Wagner, 63 S.D. 547, 550 (1934).

87. *Id.*

88. P.S. v. Psychiatric Coverage, 887 S.W.2d 622, 623–24 (Mo. Ct. App. 1994).

89. *Id.* at 624.

90. *Id.* at 625.

91. *Id.*

92. Such an order would take place on the field and during a game.

93. 27 Am. Jur. 2d Employment Relationship § 360 (2nd 2015) (listing the spatial and temporal factor as one of many factors that various jurisdictions consider when making a determination on vicarious liability). Therefore, despite that the coaches from John Jay and Ware County gave their instructions during the game to their players to harm others, this factor alone would not be enough to conclude that they were acting within their scope of employment.

the game.[94] Additionally, White, the Cache High School girls basketball coach in Oklahoma, devised his malicious plan to attack a rival player weeks before the incident occurred.[95] Both of these examples should result in a finding that the coaches acted outside the spatial and temporal limits of their employment.[96]

E. THE COACH'S CONDUCT IS NOT AT LEAST PARTLY MOTIVATED BY AN INTENTION TO SERVE THE EMPLOYER

For conduct to be considered within the scope of employment under the sixth factor, courts have held that such action must be "actuated at least in part, by a purpose to serve the master."[97] In *Hughes v. Mayoral*, the court held that a hotel employee that confronted a colleague off-hours, but at the workplace, did not impute liability to the employer-hotel because the employer "gained no benefit" by the employee's actions and "there was no intention to act in the employer's interest."[98]

As discussed above, a coach's antics at issue here comes from the coach's personal "feelings or resentment or revenge," without the best interest of the employer-schools in mind.[99] Obviously, a coach committing this type of action does much more harm than good to the school, given the intense national media scrutiny schools like Temple and John Jay received (and continue to receive) following these incidents.

F. THE COACH'S CONDUCT IS NOT EXPECTABLE IN VIEW OF THE EMPLOYEE'S DUTIES

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94. Mike Wise, *There's Only One Way Out*, WASHINGTON POST, (Feb. 27, 2009), http://www.washingtonpost.com/wp-dyn/articles/A54702-2005Feb25.html ("[t]he day before he sent Ingram out as an enforcer, Chaney was on a conference call with reporters. He bemoaned what he called illegal screens set by Saint Joseph's players and said he would dispatch 'one of my goons and have him run through one of those guys and chop him in the neck or something.'").

95. Jacob Unruh, High school basketball: Cache players say their coach tried to injure opponent, NEWSOK (Oct. 14, 2015), http://newsok.com/article/5453623 ("Cache High School girls basketball coach called an inbounds play designed to slam a basketball into his daughter Jentry Holt's face, a play designed weeks before with the intent to 'break her nose.'").

96. *See, e.g.*, Burroughs v. Abrahamson, 964 F. Supp. 2d 1268, 1271 (D. Or. 2013) (holding that the employer was not vicariously liable for the sexual misconduct of its employee when the plaintiff had conceded that the "sex itself occurred after hours" and "off employment premises"); Teurlings v. Larson, 320 P.3d 1224, 1233–34 (Idaho 2014) (holding that the fact that an employee may be considered to be "on duty" by their employer does not suffice for showing that the employee was acting within the temporal and spatial limits of employment when committing the tort).

97. Restatement (Second) of Agency § 228 (2nd ed. 2010). *See* 27 Am. Jur. 2d Employment Relationship §360 (2nd 2015). *See also* Hughes v. Mayoral, 721 F.Supp.2d 947, 963 (D. Haw. 2010) (holding that actions taken on the employee's own behalf, during off hours, that does not benefit the employer, is not actuated in part to serve the employer).

98. *Hughes*, 721 F.Supp.2d at 963 (quoting Henderson v. Prof'l Coastings Corp., 819 P.2d 84, 89 (Haw. 1991).

99. Noah v. Ziehl, 759 S.W.2d 905, 911 (Mo. Ct. App. 1988) ("[W]hen conduct of an employee exceeds the scope and course of employment and are done, not in furtherance of the employer's business, but to gratify the employee's feelings or resentment or revenge, the conduct is outside the scope and course of the employment."); *See Hughes* 721 F.Supp.2d at 963 ("there is no evidence suggesting that [the employee's] actions were "actuated, even in part, by a purpose to serve" [the employer]").

Because each of the above factors will likely result in a coach's actions being considered outside the scope of employment, this particular type of conduct cannot be "expect[ed]" by the schools.[100]

It is axiomatic that a school would not expect a coach to commit a tort by instructing his players to intentionally injure another player or referee. Assuming that the school did not somehow suggest, instruct, or authorize a coach to carry out such action, this type of conduct is not expected from high school or collegiate coaches because such directives would result in increased games lost, a tarnished reputation, and potential economic casualties for the school or team.[101]

CONCLUSION

In analyzing each of the seven factors that jurisdictions use to determine whether an employee is acting within his scope of employment for vicarious liability purposes, it is evident that a coach instructing his player to intentionally harm another player or referee is acting outside his scope of employment. It does not matter if these violent directives were given during a game in which the coach is working because these actions are not foreseeable and completely beyond what is expected by the employer. This ordered violence does not benefit the school in any way, as it comes with severe consequences and provides no advantage to the school.[102] As such, the employer simply should not be held legally accountable. An injured person at the hands of one of these coaches certainly would want to look for the deepest pocket they can find, but looking to the school's pocket should not be deemed an acceptable path. A rogue coach should suffer the consequences of his actions, whether it means loss of employment or facing a civil lawsuit, but the coach's individual actions are separate and distinct from the employer-school's and should remain that way.

100. *See* supra Parts IV.A–E.

101. *See supra* notes 67 and 77.

102. *See supra* Part IV. B.

Everywhere a Sign: ESPN College GameDay and the First Amendment

Neal Ternes*

"Ole Miss Offense Runs Like Obamacare Website"
- Sign broadcast on ESPN College GameDay at Louisiana State University, October 25, 2014[1]

INTRODUCTION

ESPN's iconic college football pregame broadcast, College GameDay,[2] made its first remote broadcast from a university campus in 1992, when the show visited South Bend, Indiana to preview a matchup between the nation's top two ranked teams: Notre Dame and Florida State.[3] By 2002, the show was regularly broadcast on location from a different college campus and had transformed into a cultural phenomenon.[4] Today, fans camp out overnight to get the best position to stand behind the stage where the show is filmed. They paint their faces, wear costumes, and bring signs to hold up behind the thin curtain separating the show's hosts and the hundreds to thousands of screaming football maniacs behind them. ESPN regulates the crowds,[5] fencing off a small area immediately behind the stage and guarding access to this area with security personnel.[6] However, these security measures have created a potential First Amendment issue, especially when College GameDay is filmed on the campuses of public universities.

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1. *See* Matt Vederame, *The Most Noteworthy Signs from LSU's 'College GameDay,'* SB NATION (Oct. 25, 2014, 10:11AM), http://www.sbnation.com/college-football/2014/10/25/7069535/best-signs-espn-college-gameday-lsu-baton-rouge.

2. College GameDay is also the name of a similarly styled pregame show for ESPN's coverage of men's college basketball. Because that show is filmed almost entirely in college basketball arenas, which represent significantly different venue issues in regards to legal proceedings as they are not always publicly held and are not a part of the parks and outdoor campus of public universities, this article does not discuss potential issues stemming from that program.

3. *See* JAMES ANDREW MILLER & TOM SHALES, THOSE GUYS HAVE ALL THE FUN: INSIDE THE WORLD OF ESPN (New York: Back Bay Books 2011).

4. In 2013 the show averaged 1,830,000 viewers on Saturday morning. Richard Deitsch, *Changes coming to ESPN's College GameDay this season*, SPORTS ILLUSTRATED (Aug. 6, 2014), http://www.si.com/more-sports/2014/08/03/media-circus-college-gameday-chris-fowler-espn-outside-the-lines.

5. While ESPN and other sources confirm that there is some organized policy which is used by ESPN to regulate the crowd, it is unclear whether this policy exists as a formal mandate from ESPN, is explicitly elaborated in contracts between ESPN and the participating schools, or is an unspoken mandate. Nevertheless, it is clear that there is a consistent policy enforced by university and ESPN security at each filming site.

6. Brett Taylor, *'Really, @CollegeGameDay?' ESPN's 'No religious signs' rule confounds some*, TWITCHY (Nov. 21, 2014), http://twitchy.com/2014/11/21/really-collegegameday-espns-no-religious-signs-rule-confounds-some/.

College GameDay security searches spectators seeking to enter the small fenced off area behind the stage.[7] These searches include inspecting and confiscating signs brought by spectators.[8] This paper examines the legal implications of confiscating signs as a practice on college campuses or universities. In doing so, I argue that the confiscation and destruction of signs by ESPN or campus security acting at the behest of ESPN on public university campuses constitutes a violation of the First Amendment rights of those fans. This article begins with a brief summation of the specific practices and policies of College GameDay and is followed by an examination of the legal issues surrounding a potential case against College GameDay, specifically whether ESPN could be considered a state actor in such litigation and what types of First Amendment claims may be used to justify the shows sign policies. The article concludes with some brief suggestions on possible changes that may be necessary for ESPN and the universities which host College GameDay to avoid litigation.

I. BACKGROUND

While a specific copy of College GameDay's sign policy is not available to the public, indirect evidence hints at the extent to which speech is restricted during broadcasts. Photos and screen captures from the show posted across internet forums and news websites contain some information on the show's policies and how they are implemented. From this corpus of material, dating back several years, it is clear that ESPN's creation of a restricted speech zone behind the back of its broadcasting stage is not a recent phenomenon. Furthermore, from accounts from both ESPN executives and College GameDay producers, it is clear that ESPN uses the transparent screen behind the set and the throng of screaming fans as a promotional tool.[9] This section introduces anecdotal evidence for how ESPN's policies have been enforced during the production of College GameDay and some notable incidents that have resulted from these policies.

