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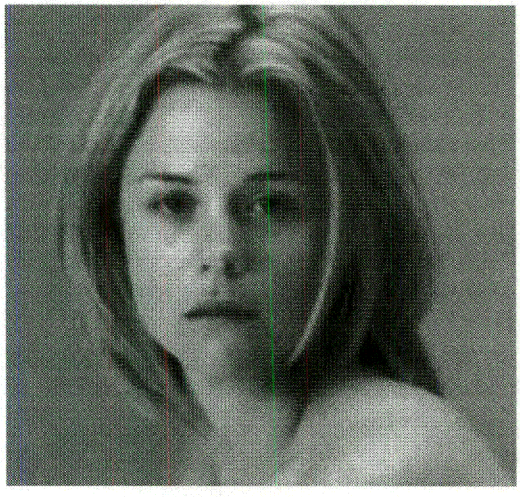
PICTURE [IM]PERFECT: PHOTOSHOP REDEFINING BEAUTY IN COSMETIC ADVERTISEMENTS, GIVING FALSE ADVERTISING A RUN FOR THE MONEY

By, Ashley Brown[1]

Introduction

The advent of Photoshop has made a once unattainable image of beauty and perfection much less a figment of the imagination and much more a tangible reality, leaving beauty in the hands of its digital creator.. In the famous words of Aqua, with very little "imagination, life is your creation."[2] Photoshop has the power to manipulate an image's appearance beyond recognition, making it possible to transform an average looking individual into a "Barbie girl, in a Barbie world."[3] This drastic transformation was captured in a thirty-seven second video: "Photoshop makes anything possible."[4] The video exemplifies the Barbie-doll ideal aesthetic for women and G.I. Joe aesthetic for men, which has been promulgated by modern retouching.[5]



Before[6]

After[7]

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1. Ashley Brown, Juris Doctor, Benjamin N. Cardozo School of Law 2014.
2. Aqua, *Barbie Girl*, Aquarium (MCA Records 1997).
3. *Id.*
4. Raul Radulescu, *Photoshop makes anything possible*, YOUTUBE (Oct. 27, 2013), https://www.youtube.com/watch?v=cPnfjwKfkSk.
5. Jessica Seigel, *The Lash Stand: Will new attitude and regulatory oversight hit delete on some photo retouching in print ads?,* ADWEEK (May 29, 2012 at 12:01 AM), http://www.adweek.com.com/news/press/lash-stand-140785?page=2.
6. Taylor, *supra* note 5.
7. *Id.*

Since the birth of the modern day photograph in 1839,[8] there have always been techniques to "improve" the captured image.[9] However, technological advancements have drastically altered the types of modifications that are now achievable.[10] The thirty-seven second YouTube video[11] demonstrates that with Photoshop it has become possible, with relatively minimal time and effort, to completely alter a person's appearance and size to create a life-like Barbie.[12] However, unlike the doll, these subjects are often well-known models and celebrities that add a sense of believability to what is an unattainable beauty.

Now, before an image is ever presented to the public, it can be diluted and digitally manipulated to achieve an unrecognizable result. Such alteration can have drastic consequences on the naïve consumer, especially when it comes to deception in certain types of product advertisements, such as cosmetics.[13] This vulnerability was recently the subject of much controversy when the self-regulating watchdog of the United States advertising industry, the National Advertising Division (NAD), moved to ban the use of Photoshop in cosmetic advertisements. Specifically, the ban followed a 2012 CoverGirl ad featuring Taylor Swift, in which her eyelashes were airbrushed to exaggerate the effects of mascara.[14] Although the footnote disclaimer in the ad stated, "[l]ashes enhanced in post production," Andrea Levine, the Director of NAD, labeled the advertisement a "product demonstration." as the purpose of the product, the mascara, is to "make your eyelashes longer and thicker," promising "2X more volume" and therefore cannot be digitally enhanced.[15] Consequently, the NAD found the disclaimer to be insufficient and declared the ad unacceptable, forcing Proctor & Gamble into discontinuing it,[16] as it stood in "contradiction to the primary message conveyed by the advertisement."[17] Although the NAD has publicly stated

8. THOMAS H. WHEELER, PHOTOTRUTH OR PHOTOFICTION?: ETHICS AND MEDIA IMAGES IN THE DIGITAL AGE 29 (2003).

9. *See* HELMUT GERNSHEIM, A CONCISE HISTORY OF PHOTOGRAPHY (3d. 1986).

10. Kerry C. Donovan, *Vanity Fare: The Cost, Controversy, and Art of Fashion Advertisement Retouching*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 581, 588 (2012) (explaining Photoshop "has resulted in 'much more extensive trickery [that] is approved without anyone batting a lash: flabby stomachs are tightened, necks and legs are lengthened, and bosoms are reshaped. The result: a flawless body shape no amount of dieting or cosmetic surgery can achieve.' Images can be manipulated in any way that is desired, from making a model slimmer or taller to changing skin color and swapping body parts.")

11. Radulescu, *supra* note 4.

12. *See* Seigel, *supra* note 6 (explaining that "Today, fashion models who appear gaunt can get their pixels plumped to fill in bony joints and jutting ribs. Celebrities, meanwhile, routinely get slimmed down to look more like models.")

13. *See* Ann Marie Britton, The Beauty Industry's Influence on Women in Society (Oct. 1, 2012) (unpublished honors thesis, University of New Hampshire) (on file with University of New Hampshire Scholars' Repository).

14. Seigel, *supra* note 6.

15. Jim Edwards, *US Moves Toward Banning Photoshop in Cosmetics Ads*, BUSINESS INSIDER (Dec. 16, 2011) http://www.businessinsider.com/us-moves-toward-banning-use-of-photoshop-in-cosmetics-ads-2011-12.

16. Edwards, *supra* note 16 (quoting the NAD decision, "[P&G] advised NAD it has permanently discontinued all of the challenged claims and the photograph in its advertisement. NAD was particularly troubled by the photograph of the model – which serves clearly to demonstrate (i.e., let consumers see for themselves) the length and volume they can achieve when they apply the advertised mascara to their eyelashes. This picture is accompanied by a disclosure that the model's eyelashes had been enhanced post production."); *See also* Seigel, *supra* note 5 (explaining, "[i]n a pivotal decision, the National Advertising Division of the Council of Better Business Bureaus late last year found that a CoverGirl mascara ad featuring singer Taylor Swift was not "truthful and accurate" because her luxurious eyelashes were enhanced with airbrushing.").

17. LOIS F. HERZECA & HOWARD S. HOGAN, FASHION LAW AND BUSINESS: BRANDS & RETAILERS 534 (2013).

"advertising self-regulatory authorities recognize the need to avoid photoshopping in cosmetics advertisements where there is a clear exaggeration of potential product benefits,"[18] the landmark CoverGirl decision did not dissuade Photoshop users. If anything, controversy surrounding the issue has been on the rise, and the media is always quick to identify advertisers' missteps and oversights.[19]

Although the potential for consequences is plentiful, a general lack of caution is rampant throughout various industries, not just advertising.[20] News organizations, similar to the advertising industry, operate under self-regulating policies that tout an industry standard allowing the "enhancement of photographs for clarity and definition," but forbidding any change to the photograph's actual composition.[21] Moreover, Photoshop has completely saturated all forms of e-commerce to such an extreme that some commentators have begun to satirize the practice.[22] For instance, Ellen DeGeneres took her stab when she invited Target model, Tanya Marie Keller, to be a guest on her show.[23] In March of 2014, Target retouchers notoriously butchered Keller's bikini image, stretching her arms past her knees and cropping out a noticeably large portion of her crotch.[24] In the spirit of Ellen's comedic ways, Keller came on stage wearing arm extensions in a lighthearted attempt to spoof Target's oversight.[25]

Photoshop has become so common within the fashion and advertising industry that most have come to approach it with overwhelming indifference, accepting its presence in all images as a fact of life.[26] Part I of this Note will focus on the regulatory scheme that is implicated in the Photoshop discussion and whether such improprieties in cosmetic advertisements fall under the purview of the false advertising paradigm. The ramifications of Photoshop's use in these advertisements are multi-faceted, but are ultimately rooted in two distinct, yet related paths of upheaval: (1) the consumer deception issue that ensues from the unattainable results depicted in the photoshopped advertisements, and (2) the public health issue that stems from manipulating a model's appearance to a state that is beyond attainable perfection.

Part II will begin by exploring the evolution of photography, and expose it as an art form long plagued by manipulation. The discussion will continue through an overview of the current regulatory status of Photoshop, with a focus on the United States. Then, Part III will provide an overview of the three key sources of false advertising law in the United States–the Federal Trade Commission ("FTC"), the NAD, and the Lanham Act. Part IV will

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18. Edwards, *supra* note 18.

19 *See, e.g.*, Olivia Foster, *She's still beautiful!' Female fans rally in support of Beyonce after leaked shots reveal her spotty skin in pre-Photoshop L'Oreal ads*, DAILY MAIL, (Feb. 19, 2015) http://www.dailymail.co.uk/femail/article-2960198/Female-fans-rally-support-singer-leaked-shots-reveal-spotty-skin-pre-Photoshop-L-Oreal-ads.html.

20. *See* Frances Morton, *Touch-up: Photoshopping is all around us*, THE NEW ZEALAND HERALD (Sept. 5, 2010), http://www.nzherald.co.nz/entertainment/news/article.cfm?c_id=1501119&objectid=10671260 for the proposition that self-regulation extends to fact providing industries such as the news.

21. *Id.*

22. *See Ellen DeGeneres: Sophia Grace & Rosie, Simon Baker* (NBC television broadcast Apr. 2, 2014), *available at* http://www.ellentv.com/episodes/sophia-grace-and-rosie-simon-baker/.

23. *Id.*

24. ABC News, *Target Apologizes for 'Thigh Gap' Photoshop Fail*, ABC NEWS (Mar. 12, 2014 6:00am), http://abcnews.go.com/blogs/lifestyle/2014/03/target-apologizes-for-thigh-gap-photoshop-fail/.

25. *Ellen DeGeneres: Sophia Grace & Rosie, Simon Baker*, *supra* note 23

26. *See* Morton, *supra* note 21; *see also* Seigel, *supra* note 6 (quoting Photoshop guru Helene DeLillo stating, "[e]very single company is retouching, even if they say they're not," and CoverGirl spokesman, Brent Miller, "[r]etouching is standard, and post-production is standard across all advertising. Everyone does it.")

apply this information, and analyze why and when cosmetic advertisements manipulated by Photoshop qualify as false advertising. This Note concludes with a brief look at why regulatory change has become necessary in order to keep up with the technological advances of Photoshop and remedy the consumer deception and public health concerns that have arisen in its wake.

I. Background: Photoshop, Advertising Manipulation, Where it All Began

Beginning with the flicker of the first flash, photography is an art form plagued by manipulation. In fact, "photography itself is an inherent manipulation," and its process is skewed from beginning to end by the "biases and interpretations of the photographer, printer, editor, or viewer."[27] Modern photography is deemed to have been invented in 1839, but traces of the first documented altered photograph appeared as early as 1840.[28] As such, pre-production techniques such as lighting, hair, and makeup coupled with post-production dark room tools[29] were around long before computers and Photoshop. Although previously a more painstakingly slow and tedious process, pre-Photoshop photographers were able to "retouch" any blemishes or imperfections using brushes.[30]

A. *The Evolution of Photoshop*

For the remainder of the 19th century, and for the majority of the 20th, photographic technology advanced at a steady rate with the potential for manipulation increasing each step of the way.[31] However, in 1987, Ph.D. student Tom Knoll revolutionized the world of photography when he developed the computer application: Display.[32] Credited as the "unofficial father of Photoshop,"[33] Display surpassed any previous advancement by light years. The program caught the attention of software giant, Adobe, who purchased the program from Knoll in September of 1989.[34] Six months later, on February 1, 1990, photography was forever changed with the release of Photoshop 1.0.[35] Two decades and 13 versions later, the once simple yet revolutionary program has gone from "basic retouching," such as digital color editing,[36] to the ability to "slim bodies, enlarge heads, narrow waists, and pump breasts and muscles with a click and a drag" thanks to the Liquify tool, introduced in Photoshop 6.0.[37]

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27. WHEELER, *supra* note 9.

28. *Id.* at 29.

29. Kate Betts, *The Man Who Makes the Pictures Perfect*, THE NEW YORK TIMES (Feb. 2, 2003), http://www.nytimes.com/2003/02/02/style/the-man-who-makes-the-pictures-perfect.html?pagewanted=all&src=pm.

30. *See id.* (quoting Photoshop connoisseur Pascal Dangin stating, "[i]t's about changing light. Think of this as a virtual darkroom, where you would expose parts of the photo to make it denser. Only in a darkroom, that would take five hours, and here we do it in an instant.")

31. *See id.*, (providing examples of manipulation and explaining, "[i]n a culture in which image is a major commodity, the paradox of appearing natural on film is nothing new. As far back as the mid-19th century, the photographer Mathew Brady employed retouchers to improve formal portraits. In the early 20th century, Man Ray used innovative techniques like solarization, and in the 1930's and 40's the Hollywood photographer George Hurrell elevated actresses like Jane Russell and Joan Crawford into icons of glamour by lengthening their eyelashes, smoothing every wrinkle and blemish and highlighting their hair.")

32. *A Quick History of Adobe Photoshop & Cool Facts Behind the Living Legend*, 1STWEBDESIGNER.COM (last visited Apr. 6, 2014), http://www.1stwebdesigner.com/inspiration/history-of-adobe-photoshop/.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. Seigel, *supra* note 6.

Photoshop transformed the formerly tedious retouching process and provided the power of manipulation to anyone capable of turning on a computer. In some ways, it has enhanced and expanded photography exponentially as an art form. For example, it has vastly expanded the different lighting techniques, making the possibilities for different exposure scenarios endless.[38] The "harsher aspects of dramatic lighting," which once impeded photographers from exploring possible exposures in greater depth, are now encouraged and experimented with, transforming a once discounted technique into an enhancement.[39] However, although such tools have long been employed, Photoshop has enabled them to evolve and procreate at an alarming rate,[40] adapting to overcome any small, less than perfect detail.

B. *Photoshop Today: From Dolls to Politicians*

Today, Photoshop is prevalent throughout all aspects of society and its creations are plastered on the covers of magazines.[41] Its reach spans far beyond the fashion and advertising industries, and extends to the beloved dolls that children grow up with and see as role models. Additionally, such development is not limited to girls.[42] These "beyond human" characteristics are evident in the stereotypical representation of masculinity in the first doll marketed to boys – G.I. Joe.[43] The original 1964 version of the strapping soldier was proportionately accurate, but as time continued, the doll's chemistry noticeably transformed.[44] The newer versions of G.I. Joe are "increasingly muscular and more sharply defined" and have become less representative of the human male.[45] Today, if G.I. Joe were a live male, he would look similar to Popeye, with biceps measuring "26 inches in circumference," which is in stark contrast to the average male bicep, which "measures approximately 12.5 inches when flexed."[46] Hint: there is a reason why Popeye is a cartoon character.

Politicians have also employed Photoshop to shape public perception.[47] Photo manipulation was a popular tactic employed by tyrants like Joseph Stalin and Adolf Hitler during World War II.[48] These groups would airbrush out former members after their departure to erase any trace of their existence.[49] Even historically celebrated American heroes such as Abraham Lincoln are implicated in the controversy. It is alleged that the

38. *See* Betts, *supra* note 30 (quoting Harper's Bazaar photographer Patrick Demarchelier discussing the "photoshop guru" Pascal Dangin, stating, "Before I met Pascal, I couldn't do so many different kinds of lighting … ")

39. *See id.*

40. *Id.*

41. *Photoshopping: Altering Images and Our Minds*, BEAUTY REDEFINED (Mar. 12, 2014) http://www.beautyredefined.net/photoshopping-altering-images-and-our-minds.

42 *Id.*

43. 1 MEN & MASCULINITIES, A SOCIAL, CULTURAL, AND HISTORICAL ENCYCLOPEDIA, 354 (Michael Kimmel & Amy Aronson eds., 2003).

44. *Id.*

45. *Id.*

46. *Id.*

47. Noel Lawrence, *Laws Regulating Usage of Photoshop*, EHOW, http://www.ehow.com/list_7347521_laws-regulating-usage-photoshop.html (last visited Mar. 30, 2014 2:02PM).

48. *Id.*

49. *Id.*; *see also* Delana, *Politics of Photoshop: 15 Shady Edits for Political Purposes*, WEBURBANIST, http://weburbanist.com/2010/10/27/politics-of-photoshop-15-shady-edits-for-political-purposes/ (last visited Apr. 16, 2014) (comparing photographs in which "a commissar is removed from a photo where he once walked alongside Josef Stalin," and another of Hitler and Joseph Goebbels, one of Hitler's closest advisers and a high-ranking Nazi official, who had been removed from a 1937 photograph.") (emphasis added).

President never posed for a particular famous portrait, but rather his head was "pasted onto the body of Southern politician John Calhoun."[50]

Photoshop has become so embedded within our culture that "consumers are now even airbrushing at home."[51] From yearbook photos to removing landscape to accurately reflect scenery changes,[52] photo trickery has become intertwined into the fabric of everyday life. However, despite such permeation, the fashion industry is seen by many as the leading culprit.[53] One of the most startling and recent depictions of extreme Photoshop is a Ralph Lauren ad that featured model Filippa Hamilton, which more closely resembled a doll than an actual person. In the photo, Hamilton was digitally altered to the point that her hips were "slimmer than her head," making her seem more doll-like than human. [54] Hamilton, who was later fired by the company, claimed Ralph Lauren told her it was because she was overweight. [55] Although the advertisement only appeared in Japan for a relatively short period of time, its depiction was so startling that it caused controversy all around the world.[56]

C. *The Current Status of Photoshop Regulation*

The NAD is not alone in its response to deceptive beauty advertisements. In fact, many would argue that the United States lags behind other countries in its regulation of Photoshop.[57] Currently, digital alteration is unregulated in the United States,[58] whereas many countries are in the midst of proposing proactive measures to minimize the trickery of Photoshop in advertisements.[59]

In 2009, British Parliament member Jo Swinson lobbied for a complete ban on advertisements targeting children under 16-years-old.[60] Advertisers were called on to adopt a self-imposed scaled labeling system, which would require a disclaimer to accompany all digitally altered advertisements depending upon the degree of retouching.[61] Under this model, photoshopped advertisements manipulating cosmetic results, such as the Taylor Swift CoverGirl ad, would fall at one end of the spectrum in juxtaposition to minor

50. Delana, *supra* note 50.

51. *See* Seigel, *supra* note 6 (citing a survey conducted by fashion magazine *Glamour* "in which 60 percent of 1,000 women polled had no problem with retouching personal photos that might appear on Facebook or online dating sites.")