The restricted speech zone is created through the erection of metal barriers behind the stage that extend back approximately 100 feet depending on where the show is being filmed.[10] ESPN also utilizes security, allegedly a mix of local police officers and private bouncers, who monitor the free speech zone and the corporate booths which are set up on the periphery of the restricted zone behind the stage.[11]

> Keri Potts, an ESPN spokeswoman, said ESPN and university campuses come to an agreement before GameDay visits that details

7. Beth Maiman, *College GameDay: 10 ways to make the most of your experience*, USA TODAY (Sept. 4, 2014), http://college.usatoday.com/2014/09/04/college-gameday-10-ways-to-make-the-most-of-your-experience/.

8. Chris Carlin, *How to be a part of ESPN's College GameDay*, UPPERDECKBLOG (Oct. 31, 2011), http://upperdeckblog.com/2011/10/how-to-be-a-part-of-espn%E2%80%99s-college-gameday/.

9. *See* Miller, *supra* note 3; and Maiman, *supra* note 7.

10 Sam Mitchell, *Mitchell: Volunteering for ESPN during College GameDay*, HOTTYTODDY (Oct. 6, 2014), http://hottytoddy.com/2014/10/06/mitchell-volunteering-during-college-gameday-overall-experience/.

11. "College GameDay is joining forces with Fargo police early Saturday morning to step up security. They'll be checking all gates to the fan pit. Only letting in people and items they deem appropriate. Anything they believe is out of taste, they might take away. So ESPN producers say it's best to wow them with your creativity, rather than be turned away. Judi Weiss/GameDay Sr. Operations Producer: "We just list what we rather people bring out for the fun of the show, to keep the show moving, organic. Something creative, so it catches a talent's eye during our sign segment. Security can also confiscate anything that infringes on corporate sponsors, like signs with hashtags." *See* WDAY Staff, *Security to be tight downtown Fargo Saturday for College GameDay,* WDAY 6 (Sept. 12, 2014), http://www.wday.com/content/security-be-tight-downtown-fargo-saturday-college-gameday.

> space requirements, technical needs and other issues. The agreement, Potts said, gives ESPN oversight of the sprawling ESPN compound and what takes place inside of it. Much of this focus is on the pit, or the group of people right behind the stage that is most visible on television. The agreement specifically states campus security assist ESPN security with removing signs within camera view "that use objectionable language or are in poor taste," including signs whose message is vulgar, racist, sexist, religious, political, or that advances a business interest or a call to action.[12]

Guards monitor the entrance to the zone and search all entrants for illicit materials, including signs and any materials that could be used to create signs.[13] Any sign that does not approved of by the security guards is confiscated, despite the fact that ESPN does not have a published policy on what constitutes appropriate GameDay signage.[14] From a press release by the University of Wisconsin-Madison, "authorities also advise participants that signs on sticks will not be permitted at the event. For those admitted to the areas close to the ESPN stage, note that network personnel will screen signs, items, appearance and attire for appropriateness."[15] Furthermore, two ESPN producers are quoted in USA Today discussing signs during GameDay, saying,

> "Obviously you can't go to college GameDay without making signs,' Kohn says, who made a classic 'Palm tree is better than a Stanford tree' sign to show her school spirit. Plus the signs make a good memento to keep. Although creative signs are encouraged, understand that signs that don't follow the rules will get confiscated. 'Be as creative and get as close as you can to the line without going over the line,' Fitting says. 'We encourage that — we like off the wall stuff, we don't like the obvious signs — we like random."[16]

According to multiple websites and fan comments however, some rules seem to appear quite frequently: no political signs, no vulgarity, no .com signs, and nothing potentially dangerous.[17] While what specifically constitutes a political or vulgar sign in the minds of ESPN security is unclear, anecdotal evidence includes signs with messages such as "God Hates the SEC" are routinely removed from College GameDay even after they have been broadcast from the restricted speech zone.[18] Other signs that have been aired on television in recent years in spite of ESPN's restrictions include, "Kirk [Herbstreit] Eats Pussy Like His Mom's Spaghetti," "Billy Ray Should Have Pulled Out," and "Crap On Me Sam Ponder."[19]

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12. Sean Rossman, *Does ESPN's GameDay Control Free Speech?*, TALLAHASSEE DEMOCRAT (Oct. 23, 2014), http://www.tallahassee.com/story/news/local/2014/10/22/espns-gameday-control-free-speech/17721195/.

13. Carlin, *supra* note 8.

14. Mike Kaszuba, *Fargo Flips for ESPN's 'College GameDay,'* MINNEAPOLIS STAR TRIBUNE (Nov. 28, 2014), http://www.startribune.com/entertainment/tv/284191531.html?page=2&c=y.

15. *A fan's guide to ESPN College GameDay, Camp Randall Stadium, Campus Traffic*, UNIVERSITY OF WISCONSIN-MADISON (Sept. 30, 2011), http://www.news.wisc.edu/19831.

16. *See* Maiman, *supra* note 7.

17. *See* WDAY Staff, *supra* note 11.

18. *See, e.g.*, Rossman, *supra* note 12; and Strictlyrude27, *My Sign Got Taken From Me at College GameDay*, IMGUR (2014), http://imgur.com/gallery/YMGKvHT.

19. Timothy Burke, *GameDay signs*, DEADSPIN (Dec. 6, 2014), http://deadspin.com/tag/gameday-signs.

II. STATE ACTION

Those who would challenge ESPN's banner policies during filming of the College GameDay program under the First Amendment would first have to prove that the removal of signs and banners constitutes "state action."[20] Though ESPN is not inherently a state actor[21], the Supreme Court held in *Burton v. Wilmington Parking Authority*[22] that, "private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it." This does not mean that all organizations that are in some way connected to the state are necessarily considered state actors.

> The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct.[23]

Rather, the court has held that when the impetus of discriminatory practice is private, the state must have "significantly involved itself with invidious discriminations"[24] in order for the private entity to be held accountable under the regulations of the Constitution.

Nevertheless, there have been many instances of private entities being named as state actors because of their contractual affiliations with the state, the presence of state actors in decision-making positions within the private organization, or attempts to use the government to enforce their private contracts.[25] Of particular interest in any case against ESPN for College GameDay would be *Wickersham v. City of Columbia*[26], wherein the 8th Circuit Court of Appeals ruled that an airshow company's prohibition of political demonstrations during and around performances was a state action and thusly a violation of

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20. The First Amendment of the United States Constitution states only that "*Congress* shall make no law," abridging the freedoms of speech and assembly; these protections are extended to states through the Fourteenth Amendment. *See, e.g.,* Gitlow v. New York, 268 U.S. 652 (1925); Chaplinsky v. New Hampshire, 315 U.S. 568, 570 (1942); Near v. Minnesota, 283 U.S. 697, 707 (1931). However, the Supreme Court's implementation of the state action doctrine in The Civil Rights Cases, 109 U.S. 3 (1883), holds that the Fourteenth Amendment applies only to state action, and not to private persons.

21. While most states do not require private actors to afford individuals constitutional rights, California and a handful of other states extend constitutional protections to private actors. *See* CAL. CONST. art I, pt. 1; *see also* Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

22. Burton v. Wilmington Parking Authority, 365 U.S. 715, 728 (1961) (ruling that a diner, which was a renter of public space as part of a public parking garage and was built and maintained by the government to help fund the public parking structure, was a state actor and, as such, could not deny service to African Americans).

23. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (ruling in favor of Moose lodge, who used a discriminatory policy to deny service to African Americans. The lodge was located on private land and was privately owned and the Court ruled that the obtaining and use of a liquor license did not constitute a significant confluence with the state).

24. Reitman v. Mulkey, 387 U. S. 369, 380 (1967).

25. *See, e.g.,* Forbes v. City of N.Y. 85 A.D.3d 1106 (2011); Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 535 U.S. 971 (2002); Marsh v. Alabama, 326 U.S. 501 (1946); Shelley v. Kraemer, 334 U.S. 1 (1948); Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Griffin v. Maryland, 378 U.S. 130 (1964).

26. Wickersham v. City of Columbia, 481 F. 3d 591 (8th Cir. 2007).

the First Amendment. This was because the airshow had collaborated with the local police department for security and enforcement of its speech restriction policies.[27]

It is likely that ESPN would be seen as a state actor when producing College GameDay on the campuses of public universities. ESPN is contractually tied to the university,[28] is producing the show from space on the college campuses, and is using university police to supplement their security force. The designation of state actor does not, however, guarantee that speech policies will be in violation of rights that are protected by the First Amendment, as there are legal restrictions to free speech.

III. FREE SPEECH RESTRICTIONS AND OBSCENITY

Restrictions to free speech typically fall into one of two categories: content-neutral restrictions and content-specific restrictions. The Supreme Court has found that the time, place and manner of speech can be restricted, provided that the restriction is content-neutral, serves a compelling government interest, is narrowly drawn, and provides for alternate channels of communication.[29] The Court specifically noted in the case of *Cox v. Louisiana* that individuals cannot "insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech"[30] because of the risk this would pose to the general public. As state actors,[31] public universities are required to follow strict time, place and manner guidelines when attempting to restrict speech on their campuses.[32] As a general rule, "[o]utdoor areas of [a university's] campus generally accessible to students such as

27. "Whether a private entity like Salute forfeits some of its right to deliver its own message unimpeded by others when it assumes the role of state actor need not be decided on this record because Salute has not shown that the injunction infringed its own ability to deliver its chosen message. The district court's injunction protects Salute's daily noontime ceremony in honor and remembrance of veterans from any competing expressive activities, giving Salute complete control over the message that it wants to communicate during this special event. The presence of non-disruptive expressive conduct during the remainder of the air show was not shown to threaten to alter Salute's message. There is no evidence that Salute's message was diluted by the presence of a small number of sign carriers and leaflets at the 2005 air show, which was attended by over 25,000 people. Appellees sought only to express their own views as spectators at the air show, and their signs and leaflets were "not likely [to] be identified" with Salute." *Id.* at 600.

28. "ESPN and the universities often call each other business partners, and that partnership has been enormously rewarding for both sides. For the colleges, beyond money for athletic departments, the partnership provides exposure that college officials say increases recruiting prowess, alumni donations and even the quality of applicants. For ESPN, college football feeds a voracious need for the kind of programming that makes the network indispensable to sports fans." James Andrew Miller, et al., *College Football's Most Dominant Player? It's ESPN*, N.Y. TIMES (Aug. 24, 2013), http://www.nytimes.com/2013/08/25/sports/ncaafootball/college-footballs-most-dominant-player-its-espn.html?_r=0.

29. *See, e.g.,* Ward v. Rock Against Racism, 491 U.S. 781 (1989); United States v. O'Brien, 391 U.S. 367 (1968); Cohen v. California, 403 U.S. 15 (1971); Grayned v. City of Rockford, 408 U.S. 104 (1972).

30. Cox v. Louisiana, 379 U.S. 536 (1965).

31. Publicly funded schools are inherently state actors. "In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect" Tinker v. Des Moines Indep. Cmty Sch. Dist. 393 U.S. 503, 511 (1969).

32. "The campus of a public university, at least for its students, possesses many of the characteristics of a public forum." Widmar v. Vincent, 454 U.S. 263, 268 n.5 (1981); *see also, e.g.,* Hays Cty. v. Supple, 969 F 2d. 111 (5th Cir. 1992); Pleasant Grove City v. Summum, 129 U.S. 1125 (2009); Univ. and Cmty. Coll. Sys. v. Nevada for Sound Gov't, 100 P.3d 179, 190 (Nev. 2004); Pro-Life Cougars v. Univ. of Hous., 259 F. Supp. 2d 575, 582 (S.D. Tex. 2003).

plazas and sidewalks" are "public forums for student speech."[33] Furthermore, campus codes that restrict student speech by creating designated "free speech zones" or allowing prior restraint by university administrators have been successfully challenged several times,[34] meaning that university-created time, place, and manner restrictions on speech are not always legally valid.

The policing of signs at College GameDay would not likely be considered a content-neutral restriction of free speech for the simple reason that not all signs are disallowed or confiscated when patrons attempt to enter the restricted area behind the stage.[35] It is also worth noting that signs that are not allowed in the restricted area are permitted in other areas around the sprawling GameDay site, provided that they are not within the view of the cameras. Furthermore, the current policies restricting signs in the area behind the stage have not been effective in preventing some of the more risqué messages from getting on television since the camera clearly show sign messages that are outside of the restricted area. Because of this, claiming that the restricted area behind the stage of College GameDay represents a legitimate time, place, and manner restriction on students is unlikely to succeed as a defense for ESPN's sign policies during tapings of the show. However, there are still possibilities for limiting signs based on their content if those signs contain obscene material, which is not protected by the First Amendment.

There are several classes of content-specific speech restrictions. However, for the purpose of this article, I will primarily discuss obscenity as it is one of the few categories that apply to the content of signs at ESPN College GameDay. In *Miller v. California*, the Supreme Court established a three-prong test for obscenity,[36] whereby a work must not appeal to any community standard of decency, depict or describe excretory or sexual functions in a patently offensive way, and lack any serious literary, artistic, political, or scientific value.[37] Any work must meet all three prongs of this test to be considered obscene and therefore outside the protections of the First Amendment.[38] This does not mean that speech that some may feel is profane or indecent is necessarily obscene.[39] Indeed, one case

33. Justice For All v. Faulkner, 410 F.3d 760, 769 (5th Cir. 2005).

34. "[T]he University's requirement that all speakers give five to 15 days of advance notification to the University is facially unconstitutional. . . the Court has determined that other open areas of campus constitute designated public fora, not limited public fora, and the University has simply offered no explanation of its compelling interest in restricting all demonstrations, rallies, and protests from all but one designated public forum on campus." University Chapter v. Williams, No. 1: 12-cv-155 (S.D. Ohio June 12, 2012). *See also, e.g.,* Roberts v. Haragan, 346 F. Supp. 2d 853 (N.D. Tex. 2004); Doe v. Univ. of Mich., 721 U.S. 852 (1989).

35. "Confiscation ranks with forced government speech as amongst the purest forms of content alteration. There is little if any difference between hiding from public view the words and pictures students use to portray their college experience, and forcing students to publish a state-sponsored script." Kincaid v. Gibson, 236 F. 3d 342, 355 (6th Cir. 2001).

36. It is important to note that the possession of obscene materials falls under an implied right to privacy and is not illegal per the Supreme Court's ruling in Stanley v. Georgia, 394 U.S. 557 (1969).

37. *See* Miller v. California, 413 U.S. 15 (1973); *see also* Roth v. United States, 354 U.S. 476 (1957).

38. "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . . Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky*, 315 U.S. 568 (1942).

39. *See, e.g.,* Snyder v. Phelps, 562 U.S. 443 (2011) (determining that speech of religious protestors at funerals of American soldiers holding signs reading, "God Hates Fags" is a form of protected political and religious speech); Hustler Mag., Inc. v. Falwell, 485 U.S. 46 (1988) (ruling that a parody advertisement for Bacardi claiming the Rev. Jerry Falwell's first sexual encounter was in an outhouse with his mother is not considered obscenity); Texas v. Johnson, 491 U.S. 397 (1989) (holding that burning the American flag is protected political

involving claims of obscenity on university campuses is *Iota Xi Chapter of Sigma Chi v. George Mason University*, where a campus fraternity's annual "ugly woman contest" caused the fraternity brothers to be sanctioned because of student outrage.[40] In ruling for the fraternity, the district court held that, "GMU has disciplined the members of Sigma Chi because the activity was deemed offensive . . . The First Amendment does not recognize exceptions for bigotry, racism, and religious intolerance or ideas or matters some may deem trivial, vulgar or profane." Similarly in *Papish v. Board of Curators for the University of Missouri*, the Supreme Court found that the expulsion of a student for distributing a publication that included indecent speech, specifically a political cartoon depicting a policeman raping the statue of liberty and an article entitled "Mother Fucker Acquitted", was not obscene.[41] The court noted, "the mere dissemination of ideas–no matter how offensive to good taste–on a state university campus may not be shut off in the name alone of 'conventions of decency.'"[42]

This is where a case against College GameDay may struggle. If the content of a restricted sign was even more vulgar than the signs currently receiving airtime on ESPN then there is a possibility that the content of the sign would be deemed obscene and therefore not protected by the First Amendment. However, ESPN's policies also include commercial, religious, and political speech in its list of subjects banned from signs within the restricted zone. None of these constitute obscenity, and political speech in particular receives the highest order of protection under the First Amendment.[43] If a complainant were prevented from entering the restricted zone for carrying a sign with religious or political speech, any attempts to claim that the message is obscene would almost certainly fail. From a broader view, the clear restrictions against religious and political speech are inherently in violation of the First Amendment. ESPN or the hosting public university has no legal basis to quash the political speech of students on campus simply because the television show wants to have a specific image and message behind the stage where the hosts sit. ESPN is not required to have an open air stage, universities often encourage students and fans to show up for the show and demonstrate their school spirit, and the producers for the show have often stated that having students waving signs behind the set is encouraged by ESPN.[44] If speech is encouraged in the restricted area behind the set of College GameDay, then it ought to follow that political and religious speech would be included in that subset. A blanket encouragement of speech in a public area cannot legally be accompanied by restrictions on protected forms of free speech.

CONCLUSION

While there are no current First Amendment plaintiffs lining up with claims against ESPN College GameDay or the public universities that host the program, there is a distinct potential for litigation if the current policies and practices remain in place. The television

speech); Jacobellis v. Ohio, 378 U.S. 184 (1964) (overturning the conviction of a man as unconstitutional because the French film "*The Lovers* " was not obscene material).

40. Iota Xi v. George Mason Univ., 993 F.2d 386 (E.D. Va. 1993).

41. Papish v. Board of Curators, 410 U.S. 667 (1973).

42. *Id.* at 670.

43. *See, e.g.*, N.Y. Times v. Sullivan 376 U.S. 254 (1964); Nat'l Socialist Party v. Village of Skokie, 432 U.S. 43 (1977); Citizens United v. FEC 558 U.S. 310 (2010).

44. *See* Maiman, *supra* note 7.

show's popularity and status have made it a cultural symbol for fans of college football, but the creation of the restricted area behind the stage has the potential to fundamentally alter the program if it is not properly addressed. Restructuring the zone to be more inclusive could be one simple solution. However, if the producers are unwilling to allow political and religious speech in particular, ESPN's show might be better off getting rid of the show's backdrop of screaming football fans altogether and installing a wall behind the announcers.

From the Law's Bearded Prophet[1] to the Interactive Engager: Using Film to Create Criminal Law

Courtney Cox Hatcher and Courtney Chaipel Pugh*

INTRODUCTION

Scholars and community outreach professionals recognize that film provides an accessible and approachable pedagogical method that may be utilized to reach those who are uninterested, or simply uninformed, about a relevant subject. Many disciplines use film as a teaching method to reach children and adults alike. For example, literature professors employ film to teach Shakespearean plays[2] and literary theory,[3] and sociology professors use film to teach about particular social problems.[4] History teachers use film to teach historical inquiry,[5] law professors use film to teach legal concepts,[6] and science instructors use film to teach biology,[7] astronomy, physics, chemistry, and earth science.[8] Teaching professionals recognize that film, as well as other pop culture mechanisms, allow teachers and professors to engage students and facilitate their learning.[9] Community outreach

1. *See* John Henry Schlegel, *Between the Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor, in* 1 The History of Legal Education in the United States: Commentaries and Primary Sources 961 (Steve Sheppard ed., 2006) (discussing the development of law school teaching). Christopher Columbus Langdell was known as the bearded prophet and thought to be "mad" by some for his "suggestion that law was a science" and for pushing the notion to a point in which he did not seem to "understand the difference between Blackstone's science, Newton's science, Lyell's science, and Darwin's science." *Id.*

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2. *See* Michael Collins, *Using Films to Teach Shakespeare*, 46 SHAKESPEARE QUARTERLY 228 (1995) (discussing one educator's process of using film to teach Shakespearean plays).

3. *See* Valerie Muller, *Film as Film: Using Movies to Help Students Visualize Literary Theory*, 95 THE ENGLISH J. 32 (2006) (encouraging educators to use film to develop students' critical thinking skills and help students identify literary elements, such as symbolism and plot, in film).

4. *See* James T. Hannon & Sam Marullo, *Education for Survival: Using Films to Teach War as a Social Problem*, 16 TEACHING SOCIOLOGY 245 (1988) (presenting the advantages of film as a teaching tool and providing strategies for film use in the sociology classroom to teach the social problems of war).