52. *See* WHEELER, *supra* note 9, at 53-56 (stating that "In the wake of the September 11, 2001, terrorist attacks in New York and Washington, D.C., actor/director Ben Stiller ordered the digital erasing of the World Trade Center towers from scenes of Manhattan's skyline in his film *Zoolander*" and also that "Yearbook photos are sometimes manipulated by students (or their parents).")

53 Katie Ellis, *Photoshop Number One Culprit in 'Bad Side' of Fashion Advertising*, THE ROCKET (Sept. 19, 2013) http://www.theonlinerocket.com/campus-life/2013/09/19/photoshop-number-one-culprit-in-bad-side-of-fashion-advertising.

54. *Id.*

55. Carrie Melago, *Ralph Lauren model Flippa Hamilton: I was fired because I was too fat!*, NY DAILY NEWS (Oct. 14, 2009, 8:48 AM), http://www.nydailynews.com/life-style/fashion/ralph-lauren-model-filippa-hamilton-fired-fat-article-1.381093.

56. *Id.*.

57 Lawrence, *supra* note 48.

58 *Id.*

59 *French Politicians Want Photoshop Warning*, CNN (Sept. 24, 2009), http://scitech.blogs.cnn.com/2009/09/24/french-politicians-want-photoshop-warning.

60. Eric Pfanner, *A Move to Curb Digitally Altered Photos in Ads*, THE NEW YORK TIMES (Sept. 27, 2009), http://www.nytimes.com/2009/09/28/business/media/28brush.html?_r=0.

61 *Id.*

technical alternations, such as lighting.[62] In France, Valerie Boyer followed the lead of Jo Swinson and introduced a similar bill in the country's National Assembly.[63] In addition, the French bill went one step further than its English predecessor, expanding coverage to editorials as well as print advertisements and placing a steep price on those who failed to comply with fines of almost $55,000, "or up to 50 percent of the cost of the advertisement."[64]

In Brazil, Congressman Deputy Wladimir Costa proposed a bill,[65] requiring all digitally manipulated advertisements to have a warning label that would read, "Attention: image retouched to alter the physical appearance of the person portrayed," notifying the consumer that the image had been enhanced.[66] Last year, Israel went one-step further to ensure that the models in its advertisements embody not only an attainable, but a healthy image by regulating computer-generated changes to advertisements and setting a threshold body mass index ("BMI") requirement for models in its country.[67] On January 1, 2013, the "Photoshop Law" officially banned the use of underweight models in all advertisements and publications within Israel's borders and required a "warning label" to accompany any advertisement in which models appear thinner due to digital manipulation.[68] The Photoshop debacle even reached New Zealand after the country's version of the *Next Top Model* television program botched images of the contestants to the point of embarrassment.[69] At the time of this blunder in September 2010, the New Zealand government had no plans for Photoshop legislation. However, the Women's Affairs Minister, Pansy Wong, took a stance on the issue by urging the media to portray women accurately.[70]

In 2010, the United States skirted the issue with House Bill 4925, created "to establish a national task force to develop voluntary steps and goals for promoting healthy and positive depictions of women in the media to instill a healthier idea of femininity among young people."[71] Although at this point the government had not directly tackled the issue, it was clear that the anti-Photoshop sentiment was shared and growing throughout many aspects of American society.[72] Aerie, the lingerie brand from American Eagle, became a pioneer in the industry when it chose to follow fellow Canadian retailers by joining the movement with their Spring 2014 ad campaign, Aerie Real, "challenging supermodel standards by featuring unretouched models in their latest collection of bras, undies and apparel."[73]

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62. Donovan, *supra* note 11, at 587.

63. Pfanner, *supra* note 61.

64. *Id.*

65. *See* Donovan, *supra* note 11, at 586 (explaining the goal of the proposal "is to promote awareness in the consumer that the image has been retouched."

66. *Id.*

67. Bruno Nota, *Israel Bans Skinny, BMI-Challenged Models*, ABC NEWS (Jan. 3, 2013), http://abcnews.go.com/International/israeli-law-bans-skinny-bmi-challenged-models/story?id=18116291.

68. Keeia Lynn, *Israel's "Photoshop Law" Goes in Effect*, BIG THINK, http://bigthink.com/ideafeed/israels-photoshop-law-goes-into-effect

69. Frances Morton, *Touch-up: Photoshopping is all around us*, THE NEW ZEALAND HERALD (Sept. 5, 2010), http://www.nzherald.co.nz/entertainment/news/article.cfm?c_id=1501119&objectid=10671260.

70. *Id.*

71. Lawrence, *supra* note 60.

72 See generally Tamara Abraham, *The Self Esteem Act: Parents Push from Anti-Photoshop Law in U.S. to Protect Teens from Unrealistic Body Image Ideas*, DAILYMAIL UK (Oct. 12 2104 3:02 pm EST)

73. Ellie Krupnick, *Aerie's Unretouched Ads Challenge Supermodel Standards for Young Women*, THE HUFFINGTON POST (1/17/2014 12:04pm EST), http://www.huffingtonpost.com/2014/01/17/aerie-unretouched-ads-photos_n_4618139.html.

At the beginning of 2014, advocates finally got the legislature's attention with the Truth in Advertising Act, a bill supporting legislation that would require the Federal Trade Commission ("FTC") to review the use of altered images of the human body in advertisements.[74] The Act was introduced by a Florida Congresswoman on March 27, 2014 and has already gained the support of the American Medical Association.[75]

II. Advertising Regulation in the United States

Ultimately, the problem with Photoshop is the deceptive nature of the digitally manipulated advertisements it creates, which could potentially violate the consumer protection laws of the United States, thereby implicating the Federal Trade Commission Act ("FTC Act") and the Lanham Act.[76] Therefore, in order to accurately understand the implications of any alteration beyond what is attributable to a product's performance, a foundational knowledge of both sources, in addition to the self-regulatory body of the advertising industry, is necessary.

A. *The Federal Trade Commission*

Section 5 of the FTC Act of 1914 covers methods of unfair competition, however, the FTC did not have jurisdiction over "unfair or deceptive acts or practices" until 1938, when the Wheeler-Lea Amendment to Section 5 of the FTC Act was passed. The restated Section 5 states: "[U]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."[77] Although the cornerstone of this mandate are the terms "unfair" and "deceptive," distinctively two words, it was not until 1964 that such a distinction between the terms actually came to fruition and courts began to employ separate standards.[78]

As advertising evolved out of the power of a message, this notion still frames the FTC's regulation of advertising.[79] Similarly to most other areas of legal reform, the FTC has not caught up to the advancements in technology. It continues to define deceptive

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74. *See New Bill Calls on FTC to Take Action on Photoshopped Images*, TRUTHINADVERTISING.ORG (Apr. 2, 2014), https://www.truthinadvertising.org/new-bill-calls-ftc-take-action-photoshopped-images/ (further explaining "the bill seeks to get at images that materially change an individual's true shape, color, proportion or size, and is not after banning all Photoshopping.")

75. *See id.* (pointing out that the AMA has previously taken similar efforts when it "adopted a policy in 2011 encouraging advertising associations to help develop guidelines that would discourage the use of such images, especially in teen-oriented publications" after finding that "[a] large body of literature links exposure to media-propagated images of unrealistic body images to eating disorders and other child and adolescent health problems."); *See also* Seigel, *supra* note 6 (explaining that the "American Medical Association condemning unrealistically retouched models as a public health hazard in 2011, digital doctoring may be entering a new age of regulation.")

76 *See* Eric Gardner, *Jake Gyllenhaal Claims Defemation By Photoshop*, HOLLYWOOD REPORTER (May 19, 2011), http://www.hollywoodreporter.com/thr-esq/jake-gyllenhaal-claims-defamation-by-190274

77. Jef I. Richards & Richard D. Zakia, *Pictures: An Advertiser's Expressway Though FTC Regulation*, 16 GA. L. REV. 77, 86 (Fall 1981).

78. *Id.* at 85 (discussing FTC v. Raladam Co. as a "catatrophic setback for the Commission's program for advertising reform," finding that "the advertising regulation proposed by the FTC was outside the purpose of section 5 because the necessary element of competition was lacking. As the Sixth Circuit concluded in that case, the Commission 'came into being as an aid to the enforcement of the general governmental anti-trust and anti-monopoly policy, and . . . its lawful jurisdiction [does] not go beyond the limits of fair relationship to that policy.'")

79. *See* Linda J. Demaine, *Seeing is Deceiving: The Tacit Deregulation of Deceptive Advertising*, 54 ARIZ. L. REV. 719, 722 (Fall 2012) (explaining, "[d]espite the nearly universal paradigm shift from language to visual imagery in advertising, the FTC continues to focus its efforts on linguistic claims and leaves visual imagery almost entirely unregulated").

advertising, regardless of the medium of communication, as advertising that is "likely to mislead consumers acting reasonably under the circumstances."[80] The void in the FTC's regulation of deceptive photoshopped advertising images can partially be attributed to the fact that their focus lies in the speech that an advertisement conveys as opposed to the image, even though the message conveyed through a picture can be just as powerful as one communicated through words.[81]

B. *Self-Regulation: The Advertising Self-Regulatory Council ("ASRC")*

While the FTC handles the more egregious and repeat offenses, as previously mentioned, the United States' advertising industry is largely self-regulated.[82] Self-regulation is beneficial for both the consumers and the advertisers.[83] The system fosters consumer trust by monitoring emerging issues and trends in the marketplace as well as holding advertisers responsible for practices that fail to meet industry standards.[84] In the United States, a large majority of advertising regulation is self-imposed by the policies and procedures of the Advertising Self-Regulatory Council ("ASRC") of the Council of Better Business Bureaus.[85] Formed by a partnership of advertising agencies in 1971,[86] the ASRC is comprised of a board of corporate and advertising executives along with attorney staff members.[87] It houses the National Advertising Division ("NAD"), Children's Advertising Review Unit, National Advertising Review Board, Electronic Retailing Self-Regulation Program and Online Interest-Based Advertising Accountability Program.[88] The NAD serves as the "watchdog" of the advertising industry, monitoring all national dissemination in all media, with the goal of maintaining high standards of "truth and accuracy" and providing a speedy and effective mechanism to resolve complaints.[89] While its rulings are not legally binding, the body's effectiveness is evident by the fact that 90 percent of companies agree to abide by the terms of its decisions.[90] This adherence may be attributable to NAD's close relationship with the FTC, as many members of its staff are often from the Commission.[91] In addition, those who refuse to comply are often referred to the FTC, "which has the power to fine, sue or bring injunctions against companies."[92]

C. *False Advertising Under the Lanham Act §43(a)(1)(B)*

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80. 15 U.S.C. §55(a)(1) (2012); *see also* Demaine, *supra* note 80, at 722 ("FTC and Lanham Act deceptive advertising cases proceed essentially as though the visual imagery revolution never happened.")

81. *See* Demaine, *supra* note 80.

82. *See supra* Part I.

83. ESRP Review Program: General Activity Report, ASRC Advertising Self-Regulatory Council, Jan. 2014, *available at* http://www.asrcreviews.org/wp-content/uploads/2014/01/ERSP-General-Activity-Report-2013-.pdf.

84. *Id.*

85. *Id.*

86. Alene Dawson, *Clamping Down On Beauty Product Claims*, LOS ANGELES TIMES (Oct. 28, 2012), http://www.latimes.com/features/image/la-ig-beauty-crackdown-20121028,0,4282901.story#axzz2xT3gLaNJ.

87. Jason Rea, *Actual Results May Vary: Toward Fiercer National Regulation of Digitally Manipulated Cosmetics Advertisements*, 19 WM. & MARY J. WOMEN & L. 161, 165 (2012).

88. ESRP Review Program: General Activity Report, *supra* note 83.

89. ABA Section of Antitrust Law, Consumer Protection Law Developments 679 (2009)

90. Social Media Digest, 2012, *available at* http://asrcreviews.org.wp-content/uploads/2013/02/social-media-Digest.PDF

91. *See* Rea, *supra* note 88, at 166 (quoting a commentator who explained, "the ASRC's "rulings are respected and followed by most advertisers because it enjoys a close relationship with the FTC, from which it has historically drawn some of its senior staff.")

92. Edwards, *supra* note 16.

Although jurisdiction for false advertising claims generally falls under the purview of the FTC, the Lanham Act provides key concepts for the framework of accessing photoshop liability. Trademarks are the primary subject of the Act; subsequently, its coverage of false advertising is limited to Section 43(a)(1)(B).[93] Two categories of false advertising claims exist under this section: (1) those that are literally false, and (2) those that are false by implication, which compels a showing of actual deception.[94] Both require the plaintiff to show:

> (1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement.[95]

If the plaintiff successfully substantiates the claim, the Lanham Act grants courts the discretion to institute an appropriate remedy in the form of an injunction as well as damages including (1) defendant's profits, (2) plaintiff's actual damages, and (3) costs of the action.[96]

While the Lanham Act provides federal courts with jurisdiction over false advertising cases,[97] the FTC is better situated and equipped to handle what can be a complex fact pattern. Therefore, it is unsurprising that in assessing liability for false advertising under the Lanham Act, federal courts have looked to the FTC to dictate the principles they should endorse. However, this does not mean that such analysis is all-inclusive.[98]

IV. Using the False Advertising Framework To Access Photoshop Liability

The seminal historical case for guidance in assessing Photoshop liability *is FTC v. Colgate-Palmolive Co.*, in which the Supreme Court held that the message communicated by a television advertisement for shaving cream deceived consumers by falsely conveying that the product was so powerful that it could shave sandpaper in virtually no time after application.[99] After seeing the demonstration, consumers chose to rely upon this claim and elected to purchase the product.[100] Colgate's failure to disclose to consumers that the results of the demonstration were not solely attributable to the product was deceptive.[101] This constituted a direct violation of Section 5 of the FTC Act, which prohibits "the intentional

93. Lanham Act, 15 U.S.C. §1051-1141n (2006)

94. Aviva Sports Inc. v. Fingerhut Direct Marketing Inc., 829 F. Supp.2d 802, 811 (D. Minn. 2011).

95. *Id.* at 808.

96. *Id.*

98. *See* 15 U.S.C. § 1121(a).

98. Demaine, *supra* note 80, at 741.

99. *See* F.T.C. v. Colgate-Palmolive Co., 380 U.S. 374, 377 (1965) (describing "[t]he evidence before the hearing examiner disclosed that the sandpaper of the type depicted in the commercials could not be shaved immediately following the application of Rapid Shave, but required a substantial soaking period of approximately 80 minutes.")

100 *Id.* at 393.

101. *See id.* at 386 (finding that "the commercials involved in this case contained three representations to the public: (1) that sandpaper could be shaved by Rapid Shave; (2) that an experiment had been conducted which verified this claim; and (3) that the viewer was seeing this experiment for himself." The Court found "each underlying product claim is true and in each the seller actually conducted an experiment sufficient to prove to himself the truth of the claim. But in each the seller has told the public that it could rely on something other than his word concerning both the truth of the claim and the validity of his experiment.")

misrepresentation of any fact which would constitute a material factor in a purchaser's decision whether to buy."[102]

In reaching this conclusion, the Court outlined criteria for classifying an advertisement as deceptive that was later formulized in the Commission's 1983 Policy Statement on Deception.[103] Deception most often involves "omissions of material information."[104] When a cosmetic advertisement, such as an anti-wrinkle cream, features a model whose skin has been digitally retouched to a smoothness and perfection beyond any benefit that could be attributable to the product, the consumer is deceived by the false misrepresentation and the advertiser's failure to disclose the product's true capabilities.[105]

Common deceptive practices include "false oral or written representations, misleading price claims, sales of hazardous or systematically defective products or services without adequate disclosures, failure to disclose information regarding pyramid sales, use of bait and switch techniques, failure to perform promised services, and failure to meet warranty obligations."[106] As the Taylor Swift CoverGirl ad demonstrates, the deception in photoshopped cosmetic advertisements results from a "failure to perform promised services."[107] The CoverGirl ad promised to give lashes "2X more volume;" however, the results depicted in the advertisement were not attributable to the mascara itself, but rather a digital enhancement from Photoshop.[108]

In evaluating whether an advertisement fits the categories above and falls within the "deceptive" classification, the FTC states that an advertisement must contain "a representation, omission or practice that is likely to mislead the consumer, acting reasonably in the circumstances, to the consumer's detriment."[109]

A. *Factor One: Likely to Mislead*

When analyzing the first factor, the entire advertisement is taken under consideration.[110] If "the representation itself establishes the meaning," then actual deception is present, and it is classified as an "express claim." Otherwise, the advertisement must qualify as "likely to mislead" and will constitute what is known as an implied claim.[111] This

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102. *See id.* (leading to the conclusion "that the undisclosed use of plexiglass in the present commercials was a material deceptive practice, independent and separate from the other misrepresentation found.")

103. *See* FTC Policy Statement on Deception, FEDERAL TRADE COMMISSION, 104 F.T.C. 110, 174 (1984), *available at* http://www.ftc. gov/bcp/policystmt/ad-decept.htm.