5. *See* Adam Woelders, *Using Film to Conduct Historical Inquiry with Middle School Students*, 40 HIST. TEACHER 363 (2007) (advocating for the use of film to reach today's history students).

6. *See* Judith M. Barger, *Law and Order in the Emerald City: Using* The Wizard of Oz *to Illustrate Homicide Principles*, 10 OHIO. ST. J. CRIM. L. 627 (2013) (explaining how one professor uses *The Wizard of Oz* to teach mens rea, actus reus, homicide, and self-defense).

7. *See* Gregory S. Pryor, *Using Pop Culture to Teach Introductory Biology*, 70 AM. BIOLOGY TEACHER 396 (2008) (promoting the use of film and other pop culture media to engage non-biology students in the subject).

8. *See* James Freiden & Deborah W. Elliott, et al., *Science Lesson Plans Using Movies and Film*, TEACHWITHMOVIES.ORG, http://www.teachwithmovies.org/science-technology-subject-list.htm (last visited Apr. 12, 2016) (providing educators with lesson plans and resources to utilize in incorporating film into their teaching curriculum).

9. Pryor, *supra* note 7, at 396.

programs also use film to teach certain concepts.[10] These programs encourage their coordinators to consider using film as one of their teaching tools.[11]

This Article strives to add to the discussion of using film as a teaching tool, specifically for criminal law professors and community outreach coordinators. By utilizing five popular animated films,[12] this Article examines how animated film scenes can be used to teach criminal law to students in law school and to laypeople in community outreach programs across the nation.[13] Part II provides an insight into the history of legal education, describes the objectives of teaching criminal law, and explains why alternatives to the traditional Socratic method teaching style can be useful, especially for today's students. It also describes community outreach programs and presents research to support the idea that film offers a powerful tool to community outreach coordinators in helping people understand legal concepts that may impact their lives. It then explains why animated films in particular are especially powerful for teaching criminal law. Part III explains the plots of the five chosen films, highlighting crime-specific scenes in each film. Part IV offers an introduction to the Model Penal Code's mental states of culpability. It then analyzes the specific crimes and, in doing so, provides teaching tools for criminal law professors and community outreach leaders alike.[14] Part V concludes, reiterating the importance of considering alternative methods of teaching in the classroom and in the community.

I. CRIMINAL LAW COURSES AND COMMUNITY OUTREACH PROGRAMS

A. THE HISTORY OF TEACHING LAW AND THE MOVE TOWARD INTERACTIVE LEARNING

Prior to the late eighteenth century, legal education in a formal classroom was practically non-existent.[15] Well into the twentieth century, it was still common for an individual who sought to become a lawyer to undertake informal self-training.[16] "Few self-taught lawyers achieved a level of competence necessary to adequately serve their clients."[17] Throughout this time of informal legal education, aspiring lawyers were educated

10. John Marshall Law School, *AJMLS Street Law Program Educates and Inspires Local High School Students*, JOHNMARSHALL.EDU, Jan. 2014, http://www.johnmarshall.edu/ajmls-street-law-program-educates-inspires-local-high-school-students/.

11. *See* University of Washington School of Law, *Street Law at the UW School of Law*, LAW.WASHINGTON.EDU, http://www.law.washington.edu/Clinics/Streetlaw/links.aspx (last visited Apr. 12, 2016) (listing the website, teachwithmovies.org, as a resource for Street Law participants to use).

12. This Article uses five films in total, but three of the films are part of the *Toy Story* trilogy.

13. In addition to teaching criminal law, film can also be used to teach professional responsibility to law students or working professionals. *See* Deborah L. Rhode, *Teaching Legal Ethics*, 51 ST. LOUIS U. L.J. 1043, 1053 (2007) (suggesting that movies and television clips can be helpful in teaching legal ethics).

14. The authors recognize that the crimes depicted in this paper are committed by animated figures (such as toys and animals), which are not normally held to the standards of the United States legal system. Nevertheless, if the actions of each character are equated to those of a human, the films can be seen to outline examples of various crimes.

15. *See* John O. Sonsteng, *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century* 16 (2008) ("[L]aw school education lasted eighteen months or less and the curriculum consisted of ungraded, elementary courses.").

16. *Id.*

17. *Id* at 13.

through an apprenticeship system.[18] In Massachusetts, the typical college graduate underwent a three-year apprenticeship program, while a non-college graduate underwent a four-to-seven year program.[19] Even though this apprenticeship system provided some education for soon-to-be lawyers, there were disadvantages, including a lack of formal examination, mandatory assignments, and lectures.[20] The apprenticeship system prevalent in nineteenth-century America did result in one serious positive outcome: It led to the development of the first law school in the country, Litchfield Law School, founded by Judge Tapping Reeve.[21]

This first law school[22] was a great success in that it graduated many political and legal powerhouses in its relatively short period of operation,[23] including "three U.S. Supreme Court members, fifty-six state supreme court judges, twenty-eight Senators, one hundred and one Congressmen, fourteen governors, six U.S. cabinet members, and eight professors."[24] The full program took fourteen months to complete and consisted of daily ninety-minute lectures based on Blackstone's *Commentaries* treatises; students were rigorously tested every Saturday on the learned material.[25] Despite Litchfield Law School's success, the growth of other law schools in the nation, notably Harvard, Columbia, and Yale, contributed to the closing of America's first law school.[26] As law schools became more prominent in the United States, many scholars began shaping the future of legal education.[27] One of the most renowned scholars was Christopher Columbus Langdell, who graduated from Harvard in 1853 and went on to serve as Harvard's first dean of law.[28] Due to his scientific mind, Langdell sought to incorporate the scientific method into the legal classroom.[29] His efforts led to the incorporation of the Socratic method in legal studies,[30] a teaching tool that has developed a notorious reputation in the legal community.

Aspiring law students have many concerns regarding their first day in law school. Some of these worries may be unlikely scenarios concocted in a nervous student's mind, while others are based on countless horror stories about grueling law school traditions that would leave anyone apprehensive. Few of these traditions are more feared than the

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18. A. Christopher Bryant, *Reading the Law in the Office of Calvin Fletcher: The Apprenticeship System and the Practice of Law in Frontier Indiana*, 1 NEV. L.J. 19, 19 (2001).

19. *Id.* at 24.

20. Thomas Hunter, *The Institutionalization of Legal Education in North Carolina, 1790–1920, in* 1 The History of Legal Education in the United States 406 (Steve Sheppard ed., 1999).

21. Paul S. Gillies, *An Education in the Law*, 27 VT. B.J. 13, 14 (2001).

22. It is worth noting that Litchfield Law School was not the first form of formal legal education in the United States. In 1779, five years before Litchfield Law School's establishment, William and Mary established its law department. *Id.*

23. Hunter, *supra* note 20, at 406; Steve Sheppard, *An Introductory History of Law in the Lecture Hall, in* 1 The History of Legal Education in the United States 13 (Steve Sheppard ed., 1999).

24. Sheppard, *supra* note 23, at 13.

25. Gillies, *supra* note 21, at 14.

26. Sheppard, *supra* note 23, at 13.

27. *See generally* Bruce A. Kimball & Pedro Reyes, *The "First Modern Civil Procedure Course" as Taught by C.C. Langdell, 1870–78*, 47 AM. J. LEGAL HIST. 257 (2005) (discussing the development of the teaching of civil procedure, including Langdell's contributions); William Blake Odgers, *Sir William Blackstone*, 28 YALE L.J. 542 (1919) (offering an in-depth biography of Blackstone's life and his eventual judgeship).

28. Sheppard, *supra* note 23, at 25.

29. Nancy Cook, *Law as Science: Revisiting Langdell's Paradigm in the 21st Century*, 88 N.D. L. REV. 21, 25 (2012).

30. *Id.*

notorious Socratic method.[31] In what some argue is an outdated way of teaching the law,[32] the Socratic method involves professor-student interaction where:

> [T]he professor calls upon a student and engages that student in a colloquy, either about a case or about some other problem. As the student answers, the professor poses other questions in an attempt to get the student to delve into the problem in more detail. The professor may continue with one student for a time or pose questions to a number of students. The students who are not actively answering the question are expected to be following along and considering the problems and answers in case they are called upon next.[33]

This pure form of the Socratic method is essentially an illusion in today's law classroom.[34] While students are indeed subject to questioning about cases by their professors, it is common for the classroom to involve a group discussion rather than the interrogation of one individual. To this end, many professors and law schools now seek to modernize their way of teaching legal concepts by utilizing new and varying platforms. It would not be unusual for a law student entering school today to encounter a classroom that uses clickers,[35] online discussion boards,[36] or even Sue, the nearly complete Tyrannosaurus Rex skeleton whose history teaches an important lesson on contract defenses.[37] Due in large part to the creativity of many law professors who seek an alternate route to the traditional Socratic method, a wide array of different tools are being used to improve student comprehension.

Films have long been incorporated into a professor's pedagogy to increase student understanding of legal materials. In fact, a 1995 survey revealed that one third of responding law professors utilized film in connection with their lectures.[38] An instructor who utilizes a well-crafted film to hone in on significant concepts is likely to grasp the attention and interest of every student in some way.[39] Because film has a history of effective

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31. Perhaps the largest culprit for this ever-prevailing terror of the Socratic method is the 1973 film *The Paper Chase*, which many aspiring law students are told to watch to (perhaps misleadingly) prepare them for what is to come. The Paper Chase (Twentieth Century Fox Film Corporation 1973).

32. For a general overview of the criticisms of the Socratic method, see Ruta K. Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 LOY. U. CHI. L.J. 449 (1996).

33. Jeffrey D. Jackson, *Socrates and Langdell in Legal Writing: Is the Socratic Method a Proper Tool for Legal Writing Courses?*, 43 CAL. W. L. REV. 267, 272–73 (2007).

34. "Socratic questioning is perceived as a rite of passage that all law students endure in their first year of law school. . . . Despite this perception, the traditional Socratic Method is today more myth than reality." Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113, 113–14 (1999). *See also* Lowell Bautista, *The Socratic Method as a Pedagogical Method in Legal Education*, University of Wollongong (2014), *available at* http://ro.uow.edu.au/cgi/viewcontent.cgi?article=2486&context=lhapapers (analyzing the use of the Socratic method in Australia but noting that even in America, where it was once a fundamental aspect of law school, the method is on the decline).

35. Stephen M. Johnson, *Teaching for Tomorrow: Utilizing Technology to Implement the Reforms of MacCrate, Carnegie, and Best Practices*, 92 NEB. L. REV. 46, 69 (2013).

36. K.K. DuVivier, *Goodbye Christopher Langdell?*, 43 ENVTL. L. REP. NEWS & ANALYSIS 10475, 10480 (2013).

37. Professor Cherry uses Sue's fascinating and unique history as an alternative to the Socratic method while teaching contract law and contract defenses. Miriam A. Cherry, *A Tyrannosaurus-Rex Aptly Named "Sue": Using a Disputed Dinosaur to Teach Contract Defenses*, 81 N.D. L. REV. 295, 297 (2005).

38. Sheppard, *supra* note 23, at 42.

39. "Film is an effective tool for classroom learning because students generally embrace this medium, especially if they perceive value in its viewing." Bruce Clemens & Curt Hamakawa, *Classroom as Cinemas: Using*

interdisciplinary use,[40] it is not difficult to see how it can also be used to educate students coming to law school from various undergraduate concentrations with many different learning styles. By relating popular films such as the *Harry Potter* series,[41] *The Wizard of Oz*,[42] and *Star Trek: The Next Generation*[43] to particular legal subjects, professors have successfully emphasized the importance of the law on a larger scale while piquing student interest in the underlying legal concepts. Specifically, at least one professor added films to her white collar crime class curriculum in order to "spur[] more sophisticated discussion."[44] This may be an effective way to teach criminal law to first-year law students, some of whom may not be interested in criminal law otherwise.

Using film in the classroom may also be an effective way to teach statutory interpretation, which is one of the primary objectives of a first-year criminal law course.[45] The Model Penal Code, as drafted by the American Law Institute and promulgated in 1962,[46] is often used by professors to demonstrate this concept and remains a "great persuasive power in . . . classrooms."[47] Because it is not uncommon for film plots to incorporate criminal conduct,[48] criminal law professors may find it useful to include unlawful acts found in films when teaching statutory interpretation through the Model Penal Code.

Film to Teach Sustainability, 9 ACAD. OF MGMT. LEARNING & EDUC. 561, 561 (2010).

40. *See* Matthew Alexander, Anna Pavlov & Patricia Lenahan, *Lights, Camera, Action: Using Film to Teach the ACGME Competencies*, 39 FAMILY MED. 20 (2007) (explaining how film can be used to "facilitate the teaching of the Accreditation Council for Graduate Medical Education"); Jeanette A. Higgins & Shannon Dermer, *The Use of Film in Marriage and Family Counselor Education*, 40 COUNSELOR EDUC. & SUPERVISION 182 (2001) (suggesting the use of film to improve educational techniques for aspiring marriage and family counselors).

41. *See generally* Symposium, *Harry Potter and the Law*, 12 TEX. WESLEYAN L. REV. 427 (2005) (providing multiple essays that describe the intersection of law and fiction in the *Harry Potter* series, including analyses of family law and civil rights law).

42. *See* Barger, *supra* note 6, at 2 (using *The Wizard of Oz* to teach various criminal law topics).

43. *See* Paul Joseph & Sharon Carton, *The Law of the Federation: Images of Law, Lawyers, and the Legal System in "Star Trek: The Next Generation"*, 24 U. TOL. L. REV. 43 (1992) (analyzing the legal system that *Star Trek* writers utilized in creating the series).

44. Geraldine Szott Moohr, *White Collar Crime Goes to the Movies*, 11 OHIO ST. J. CRIM. L. 785, 786 (2014) (presented as part of the commentary symposium entitled *White Collar Crime, Federal Criminal Law, and Business Crimes Pedagogy*, with guest editor Professor Ellen S. Podgor).

45. Brian R. Gallini, *From Philly to Fayetteville: Reflections on Teaching Criminal Law in the First Year . . . Four Years Later*, 10 OHIO ST. J. CRIM. L. 657, 659 (2013) (presented as part of the commentary symposium entitled *Criminal Law Pedagogy*, with guest editor Ellen S. Podgor) ("[T]he Criminal Law course—unlike most if not all other first year courses—exposes students to the importance of statutory interpretation throughout the semester."); Joshua Dressler, *Criminal Law, Moral Theory, and Feminism: Some Reflections on the Subject and on the Fun (and Value) of Courting Controversy*, 48 ST. LOUIS U. L.J. 1143, 1150–51 (2004) ("I warn students on day one that they will be held responsible for two sets of doctrine, the common law and the Model Penal Code . . . the latter because it is a wonderful tool for critiquing the common law, for seeing where modern law is moving, and for helping students learn skills of statutory interpretation.").

46. Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 320 (2007).

47. Ernest G. Mayo, *The Model Penal Code and Rhode Island: A Primer*, 52 R.I. B.J. 19, 43 (Jan./Feb. 2004). For an examination of the Model Penal Code's reach outside of the classroom, particularly in legislatures and courts around the United States, see Robinson & Dubber, *supra* note 46, at 326–27.

48. Jacque Wilson & William Hudson, *Gun violence in PG-13 movies has tripled*, CNN (Nov. 11, 2013 5:41PM ET), www.cnn.com/2013/11/11/health/gun-violence-movies/ ("94% of the most popular movies since 1985 contain at least one violent scene, and half of those involve a gun. For the study . . . researchers analyzed the 30 top-grossing films every year from 1950 to 2012.").

B. COMMUNITY OUTREACH PROGRAMS DEFINED AND EXPLAINED

In addition to teaching criminal law, community outreach coordinators and instructors may use crime-in-film examples to teach participants about different crimes. By using film, particularly popular films that members of the community are familiar with, community outreach instructors are able to teach the group in a way that many members find easier to comprehend and remember.

Community outreach programs vary widely in their size and scope.[49] Some promote physical activity,[50] while others promote learning law[51] or literacy.[52] Their underlying mission, though, is the same: "[to] promote good throughout a community."[53] One organization in particular works to promote legal learning and has gained popularity in recent years: Street Law.[54] This organization, which began at Georgetown University Law Center and has spread internationally, works to "educate students and communities about law, democracy, and human rights."[55] At the core of Street Law community outreach programs are the following goals: (1) "[to] teach young people practical information about law, democracy[,] and human rights;" (2) "[to] develop the skills young people need in order to use this knowledge in their community and in their lives;" and (3) "[to] deepen young people's commitment to their communities through meaningful partnerships with caring adults and involvement in community activities."[56] As is made clear by the organization's goals, education is a focal point of Street Law, as it is for similar community outreach programs.[57] Based on years of study, researchers now know that those who learn to follow rules and laws succeed in overcoming adversity and harsh circumstances.[58] Street Law and other similar community outreach programs[59] focus on several different aspects of the legal system, including criminal law, ensuring that young people learn about the laws that affect their everyday lives.[60] Deriving its name from the desire to attract young people and teach them "'the law [they] need to know on the streets,'" Street Law uses interactive methods, including film, to engage people in the law, resisting lecture methods of presenting information.[61] By involving people in their own learning, Street Law volunteers

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49. Sarah Kruse, *Community Outreach Programs*, IDEAFIT.COM, January 2002, http://www.ideafit.com/fitness-library/community-outreach-programs.

50. *Id.*

51. Street Law Incorporated, *About Us*, STREETLAW.ORG, http://www.streetlaw.org/en/about/who_we_are (last visited Apr. 12, 2016).

52. Greek Orthodox Archdiocese of America—Greek Orthodox Ladies Philoptochos Society Incorporated, PHILOPTOCHOS.ORG, http://www.philoptochos.org/outreach/projects/makedifference (last visited Apr. 12, 2016).

53. Kruse, *supra* note 49.

54. Street Law Incorporated, *supra* note 51.

55. *Id.*

56. Matthew M. Kavanagh & Bebs Chorak, *Teaching Law as a Life Skill: How Street Law Helps Youth Make the Transition to Adult Citizenship*, 18 J. FOR JUV. JUS. AND DETENTION SERV. 71, 72 (2003).

57. *Id.*

58. *Id.* at 72–73 (examining the results of a twenty-year longitudinal study performed by Project Competence, as well as the results of the Department of Labor's *SCANS 2000* Commission report).

59. Street Law also partners with community schools to involve attorneys in the classroom. Association of Corporate Counsel, *Taking Law to the Classroom*, 23 No. 9 ACC Docket 88, 90 (2005); Gloria Santona, *McDonald's Legal Department Takes Law to the Street*, 20 No. 8 ACCA Docket 96, 98 (2002).

60. Kavanagh & Chorak, *supra* note 56, at 73.

61. Edward L. O'Brien, *Democracy for All: Human Rights and Street Law Legal Literacy Programs; Reflections After 20 Years of Democracy in South Africa* 1, Nov. 16, 2014, *available at* http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/OBrien.pdf; John Marshall Law School,

increase knowledge retention by staggering amounts; in some cases, retention increases by more than fifty percent.[62]

C. WHY CRIMINAL LAW PROFESSORS AND COMMUNITY OUTREACH INSTRUCTORS SHOULD CONSIDER FILM AS A TOOL IN THEIR TEACHING TOOLKITS

The benefits of using film as a teaching method can be tremendous, which is why both law schools and community outreach programs incorporate film and other interactive methods into their curricula.[63] Studies show that popular media, including film, television, and video games, infiltrate the lives of those in the developed world at increasing rates.[64] Those who use streaming services, such as Netflix, report watching an average of three movies *per week*, an average that results in over one hundred fifty movies per year.[65] Not only do these films have the ability to provide entertainment and evoke "an emotional connection," they also offer learning tools for instructors seeking to expand their students' horizons.[66]

Media and global communications have changed the learning landscape in the law school classroom[67] and should continue to do so at the community outreach level as well. In particular, since community outreach programs reach those without any legal background, it is important to use methods that help people learn best. Many studies have been conducted to show that people learn better when they are presented with material in verbal and visual form simultaneously, as a film does,[68] because "visual media makes concepts more accessible to a person than text media and help[s] with later recall."[69] Films also have the ability to present "complex ideas in a short period of time," unlike text, audio, or visual images alone.[70] Further, films have the ability to engage those who may not otherwise be engaged in the material.[71] In fact, copyright law is relaxed when film is used for an educational purpose, according to federal statute.[72] Some of the many reasons for law schools and community outreach programs to use film include increased learning, engaging

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supra note 10, at 2.