104. *Id.* (stating other occurrences as "forms of conduct associated with a sales transaction," and explaining that "[t]he issue is whether the act or practice is likely to mislead, rather than whether it causes actual deceptions.")

105 *See* What constitutes "false advertising" of food products or cosmetics within §§ 5 and 12 of the Federal Trade Commission Act (15 U.S.C.A. §§ 45, 52), 50 A.L.R. Fed. 16.

106. *Id.*

107 Tanzina Vega, *Covergirl Withdraws Enhanced Taylor Swift Ad*, MEDIA DECODER http://mediadecoder.blogs.nytimes.com/2011/12/21/covergirl-withdraws-enhanced-taylor-swift-ad/.

108 http://mediadecoder.blogs.nytimes.com/2011/12/21/covergirl-withdraws-enhanced-taylor-swift-ad/.

109. FTC Policy Statement on Deception, *supra* 104.

110. *Id.*

111. FTC Policy Statement on Deception, *supra* note 104; s*ee also* Demaine, *supra* note 80, at 745, (explaining that express claims "tend to be relatively straightforward and are the more easily discernible type of deception" and providing an example of one such claim: "An advertiser makes an expressly false claim, for instance, by representing a mineral specimen as natural when it has been artificially enhanced or furniture as antique when it is insufficiently old to warrant the designation." Whereas implied claims "invoke more subtle psychological processes to convey misleading messages," and providing an example of one such: "An advertiser might play the U.S. national anthem in the background during his radio advertisement for clothing actually made in a foreign country. If consumers are likely to infer erroneously that the clothing is made in the United States, the use of the song may constitute an implied claim about its country of origin").

inquiry examines not only the advertisement itself but also the allegations of the complaint, in the context of the transaction to be conducted.[112] As the average consumer most likely does not have the expertise of the FTC, this evaluation will be conducted based on the intuitions of the general consuming public. Therefore, if actual deception is not found, evidence of the corresponding "consumers' expectations" may be required.[113]

The Advertising Standards Authority ("ASA"), the United Kingdom's equivalent to the NAD, recently banned two L'Oreal celebrity advertisements, demonstrating how a consumer is likely to be misled by the false representations of Photoshop.[114] The offending ads in question featured model Christy Turlington for Maybelline's "Eraser" foundation and actress Julia Roberts for Lancome's "Teint Miracle" foundation.[115] The advertisements featured foundations that combined makeup and anti-aging formulas to reduce the visibility of wrinkles while enhancing the skin's overall shine.[116]

Similarly to the Taylor Swift CoverGirl advertisement,[117] these also contained text to disclaim the image "as an illustrated effect."[118] Maybelline and Lancome attempted to defend the advertisements in a similar fashion as CoverGirl, purporting that the disclaimer provided sufficient warning. However, the ASA ultimately came to the same conclusion as the NAD and banned the advertisements in their digitally altered form.[119]

While a majority of consumers are aware of the use of Photoshop in advertisements,[120] it is this inherent understanding that allows this deception to continue. As nearly all advertisements are saturated with digital retouches, it has become nearly impossible for the lay consumer, even with knowledge and understanding of its existence, to know to what extent the qualities portrayed in the advertisement are a result of the product itself or of a graphic designer.[121]

Advertisements are intended to serve, in some sense, as a demonstration of a product's attributes, or in this case the benefits resulting from its use.[122] Thus, it is unsurprising that consumers would likely believe that by using the product, they could achieve similar results to those demonstrated in the advertisement, i.e. wrinkle-free skin. The FTC only requires a "message's overall impression" to be misleading, regardless of whether any portion of it states the truth. Therefore, even if the product marginally improved skin quality, this alone

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112. *See* FTC Policy Statement on Deception, *supra* note 104, (explaining, "[i]n cases of implied claims, the Commission will often be able to determine meaning through an examination of the representation itself, including an evaluation of such factors as the entire document, the juxtaposition of various phrases in the document, the nature of the claim, and the nature of the transactions").

113. Demaine, *supra* note 80, at 745, stating that "the FTC pays close attention to claims that consumers are ill-equipped to evaluate, presumably from a lack of requisite knowledge or objectivity."

114. Pfanner, A Move to Curb Digitally Altered Photos in Ads, THE NEW YORK TIMES (Sept. 27, 2009), http://www.nytimes.com/2009/09/28/business/media/28brush.html?_r=0.

115. Dawson, *supra* note 66.; *See also* Rea, *supra* note 88, at 161.

117 Tanzina Vega, *British Authority bans two ads by Loreal*, MEDIA DECODER http://mediadecoder.blogs.nytimes.com/2011/07/27/british-authority-bans-two-ads-by-loreal/?_r=0.

117. *See supra* Part I.

118. *See* Rea, *supra* note 88, at 183, explaining because Maybelline and Lancome refused to provide the advertisements in their original form the ASA could not conclude "that the digital alterations to the ads had not exaggerated the effects the products could achieve," and therefore "banned the ads in their current form."

119. Seigel, *supra* note 6.

120 Anup Shah, Media and Advertising, Global Issues, http://www.globalissues.org/print/article/160.

121. *See* Rea, *supra* note 88, at 184, (claiming "retouching makes it impossible to distinguish between what is real and what is false-between what is the actual result of the product and what is the result of computer wizardry").

122 *Id.* at 162-63.

would not necessarily be enough to overcome the false advertising claim.[123] The inability for the reasonable consumer to discern which benefits are attributable to the product itself, as opposed to the advertisement's digital enhancement, results in a naivety and furthers the often-blind acceptance of advertisements as facially true.[124] Together this yields the conclusion that the L'Oreal photoshopped advertisements are "likely to mislead" without the need of further extrinsic evidence.[125] In evaluating such a claim, it is presumed that the reasonable consumer understands and evaluates advertisements under a biased notion. Therefore, the fact that the reasonable consumer is aware of the digital manipulation, and is as a result unable to distinguish between reality and falsity, strengthens this factor.[126]

The core of deception in the L'Oreal photoshopped advertisements is simple–"when a product is sold, there is an implied representation that the product is fit for the purposes for which it is sold; when it is not, deception occurs."[127] The cosmetic products, when enhanced with Photoshop, are no longer "fit for the purpose[s] for which it is sold," and deception has occurred.[128]

B. *Factor Two: The Reasonable Consumer*

Once it is decided whether an advertisement is considered to likely be deceptive, the test then becomes "whether the consumer's interpretation or reaction is reasonable in light of the claim."[129] The reasonableness factor must be deduced from a general consensus rather than a single perception, meaning the sentiment must be shared throughout a population.[130] However, a caveat exists if the advertisement is targeted to a specific audience.[131] In such an instance, the Commission evaluates the claim from the perspective of a "reasonable member of that group."[132] In most cosmetic settings, women are more than likely the target audience of advertisements. More specifically, in the L'Oreal cases, the reasonable consumer can be specified to middle-aged women who are either taking

123. *See* Brooke E. Crescenti, *Undercover Marketing: If Omission is the Mission, Where is the Federal Trade Commission?*, 13 J.L. & POL'Y 699, 709 (2005) (stating "if a message's overall impression is misleading, it is no defense that some elements of the communication are true because "words and sentences may be literally and technically true and yet be framed in such a setting as to mislead or deceive.")

124 *See* Rea, supra note 88, at 162-63.

125. *See* Demaine, *supra* note 80, at 745 (stating that "the FTC pays close attention to claims that consumers are ill-equipped to evaluate, presumably from a lack of requisite knowledge or objectivity.")

126. *See id.* (asserting "The FTC and courts presume that the reasonable consumer understands the biased source of these statements, realizes that the claims are not factual, and discounts them accordingly.")

127. FTC Policy Statement on Deception, *supra* note 104.

128 *Id.*

129. *Id.*

130. *See id.* (quoting Heinz W. Kirchner, 63 F.T.C. 1282, 1290 (1963) "An advertiser cannot be charged with liability with respect to every conceivable misconception, however outlandish, to which his representations might be subject among the foolish or feebleminded. Some people, because of ignorance or incomprehension, may be misled by even a scrupulously honest claim.")

131 *Id.*

132. *See id.* (stating "[w]hen representations or sales practices are targeted to a specific audience, the Commission determines the effect of the practice on a reasonable member of that group. In evaluating a particular practice, the Commission considers the totality of the practice in determining how reasonable consumers are likely to respond."); *see also* Demaine, *supra* note 80, at 742 (noting especially vulnerable groups which "require a lower standard of reasonableness. Clearly recognized vulnerable groups include children, who have not yet developed their full cognitive capacity to discern deception, and the elderly and terminally ill, who are presumed to possess diminished objectivity.")

preventative measures to minimize the effects of aging on their skin or are noticing the changes and trying to lessen their visibility.[133]

Similarly to the first evaluation, this factor also considers the complete advertisement "without emphasizing isolated words or phrases apart from their context."[134] This is where the disclaimer categorizing the L'Oreal ads as an "illustrated effect," and the CoverGirl's ad stating, "lashes enhanced post production" comes into play.[135] In providing specific guidance for this factor, the FTC's Policy Statement states "disclosures must be legible and understandable."[136] However, even if they are, they may still be "insufficient to correct misleading representations" as they do not "necessarily correct" the deception, and, therefore, can still result in a violation of the law "even if the truth is subsequently made known to the purchaser."[137] Although the aforementioned advertisements contained disclaimers, the miniscule size print coupled with the nature of the advertisement–to demonstrate a cosmetic on a woman's face–render it deceptive to the reasonable consumer.[138]

The Commission finds that "if consumers understand the[ir] source and limitations practices," certain subjective claims, such as those inciting "taste, feel, appearance, smell or . . . correctly stated opinions" are unlikely to deceive the reasonable consumer and generally does not take action against such messages.[139] Within this consideration are claims that are so outlandish that, unless taken seriously by the consuming public or "amount to objective facts," the general consumer does not take seriously and therefore are generally not actionable as well."[140] The Commission refers to these egregious misrepresentations as puffery and cites examples, such as the term "miracle."[141] In *Time Warner Cable, Inc. v. DIRECTV, Inc.*, the Second Circuit evaluated a DIRECTV advertisement featuring a pixelated image with the words "source matters" plastered in the center.[142] The Court's analysis in this case shows that visual images can be classified as puffery and, therefore,

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133 *See generally* In re L'Oreal Wrinkle Cream Marketing and Sales Practices Litigation. No. 2:12-03571, 2013 WL 6450701.

134. FTC Policy Statement on Deception, *supra* note 104.

135 *See* Rea, *supra* note 88, at 162-63 and 185-186.

136. FTC Policy Statement on Deception, *supra* note 104.

137. *See id.* (explaining "[i]n evaluating such disclosures, the Commission recognizes that in many circumstances, reasonable consumers do not read the entirety of an ad or are directed away from the importance of the qualifying phrase by the acts or statements of the seller. Disclosures that conform to the Commission's Statement of Enforcement Policy regarding clear and conspicuous disclosures.")

138. *See* Rea, *supra* note 88, at 184.

139. FTC Policy Statement on Deception, *supra* note 104; *see also* Rebecca Tushnet, *Looking at the Lanham Act*, 48 HOUSTON L. REV. 862, 908 (2011) (explaining "[a] nonactionable puffery. A visual depiction of a product can be so grossly exaggerated that no reasonable buyer would take it at face value.")

140. *See generally* FTC Policy Statement on Deception, *supra note* 104 (providing an example of when even exaggerating claims are actionable: "For instance, in rejecting a respondent's argument that use of the words "electronic miracle" to describe a television antenna was puffery, the Commission stated: Although not insensitive to respondent's concern that the term miracle is commonly used in situations short of changing water into wine, we must conclude that the use of "electronic miracle" in the context of respondent's grossly exaggerated claims would lead consumers to give added credence to the overall suggestion that this device is superior to other types of antennae,") (quoting Jay Norris, 91 F.T.C. 751, 847 n.20 (1978)), *aff'd*, 598 F.2d 1244 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979); *see also* Donovan, *supra* note 11 (reasoning that puffery cannot include objective facts because they are subjective opinions).

141. FTC Policy Statement on Deception, *supra* note 104.

142. Time Warner Cable, Inc. v. DIRECTV, Inc., 497 F.3d 144, 149 (2d Cir. 2007).

could serve as potential defense to a false advertising claim of a photoshopped advertisement, adding an interesting element to the Photoshop debate.[143]

As previously mentioned, the use of Photoshop in advertisements is not actually unknown by the average consumer. In the digital age of today, the general population is aware of Photoshop's manipulation, as it has become so embedded within our culture that "consumers are now even airbrushing at home."[144] From yearbook photos to removing landscape to accurately reflect scenery changes,[145] photo trickery has become intertwined with the fabric of everyday life. However, the use has become so widespread that consumers, even with this requisite knowledge, have become incapable of distinguishing which enhancements are attributable to the product advertised and which are the result of a digital paintbrush.[146] As "puffery cannot distort consumer decisions,"[147] this void is especially crucial when it comes to cosmetics because the core of the product is the results a consumer hopes to gain from its use; when it is impossible to discern what those are, the deception is further exacerbated and cannot be chalked up to mere puffery. This analysis also demonstrates why a warning label, such as that mandated by Israel's "Photoshop Law" or the one proposed by the Brazilian Congressman, would be rendered ineffective.[148] No disclaimer, such as the one in the L'Oreal or CoverGirl advertisements, would be sufficient enough because consumers, while aware of the manipulation, they are just unable to tell which enhancements result from it.

In the *Time Warner Cable* case, the court classified the heavily pixelated DIRECTV ad as puffery because no reasonable consumer could confuse it for "a true representation about cable's image quality."[149] Applying the Second Circuit's analysis to the photoshopped cosmetic advertisement does not lead to the same conclusion because the fact that consumers are aware of the manipulation is not enough if the misrepresentation is not exaggerated to the point where its deception is easily perceived.

C. *Factor Three: Materiality*

After determining whether the reasonable consumer is likely to be deceived, the materiality of the deception is then considered. The FTC defines a material misrepresentation as "one which is likely to affect a consumer's choice of or conduct regarding a product."[150] In the case of Photoshop, this would mean that the consumer's decision to purchase the product was a result of the misrepresentation caused by the use of

143. *See* Tushnet, *supra* note 140 (discussing the Time Warner case stating, "representation would simply be apparent. In the case at bar, no reasonable consumer could mistake the defendant's heavily pixilated image for a real representation about cable's image quality." Photoshop is different here because the reasonable consumer can easily mistake a photoshopped cosmetics advertisement for a real representation of the product's quality.)

144. *See* Seigel, *supra* note 6 (citing a survey conducted by fashion magazine *Glamour* "in which 60 percent of 1,000 women polled had no problem with retouching personal photos that might appear on Facebook or online dating sites.")

145. *See* WHEELER, *supra* note 9, (stating that "In the wake of the September 11, 2001, terrorist attacks in New York and Washington, D.C., actor/director Ben Stiller ordered the digital erasing of the World Trade Center towers from scenes of Manhattan's skyline in his film *Zoolander*," and for the proposition that "Yearbook photos are sometimes manipulated by students (or their parents).")

146 *See Tushnet*, supra note 140.

147. *Id.* at 907.

148. *See supra* Part III.

149. *See* TimeWarner Cable, Inc. v. DIRECTV, Inc., 497 F.3d 144 (2d Cir. 2007).

150. FTC Policy Statement on Deception, *supra* note 104.

digital retouching in the advertisement. In assessing what sources of information are material, the FTC advises to presume that certain categories are such.[151]

At the top of this list are express claims in which materiality is inherent "because the manufacturer intended the information or omission to have an effect."[152] In addition, when proof of an implied claim has been substantiated, materiality is inferred as well.[153] Furthermore, claims that "significantly involve health, safety or other areas with which the reasonable consumer would be concerned" are also deemed material.[154]

The three photoshopped advertisements discussed above are all for cosmetics, an area in which the reasonable consumer is a woman, are not just concerned, but consumed. In a world filled with advertisements that feature an "idealized, airbrushed and unattainable physical beauty," it becomes impossible to escape the cold, hard truth – we are constantly judged on the basis of our appearance.[155] This truth can be difficult to cope with today as Photoshop has created an artificial perfection that has not only created an unattainable ideal but has subsequently resulted in growing public health concerns with damaging consequences.[156]

The economic repercussions of such a state are startling as $7 billion is spent each year on cosmetics.[157] The ramifications of such an unrealistic portrayal of beauty run deeper than the surface. Over ten years, from 1997 to 2007, the overall number of cosmetic surgical and non-surgical procedures increased a startling 500%, with women accounting for 91% of the population of recipients in 2007.[158] The modeling industry has long been targeted for advancing an unhealthy aesthetic that sends the wrong message to vulnerable youths who look up to these figures as role models and aspire to craft their appearance accordingly.[159] However, the rise of Photoshop has elevated this problem to new heights as mostly every image now disseminated in the media, even on personal social networking sites such as Facebook, has been digitally enhanced.[160] A 2008 survey from the YWCA, one of the largest and oldest women's organization in the United States,[161] shows that these

151. *See id.* (quoting a recent Supreme Court decision stating, "[i]n the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising." And for the further explanation of express claims, "[w]here the seller knew, or should have known, that an ordinary consumer would need omitted information to evaluate the product or service, or that the claim was false, materiality will be presumed because the manufacturer intended the information or omission to have an effect. Similarly, when evidence exists that a seller intended to make an implied claim, the Commission will infer materiality.")

152. *See id.* (further explaining that "[w]here the seller knew, or should have known, that an ordinary consumer would need omitted information to evaluate the product or service, or that the claim was false, materiality will be presumed because the manufacturer intended the information or omission to have an effect.")

153. *See id.*, (further detailing that, "[d]epending on the facts, information pertaining to the central characteristics of the product or service will be presumed material. Information has been found material where it concerns the purpose, safety, efficacy, or cost, of the product or service. Information is also likely to be material if it concerns durability, performance, warranties or quality. Information pertaining to a finding by another agency regarding the product may also be material.")

154. *See Id.* at 6.