62. O'Brien, *supra* note 61, at 4.

63. John Marshall Law School, *supra* note 10, at 2.

64. Ron Bleed, *Visual Literacy in Higher Education* 3–4 (ELI Explorations 2005), *available at* https://net.educause.edu/ir/library/pdf/eli4001.pdf.

65. BusinessWire, *Average Netflix User Watches 5 TV Shows, 3 Movies Per Week via the Service*, BUSINESSWIRE.COM (Sep. 6, 2012, 1:33 PM EST), http://www.businesswire.com/news/home/20120906006400/en/Average-Netflix-User-Watches-5-TV-Shows#.VPN1IylJPyo.

66. Harriet Swain, *Films can have a leading role in education*, THE GUARDIAN (Nov. 19, 2013, 5:12 PM EST), http://www.theguardian.com/teacher-network/2013/nov/19/film-education-learning-tool-inclusion.

67. Julian Hermida, *Teaching Criminal Law in a Visually and Technology Oriented Culture: A Visual Pedagogy Approach*, 16 LEGAL EDUC. REV. 1, 1 (2006), *available at* http://www.julianhermida.com/dossier/dossiervisualpedagogy.pdf.

68. Science Education Resource Center, *Why Use Media to Enhance Teaching and Learning*, SERC.CARLETON.EDU (May 15, 2012), http://serc.carleton.edu/sp/library/media/why.html.

69. *Id.*

70. *Id.*

71. Meghan Mathis, *Using Movies to Increase Student Learning*, TEACHHUB.COM, http://www.teachhub.com/using-movies-increase-student-learning (last visited Apr. 12, 2016).

72. 17 U.S.C. § 110(1). Section 110, subsection 1, states that "performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit education institution, in a classroom or similar place devoted to instruction" does not infringe copyright.

the uninterested, making concepts more accessible, and explaining complex ideas in a short amount of time.

Animated films specifically may reach a broad range of students in a criminal law classroom and people participating in a community outreach program. Since incoming law school students may vary in age from their early 20s to their late 40s or older,[73] and those participating in community outreach programs will range equally—or more so—in age, it is crucial that professors choose films that appeal to an age-diverse audience. Animated films, particularly those from Disney, meet this requirement. Approximately 200 million people watch Disney films every year;[74] so it is probable that most, if not all, of the students in the class or participants in the community outreach program will have watched a particular Disney film or will be familiar with its basic plot. Disney animated films are known to appeal "to mass audiences, to the everyday citizen,"[75] which further increases the likelihood that the students or community outreach participants will have watched the films. In fact, Disney has been recognized as "a central storyteller in our society,"[76] with stories that are remembered for years to come and include a wide array of moral and cultural lessons. Not only is it more likely that students and community outreach participants will have seen animated films, this genre of films in general has a reassuring quality that makes viewers more apt to accept the films and their lessons because viewers' values are not challenged.[77] Overall, due to their wide audience reach and ready acceptance by the masses, animated films reign supreme over live-action films when teaching criminal law to law students and to community outreach participants.

II. PLOT SYNOPSES AND CRIME IN THE FILMS

A. THE LION KING (1994)

Set in Africa, *The Lion King*[78] chronicles the circle of life that is a lion father's death and his son's eventual claim to the throne. After Simba is shamed into leaving his pride by his power-hungry uncle, he matures into a happy, carefree lion while his ruthless uncle, Scar, destroys the once-vibrant Pride Lands. Simba, with the help of his friends and a wise monkey, decides to reclaim what is rightfully his and rid the Pride Lands of Scar.

The Lion King follows Simba as he grows from a cub to a mature lion, highlighting his many misadventures and confrontations. Although the film was produced as a children's movie and acclaimed as such, it details several instances of criminal acts as outlined in the Model Penal Code, including: (1) false imprisonment,[79] (2) aggravated assault,[80] and (3)

73. Kimberly Dustman & Phil Handwerk, *Analysis of Law School Applicants by Age Group; ABA Applicants 2005–2009*, LSAC (Oct. 2010), http://www.lsac.org/docs/default-source/data-(lsac-resources)-docs/analysis-applicants-by-age-group.pdf.

74. Rebecca Rabison, Deviance in Disney, Representations of Crime in Disney Films: A Qualitative Analysis 2 (Apr. 2008) (undergraduate thesis, Wesleyan University), (available at http://wesscholar.wesleyan.edu/cgi/viewcontent.cgi?article=1147&context=etd_hon_theses).

75. *Id.* at 3.

76. ANNALEE EDWARDS, MOUSE MORALITY: THE RHETORIC OF DISNEY ANIMATED FILM 2 (2002).

77. THOMAS LEITCH, CRIME FILMS 303 (2002) (classifying all animated films as cartoons).

78. THE LION KING (Disney 1994).

79. *See* M.P.C. § 212.3 (2013) (outlining the crime of false imprisonment); *see also* Part IV.A (detailing Scar's false imprisonment of Zazu).

murder.[81] While these scenes may be overlooked by children or simply categorized as scary, they provide valuable tools for educators and community outreach professionals.

False imprisonment is depicted when Scar devastates the once-lush Pride Lands and forces those who were loyal to Mufasa, the former king and Simba's father, to follow his commands. During his destructive reign as king, Scar imprisons Zazu, Mufasa's former majordomo, in the skeleton of a dead animal.[82] Zazu is then forced to serve as Scar's jester, bullied into entertaining the illegitimate ruler through song.

While many scenes satisfy the criminal elements of aggravated assault, there is one that is particularly vivid. Simba and his friend, Nala, accompanied by Zazu, journey into the elephant graveyard, a forbidden area. Upon reaching the graveyard, hyenas approach them. As the trio tries to escape the hyenas, the wild dogs capture Zazu and shove him into a boiler.[83] Seconds later, Zazu's charred body is hurled into the air.

Finally, in a scene that serves as the catalyst for Simba's departure from the Pride Lands, Scar devises a plan to murder both the cub and his father. First, Scar instructs the hyena pack to frighten a herd of wildebeests, leading the stampede into a gorge where Scar has instructed Simba to wait for Mufasa. Then, Scar alerts Mufasa of the stampede, and Mufasa rushes to save Simba. Fortunately, Simba is saved. Unfortunately, Mufasa struggles to scale the cliff to safety. Scar, seeing his opportunity, flings Mufasa off the cliff to his death.[84] Scar later admits to the murder in his final battle with Simba.

B. TOY STORY TRILOGY (1995, 1999, 2010)

Toy Story[85] follows two anthromorphic toys—a cowboy doll, Woody, and a space ranger action figure, Buzz Lightyear—through a suburban town as they seek to find their way back to their owner, Andy Davis, before he moves into a new home. After the toys are reunited with Andy, an overzealous toy collector named Al steals Woody in *Toy Story 2*.[86] Buzz teams up with the rest of Andy's toys to rescue Woody before Al takes him to Japan to reside in a museum. In the final film of the trilogy, *Toy Story 3*,[87] Andy prepares to head to college, and his toys, now reduced to a lonely few, are mistakenly sent to a daycare where they encounter Lotso, a seemingly friendly—but ultimately sinister—strawberry-scented teddy bear. Following their escape from the daycare and an encounter with the incinerator at a landfill, Woody, Buzz, and their friends end up with a little girl named Bonnie after Andy hesitantly parts ways with the toys he loves.

The *Toy Story* trilogy follows a group of toys through years of play and adventure. Though geared towards an adolescent audience, the films depict crimes that are incorporated in the Model Penal Code, including: (1) criminal conspiracy,[88] (2) aggravated

80. *See* M.P.C. § 211.1 (2013) (defining the crime of aggravated assault); *see also* Part IV.B (analyzing the hyenas' assault of Zazu).

81. *See* M.P.C. § 210.2 (2013) (outlining the crime of murder); *see also* Part IV.C (examining the murder of Mufasa).

82. THE LION KING, *supra* note 78, at 48:21–49:23.

83. *Id.* at 18:10–20:54.

84. *Id.* at 31:05–38:21.

85. TOY STORY (Disney 1995).

86. TOY STORY 2 (Disney 1999).

87. TOY STORY 3 (Disney 2010).

88. *See* M.P.C. § 5.03 (2013) (explaining the crime of criminal conspiracy); *see also* Part IV.A (analyzing

assault,[89] and (3) attempted murder.[90] The scenes illustrating these offenses may serve as helpful tools for instructors to explain the relevant crimes.

The first *Toy Story* film depicts an instance of criminal conspiracy among the toys. Due to the perceived jealousy over Andy's newfound affection for Buzz, Woody knocks Buzz out of Andy's second-story window in an attempt to push him behind the desk. The other toys, angered at what they view as Woody's retaliation against Buzz, conspire to harm Woody in return, presumably by pushing him out of the window.[91] However, Andy foils the toys' plan by announcing his return to the room.

Aggravated assault is shown in the second *Toy Story* film. Nearing the end of their mission to rescue Woody from his seemingly inevitable departure to Japan, the toys find themselves in the baggage sorting area of a local airport searching for Woody. Buzz locates the suitcase that contains Woody and opens it, but the Prospector uses his pickaxe in an attempt to dismember Woody and prevent his escape.[92]

The final *Toy Story* film illustrates a scene of attempted murder. Andy's toys, joined by Lotso, find themselves trapped in a landfill, heading towards the incinerator. Knowing their abysmal fate, Lotso discovers an emergency shut-off switch for the incinerator. Woody helps Lotso reach the switch, but Lotso takes the opportunity to escape the incinerator himself and leaves the other toys to perish.[93] Fortunately, the toys are saved by The Claw, a claw crane operated by their trusty companions, the alien toys.

C. BIG HERO 6 (2014)

Set in the futuristic city of San Fransokyo, *Big Hero 6*[94] follows Hiro Hamada, a fourteen-year-old boy whose life changes after his older brother, Tadashi, dies in a fire. In his grief, Hiro finds friendship in a robot his brother invented prior to his death. This robot, Baymax, was built by Tadashi as a personal healthcare companion. Hiro and Baymax ultimately band together with four of Tadashi's friends to form the superhero team, Big Hero 6. The team works together to stop the scheme of Robert Callaghan, a distinguished professor who tries to seek revenge against a man he believes to have killed his daughter. After the team heroically prevents the destruction of their town from Callaghan's ill motives, Big Hero 6 remains in San Fransokyo, presumably fighting crime and helping the city.

Big Hero 6 depicts an array of chaos as the team tries to figure out the reasons behind Tadashi's death and stop a mad man. In relevant part, there are three acts that would constitute reprehensible crimes punishable under the Model Penal Code: (1) theft,[95] (2)

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the toys' conspiracy to throw Woody out of a window).

89. *See* M.P.C. § 211.1 (2013) (outlining the crime of aggravated assault); *see also* Part IV.B (evaluating the Prospector's assault on Woody).

90. *See* M.P.C. § 5.01 (2013) (detailing attempt crimes); *see also* Part IV.C (exploring Lotso's attempt to murder the toys by failing to act).

91. TOY STORY, *supra* note 85, at 25:55–28:30.

92. TOY STORY 2, *supra* note 86, at 1:15:50–1:16:00.

93. TOY STORY 3, *supra* note 87, at 1:20:20–1:20:58.

94. Big Hero 6 (Disney 2014).

95. *See* M.P.C. § 223.2 (2013) (outlining the crime of theft); *see also* Part IV.A (assessing Callaghan's theft of the microbots).

aggravated assault,[96] and (3) attempted murder.[97] The scenes portraying these crimes can be used to educate students and laypeople about criminal law.

Theft is the first crime encountered in the film. Hiro invents hundreds of small magnetic pieces of equipment called microbots. These microbots are attracted to each other and work together, controlled by the owner's mind, to construct innovative objects. Hiro presents these microbots at a student showcase for the local university, and Robert Callaghan later steals the microbots to assist in his revenge plot against his daughter's alleged killer.[98]

Aggravated assault is shown during various scenes, but one stands out from the rest. In one particular battle between the Big Hero 6 team and Callaghan, Callaghan's face is hidden beneath a mask. The team attempts to subdue him in order to remove the mask and reveal his true identity, but in the process, Callaghan hurls a large stone in an attempt to strike the team.[99]

In one of the film's more dramatic scenes, one character attempts to murder another. After discovering that Callaghan was involved in the fire that killed his brother, Hiro orders Baymax to destroy Callaghan. Baymax attempts to murder Callaghan but is intercepted by the other members of the Big Hero 6 team, which allows Callaghan to escape.[100]

III. APPLYING CRIME IN THE FILMS TO EDUCATION

Generally, the commission of a criminal act requires both (1) an act or omission (the actus reus) and (2) a particular mental state (the mens rea).[101] An analysis of criminal acts is thus incomplete without an understanding of the requisite mental state a perpetrator must have to commit the crimes. Under the Model Penal Code, there are four potential mental states, any of which may be necessary to establish the intent to commit a crime: purposely, knowingly, recklessly, and negligently.[102]

Model Penal Code section 2.02 outlines the general requirements of culpability. A person acts with purpose when "it is his conscious object to engage" in the conduct.[103] A person is said to act knowingly if she "is aware that [her] conduct is of that nature or that such circumstances exist; and . . . that it is practically certain that [her] conduct will cause such a result."[104] A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to

96. *See* M.P.C. § 211.1 (2013) (detailing the crime of aggravated assault); *see also* Part IV.B (analyzing Callaghan's assault on the Big Hero 6 team).

97. *See* M.P.C. § 5.01 (2013) (explaining the elements of attempt crimes); *see also* Part IV.C (analyzing Hiro's order for Baymax to kill Callaghan).

98. BIG HERO 6, *supra* note 94, at 33:00–33:15, 1:09:30–1:09:45.

99. *Id.* at 1:06:54–1:07:02.

100. *Id.* at 1:09:59–1:11:02.

101. Wayne R. LaFave, Criminal Law § 5.1(a), 253 (5th ed. 2010).

102. *See generally* M.P.C. § 2.02 (2013) (describing the MPC's recognized mental states).

103. M.P.C. § 2.02(a)(i) (2013).

104. M.P.C. § 2.02(b) (2013).

him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.[105]

Finally, a person acts negligently "with respect to a material element of an offense" when that person "should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct."[106] A person will satisfy this element if his or her conduct is "a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."[107] One or more of these mental states will be used in relation to each of the criminal acts outlined in *The Lion King*, the *Toy Story* trilogy, and *Big Hero 6*.

A. FALSE IMPRISONMENT, CONSPIRACY, AND THEFT

1. FALSE IMPRISONMENT

False imprisonment is explained in Model Penal Code section 212.3,[108] which states: "A person commits a misdemeanor if he knowingly restrains unlawfully so as to interfere substantially with his liberty."[109] This definition can be further broken down into three elements: (1) if having knowledge of his or her actions, (2) a person unlawfully restrains another (3) in a way that interferes substantially with his or her liberty. Courts hesitate to define what constitutes substantial interference with liberty, although one court has said it is a question of fact for a jury.[110] Nevertheless, courts have indicated that "[w]henever a person unlawfully obstructs or deprives another of his freedom to choose his own location, that person will be liable for that interference."[111]

In *The Lion King*, Scar captures and keeps Zazu in an animal skeleton for an indeterminate amount of time. Although the scene is short, Scar appears to satisfy all of the elements of false imprisonment. In regard to the first element, Scar is well aware that he is restraining Zazu against Zazu's will. Additionally, Scar instructs Zazu to entertain him and refuses to allow him to speak of Mufasa.[112] These actions show that Scar knowingly

105. M.P.C. § 2.02(c) (2013).

106. M.P.C. § 2.02(d) (2013).

107. *Id.*

108. See Part II(A) for a discussion of the application of the Model Penal Code to teach statutory interpretation in criminal law classrooms.

109. M.P.C. § 212.3 (2013).

110. Karen Bartlett, *Hines 57: The Catchall Case to the Texas Kidnapping Statute*, 35 ST. MARY'S L.J. 397, 401–02 (2004). Though this article discusses the kidnapping statute in Texas, the Texas Penal Code defines restrain as "restricting a person's movements without consent, 'so as to interfere substantially with the person's liberty, by moving the person from one place to another or by confining the person.'" *Id.* at 399 (citing TEX. PEN. CODE ANN. § 20.01(1) (Vernon 2003)). This language is nearly identical to the definition of false imprisonment in the Model Penal Code. *See* M.P.C. § 212.3 (2013) (outlining false imprisonment).

111. Broughton v. State, 335 N.E.2d 310, 314 (N.Y. Ct. App. 1975) (citing the Restatement, 2d, Torts, § 35, comment *h*). It is worth noting here that the crime and the tort of false imprisonment overlap tremendously in their analysis, so resources from civil law and criminal law appear to be used interchangeably. *See* Robert E. Cleary, Jr., Kurtz Criminal Offenses and Defenses in Georgia F9 (2014) (stating that it may be helpful to use civil false imprisonment statutes and cases to "ascertain[] the meaning of the elements of criminal false imprisonment" because the statutes tend to be nearly identical).

112. These actions by Scar could constitute felonious restraint under Model Penal Code section 212.2(b), which states: "A person commits a felony of the third degree if he knowingly: . . . (b) holds another in a condition

imprisoned Zazu, as it can be inferred that Scar is "practically certain"[113] that his actions imprisoned Zazu. This analysis can also be used to show that Zazu is restrained unlawfully, as the film does not provide any legal justification for Zazu's detention.

Scar could raise the defense that he is the king and thus can legally restrain Zazu. As noted above, though, only when there is "legal justification for [an] arrest" may a person be lawfully restrained.[114] Without legal authority or justification, even an officer of the law is forbidden to confine someone.[115] In this scene, there is no indication that Scar has any legal justification to detain Zazu, so this defense would most likely fail.

2. CONSPIRACY

Criminal Conspiracy is explained in Model Penal Code section 5.03(1), which states:

> A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he: (a) agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.[116]

The basis of criminal conspiracy is the necessity for an underlying crime.[117] The fundamental requirements to establish a conspiracy can be simplified for educational purposes as: (1) the participation of at least two individuals, (2) who agree to commit an unlawful objective, (3) have the intent to commit the underlying elements of the offense, and (4) perform an overt act in furtherance of the conspiracy.[118] An overt act in furtherance of the conspiracy is required for some, but not all, underlying offenses.[119]

In *Toy Story*, the toys, led by a particularly irate Mr. Potato Head, desire—and then ultimately attempt— to inflict harm upon Woody in retaliation for what they believe was his act of throwing Buzz out of the window. Though it is unclear what method of harm the toys are going to inflict upon Woody, it is clear that the toys are discussing their intent to, at the very least, commit some sort of physical assault on Woody. The toys work together, as a group, to come to the agreement that Woody deserves to be punished for allegedly harming Buzz. The toys intend to commit the underlying elements of assault,[120] and a subsequent

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of involuntary servitude." An instructor could use this example to teach the felony of felonious restraint in addition to the misdemeanor of false imprisonment.

113. M.P.C. § 2.02(2)(b) (2013).

114. *See* Nesmith v. Alford, 318 F. 2d 110, 119 (5th Cir. 1963) (finding that police officers who arrested Caucasians for eating lunch with African Americans had no legal justification for the arrests and, therefore, were liable for false imprisonment).

115. Gillan v. City of San Marino, 147 Cal. App. 4th 1033, 1044 (Ca. 2d Dist. Ct. App. 2007) (finding that, if an officer makes an arrest without process and the plaintiff is damaged due to the arrest, the officer must prove that the arrest was justified).

116. M.P.C. § 5.03(1) (2013).

117. "Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act." Iannelli v. United States, 420 U.S. 770, 777 (1975).

118. People v. Johnson, 303 P.3d 379, 384 (Cal. 2013).

119. United States v. Shabani, 513 U.S. 10 (1994) (holding that an overt act in furtherance of the conspiracy is not required to establish a violation of 21 U.S.C. § 846, the drug conspiracy statute).