155. *See Beauty at Any Cost, The Consequences of America's Beauty Obsession on Women & Girls,* YWCA (August 2008), *available at* http://www.ywca.org/atf/cf/%7B711d5519-9e3c-4362-b753-ad138b5d352c%7D/BEAUTY-AT-ANY-COST.PDF.

156 *Id.*

157. *Id.*

158. *Id.*

159 *Id.*

160 *Id.*

161. *Id.*

developments yield tangible health problems that surface at a very young age.[162] According to the YWCA, as many as 80% of women are dissatisfied with their appearance.[163] In addition, out of the 10 million women who suffer from one of the most common mental health problems of girls and women—eating disorders—nearly 40% of newly-diagnosed cases "are in girls 15-19 years old, but symptoms can occur as young as kindergarten."[164] There are secondary consequences to these statistics as well. For example, the quest towards an unrealistic physical appearance is often accompanied by low self-esteem and depression.[165]

"A finding of materiality is also a finding that injury is likely to exist because of the representation."[166] And while in some false advertising claims the injury may be less apparent, it is evident from the statistics above that the grave injury resulting from the use of Photoshop only further advances this factor's analysis. Because consumers chose to purchase products based on the false results in a photoshopped advertisement and would have likely "chosen differently but for the deception," it can be concluded that injury exists and that the claim is material.[167]

D. *The Lanham Act Evaluation*

As previously explained, when evaluating Lanham Act claims, courts have looked to the FTC for guidance.[168] However, the Lanham Act differs slightly from the FTC in its approach to deceptive advertising. First, if a plaintiff fails to establish actual deception on the face of the offending advertisement itself, then extrinsic evidence is required to support the allegation that an advertisement is misleading.[169] This creates an additional burden for a plaintiff because "false claims may be prohibited without extrinsic evidence of consumer reaction."[170] Such evidence is "usually in the form of an expensive consumer survey," and can be of concern in dissuading people from bringing an action.[171]

The reasonable consumer is included in the Lanham Act analysis, but it has not been evaluated uniformly throughout the courts.[172] In some courts, the reasonable consumer has received minimal consideration, and the discussion has been limited to "judicial references." While other courts apply a harsher standard requiring that "the ad deceive a 'substantial segment' of the intended audience."[173] When evaluating this standard, courts generally rest their conclusion on the "overall impression created by the advertisement," and, similar to the FTC, agree "that disclaimers, disclosures, and other parts of ads that convey accurate information may correct claims that would be deceptive if viewed in

162. *Id.*
163 *Id.*
164. *Id.*
165. *Id.*
166. FTC Policy Statement on Deception, *supra* note 104.
167. *See Id.*
168. Demaine, *supra* note 80, at 741.
169. *See Id.* at 745.
170. *See* Tushnet, *supra* note 140, at 909-10.
171. *Id.* at 910.
172. Demaine, *supra* note 80 at 742-44.
173. *Id.* at 742 (stating "[i]n Lanham Act cases, the courts also incorporate a reasonableness requirement into their decision-making. Similar to FTC cases, this requirement sometimes manifests in judicial references to reasonable consumers, whereas at other times the courts require that the ad deceive a "substantial segment" of the intended audience.")

isolation."[174] Finally, the materiality analysis is quite similar to that of the FTC but slightly less detailed.[175]

V. The Wrath of Photoshop: A Blaze of Fury

In recent years, as the potential for digital manipulation has grown astronomically and the concept of beauty has developed with it, there has been a growing concern as to whether the average consumer knows that such results are largely unattainable.[180] This has caused a rise in this type of litigation in which the cosmetic industry has found itself at the forefront.[176]

In the latest case on point, twelve plaintiffs brought a class-action lawsuit for the false advertising of anti-wrinkle creams from the cosmetic giant, L'Oreal.[177] In their complaint, the plaintiffs specifically allege "L'Oreal photoshops images to give prospective customers a false impression of their products' efficacy" knowing that "its products cannot provide the promised age-negating results."[178]

This complaint followed a similar consumer class-action suit filed in federal court early in 2013 against Avon alleging that, in addition to the company's deceptive promise of "superior results," the product advertising compounded the wrongdoing with "the use of computer software such as Photoshop and high end digital editing equipment."[183] This "allows Defendant to present images of flawless skin, when the reality is likely far different." The complaint asserts that this manipulation adds an additional "layer of deception," further altering "the perception of consumers."[184]

The Complaint described a "central theme" of "false, misleading, and/or deceptive marketing campaign" to be the tactic of L'Oreal's campaign.[179] Applying the false advertising framework and analyzing the materiality, the reasonable consumer, and likely to mislead factors lends a conclusion of culpability. First, the advertisements are likely to cause deception because the consumers, unable to distinguish which aspects are the result of Photoshop and which are of the product itself, will likely accept the claims advanced in the advertisement as of the product's benefit, thereby being deceived into believing they will be able to achieve similar results as well.[180]

Next, as the target of the advertisement is most likely an adult female, the reasonable consumer factor would be evaluated using this subset as the target audience. As explained in the previous section, no matter the sophistication of the reasonable consumer, when it comes to cosmetics, it becomes impossible within this specialized category to discern the product's true benefits as opposed to those that can only be achieved through digital manipulation.

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174. *Id.* at 744.

175. *Id.* at 747.

176. Kevin M. Lemley, *Resolving the Circuit Split on Standing in False Advertising Claims and Incorporation of Prudential Standing in State Deceptive Trade Practices Law: The Quest for Optimal Levels of Accurate Information in the Marketplace*, 29 U. ARK. LITTLE ROCK L. REV. 283, 321 (Winter 2007).

177. *See* In re L'Oreal Wrinkle Cream Marketing and Sales Practices Litigation, No. 2:12-03571, 2013 WL 6450701, at *1.

178. *See Id.* at *2,

179. *See Id.* at *2 (stating "[t]he Complaint does not just allege that L'Oreal made one or two false or misleading claims. Instead, the Complaint describes a "false, misleading, and/or deceptive marketing campaign" whose "central theme" was that L'Oreal anti-wrinkle products were "the product of vigorous scientific research and resulting discoveries.")

180. *Id.*

The materiality prong of the deception is satisfied because L'Oreal's misrepresentations are objectively material to the reasonable consumer who relied upon the product's depiction in the advertisement in their decision to purchase the products in question.[181] Furthermore, one plaintiff even did "so based on a before and after photo of a woman's face that 'purported to demonstrate the dramatic results that would be achieved from using [L'Oreal] products.'"[182] It can reasonably be assumed that the reasonable consumer would not have purchased and used the product but for L'Oreal's misrepresentations.

VI. Conclusion

The Supreme Court's analysis in *FTC v. Palmolive-Colgate Co.* remains prevalent today, and it has been used to assess deceptive photoshopped advertisements. For example, the NAD employed the standard in their evaluation of the Taylor Swift CoverGirl ad demonstrating that advertisers can be culpable for deceptive photoshopped advertisements when they mislead consumers about a product's benefits. FTC precedent, in conjunction with the decisions from the NAD, lends guidance in framing a working assessment for analyzing photoshop liability. Applying the reasonable consumer test employed in *FTC v. Colgate-Palmolive Co.*, and described further by the FTC, leads to the conclusion that photoshopped advertisements could be treated as deceptive if they are likely to mislead consumers acting reasonably under the circumstances[183] and that deception was a material factor in the consumer's decision to purchase.[184]

The Photoshop epidemic has left consumers in a state of flux when it comes to cosmetic purchases as they are no longer able to ascertain the benefits of the products they are considering purchasing. This deception, which has been furthered by digital enhancement in advertisements, has made regulatory action a much-needed remedy. This already exists within the law, but guidance on its application to this technical subject area is necessary for uniform enforcement.

181. *Id.*

182. *See id.* (discussing both Lancome and L'Oreal products. Lancome is a luxury brand L'Oreal.)

183. Demaine, *supra* note 80, at 760.

184. *Id.* at 746.

The Devil and Mr. Johnson: A Bluesman's Son Wins Possession on Judgment Day

W. John Thomas, JD, LLM, MPH†

If I had possession over judgment day / Lord, the little woman I'm lovin' wouldn't have no right to pray

If I Had Possession over Judgment Day, by Robert Johnson[1]

INTRODUCTION

On February 20, 2014, the Mississippi Supreme Court[2] entered its fourth ruling[3] in litigation arising from the estate of the blues musician Robert Johnson.[4] The Bluesman died intestate[5] and penniless[6] on August 16, 1938, a little more than a year after completing the second of his two recording sessions, which resulted in the pressing of a total of twenty nine songs.[7] Although the recordings generated little income during Johnson's lifetime, upon a reissue in two albums in the 1960s–*King of the Delta Blues Singers*, Volumes I and II–the likes of Eric Clapton, the Rolling Stones, Bob Dylan, and Led Zeppelin[8] began recording covers of many of those songs performed by what Clapton has called "the most powerful cry that I think you can find in the human voice."[9] In 1990, Columbia Records compiled the recordings into a box set which generated an estimated $1.2 million in songwriter's

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1. © (1978) 1990, 1991 Lehsem II, LLC/Claud L. Johnson, Administered by Music & Media International, Inc. For more information about Robert Johnson, *see, e.g., generally*, Elijah Wald, ESCAPING THE DELTA: ROBERT JOHNSON AND THE INVENTION OF THE BLUES, 124 (2004); Peter Guralnick, SEARCHING FOR ROBERT JOHNSON (1982); and STEPHEN C. LAVERE, ROBERT JOHNSON: THE COMPLETE RECORDINGS, liner Notes (1990).

2. Anderson v. LaVere, 136 So. 3d 404 (Miss. 2014).

3. In 1996, the Mississippi Supreme Court ruled on the petition to open Robert Johnson's estate. *In re Estate of Johnson,* 705 So.2d 819, 825 (Miss.1996). In 2000, the Mississippi Supreme Court ruled on a motion to transfer the proceedings from one Mississippi court to another. *In re Estate of Johnson*, 767 So. 2d 181, 182 (Miss. 2000). In 2004 the court ruled on an issue of res judicata, *Anderson v. LaVere*, 895 So. 2d 828, 836 (Miss. 2004). In 2014, the court ruled on the ownership of two photographs of Johnson. *Anderson v. LaVere*, 136 So. 3d 404, 412 (Miss. 2014).

4. For more detailed litigation history see W. John Thomas, *The Devil and Mr. Johnson: A Bluesman's Cultural Legacy at an Intellectual Property Crossroads*, 11 TEXAS REV. ENT. & SPORTS L. 1, 14-19 (2009).

5. Anderson v. LaVere, 136 So. 3d at 406.

6. Anderson v. LaVere, 895 So. 2d at, 831 (Miss. 2004).

7. *See*, Thomas, *supra* note 4, text & notes 61 - 71.

8. For a list of thirty five performers who have covered Robert Johnson tunes, see http://xroads.virginia.edu/%7EMUSIC/blues/rjmore.html (last visited September 6, 2014).

9. Liner notes, *supra* note 1, at 23.

royalties by 2003[10] and untold "millions" by the 2010s,[11] rendering the estate assets worthy of litigation.

The litigation pitted Claud Johnson, who claimed to be Robert Johnson's son, against the descendents of Carrie Thompson, Robert Johnson's half-sister, and Steve LaVere, the musicologist/impresario who maintained that he had purchased from Thompson a share in the rights both to the recordings and to photographs of the musician.[12] With the location of Robert Johnson's remains unknown[13] and, thus, DNA testing unavailable, resolution of the claims turned on acceptance of a witness to Claud's procreative.[14] Eighty-year-old Eula Mae Williams regaled[15] the trial court with her recollection of observing Claud's mother, Vergie Mae Cain, making love to Robert Johnson approximately nine months before Claud's birth.[16] Although the trial court characterized the scene that Eula Mae described as "somewhat an unusual situation, but not an unbelievable situation,"[17] the Mississippi Court found the testimony "more than sufficient to establish the credibility of the witness and to prove the facts asserted. It rings true."[18]

That litigation resolved in Claud's favor all issues except for ownership of what the Mississippi Supreme Court characterized as "three pictures and a note."[19] The photos have appeared in CD liner notes and have been licensed for use on T-shirts, hats, posters, bumper stickers, Christmas tree ornaments, teddy bears, and more.[20] The "note" given by Johnson to his half-sister contained biographical data[21] and has potential value as a component in selling film rights to Johnson's story.[22]

In 2009, I wrote an article titled *The Devil and Mr. Johnson: A Bluesman's Cultural Legacy at an Intellectual Property Crossroads*,[23] which reviewed Robert Johnson's brief life and musical and commercial legacy and proposed the enactment of federal legislation akin to the Native American Grave Protection and Repatriation Act (NAGPRA).[24] This legislation protects "cultural patrimony"[25] inherent in "an object having ongoing historical, traditional, or cultural importance."[26] A ceremonial mask, shard of pottery, or eagle feather may have such cultural significance to a Native American tribe as to make it inalienable.[27]

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10. *See,* Thomas, *supra* 4, text & note 134.
11. *Id.,* text & note 136.
12. *See, id., supra* note 4, text & notes 162-186.
13. *See,* Kelly Ludwig, *The Many Grave Markers of Robert Johnson*, BEST ROAD TRIP EVER, http://bestroadtripever.com/the-many-grave-markers-of-robert-johnson/ (last visited September 16, 2014)
14. Thomas, *supra* note 4, text & notes 177-183.
15. Via deposition. *Id.*
16. 767 So. 2d at 183.
17. *See*, Thomas, *supra* note 4, text & note 182.
18. *Id.*, text and note 183.
19. 705 So .2d 819, at 836.
20. For a survey of available products, visit http://www.cafepress.com/rjohnsonstore (last visited September 6, 2014). In 1994, Johnson, relieved of his smoking habit, even appeared on a U.S. postage stamp. http://www.americanbluesscene.com/2012/09/robert-johnson-on-a-stamp/ (last visited September 6, 2014).
21. *See,* Thomas, *supra* note 4, text & note 120.
22. Conversation with Stephen Nevas, lawyer for the Johnson Estate, February 7, 2009.
23. Thomas, *supra* note 4.
24. 25 U.S.C. §§ 3001-013
25. 25 U.S.C. §§ 3003(D).
26. *Id.*
27. Thomas, *supra* note 4, text & note 33.

So too, I argued, to the Johnson family, does a recording, photograph, or "essential data about Robert Johnson's life."[28]

This article revisits the intellectual crossroads occupied by "[t]he dark king of a strange and haunting world"[29] of the Mississippi Delta Blues. In particular, this article examines the contours and implications of the Mississippi Supreme Court's decision regarding those "three pictures and a note."[30] Part II of this article summarizes the complete tale of litigation over rights involving Johnson's estate. Part III explicates the Mississippi Supreme Court's 2014 decision[31] that resolved who got possession of the few estate items whose ownership remained in dispute. Part IV offers some reflections on the ownership of culturally significant property. Part V offers some conclusions about the long-running dispute concerning the ownership of the "essential data about Robert Johnson's life."[32]

I. THE LITIGATION HISTORY

I feel like blowin' my lonesome horn / Well I got up this mornin', all I had was gone Walkin' Blues, by Robert Johnson[33]

Robert Johnson lived for but twenty-seven years.[34] The litigation concerning his intellectual property legacy survived for nearly as long, commencing in 1989[35] and finally concluding in 2014.[36]

In the summer of 1973, Tennessee-based music producer Steve LaVere laid the groundwork for the litigation when he met with Carrie Thompson to view photographs of her then nearly-forgotten half-brother.[37] Leaving Thompson's home with knowledge of previously undisclosed visual and biographical evidence of the bluesman's life, LaVere met with Sony records and "pitched the idea of rereleasing Johnson's music."[38] Buoyed by Sony's interest in the project,[39] LaVere again graced Thompson's doorstep in 1974, leaving with a signed agreement granting him "all of her right, title and interest . . . in and to the musical works and recordings of Robert L. Johnson."[40] The agreement also granted LaVere

28. Conversation with Annye Anderson's lead lawyer, James Craig, February 5, 2009. One remaining dispute concerns ownership of information that Johnson's half-sister gave to Steve LaVere. The information has value for purposes of selling movie rights. *Id.*

29. *Id.* at xvi. In the quoted passage, Wald is questioning this mythologized image of Johnson.

30. 705 So. 2d, at 836. For further discussion, *see infra* text & notes 44-100.

31. Anderson v. LaVere, 136 So.3d 404 (Miss. 2014).

32. Conversation with Annye Anderson's lead lawyer, James Craig, February 5, 2009. One remaining dispute concerns ownership of information that Johnson's half-sister gave to Steve LaVere. The information has value for purposes of selling movie rights. *Id.*

33. © (1978) 1990, 1991 Lehsem II, LLC/Claud L. Johnson, Administered by Music & Media International, Inc.

34. Elijah Wald, ESCAPING THE DELTA: ROBERT JOHNSON AND THE INVENTION OF THE BLUES, 124 (2004).

35. In re Estate of Johnson, 767 So. 2d 181, 182 (Miss. 2000).

36. Anderson v. LaVere, 136 So. 3d 404 (Miss. 2014).

37. Matter of Estate of Johnson, 705 So. 2d 819, 820 (Miss. 1996).

38. *Id.* at 406.

39. *Id.*

40. *Id.* at 407.

the right to exploit the photographs and information included in a note, the possession and ownership of which would remain with Thompson.[41]

All proceeded as planned for LaVere and Thompson until 1992 when Claud Johnson appeared on the scene and asked, "Is there anything coming from my daddy's records?"[42] After overcoming contentions that his claims were time-barred,[43] Eula May's captivating testimony won the day and Claud found himself Robert Johnson's sole heir.[44]

Nevertheless, the matter of the ownership of those "three pictures and a note"[45] remained. On March 21, 2000, Annye Anderson, the half-sister and a co-beneficiary of the will of Carrie Thompson,[46] and her grandson, Robert M. Harris, filed suit against Claud Johnson, Stephen C. LaVere, LaVere's company Delta Haze Corporation, and Sony Music Entertainment.[47] The complaint alleged breach of the 1974 contract between Anderson's and Harris's predecessor, Annye Thompson, and Steve LaVere.[48] In essence, Anderson and Harris claimed that the photographs and a note in Thompson's possession when LaVere came knocking at her door were her property, not Johnson's.[49] As a result, they were not part of Claud Johnson's winnings when he was judged the sole heir of Johnson's estate.[50]

The trial court rejected Anderson and Harris's contention, holding their claims were barred because they "could have petitioned the Chancery Court to make a determination that the copyrights to the photographs were rightfully theirs" in the case in which Claud Johnson proved his rights as heir to Johnson's estate.[51] The Mississippi Supreme Court, however, reversed, holding that only Claud Johnson's heirship status, and not claims of ownership to property, had been litigated.[52] Thus, the court remanded the case for trial,

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41. *Id.*

42. GURALNICK, *supra* note 1, at 68.

43. Perhaps ironically, it was Steve LaVere who removed that hurdle for Claud. In 1969 and 1972, respectively the Rolling Stones recorded two Robert Johnson songs. Response Brief of ABKCO, ABKCO Music Inc. v. LaVere, No. CV-95-07682-TJH (9th Cir. Dec. 4, 1998), 98 WL 34105058, at *6. LaVere threatened to sue The Rolling Stones' record company, Virgin Records, for copyright infringement. *Id.* at 7. In response, the publishing company, which had registered copyrights of the Stones' adaptations of the tunes, filed suit against LaVere seeking a declaration that Johnson's versions of the songs had entered the public domain when their initial twenty-eight year copyright term expired without renewal. *Id.* The publisher won at trial and LaVere appealed to the Ninth Circuit. ABKCO Music Inc., 217 F.3d at 685. The Ninth Circuit held that under a 1997 revision to the federal Copyright Act, 17 U.S.C. § 303(a) (2005), copyright had not come into existence until the publication of Johnson's lyrics in conjunction with Columbia Records' 1990 release of the box set of his complete recordings, the project that LaVere spearheaded. *See id.* at 687. For a detailed discussion of the litigation, see Thomas, supra note 3, at text & notes 107 – 130.

44. Estate of Johnson, 767 So.2d at 185.

45. 705 So. 2d at 836.

46. 767 So. 2d at 182.

47. "The case was transferred from the Circuit Court of Hinds County to the Circuit Court of Leflore County. The trial court determined that Leflore and Copiah Counties were the only proper venues in Mississippi. Anderson and Harris chose the Circuit Court of Leflore County. Although Anderson disputes venue, this is meritless. Claud was the only resident of Mississippi, residing in Copiah County, Mississippi. Anderson was a resident of Massachusetts. Harris was a resident of Maryland. LaVere was a resident of California. Delta was a foreign corporation organized under the laws of Nevada. Sony was a foreign corporation organized under the laws of Delaware. The Estate of Robert L. Johnson (Johnson Estate) was administered in Leflore County, Mississippi. The only connection the case has with Hinds County is that a CD was purchased there." 705 So.2d 819, at 830.

48. *Id.* at 829. The complaint also alleged "conversion, fraud, [and] misrepresentation." *Id.*

49. 705 So.2d at 822

50. *See id.*

51. 705 So.2nd at 831.

52. In re Estate of Johnson, 767 So.2d 181, 186 (Miss. 2000).

setting the stage for a final chapter of litigation before everyone heads home "with a great, long story to tell."[53]

In January 2005, the defendants moved to dismiss the complaint on the ground that the plaintiffs' claims were time-barred.[54] Apparently in no hurry to adjudicate the impact of lapse of time, the trial court did nothing for the next six years.[55] But, in January 2011, in the hope of yet again exploiting those recordings and photographs in a "Centennial Collection" commemorating Johnson's 100th birthday, Sony "awoke"[56] the court when it filed an "Emergency Motion for a License" to use the property.[57] Arising from its slumbers, the trial court held that "the doctrines of laches, judicial estoppel, and collateral estoppel precluded all of the plaintiffs' claims."[58] Anderson and Harris appealed to the Mississippi Supreme Court, presenting the question whether their claims survived "[f]rom four until late."[59]

III. FINAL VISIT TO THE MISSISSIPPI SUPREME COURT CROSSROADS

Watch your close friend, baby, then your enemies can't do you no harm
When You Got a Good Friend, by Robert Johnson[60]

In its 2004 decision in this case, the Mississippi Supreme Court recognized that the claimants' objective in this final round was to resolve the ownership of "three pictures and a note."[61] More than mere family trinkets, these were artifacts in Thompson's ongoing effort to authenticate "various times and events in her family and in Robert Johnson's life."[62] When LaVere "expressed to her his interest in publishing a book about the life of Robert Johnson," Thompson responded by sharing these items as exemplars of "specific biographical information about Robert Johnson" from her "personal recollections and knowledge."[63]

Somewhere, though, in the journey from complaint, to trial court, to Mississippi Supreme Court, back to trial court, and a return to the Mississippi Supreme Court, that note and one photograph slipped through a passway[64] and landed beyond the claimants' view. In its presumably final decision regarding the estate, the court addressed ownership only of the two photographs Sony Music Entertainment intended to use in the packaging of yet another

53. Robert Johnson, *Last Fair Deal Gone Down*, © (1978) 1990, 1991 Lehsem II, LLC/Claud L. Johnson, Administered by Music & Media International, Inc.

54. 136 So. 3rd at 408.

55. 136 So. 3rd at 408.

56. *Id.*

57. *Id.* at 408-09. "Sony sought permission among all parties to use the photographs in the packaging of this album, subject to a licensing fee which would be held by Sony until resolution of this dispute. LaVere and Claud Johnson agreed, but Anderson and Harris did not, so Sony filed an Emergency Motion for a License, which the trial court granted." *Id.*

58. *Id.* at 409.

59. From Four until Late, © (1978) 1990, 1991 Lehsem II, LLC/Claud L. Johnson, Administered by Music & Media International, Inc.

60. © (1978) 1990, 1991 Lehsem II, LLC/Claud L. Johnson, Administered by Music & Media International, Inc.

61. 705 So.2d 819.

62. Complaint, ¶ 15, filed March 21, 2000.

63. *Id.* ¶ 18.

64. Robert Johnson, *Stones in My Passway*, © (1978) 1990, 1991 Lehsem II, LLC/Claud L. Johnson, Administered by Music & Media International, Inc.

reissue of Johnson's recordings.[65] When Sony revived the proceedings, the plaintiffs responded by asserting their claims to those photographs, but they did not reference the note or the third photograph.[66]

The crucial moment in that ticking of the estate's time clock occurred in 1992 when researcher and Johnsonophile[67] Mac McCormick located Claud Johnson, who had only that one question about his father's life and music: "Is there anything coming from my daddy's records?"[68] McCormick had let "that one singer, that riddle of a man"[69] known as Robert Johnson "consume"[70] both his personal and professional lives.[71] Decades of effort resulted in McCormick knowing "more than anyone on earth" about the bluesman.[72] When his singular obsession landed him at Claud's doorstep, what had been a simple estate probate transformed into a decades-long contest between Claud and the heirs of Robert Johnson's half-sister, Anderson and Harris.

Initially, the half-sister's heirs focused their legal efforts on initiating probate proceedings as a vehicle for acquiring Johnson's royalty earnings and for resolving their dispute with the musicologist/impresario LaVere over their share of those earnings.[73] When Claud's challenge materialized, the half-sister's heirs (and their lawyers) focused their attention on the big prize–those royalties.[74] Thus, the first round of litigation failed to address what were then minor matters: those "three pictures and a note."[75]

After a six year litigation equivalent of a blank stare, Sony refocused the half-sister's heirs' vision on what were the biggest remaining prizes: the two photos to be used in the Centennial reissue of Johnson's recordings.[76] Why, in yet another packaging of the same recordings, would Sony again use only two of the three photographs?[77] There are only two explanations: (1) either that the third photograph is lost, or (2) it is locked in a vault somewhere in Mexico.[78] In his 1989 book, *Searching for Robert Johnson,*[79] Peter Guralnick recounted McCormick revealing to him a photograph of Johnson standing alongside his nephew, dressed in a sailor's uniform, with Johnson's "arm draped affectionately around the sailor's shoulder."[80] McCormick later suffered from what has been characterized either as mental illness or fear of LaVere suing him.[81] In any event, he has ceased his research[82] and

65. Robert Johnson, *The Centennial Collection*, SONY LEGACY, April 26, 2011. The packaging uses two photographs of Robert Johnson. *Id.*

66. Anderson v. LaVere, 136 So.3d 408-409 (Miss. 2014).

67. See John Jeremiah Sullivan, *The Ballad of Geeshie and Elvie*, NY TIMES, April 13, 2004, available at http://www.nytimes.com/interactive/2014/04/13/magazine/blues.html?_r=0 (last visited September 10, 2014). McCormick is "one of the two or three most important figures" in the field of researching early blues musicians, *id.*, and has a towering reputation among Robert Johnson researchers. *See, id.*

68. GURALNICK, *supra* note 1, at 68.

69. Sullivan, *supra* note 62.

70. *Id.*

71. *Id.*

72. *Id.*

73. *See, Thomas, supra* 4, text & notes 162-186.

74. 705 So. 2d 819

75. 705 So. 2d 819, at 836. Two of the photographs are currently in the possession of the Johnson estate. Complaint, ¶ 15, filed March 21, 2000.

76. 705 So. 2d 819

77. *See supra*, text and note 61, for information on the Centennial packaging.

78. *Sullivan, supra* note 62

79. GURALNICK, supra note 1.

80. *Id.* at 65-66.

81. Frank DiGiacomo, *Searching for Robert Johnson*, VANITY FAIR, Nov. 2008, 253.

at times has claimed not to know where the photograph is.[83] On other occasions, he has apparently indicated that the he has stashed the photograph "in a safe place in Mexico."[84] What is known is that no one other than McCormick has seen the photograph since he showed it to Guralnick prior to the 1989 publication of *Searching for Robert Johnson,*[85] and McCormick is no longer willing to speak about it.[86]

And the note? The parties have made no mention of it since that 2004 Mississippi Supreme Court decision linking it with the "three pictures."[87] It seems to have disappeared from the litigation the way that Robert Johnson vanished from his son Claud's life. The son saw his father but once.[88] On that fateful day, Claud's grandparents blocked him from leaving the house to greet or, worse, touch the purveyor of "the devil's music."[89] Rebuffed, Johnson remarked, "'Well, I might as well go on,"[90] and "wandered off."[91] That once supposedly vital scrap of Johnson's life history now seems to have wandered off, too.

The claimants also appear to have let their litigation strategy wander. The half-sister's heirs' claims accrued and the applicable three year statute of limitations[92] began running when in 1990 Sony first indicated an intention to use the two photographs in the first Robert Johnson box set.[93] Those heirs did not file their claim until 2000,[94] well past the three year limit. Their explanation? Until Claud Johnson appeared on the scene, they had believed that "they were entitled to the photographs as Johnson's heirs."[95] Only after losing on the issue of Claud's paternity did the half-sister's heirs embrace the new factual theory that the photographs were not part of Johnson's estate, but, rather, that he had given them to that half-sister.[96]

This "wringing [of the] hands and cryin',"[97] however, did not toll the statute.[98] Indeed, concluded the court, a "stone appeared in their pass way"[99] when in 1991 Sony began paying photograph royalties to Johnson's estate and not to the half-sister.[100]

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82. *Id.*

83. Email exchange with Richard Oakes, lawyer for Delta Haze Corp, February 11, 2009.

84. *Sullivan, supra* note 62.

85. *Id.*

86. *Id.*

87. In re Estate of Robert L. Johnson, 705 So.2d 819, at 836. For further discussion, *see infra* text & note 93.

88. Rick Bragg, *Court Rules Father of the Blues Has a Son*, NY TIMES, June 17, 2000, available at http://www.nytimes.com/2000/06/17/us/court-rules-father-of-the-blues-has-a-son.html (last visited September 11, 2014).

89. *Id.*

90. *Id.*

91. *Id.*

92. The Mississippi Supreme Court observed the governing statute is Miss. Code Ann. § 15–1–49(1) (Rev.2012). 136 So.3rd at 411.

93. *Id.* at 412.

94. *Id.*

95. *Id.*

96. *Id.*

97. Language taken from the Robert Johnson song, *Four until Late*, Administered by Music & Media International, Inc. (1990-91) (1978).

98. 136 So.3rd at 413.

99. Language taken from the Robert Johnson song, *Stones in My Passway*, Administered by Music & Media International, Inc. (1990-91) (1978).

100. 136 So.3rd at 413.

But, what of that third photograph and the now-forgotten note? Has the passage of time resolved claims to these, too? The half-sister's heirs have not made any claim that Sony used the information in the note in the packaging or promotion of the recordings.[101] And although neither Sony nor any other entity has paid anyone royalties for its use, the Mississippi Supreme Court observed that simply awaiting for clear evidence of payment to the wrong person is a strategy that "cannot serve to toll the statute of limitations."[102]

Should that third photograph surface, the half-sister's heir's claim to it might succeed. Mississippi statues provide that a statute of limitations does not begin running until a "plaintiff has discovered, or by reasonable diligence should have discovered, the injury."[103] Those heirs cannot possibly know whether they have suffered an injury by misappropriation of the photograph until it can be determined whether it does, as McCormick once claimed, depict Johnson. Resolving such a claim may not be simple. Consider the 2005 discovery of another putative photograph of the bluesman.[104] While surfing eBay, guitarist and researcher Zeke Schein stumbled across a photograph of a guitar player bearing a resemblance to Robert Johnson.[105] Debate raged[106] over whether the photograph depicted the "dark king."[107] In 2013, a forensic artist concluded, "[I]t appears the individual in [the photograph] is Robert Johnson. All the features are consistent if not identical."[108] Still, deliberations ensued with commentators wondering why a figure who died in 1938 would appear to be wearing a suit of a style that did not become popular until the 1940s.[109]

On judgment day, Claud Johnson certainly won possession of most of the property associated with his father. But, with respect to that photograph that Mac McCormick forgot, misplaced, or stashed in Mexico, Claud may have to "fold [his] arms and . . . slowly walk[] away."[110]

IV. REFLECTIONS ON CULTURAL PROPERTY

The blues, is a low-down shakin' chill Yes, preach 'em now Is a low-down shakin' chill You ain't never had 'em I hope you never will

Preaching Blues, by Robert Johnson[111]

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101. *See id.* at 411.

102. *See, id.* at 412.

103. Miss. Code Ann. § 15–1–49(2) (Rev.2012).

104. Frank DiGiacomo, *Searching for Robert Johnson*, VANITY FAIR, Nov. 2008, 253, available at http://www.vanityfair.com/culture/2008/11/johnson200811

105. *See DiGiacomo, supra* note 73. Schein conveyed the photograph to the Estate of Robert Johnson. Telephone interview with Zeke Schein, Salesman, Matt Umanov's Shop, New York City, N.Y. (Nov. 10, 2009).

106. *See DiGiacomo, supra* note 73.

107. WALD, *supra* note 1, at xvi.

108. Vanessa Thorpe, *Robert Johnson: Rare New Photograph of Delta Blues King Authenticated after Eight Years*, THE GUARDIAN, Feb. 2, 2013, available at http://www.theguardian.com/music/2013/feb/03/robert-johnson-photograph-identified (last visited September 16, 2014).

109. Tom Reney, *Robert Johnson Photo Questioned*, NEW ENG. PUBLIC RADIO, Feb. 16, 2013, available at http://nepr.net/music/2013/02/16/robert-johnson-photo-questioned/ (last visited September 15, 2014).

110. Language taken from the Robert Johnson song, *If I Had Possession over Judgment Day*, Administered by Music & Media International, Inc. (1990-91) (1978).

111. © (1978) 1990, 1991 Lehsem II, LLC/Claud L. Johnson, Administered by Music & Media International, Inc.

In my original tome concerning this intellectual crossroads, I proposed a legal framework[112] similar to that of the Native American Grave Protection and Repatriation Act (NAGPRA).[113] That statute protects "cultural patrimony" by prohibiting objects from being "alienated, appropriated, or conveyed"[114] if that object has an "ongoing historical, traditional, or cultural importance central to the Native American group or culture."[115] I proposed a federal statute that would prohibit sale beyond lineal descendants of the creating artist of the copyright to music and related property, like photographs, "when 1) the artist has died and 2) the music was not published during the artist's lifetime."[116] "If there are no lineal descendants, then the rights pass to the public domain. If descendants survive, they alone have the privilege of ownership."[117] The scheme, like NAGPRA, would allow owners to compensate non-descendants for assistance in promoting the property, but would prohibit the conveyance on an ownership interest. Those enlisted must serve as "defender, protector, and advocate" of the property.[118]

I argued in the original piece that "the passage of time, the failure to register the copyrights originally, and the failure to administer Johnson's estate" [119] made it difficult to determine ownership and justified legislative intervention to prevent corrupt "trafficking in [American music] cultural items."[120] The missing photograph, ownership of which may have escaped allocation in the Mississippi Supreme Court's 2014 decision, presents a dramatic illustration of both points. We do not know how Mac McCormick acquired the photograph. Did he, much like Zeke Schein, but before the invention of eBay, discover it among lost treasures in an antique or pawn shop? Did he, like Steve LaVere, purchase it from someone claiming to own it? McCormick will not say. Absent information about its ownership, improper sale, or trafficking, of the photograph remains a possibility.

Will the photograph ever again see the light of day? Is it even an image of Robert Johnson? We do not know. But, as evidenced by litigation over the two currently known photographs, we do know that, if it does surface, it will have substantial economic value. Dropping it down at the intellectual crossroads where this litigation began will likely result in more claims of fraud, breach of contract and overreaching. My suggested legislative structure would avoid both that unsightly furor and place any gains in the hands of the Robert Johnson family.