120. See *infra* Part IV.B for an outline of the elements of aggravated assault.

overt act in furtherance of the assault may be shown by the toys lifting Woody off of his feet and carrying him until they are interrupted by Andy's impending arrival.

3. THEFT

Theft by Unlawful Taking or Disposition is explained in Model Penal Code section 223.2, which states in relevant part: "A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof."[121] The Model Penal Code offers one definition of a deprivation as the withholding of property belonging to "another permanently or for so extended a period as to appropriate a major portion of its economic value."[122]

An analysis of *Big Hero 6* provides a straightforward example of theft by unlawful taking or disposition. In the film, Robert Callaghan steals Hiro's microbots from a robotics exhibition and relocates them to a warehouse for an indeterminate amount of time. Callaghan begins to replicate the microbots, eventually producing thousands more. Callaghan's theft of the microbots leads Hiro to believe that they were destroyed in the fire and ultimately deprives him of the use, both personal and economic, of his microbots.

B. AGGRAVATED ASSAULT

Aggravated assault is explained in Model Penal Code section 211.1(2), which states in relevant part:

> A person is guilty of aggravated assault if he: (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon.[123]

Under this statute, there are three relevant kinds of Model Penal Code culpability and four broad scenarios that satisfy aggravated assault. The three pertinent mental states are purposely, knowingly, and recklessly.[124] The first type of aggravated assault scenario that satisfies the Model Penal Code definition includes the following elements: (1) a person attempts (2) to cause serious bodily injury (3) to another person. The second type involves (1) a person who purposely, knowingly, or recklessly (2) causes serious bodily injury to another. The third type involves (1) a person who attempts (2) to cause bodily injury to another (3) with a deadly weapon. The fourth type involves (1) a person who purposely or knowingly (2) causes bodily injury to another (3) with a deadly weapon.

The three films present the first, second, and fourth types of aggravated assault scenarios, which may be used by instructors when teaching aggravated assault. In *The Lion King*, the hyenas place Zazu in a boiler, causing serious bodily injury. This action satisfies the elements of the second type of aggravated assault. Regarding the hyenas' culpability,

121. M.P.C. § 223.2(1) (2013).
122. M.P.C. § 223.0(1)(a) (2013).
123. M.P.C. § 211.1(2) (2013).
124. For the definition of each of these mental states, see *supra* pp. 18–19.

the pack consciously places Zazu in the boiler with the intention of doing so. This satisfies the purposeful culpability requirement of the first element since it was the hyenas' conscious objective to place Zazu in the boiler. In regard to the second element, the film depicts Zazu's charred body hurling out of the boiler, indicating that Zazu has suffered severe burns, which would constitute a serious bodily injury since the harm inflicted on Zazu is so severe as to have the ability to permanently disfigure him. Thus, both elements of the second type of aggravated assault are satisfied.

The second *Toy Story* film depicts the fourth type of scenario of aggravated assault. The Prospector, in order to stop Woody from leaving the suitcase that is headed to Japan, uses his pickaxe to partially dismember Woody; more specifically, the Prospector nearly amputates Woody's arm by hacking at it with his pickaxe. This act satisfies the fourth type of aggravated assault scenario because the Prospector's conscious objective is to seriously harm Woody in order to prevent his departure; therefore, the first element is satisfied. Second, the Prospector causes bodily harm to Woody by nearly amputating his arm. Finally, the Prospector's weapon, a pickaxe, can be correctly categorized as a deadly weapon since the pickaxe is capable of causing death and was used in a manner that could have caused death; in fact, courts have identified a pickaxe as a deadly weapon.[125]

In *Big Hero 6*, the first kind of the aggravated assault scenarios is portrayed. In an attempt to seriously harm—and presumably kill—the members of Big Hero 6, Callaghan throws a stone at the team. Fortunately, Baymax protects the group, and all members escape without injury. Callaghan easily satisfies the three elements of the first type of aggravated assault because he attempts, by throwing the large stone at the team, to cause bodily harm to the team members. It is worth noting that if the stone qualifies as a deadly weapon, and it may because of the manner in which it was used, the third type of aggravated assault scenario may also be satisfied by Callaghan's action.

C. MURDER AND ATTEMPTED MURDER

Murder is explained in Model Penal Code section 210.2(1)(a), which states: "[C]riminal homicide constitutes murder when: (a) it is committed purposely or knowingly."[126] As previously stated, an individual acts with purpose when "it is his conscious object to engage" in the conduct,[127] and a person acts with knowledge when the person is "aware that his conduct is of that nature or that such circumstances exist."[128]

In *The Lion King*, Mufasa desperately clings to the edge of a cliff in an attempt to avoid falling into the stampede of animals below. When Scar approaches the cliff, Mufasa cries out to his brother for help. Instead of pulling Mufasa to safety, Scar latches onto Mufasa's paws and then throws him to his ultimate demise. This scenario provides a simple example of a murder committed with purposeful intent. Scar acted with purpose when he

125. People v. Avalos, No. G043647, 2011 WL 977579, at *1 (Cal. 4th Ct. App. Mar. 21, 2011) (finding that the defendant used two deadly weapons: a pickaxe and a shovel); Hudgins v. State, 374 S.E. 2d 566, 569 (Ga. Ct. App. 1988) (explaining that a pickaxe handle can be used as a deadly weapon); State v. Flaugher, 713 S.E. 2d 576, 590 (N.C. Ct. App. 2011) (holding, *inter alia*, that a pickaxe is a deadly weapon when used in a manner to cut someone repeatedly).

126. M.P.C. § 210.2(1)(a) (2013).

127. M.P.C. § 2.02(a)(i) (2013).

128. M.P.C. § 2.02(b)(i) (2013).

released Mufasa over the edge of the cliff, as it was his "conscious object to engage"[129] in the act that caused his brother's death. This purposeful intent is further evidenced by Scar's final, malicious words to Mufasa: "Long live the king."

Criminal Attempt is explained in Model Penal Code section 5.01(1), which states in relevant part:

> A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required of commission of the crime, he: (a) purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be; or (b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part.[130]

For the commission of attempted murder under the Model Penal Code, an individual must first have the level of culpability necessary to commit murder, which is purposefully or knowingly. Attempted murder can thus be committed in either of two ways: (1) an individual purposefully engages in conduct that would constitute murder if the surrounding circumstances were as the individual believed them to be, or (2) an individual purposefully or knowingly does or omits to do anything with the purpose of committing murder or with the belief that no further action on his or her part will result in the death of another.

In *Toy Story 3*, the actions of Lotso amount to attempted murder in both commissions addressed in the relevant Model Penal Code sections. As the toys were dragged to the incinerator, Woody assisted Lotso in reaching a switch that would have stopped the machine and saved the toys. Lotso was aware that the switch would have this result, and, instead of flipping the switch, made the purposeful decision to leave without turning off the incinerator. Lotso's purposeful action satisfies the elements of the first commission of attempted murder. Had the surrounding circumstances been as Lotso believed them to be—that is, had the alien toys failed to save their friends—the toys would have been thrown into the incinerator, which would have likely resulted in their deaths.

Alternatively, Lotso's actions may also satisfy the second type of attempted murder and serve as an example of what may constitute liability for an offense by an omission to act. An omission is defined by the Model Penal Code as "a failure to act,"[131] and an individual can only be liable for the commission of an offense by omission if the "omission is expressly made sufficient by the law defining the offense,"[132] as it is for criminal attempt. In *Toy Story 3*, it was Lotso's purposeful failure to act that would have resulted in the death of the toys had they not been saved by a third party.

Using *Big Hero 6* to satisfy the first type of attempted murder may prove particularly interesting due to the commission of the offense by Baymax at Hiro's direction. According to the Model Penal Code, "[a] person is legally accountable for the conduct of another person when: (a) acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct."[133] This doctrine has come to be known as the "innocent instrumentality" doctrine.[134]

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129. M.P.C. § 2.02(a)(i) (2013).
130. M.P.C. § 5.01(1) (2013).
131. M.P.C. § 1.13(4) (2013).
132. M.P.C. § 2.01(3)(a) (2013).
133. M.P.C. § 2.06(2) (2013).
134. *See* Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New*

Hiro acted purposefully when he commanded Baymax to "destroy" Callaghan. Therefore, he acted with the culpability needed to commit the offense. Additionally, when initially ordered to destroy Callaghan, Baymax stated that he could not act to harm a human being. To force Baymax to injure Callaghan, Hiro removed Baymax's programming chip that prevented him from inflicting harm upon a human. This can be used as evidence that Baymax was an innocent party used by Hiro to engage in the commission of the crime. "In such a case, the conduct of the innocent party, plus the culpable mental state of the [actor], results in the [actor's] punishment as the principal."[135]

CONCLUSION

Formal legal education initially gained momentum with a small law school in Connecticut and has since expanded to an incredible two hundred five ABA-approved law schools in the United States.[136] Along with this expansion came the progression of legal education from the well-known Socratic method to the use of interactive media, such as animated films, to teach students. As legal education improved in the classroom, community outreach programs have also sought to improve legal understanding among the general public.

In this constantly developing area of legal education, it is crucial for community outreach instructors and criminal law professors alike to expand their teaching toolkits. Films are a particularly useful way to enhance student comprehension, and the examples expressed in this Article are only a small handful of the films that may be useful to an instructor. While the focus of this Article was on animated films, particularly *The Lion King*, the *Toy Story* trilogy, and *Big Hero 6*, instructors have successfully used a multitude of films, spanning wide ranges of genres, to teach particular areas of the law.[137] Ultimately, the analyses discussed in this Article may be a stepping stone to effective utilization of film by law professors and community outreach instructors when teaching criminal law to first-year law students and laypeople, respectively.

Solutions to an Old Problem, 37 HASTINGS L. J. 91, 94 n.12 (1985) (examining the difficulty of the innocent instrumentality doctrine and different scenarios that constitute usage of this doctrine).

135. State v. Finsley, C.A. No. 9029, 1979 WL 207550, at *5 (Ohio Ct. App. Feb. 14, 1979).

136. *ABA-Approved Law Schools*, American Bar Association, http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html (last visited Apr. 12, 2016).

137. *See supra* notes 41–43 and accompanying text (providing examples of films that instructors have used, including *The Wizard of Oz*, *Star Trek*, and *Harry Potter*).