CONCLUSION

I got stones in my passway,

And my road seem dark as night

Stones in My Passway, by Robert Johnson[121]

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112. *Thomas, supra* note 1, text & notes 215-295.

113. 25 U.S.C. §§ 3001-013 (2009).

114. *See id.*

115. 25 U.S.C. § 3001(3) (D).

116. *Thomas, supra* note 1, at 25.

117. *Id.*

118. David Sassoon, *Considering the Perspective of the Victim*, in THE ETHICS OF COLLECTING CULTURAL PROPERTY 70, 71 (Phyllis Mauch Messenger, ed., 1999).

119. *Thomas, supra* note 1, at 23.

120. *Id.* at text & note 243, quoting United States v. Corrow, 119 F.3d 796, 798 (10th Cir. 1998).

121. Robert Johnson, *Stones in My Passway*, Administered by Music & Media International, Inc. (1990-91)

In the summer of 1996, a group of teenagers stumbled upon a human skull and related bones near the town of Kennewick, Washington.[122] Carbon dating revealed the skull and bones to be over 8,000 years old.[123] These remains became "known popularly and commonly as 'Kennewick Man,'"[124] but as "the Ancient One" to members of some Native American tribes in the area.[125] When the Smithsonian Institution made arrangements to transport the remains to Washington, DC for an examination that would include DNA testing,[126] the Native American tribes objected and sought to have the remains "buried immediately without further testing."[127] Citing NAGPRA,[128] the Army Corps of Engineers, asserting its authority because the remains were found on federal lands,[129] stopped all testing and resolved to convey the remains to the Tribes for burial.[130] The scientists instituted litigation and asserted that NAGPRA was inapplicable because the remains did not "bear some relationship to a presently existing tribe, people, or culture."[131]

In resolving the dispute in favor of the scientists, the Ninth Circuit US Court of Appeals emphasized "Congress's use of the present tense"[132] in limiting NAGPRA's application to "a tribe, people, or culture that *is* indigenous to the United States."[133] Because the Tribes offered no proof that "Kennewick Man shares special and significant genetic or cultural features with presently existing indigenous tribes, people, or cultures,"[134] the court held for the scientists.[135] The tribal members failed in their quest to have the remains interred and the Kennewick Man now resides in Burke museum in Seattle, Washington.[136]

The judgment did not terminate the debate. Scientists and tribal members continued to deliberate over the ethical treatment of the remains.[137] Congress considered[138] and rejected[139] amending NAGPRA to "make it easier for modern native people to claim human remains by virtue of common geography rather than cultural affiliation."[140] The amendment would have changed the definition of "Native American" to mean "of, or relating to, a tribe,

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1978).

122. Bonnichsen v. US, 367 F.3d 864, 869 (9th Cir. 2004).

123. *Id.* at 868.

124. *Id.*

125. *Id.* at 869.

126. *Id.*

127. *Id.*

128. *Id.* at 870.

129. *Id.*

130. *Id.*

131. *See id.* at 875, *citing* 25 U.S.C. § 3001(9) (2002).

132. Bonnichsen v. US, 367 F.3d at 865.

133. *Id.* at 875, citing 25 U.S.C. § 3001(9) (emphasis added).

134. Bonnichsen v. US, 367 F.3d at 882.

135. *Id.*

136. http://www.burkemuseum.org/kennewickman (last visited September 16, 2014).

137. *See. E.g.*, Lynda V. Mapes, *Debate over Kennewick Man Not Easily Put to Rest*, SEATTLE TIMES, Aug. 3, 2013, available at http://www.tri-cityherald.com/2013/08/03/2503976/debate-over-kennewick-man-not.html (last visited September 16, 2014).

138. THE NATIVE AMERICAN OMNIBUS ACT OF 2005, S. 536 (109th Congress, 2005–2006) (emphasis supplied), available at https://www.govtrack.us/congress/bills/109/s536/text (last visited September 16, 2014).

139. https://www.govtrack.us/congress/bills/109/s536 (last visited September 16, 2014).

140. K. Kris Hirst, *What is the Kennewick Man Controversy*, available at http://www.pcc.edu/staff/pdf/818/WhatistheKennewickManControversyAbout.pdf (last visited Sept. 16, 2014).

people, or culture that is *or was* indigenous to any geographic area that is now located within the boundaries of the United States."[141]

The Kennewick Man debate boiled down to a "chafe between science and spirituality."[142] Reasonable participants in the discussion disagreed on the relative values of science and spirituality.[143] With the case of Robert Johnson, I have presented a discussion concerning the limits of property ownership. When such property is not registered for copyright during the creator's lifetime, it is at risk of leaving the possession of that creator's lineal descendants. It is a chafe between commerce and culture. Do we really want commerce to be able to trump the cultural legacy of the "dark king"[144] and his "strange and haunting world?"[145]

141. NATIVE AMERICAN OMNIBUS ACT OF 2005, *supra* note §, at §108.

142. Kevin Taylor, *The Long Legal and Moral Battle over Kennewick Man*, INDIAN COUNTRY, April 25, 2013, available at http://indiancountrytodaymedianetwork.com/2013/04/25/long-legal-and-moral-battle-over-kennewick-man-149008 (last visited Sept. 16, 2014).

143. *See id.*

144. WALD, *supra* note 1, at xvi.

145. *Id.*

WHITE COLLAR MOVIES AND WHY THEY MATTER

Geraldine Szott Moohr[1]

Entertaining movies can educate, inspire, and change the way we view the world. Their stories, enhanced with persuasive actors and aided by camera and lighting techniques, are compelling windows into other lives. Movies are a communal experience, whether watched in a darkened theater or at home in the knowledge that others also identify with characters and enjoy the stories. They last forever through and on digital devices, decades after their release. Potent and revealing—is it any wonder that movies can shape the character and direction of American culture?[2] Indeed, it would be strange if they did not.

This article uses a specific film genre, white collar movies, to explain why and suggest how such films "shape American culture." Though relatively new, white collar movies have become familiar since *Trading Places*[3] and *Wall Street*[4] debuted. Carefully crafted with dramatic screenplays, they feature performances of talented actors and the work of respected directors. They often achieve critical acclaim,[5] and attract wide audiences as box office revenues indicate.[6] The genre hit a high point between 2009 and 2013 when producers released seven white collar films.[7] They are now so familiar that filmmakers use white collar conduct as a catalyst for other narratives.[8]

In this paper, I evaluate four white collar films and consider their contribution to popular culture. The task requires some familiarity with the term "white collar crime," and Part I reviews its development. For purposes of analysis, I define white collar crime in terms of fraud. The fraud conception eliminates films that include physical violence and coercion. Equally important, I focus on movies whose purpose is entertainment, which excludes documentaries. These narrow parameters facilitate a meaningful comparative analysis of the four movies.

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1. Professor Emerita, University of Houston Law Center, J.D. American University. I am grateful to Mon Yin Lung for excellent assistance, Amanda Parker for research and editing, Michael Olivas for his insightful advice, and Josh Dressler, Paul Marcus, Bruce Palmer, and Ellen Pogdor. Thank you also to the participants in the white collar crime workshop of the 2013 South East Association of Law Scholars conference. I am grateful for the support of the University of Houston Law Center Foundation.

2. ROBERT SKLAR, MOVIE-MADE AMERICA: A CULTURAL HISTORY OF AMERICAN MOVIES vi (1976).

3. TRADING PLACES (Paramount 1983).

4. WALL STREET (Twentieth Century Fox Film Corporation 1987).

5. The seventeen movies listed in the Appendix were nominated for 48 Oscars and Golden Globe awards.

6. A few examples of first-run proceeds, adjusted to 2014 dollars, are illustrative. *Catch Me If You Can* (2002) earned the highest box office gross returns ($210,717,310). *The Informant!* (2009) grossed $36,613,109, and *Wall Street* (1987) grossed $85,043,926. First-run totals do not include income from subsequent releases to cable television stations, film services like Netflix, or global distribution, among others. Also, box office returns do not reliably translate to numbers of viewers.

7. *See* AMERICAN HUSTLE (Columbia Pictures 2013); ARBITRAGE (Green Room Films 2012); CASINO JACK (An Olive Branch Productions 2010); MARGIN CALL (Before The Door Pictures 2011); THE INFORMANT! (Warner Bros. 2009); THE WOLF OF WALL STREET (Paramount Pictures 2013); and WALL STREET: MONEY NEVER SLEEPS (Twentieth Century Fox Film Corporation 1987). I cannot resist noting that this is the first time in my professional life that *See* is entirely apt.

8. *See, e.g.*, MICHAEL CLAYTON (Samuels Media 2007); BLUE JASMINE (Perdido Productions 2013).

In Part I, I also briefly present a theory of social change that suggests why movies matter. The theory posits that the norms and values found in entertainments[9] are absorbed into popular culture and ultimately influence development of social institutions. Thus, values limned first in entertainments can ultimately affect legal culture and the law.

Part II first examines the common characteristics of the white collar genre and then summarizes the core narratives of four commercially and artistically successful films: *Wall Street*,[10] *Boiler Room*,[11] *The Wolf of Wall Street*,[12] and *Margin Call*.[13] Part III looks more closely, comparing the films in terms of individual responsibility for offenses, group or firm responsibility, and systemic flaws that lead to financial harm but for which none bear responsibility. Finally, in Part IV, the larger story told by these white collar films is defined and considered. This larger narrative suggests internal and external constraints on the use of criminal law in dealing with financial crimes. As it turns out, going to the movies can enlighten as well as entertain the ordinary moviegoer.

I. THE CONCEPTUAL FRAMES

Before considering how white collar films matter, one has first to define a white collar movie. That depends, in part, on how one defines a white collar crime. Accordingly, the discussion briefly introduces this category of criminal law and establishes basic parameters of a white collar movie. The consideration of why movies matter is based on a theory of social change that links popular culture to its relative, popular legal culture, and is the subject of Part B.

A. White Collar Crime

Broadly speaking, criminal law is a system of rules and standards that expresses community standards, determines whether they have been violated, and allocates punishment.[14] White collar doctrine is an essential part of that system, and serves the same purposes as traditional crimes: to punish immoral and harmful conduct, deter future crimes, and express community values.[15]

Nonetheless, as compared to common law crimes,[16] white collar criminal law is a newcomer.[17] After its introduction as a sociological conception,[18] the term was applied

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9. I use the term "entertainments" as the novelist Graham Greene did, to separate his lighter novels from his literary fiction. *See* Graham Greene, radio interview quoted in Mark Silverstein, *After the Fall: The World of Graham Greene's Thrillers*, 22 Novel: A Forum on Fiction, No.1, 11-24 (1988) (explaining why some of his novels had a broader audience than others).

10. WALL STREET (Twentieth Century Fox Film Corporation 1987).

11. BOILER ROOM (New Line Cinema 2000).

12. THE WOLF OF WALL STREET (Paramount Pictures 2013).

13. MARGIN CALL (Before The Door Pictures 2011).

14. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 14-21 (6th ed. 2012) (explaining theories of punishment).

15. *See* United States v. Bergman, 416 F. Supp. 496 (S.D.N.Y. 1976) (explaining why a respected community leader convicted of fraud must be punished); *see also* J JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 798-805 (2d ed. 1960).

16. *See* Stanford H. Kadish, *The Model Penal Code's Historical Antecedents*, 19 RUTGERS L.J. 521 (1988) (noting common law crimes first addressed physical intrusions on life and property).

17. There is a robust literature on white collar crime. *See, e.g.*, STEPHEN ROSOFF, *ET. AL*, PROFIT WITHOUT HONOR: WHITE COLLAR CRIME AND THE LOOTING OF AMERICA (5th ed. 2010); DAVID O. FRIEDRICHS, TRUSTED CRIMINALS: WHITE COLLAR CRIME IN CONTEMPORARY SOCIETY (2d ed. 2009).

18. In 1940, a sociologist, Edwin Sutherland, created the term as an offense committed by members of the upper class in order to show that the privileged elite were not more law-abiding than those less privileged. *See*

generally to crimes committed in the course of business.[19] Thereafter, white collar criminal law developed quickly,[20] but rather haphazardly, as legislators responded to new threats to public safety and economic security.[21] One result is that white collar statutes appear randomly throughout the United States Code.[22] The federal criminal code includes statutes that use undefined common law terms,[23] as well as newer, comprehensive statutes that include definitions and detailed subsections.[24] White collar crimes are also found in regulatory and administrative codes that authorize criminal penalties in extreme circumstances.[25] This array of criminal provisions makes for a shapeless, unstructured doctrine.[26]

Even so, a large percentage of white collar offenses involve fraud or deceptive conduct that results in unlawful takings of property.[27] This fraud conception of white collar crime is appropriate for present purpose: an act of deception with the intent to defraud the owner of money or property.[28] Although white collar frauds are effected without physical violence, physical harm can result. For instance, selling medical drugs for off-label purposes or ignoring workplace safety regulations can cause serious physical injury. The *actus reas* of white collar fraud is a lie or deceit, which is, by definition, non-violent. Although victims may feel like victims of theft, the act of taking through deception is fraud,

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EDWIN H. SUTHERLAND, WHITE COLLAR CRIME: THE UNCUT VERSION 7 (1983) (business crimes were those "committed by a person of respectability and high social status in the course of his occupation"); *see also* Gilbert Geis & Colin Goff, *Introduction*, in EDWIN H. SUTHERLAND, WHITE COLLAR CRIME: THE UNCUT VERSION ix (1983).

19. *See* MAURICE PUNCH, DIRTY BUSINESS: EXPLORING CORPORATE MISCONDUCT: ANALYSIS AND CASES 50 (1996) (noting the expanded use of the term to include all corporate crime).

20. It bears remembering that only one hundred years ago financial predators went unpunished and victims went without vindication. *See* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135 (1995) (noting expansion of federal role in criminal law).

21. *See* Morisette v. United States, 342 U.S. 246 (1952) (Jackson, J. writing) (noting the surge in technology and growth of corporations led to public welfare crimes that punished threats to a public unable to fend for itself); LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 282-90 (1993) (noting the "vast expansion of the regulatory state in the twentieth century meant a vast expansion of regulatory crimes").

22. *See* Stuart P. Green, *The Concept of White Collar Crime in Law and Legal Theory*, 8 BUFF. CRIM. L. REV. 1, 16, 19, 31 (pointing to the lack of a specific statutory provision for white collar crime and outlining various areas of crime that can be considered white collar, including "securities fraud and insider trading; health care fraud and False Claims Act cases; antitrust; banking, financial, and accounting fraud; environmental and health and safety violations; RICO; trade secret theft; and customs violations").

23. *See, e.g.*, 18 U.S.C. §§1341, 1343 (2012) ("artifice to defraud" in mail and wire fraud statutes).

24. *See, e.g.*, 18 U.S.C. § 1831 et seq. (2012) (misappropriation of trade secrets).

25. *See, e.g.*, 15 U.S.C. § 78ff (2012) (securities fraud); FRIEDMAN, *supra* note 21 at 282-93 (noting legislative habit of attaching a criminal tail to regulatory provisions).

26. One prominent scholar has referred to white collar crime as a "garbage-can category." *See* FRIEDMAN, *supra* note 21 at 292; *see also* STUART P. GREEN, LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE-COLLAR CRIME 18-19 (2006) (abandoning the attempt to group the offenses under a single definition).

27. *See, e.g.*, David Mills & Robert Weisberg, *Corrupting the Harm Requirement in White Collar Crime*, 60 STANFORD L. REV. 1371, 1394 (2008) (noting that mail and wire fraud statutes are meant to punish conduct that suggests an intent to take property by deception); *id.* at 1425 (noting that securities fraud "requires a fraud").

28. *See* HERBERT EDELHERTZ, THE NATURE, IMPACT, AND PROSECUTION OF WHITE-COLLAR CRIME 12 (1970) (discussing Department of Justice emphasis on conduct; "an illegal act or series of illegal acts committed by nonphysical means and by concealment or guile, to obtain money or property, to avoid the payment or loss of money or property, or to obtain business or personal advantage"). This definition is not entirely satisfactory, largely because it does not include regulatory offenses that do not involve deception or deceit without a direct pecuniary purpose. *See* Gilbert Geis, *White Collar Crime – What Is It?*, CURRENT ISSUES CRIMINAL JUST. 9, 16-17 (1991) (critiquing Edelhertz's definition).

not larceny.[29] The core conduct of most white collar crimes is an affirmative lie or silent betrayal of duties owed to others.[30] An often-accompanying circumstance to this conduct is that offenders operate through a business firm or use its services.[31] Firms may occupy one of three roles: (1) innocent victims of fraud, (2) tools through which offenders gain money from third parties, or (3) actual perpetrators of the crime.[32] Under federal law, firms may be held liable for the crimes of an agent when the agent acts within the scope of his or her authority and for the benefit of their firm.[33] Yet when the agent has decisional authority, the crime can be cloaked in secrecy, making detection difficult.

Bedrock principles of criminal law require proof of a *mens rea*, a culpable state of mind,[34] which varies by statute and judicial definitions. A criminal statute can require that the offender acted with purpose, with knowledge of falsity, or was reckless as to the truth. Unlike most state laws, federal law does not define these familiar terms and also includes additional undefined *mens rea* terms, such as "willfully", "with scienter", and "feloniously."[35] Thus, federal courts have necessarily defined (and sometimes supplied) the *mens rea* terms for each statute.[36] As could be expected, definitions of *mens rea* terms vary among statutes and even within statutes, serving as fodder for doctrinal confusion. Nonetheless, in white collar crimes, the *mens rea* element is often the only difference between paying civil damages or spending time in prison.[37] Although a genuinely negligent deception does not support a criminal charge and is a matter for civil redress, the line between civil and criminal conduct is porous.[38]

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29. *See* GERALDINE SZOTT MOOHR, THE CRIMINAL LAW OF INTELLECTUAL PROPERTY AND INFORMATION 18 (2008) (listing elements of common law larceny). Larceny requires a physical taking of property that belongs to another without the holder's consent. *Id.*

30. *See* HAZELL CROALL, UNDERSTANDING WHITE COLLAR CRIME 66 (2001) (remarking that "an almost universal theme among individual fraud victims was a sense of betrayal and abuse of trust").

31. *See* Geis, *supra* note 28 at 10 (asserting that many academics define white-collar crime as offenses "that are committed by persons of reasonably high standing in the course of their business, professional, or political work," and giving examples that correspond to such a definition, including "an anti-trust conspiracy among vice presidents of several major corporations, the acceptance of a bribe by a member of the national cabinet, or medi-fraud by a surgeon").

32. *See* CTR. FOR THE STUDY OF DEMOCRACY, EXAMINING THE LINKS BETWEEN ORGANIZED CRIME AND CORRUPTION 48 (2010) (discussing companies as victims and as perpetrators of corruption); *id.* at 114 (discussing criminal abuse of innocent companies).

33. *See* New York Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 480, 495-96 (1909); *cf.* MODEL PENAL CODE 2.07(1)(c).

34. *See* Morissette v. United States, 342 U.S. at 250 (1952) (noting the *mens rea* requirement is "universal and persistent in mature systems of law") (Jackson, J. writing); *see also* Staples v. United States, 511 U.S. 600, 607 (1994) (noting strict liability crimes are limited to public welfare offenses of a regulatory nature).

35. *See* Cheek v. United States, 498 U.S. 192 (1991) ("Because the Seventh Circuit's interpretation of 'willfully' as used in these [tax] statutes conflicts with the decisions of several other Courts of Appeals we granted certiorari").

36. United States v. Bishop, 412 U.S. 360 (1973) ("The Court, in fact, has recognized that the word 'willfully' in [tax] statutes generally connotes a voluntary, intentional violation of a known legal duty").

37. *Id.* at 352 (internal quotation marks omitted) ("willful, as we have said, is a word of many meanings, its construction often being influenced by its context").

38. Only a fine interpretive line exists between a *mens rea* of recklessness and negligence. *See* Wendy Gerwick Couture, *White Collar Crime's Gray Area: The Anomaly of Criminalizing Conduct Not Civilly Actionable*, 72 ALB. L. REV. 1 (2009) (suggesting that criminal liability for securities fraud is more expansive than civil liability); Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 210 (1996) (noting that "criminal law has been expanded to include what were traditionally civil violations"); John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in*

In sum, white collar films are those in which a protagonist knowingly deceives a victim with the purpose to deprive that person or entity of money or property. Although the films listed in the Appendix relate markedly different stories, they all feature secrecy, a knowing deceit, and pecuniary gain. With this definition in place, the following discussion presents the theory that explains why and how films matter.

B. Movies and Popular Culture

Popular culture and entertaining movies enjoy a close, symbiotic relationship.[39] In a reciprocal exchange, popular culture influences the stories movies tell and those same movies return the favor, influencing that culture from which they sprang. A clear understanding of this theory requires differentiating between a few terms. "Popular culture" is a collection of the "norms and values held by ordinary people."[40] Put more directly, a shared popular culture is what enables people to make sense of their lives and their world.[41] Further, it is created by "ordinary people – robust, autonomous individuals whose judgments about entertaining vehicles like movies depend on a complex set of personal needs and demands.[42] A popular culture is not imposed; it is a product of human agency exercised by ordinary individuals.[43]

Lawrence Friedman, writing in 1989, proposed a rounded theory of cultural change.[44] He first established that law is not independent of the culture in which it exists; rather, it is derivative, evolving from social forces, economic organizations, political systems, tradition, and popular culture.[45] Unpacking the term "popular culture," Friedman recognized that it is composed of ideas about specific subjects or subcultures, one of which is a "popular legal culture."[46] Perhaps the most significant step in Friedman's analysis is his insight that popular legal culture operates as a mediating device between public conceptions of the law

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American Law, 71 B.U. L. REV. 193 (1991). *See also See* United States v. United States Gypsum Co., 438 U.S. 422, 441 (1978) (noting ambiguous demarcation between socially desirable and undesirable business conduct).

39. German scholars created the field of cultural studies between the world wars, and their ideas evolved as other scholars continued their work. *See* Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM. J. L. & ARTS 91, 102-110 (2005) (summarizing development of cultural theory). The theory moved through several phases, from a critique of culture used to manipulate and form attitudes to a softer idea of national identity. After World War II, British scholars defined national culture more broadly as "what we are accustomed to and others are not," recognizing that people are agents who evaluate and alter components of a culture. *See* RAYMOND WILLIAMS, CULTURE AND SOCIETY, 1750-1950 (1958) (adopting a Burkean conception of culture as "national continuity" or "customary difference"); RICHARD HOGGART, USES OF LITERACY (1957). For a recent evaluation of early scholarship in cultural studies, see Alex Ross, *The Naysayers*, THE NEW YORKER, Sept. 15, 2014 at 88 (assessing the contributions of Walter Benjamin and Theodor Adorno, intellectual leaders of the Frankfort School).

40. *See* Lawrence M. Friedman, *Laws, Lawyers, and Popular Culture*, 98 YALE L.J. 1579, 1579 (1989) (noting that the term also refers to the vehicles that transmit values, such as folklore, books, songs, plays, television programs, movies and presumably video games and future innovations).

41. RICHARD K. SHERWIN, WHEN LAW GOES POP, THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE 5 (2000).

42. *See* Friedman, *supra* note 40 at 1585 (noting the ordinary person is autonomous, an expressive, kaleidoscopic person with many choices).

43. *See* Mezey & Niles, *supra* note 39 at 98 (comparing popular culture and mass culture and noting that mass culture is different because it is essentially a consumer good that is imposed on the public by its producers).

44. *See* Friedman, *supra* note 40 at 1579.

45. *See id.* at 1580 (commenting that social theories, as opposed to theories of autonomy, "reject[] the idea that legal systems are sealed and inward looking.").

46. *See id.* at 1579-80 (offering a definition similar to that of popular culture – the norms and values about the law that are developed and held by ordinary people).

and existing legal institutions.[47] That is, popular legal culture bridges the gap between it and existing law. In brief, the values and norms in popular legal culture can lead to or support change in the law.[48] Friedman's work goes a long way to explaining the relationship—symbiotic, fluid, looping there and back again—between popular culture and the law. His insight leads to another; in order to understand how the norms and values of ordinary people influence the law, one must attend to commercial entertainment, like the movies.

Current scholars have taken up Friedman's challenge. Some scholars emphasize the films, working from the idea that movies can express, challenge, reinforce, and change community values.[49] Not only are films "vital components in the network of cultural communication," they can bring to light hidden aspects of a legal society.[50] Thus, they examine movies as "significant documents, artifacts, or texts" that reflect public attitudes and understanding of law.[51] They seek to show that the movies not only reveal law, they also "create[] the social reality to which legal institutions adapt."[52] The films analyzed are not necessarily films that directly address the law or legal procedures, but rather cross into many film genres.

The second type of research begins with the law as it is portrayed in films. They analyze how movies portray legal institutions, such as professional ethics, judging, and trial procedures.[53] The concern of these legal scholars is that popular films can misrepresent the law, lawyers, and law practice.[54] Error, inaccuracy, and falsity can then influence the way ordinary people view lawyers, trials, judges, firms, and the law itself. A good example is the critique that films inaccurately represent or simply ignore a lawyer's ethical obligations. Such portrayals may negatively affect public opinion, and thus client expectations and even the conduct of lawyers. Scholars have also revealed serious inaccurate and problematic strategies in movies that feature trials.[55] A noted study of sixty-nine criminal trials in classic American films highlighted legal error or departures from trial practice in most of them.[56]

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47. *See id.* at 1584 (explaining that the attitudes and values embodied by entertaining vehicles influence a community's social institutions).

48. *Id.*

49. *See* STEVE GREENFIELD ET AL., FILM AND THE LAW: THE CINEMA OF JUSTICE, at v (2d ed. 2010) (noting that since 1996, thirteen books, nine edited essay collections, and at least seven symposium issues have been published on film and the law).

50. *See, e.g.*, SKLAR, *supra* n. 2 at x (movies are "vital components in the network of cultural communication").

51. *See* Donald H.J. Hermann, *The Law in Cinema: An Emerging Field of Study*, 42 N.Y.L. SCH. L. REV. 305 (1998).

52. JOHN DENVIR, INTRODUCTION TO LEGAL REELISM, MOVIES AS LEGAL TEXTS, at xvi (John Denvir, ed. 1996).

53. *See* Nancy B. Rapoport, *Dressed for Excess: How Hollywood Affects the Professional Behavior of Lawyers*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 49, 57 (2000) (suggesting that beginning lawyers may adopt the attitudes and conduct of ethically-challenged movie-lawyers); Carrie Menkel-Meadow, *Can They Do That? Legal Ethics in Popular Culture: Of Characters and Acts*, 48 UCLA L. REV. 1305 (2001) (examining the depiction of modern lawyers' professional ethics in literature, films, and television); *see also* J. Thomas Sullivan, *Imagining the Criminal Law: When Client and Lawyer Meet in the Movies*, 25 U. ARK. LITTLE ROCK L. REV. 665, 668 (2003) ("[F]ilmmakers may create wholly unreal pictures of the legal system and the work of lawyers that distort, rather than inform viewers . . . .")

54. *See* Rapaport, *supra* note 53 at 62 (suggesting that Hollywood may sacrifice accuracy in favor of cinematic tension and entertainment).

55. David Ray Papke, *Conventional Wisdom: The Courtroom Trial in American Popular Culture*, 82 MARQ. L. REV. 471, 487 (1999).

56. *See* PAUL BERGMAN & MICHAEL ASIMOW, REEL JUSTICE: THE COURTROOM GOES TO THE MOVIES

Viewers are likely to believe that error-ridden scenes are accurate, creating false expectations and adding to cynicism about legal practice and lawyers. An interesting analysis concluded that the way judges are portrayed in movies, as mere referees, contributes to a misguided conception of judging.[57] This misconception can ultimately devalue the constitutional role of courts.[58]

But sometimes, the movies get it right. In a parallel analysis, another author suggests that movies about business operations can lead to a public bias against business that reflexively supports economic regulations.[59] On the other hand, films may contribute insights about legal institutions, such as when films that showed large law firms in an unfavorable light were found to be accurate. The filmmakers had identified a shift in large firms toward a more competitive culture that led to unintended consequences.[60]

With doctrine, theory, definitions, and examples in place, we can go to the movies.

II. WHITE COLLAR MOVIES

Of the thirty films considered for this project,[61] seventeen were selected.[62] The selection criteria began with the definition, explored earlier, of white collar fraud. Whether dramas or comedies, the selected films feature protagonists who knowingly engage in deceptive conduct for pecuniary gain. In accordance with that definition, I eliminated films that featured or devolved into violent takings or worse. Movies about confidence games, which revel in deceit and double-dealing,[63] are hallmark white collar films unless their stories turn violent, as happens in two of the best.[64] I also eliminated movies in which frauds served to avenge a violent act (usually murder).[65] The discussions below summarize other common characteristics that mark the genre and consider specific movies.

A. The White Collar Film Genre

As noted, white collar movies depict non-physical fraudulent takings of money or property. They share other "codes, conventions, and visual styles," forming a genre.[66]

(1996) (studying trial movies and identifying legal error within them).

57. *See* RICHARD A. POSNER, OVERCOMING LAW 229 (1995) (commenting on the perceived role of judges, Judge Posner famously asked, "What am I? A potted plant?").

58. *See* Susan Bandes, *We Lost It at the Movies: The Rule of Law Goes from Washington to Hollywood and Back Again*, 40 LOY. L.A. L. REV. 621, 623-25 (2007) (suggesting that the fictional role of judge as a referee with limited authority can influence the selection of federal judges).

59. *See* Larry E. Ribstein, *Imagining Wall Street*, 1 VA. L. & BUS. REV. 165, 198-99 (2006) (suggesting that the film *Wall Street* typifies Hollywood's perception of American businesses and suggests such movies created "an environment that became increasingly unfriendly to takeovers"); *see also* Larry E. Ribstein, *How Movies Created the Financial Crisis*, 2009 MICH. ST. L. REV. 1171 (2009).

60. *See* Michael Asimow, *Embodiment of Evil: Law Firms in the Movies*, 48 UCLA L. REV. 1339 (2001) (concluding that law practices changed when firms embraced a business model and abandoned the professional organization model, justifying some of the common negative portrayals of large law firms).

61. Although documentary films were beyond the scope of this article's purpose, they enhance public understanding of financial scandals and merit attention. *See e.g.*, ENRON: THE SMARTEST GUYS IN THE ROOM (Jigsaw Productions 2005); INSIDE JOB (Represental Pictuers 2010); BILL MOYERS: CAPITOL CRIMES (Public Affairs Television 2006).

62. *See infra* Appendix.

63. *See, e.g.,* AMERICAN HUSTLE (Atlas Entertainment 2013).

64. *See* HOUSE OF GAMES (Filmhaus 1987); THE GRIFTERS (Cineplex-Odeon Films 1991).

65. *The Sting* (Universal Pictures 1973) was eliminated, as was the second version of *The Thomas Crown Affair* (United Artists/MGM 1999), because each began with murder.

66. *See* GRAHAM TURNER, FILM AS SOCIAL PRACTICE IV 119 (4th ed. 2006) (discussing genres generally); STEVE GREENFIELD ET AL, *supra* note 49 (2010) (discussing uses of genre in establishing parameters of law films).

Certain characteristics and styles of the white collar films identified here enable viewers to recognize the kind of movie they will see.[67] For example, white collar filmmakers include references to other white collar films, a device which strengthens audience identification of the genre. Take, for instance, a pivotal scene in *Boiler Room*, which depicts trainees watching *Wall Street* and reciting Gekko's lines as he speaks.[68] Another convention is to relate the story from the perspective of the criminal protagonist rather than of a victim or bystander.[69] This perspective almost automatically skews viewer's attention and empathy toward the criminal, often suspending audiences between wanting the villain to fail and succeed.

A second convention is that the action in white collar films is usually set within or involves commercial firms, institutional entities, or other workplaces. Offices are peopled by busy individuals striding through offices, serviced by attractive assistants. It can be a rough world; fired executives are humiliated, losing immediate access to offices, computers, and cell phones upon dismissal,[70] and may be escorted out in handcuffs.[71] Further, this workplace is definitely a white man's world. Black and brown faces are largely absent. Women appear in typical roles as stalwart spouses and girlfriends,[72] sex objects,[73] and love interests,[74] but rarely as participants in the scheme. When women have a larger presence, they are likely cast as the schoolmarm who says no[75] or as collateral damage of the scheme.[76]

Lawyers and judges rarely appear in white collar movies. In fact, the law is barely referenced, except when charges are recited upon arrest. Trials occur off screen, though we may glimpse a sentencing hearing or a courthouse. When law does make an appearance, it is usually through enforcement agents or prosecutors, whose entry is delayed until the last reel. They are generally portrayed sympathetically as dogged, committed enforcers of the law.[77] Other references to the law are almost but not entirely absent. Law exists in the notions of viewers about law and justice, establishing a cognitive dissonance in viewers' minds when they identify with the bad guy.

Finally, white collar films are almost universally grounded in an actual event, after the appearance of a biography or nonfiction book.[78] For instance, *Catch Me If You Can*[79]

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67. *See* TURNER, *supra* note 66 at 119 (noting this specific result of genre).

68. *See* BOILER ROOM (New Line Cinema 2000).

69. All seventeen of the films listed in the Appendix take this approach.

70. *See* THE INSIDER (Blue Lion Entertainment 1999); MARGIN CALL (Before The Door Pictures 2011).

71. *See* WALL STREET (Twentieth Century Fox Film Corporation 1987); THE INFORMANT! (Warner Bros. Pictures 2009).

72. *See* THE INFORMANT! (Warner Bros. Pictures 2009); OWNING MAHOWNY (Alliance Atlantis Communications 2003).

73. *See* THE WOLF OF WALL STREET (Paramount Pictures 2014).

74. *See* BOILER ROOM (New Line Cinema 2000); WALL STREET (Twentieth Century Fox Film Corporation 1987).

75. *See* THE INSIDER (Blue Lion Entertainment 1999) (single female executive at CBS nixes the story prepared for Sixty Minutes).

76. *See* MARGIN CALL (Before The Door Pictures 2011) (the sole female executive is forced to take the fall for the debacle).

77. In *The Informant!*, two agents tread a fine line between concern for their whistle-blower and manipulating him to wear a wire and obtain evidence. In *Quiz Show*, the prosecutor is a government investigatory lawyer who forms a problematic bond with the cheating celebrity. The prosecutor in *Catch Me if You Can* becomes a father figure who ultimately rescues the protagonist from a life of deception.

78. Only three of the seventeen white collar movies cited are pure fiction. *See* TRADING PLACES (Cinema

recounts the story of Frank W. Abagnale, Jr., a master at check fraud and changing identities, first told by Abagnale himself.[80] *The Wolf of Wall Street* is taken from the protagonist's autobiography,[81] as are *Rogue Trader*[82] and *Casino Jack.*[83] *Quiz Show*[84] is based on a book written by the investigating prosecutor.[85] Other movies, while not based on first-person accounts, used news events of the period first told by journalists. Examples include *The Informant!*,[86] *Barbarians at the Gate*,[87] *American Hustle*,[88] and *Wall Street.*[89]

As fulsome dramas or black comedies, white collar films weave personal relationships with lovers, families, and friends that make protagonists more (or less) sympathetic and reveal their motivations. Somewhat reluctantly, the following analysis sets aside such diverting and entertaining subplots and characters to focus on the core narratives of specific films.

B. Four White Collar Films

The four movies analyzed below tell stories of white collar crime, the individuals who commit them, and their workplaces. The brief synopses highlight three aspects of the stories; protagonists' conduct, harm caused, and the resolution. A comparative analysis of these topics follows in Part III. That analysis is made simpler because the films take place in similar settings and the protagonists are engaged in similar occupations. Nonetheless, it bears emphasizing that their narratives are not exclusive to these four films; they recur in most white collar movies.

1. Take One—Wall Street

Group Ventures 1983), WALL STREET: MONEY NEVER SLEEPS (Edward R. Pressman Film 2010), and ARBITRAGE (Lionsgate 2012).

79. CATCH ME IF YOU CAN (Dream Works 2002).

80. *See* FRANK ABAGNALE JR. ET AL., CATCH ME IF YOU CAN (1980).

81. THE WOLF OF WALL STREET (Paramount 2014). *See* JASON BELFORT, THE WOLF OF WALL STREET (2008).

82. ROGUE TRADER (Granada Film Prod. 1999). *See* NICHOLAW LEESON & EDWARD WHITLEY, ROGUE TRADER, HOW I BROUGHT DOWN BARINGS BANK AND SHOOK THE FINANCIAL WORLD (1997).

83. CASINO JACK (Bagman 2010) (reprising corruption by lobbyist that led to prison terms of elected officials). *See* JACK AMBRAMOFF, CAPITAL PUNISHMENT: THE HARD TRUTH ABOUT CORRUPTION FROM AMERICA'S MOST NOTORIOUS LOBBYIST (2011). The story also merited a documentary. *See* CASINO JACK AND THE UNITED STATES OF MONEY (Jigsaw Productions 2010) (noting convictions of Abramoff and United States Representative Bob Ney).

84. QUIZ SHOW (Baltimore Pictures 1994).

85. *See* RICHARD N. GOODWIN, REMEMBERING AMERICA (1995); JOSEPH STONE & TIM YOHN, PRIME TIME AND MISDEMEANORS (1992). In 2008, Van Doren wrote about his experience. *See* Charles Van Doren, *All the Answers*, THE NEW YORKER, July 28, 2008. A documentary, *The Quiz Show Scandal*, by Julian Krainin was aired by PBS in its American Series series in 1992.

86. THE INFORMANT! (Warner Bros. Pictures 2009). In this true story, Mark Whitacre is a government witness in an antitrust probe who embezzled company money during the investigation. *See* KURT EICHENWALD, THE INFORMANT (2000); JAMES B. LIEBER, RATS IN THE GRAIN (2000); Mark Whitacre, *When Good Leaders Lose Their Way*, 45 LOY. U. CHI. L. J. 525 (2014).

87. BARBARIANS AT THE GATE (Columbia Pictures Television 1993) (telling the story of R.J. Nabisco's fight against a takeover bid, a news-maker at the time); *see* BRYAN BURROUGH & JOHN HELYAR, BARBARIANS AT THE GATE: THE FALL OF RJR NABISCO (1990).

88. AMERICAN HUSTLE (Atlas Entertainment 2013) (recounting FBI sting operation that swept up elected officials and netted prison terms for many of them); ROBERT W. GREENE, THE STING MAN; INSIDE ABSCAM (1981).

89. WALL STREET (Twentieth Century Fox Film Corporation 1987); *See* JAMES STEWART, DEN OF THIEVES (1992); CONNIE BRUCK, PREDATORS' BALL (1989).

Bud Fox: "Okay, you got me."

Wall Street tells a familiar story of temptation, sin, and redemption that, in this retelling, is loosely based on scandals in the financial markets.[90] At that time, investors were offered substantial returns by participating in takeovers of low-profit but high-asset firms.[91] The takeovers were highly leveraged by high-risk, or junk, bonds, and investors profited when companies were dissolved and their assets sold.[92] Those with inside information, about which firms were targeted, profited mightily.[93]

As the film begins,[94] a young, ambitious Bud Fox is frustrated by his slow progress at a respected Wall Street firm. He comes from a working-class family; his father, Carl, is a union president at Blue Star, a regional airline. In early scenes, Carl shares good news about the airline with Bud, news that when it is announced will lead to increased value of Blue Star stock.

Gordon Gekko is an unscrupulous and daring financier whom Bud hopes to enlist as a client. Prodded by Gekko, Bud tells him the airline's good news, and Gekko promptly uses the information to trade at a profit. He then offers Bud success and riches in exchange for confidential information. After a brief refusal, Bud accepts Gekko's deal ("Okay, you got me"). He spies on competitors, dresses in disguises, and compromises old friends to gather information. The Faustian bargain serves Bud well. He is soon orchestrating deals, making huge sums of money, and moving to a private office. He comes to share Gekko's belief that "greed is good";[95] everyone wins when people pursue their own goals.

The narrative closely follows Bud as he deals with his firm, his father, and Gekko, but largely ignores the harm of insider trading. Investors who trade without confidential information may suffer monetary harm if they pay too much for shares or sell for too little.[96] Indeed, a viewer may not realize that using information not available to the public is a kind of cheat that disadvantages those who buy and sell stock without such information. The film instead conceptualizes harm in a personal way when it highlights the harm to Blue Star's workers if jobs are lost after the take-over.

Reflecting his working class roots, Bud convinces Gekko to gain control of Blue Star Airlines in order to return it to profitability. But after he has control of the airline, Gekko changes his mind and decides to close the airline and sell its assets – even the typewriters. Bud realizes that he has been betrayed, that he has betrayed others, and plans to save the airline. Using Gekko's tactics, he first manipulates the price of Blue Star to soaring heights, then causes it to plunge. Enraged, Gekko is forced to sell his interest in Blue Star, losing money and respect. Despite saving Blue Star, Bud is arrested and weeps as agents handcuff and escort him through the office.[97] In their final confrontation, Gekko implicates himself in

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90. *See* Ribstein, *Imagining*, *supra* note 59 (discussing the movie).

91. *Id.* at 173-74.

92. *Id.* at 174.

93. *See* DANIEL FISCHEL, PAYBACK: CONSPIRACY TO DESTROY MICHAEL MILKEN AND HIS FINANCIAL REVOLUTION (1995); STEWART, *supra* note 89; BRUCK, *supra* note 89.

94 *See* WALL STREET (Twentieth Century Fox Film Corporation 1987). The following paragraphs relate the story.

95. One of the most memorable lines in all films, the phrase was actually uttered by Ivan Boesky, who was later convicted of insider trading. *See* FISCHEL, *supra* note 93 at 179 (quoting Boesky at Berkeley graduation, May 18, 1986: "Greed is all right, by the way.").

96. J. KELLY STRADER, UNDERSTANDING WHITE COLLAR CRIME § 5.07[B] (3d ed. 2011).

97. This scene mirrors actual arrests in Wall Street offices in 1987. *See* FISCHEL, *supra* note 93 (recounting

several unlawful schemes and Bud rejects Gekko's values. Bud had recorded the conversation for federal authorities, and Gekko, too, is arrested; they both serve prison terms.

2. Take Two—Boiler Room and The Wolf of Wall Street

a. "Seth Davis: I just want in."

Boiler Room, released fourteen years after *Wall Street*, also tells of a young man's temptation, sin, and redemption in a more complicated and harsher narrative.[98] Seth Davis is an ambitious but largely unqualified college dropout who muses in opening scenes on the undeserved wealth of Microsoft secretaries and lottery winners. He, too, "just wants in." At present, he operates an illegal and profitable gambling casino in his apartment, much to the displeasure of his father, a state judge.

Intrigued by the rich lifestyle of traders, Seth joins the boiler room of the title.[99] J.T. Marlin is farther from Wall Street than the hour it takes to drive there, especially if the distance is measured by the boiler room's sales practices. The staff sells stock of questionable value by calling unsuspecting strangers and using aggressive and often deceitful techniques. Executives bully ambitious beginners into misleading sales tactics by alternating between threats of job loss and promises of millions. Salesmen fight, sometimes physically, as when Seth argues over a sales credit and is physically attacked and denied the commission. Instructed to mind his ABC's,[100] Seth tells investors whatever is necessary to make a sale, posing as an experienced broker or a good father, in turns beguiling and browbeating. With these techniques, Seth earns commissions that are four times higher than what other firms pay.

Boiler Room effectively dramatizes the direct harm of Seth's conduct through Henry, one of Seth's first clients. To Seth, Henry is just a voice on a telephone line, but viewers see a struggling mid-level administrator and his wife who are slowly saving for a house. Seth's lies lead Henry to invest in an untested company, and Seth lies again when he later dissuades Henry from selling. When the value of the shares decline, the firm will not process Henry's sell order, and Seth refuses to accept his calls. In the film's final scenes, however, Seth arranges to reverse Henry's disastrous investment.

Seth knows that he and the firm violate securities laws, and that the firm ignores compliance standards and occasionally shreds documents. Seth also learns that J.T. Marlin arranges bridge financing for firms preparing an initial public offering (IPO) of their stock. Such necessary financing is lawful when serviced by a disinterested firm, but J.T. Marlin is not disinterested; it has a financial stake in the companies it takes public. Seth suspects that sales money is not always used to buy stock, but instead is directed into the IPO. When the IPO succeeds, Marlin is enriched, and traders like Seth receive extraordinarily high commissions.

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arrest of three arbitragers that was orchestrated by Rudi Guiliani, then United States Attorney for the Southern District of New York); Ribstein, *Imagining*, *supra* note 59 at 195 (stating the arrest was the template for the arrest of a fictional Bud Fox). The scene has become a trope in other films such as *The Informant!*.

98. *See* BOILER ROOM (New Line Cinema 2000). The following paragraphs relate the story.

99. *See* http://www.thestreet.com/topic/46122/bucket-shop.html (a firm engaged in unscrupulous and often fraudulent stock sales, boiler room, bucket shop, chop shop).

100. The phrase, "Always be closing", or the ABC's of sales, was made famous in *Glengarry Glen Ross*, written by David Mamet. Seth's instructor is pleased that Seth knows his ABC's and has seen the movie. The film also bows to *Wall Street* as the young traders watch a scene from that movie, reciting Gekko's lines as he utters them.

Shedding his illusions but not his greed, Seth decides to quit—but not before defrauding the firm. His plan requires a straw investor, and Seth approaches Marty, his demanding father. At first Marty refuses, but later leaves a telephone message for Seth, agreeing to his plan and implicating himself. FBI investigators, who had recorded the call, promptly arrest Seth and Marty. Threatened with prosecution, Seth agrees to testify against the firm, and Marty and Seth reconcile and are released, escaping arrest.

b. Jason Belfort: "I've been poor, I've been rich, and I choose rich."

The protagonist in *The Wolf of Wall Street*, Jason Belfort, is unlike the naive protagonists in *Wall Street* and *Boiler Room*.[101] This black comedy traces the rise and fall of Belfort, a wheeler/dealer who indulges in copious amounts of sex, alcohol, and drugs – as well as unlawful fraud.[102] Told from Belfort's perspective, the film bookends *Boiler Room*, and tells much the same story from the viewpoint of a firm's principal.

As the film begins, Belfort is working at a Wall Street firm, eager to make his fortune within the confines of the rules. He loses his job after a market crash, and resorts to selling penny stocks, or "selling garbage to a garbage man." Belfort prospers from high commissions in this unregulated market and soon opens his own firm. By this time, he has embraced a cynical quest for wealth.

At first Belfort and his team of boyhood friends engage in touting stock to uninformed clients, using unethical and unlawful sales techniques that violate SEC rules – much as in *Boiler Room*. As his firm grows, the crimes multiply and become more serious. Because of the scale of his firm, the harm he imposes is arguably greater than that seen in *Boiler Room*. In addition to lying to investors and deceiving SEC investigators, Belfort opens a Swiss bank account in another person's name and unlawfully profits from IPOs that his firm is financing. After attempting to bribe an FBI investigator and ignoring his lawyer's advice to settle with the SEC, Belfort is eventually arrested. Finally folding, he cooperates in the prosecution of two-dozen associates, including close and old friends. Belfort serves three years in prison, losing his wife and children and much of his wealth.[103] In the closing scenes, Belfort is shown starting anew in New Zealand, once again teaching students how to sell.

3. Take Three –*Margin Call*

Eric Dale: "There was no choice, really."

Margin Call is a tense drama set during the 2008-banking crisis,[104] when respected firms dissolved into bankruptcy and taxpayer funds saved failing financial institutions. As is now understood,[105] the crisis began with home mortgages, which large banks assembled and

101. *See* THE WOLF OF WALL STREET (Paramount 2014); WALL STREET (Twentieth Century Fox Film Corporation 1987); BOILER ROOM (New Line Cinema 2000).

102. *See* THE WOLF OF WALL STREET (Paramount 2014). The following paragraphs relate the story.

103. *See* Susan Antilla, *The Wolf Is Still Bending the Truth, Prosecutors Say*, NEW YORK TIMES, Dealbook, Jan. 10, 2014, http://dealbook.nytimes.com/2014/01/10 (reporting that Belfort still owes $100 million to investors who lost money through his firm).

104. MARGIN Call (Before the Door Pictures 2011). The film's title, *Margin Call*, refers to an outcome that the executives must avoid. When the value of collateral (here, mortgage backed securities) falls below the value of the loan, lenders demand (margin call) that the borrower increase the collateral or pay the debt. In the film's scenario, the bank could not meet a margin call.

105. *See generally* GRETCHEN MORGENSON & JOSHUA ROSNER, RECKLESS ENDANGERMENT: HOW OUTSIZED AMBITION, GREED, AND CORRUPTION CREATED THE WORST FINANCIAL CRISIS OF OUR TIME (2011); MICHAEL LEWIS, THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE (2011).

sliced into mortgage-backed securities, selling them as low-risk investments.[106] During this process, the banks held the securities, which were more highly leveraged than usual because mortgages are considered stable investments.[107] When the home mortgage market collapsed, banks were left with low-value assets and large debts.[108] The film tells the story of one investment bank's brush with bankruptcy and the choice to save it at the expense of others.[109] Several characters propel the story of eighteen tense hours, from Thursday evening to Friday noon.[110]

The film begins with a somber procession of people with stiff postures and immobile faces entering an office; they have arrived to reduce the staff by 80%. Eric Dale, the bank's senior risk analyst, is one of those fired – in a demonically civil conversation. As he is escorted out of the office, Eric surreptitiously slips his junior colleague, Peter Sullivan, a flash drive. When Peter examines Eric's data, he finds that the bank's liabilities are dangerously close to exceeding its total assets. At dawn, the firm's formidable CEO, John Tuld, arrives to meet with the executives. Asked by John to explain, "as if you are speaking to your mother," Peter complies, adding that the bank's asset value has already fallen into a danger zone several times. As John remarks, the music to which all Wall Street banks had danced "seems to have stopped." Every bank that holds similar securities will face the same crisis.

The executives face a Hobson's choice: (1) to do nothing and endanger the firm's existence, or (2) to sell the securities, which also would put the firm at risk. Sam Rogers, the weathered, experienced sales manager, argues that a sell-off will ruin the bank's reputation and kill its market for years. But John reasons that the bank would eventually sink under the weight of its debt and from competition with firms who are also unloading their weak assets. A sale will at least allow a smaller bank to survive. For the strategy to work, however, all the securities must be sold immediately and all at once, before buyers become suspicious. Sam delivers a bracing explanation of the day's assignment to his sales staff; each sale will cause great harm to fellow traders and their firms and, if they succeed, their own jobs become unnecessary. In return, they will each earn at least a million dollar bonus. The strategy works, and as the selling ebbs, the bank is already dismissing many of the sales staff.

Moviegoers sense an impending harm, although little reference is made to it in the film. A junior trader remarks that the bank's decision will affect "people . . . real people." Other than this brief statement, little attention is given to the consequences of selling.

As the executives grapple with the crisis, they question the value of their work and of the industry. One of the group concludes that the finance industry will always exist. "We are necessary . . . we put a finger on the scale that favors the rich", he says. Eric, the fired analyst, thinks his work with the bank cannot compare in value with a bridge he once designed. Although Sam praises his selling staff for having added to the social good, he

106. LEWIS, *supra* n. 105 at 171.

107. *Id.*

108. *Id.*

109. MARGIN CALL (Before the Door Pictures 2011). The film is reportedly modeled on the fall of Lehman Brothers, a large financial services firm that was among the first to falter in 2008. *See* A.O. Scott, *Number Crunching at the Apocalypse*, N.Y. TIMES, Oct. 20, 2011. The firm filed for bankruptcy protection in September 15, 2008, the largest bankruptcy to date in U.S. history. *See* Anna Stolley Persky, *Great Recession: Where's the Punishment After the Crime?* WASH. LAWYER, May, 2014, at 18-25.

110. MARGIN CALL (Before the Door Pictures 2011). The following paragraphs relate the story.

chokes on the words, obviously not believing them. Only John Tuld refuses to indulge in judgment or blame. *Margin Call* foregoes resolution, just or otherwise. The final scenes indicate that the bank will continue operating much as before.

In sum, the films present stories of individual culpability for personal conduct, firm responsibility for the crimes of its own and its management and staff, and a system-wide defect that makes allocating responsibility an elusive undertaking. Each suggests the difficulty of reaching just resolutions and invites further thought about allocating responsibility for white collar crimes.

III. HOW WHITE COLLAR MOVIES MATTER

How white collar movies matter depends on what they divulge about human behavior, firm conduct, and the criminal justice system. Their forte is portraying appealing criminals, and moviegoers are both drawn to and repelled by protagonists who are not innocent. Even so, white collar films suggest that firms bear some responsibility for conduct that benefits them. A just result is elusive, and their endings include satisfyingly just resolutions, bargains for an imperfect justice, and no criminal resolution. The following discussion compares those resolutions and the films' portrayals of firm and individual culpability. This discussion is guided first by a basic tenet of criminal law, that knowing violations deserve punishment in order to deter the offender and others who may be similarly tempted.[111] Otherwise, inadvertent, accidental, and negligent harms are not subject to criminal law. A second guidepost is the realization that workplace cultures can mold executives and employees, encouraging conduct that harms clients.[112]

A. Individual Culpability and Sole Responsibility

After watching *Wall Street*, a typical moviegoer would have little doubt that Bud Fox understood Gekko's proposal was wrong, signaled by Bud's initial reaction. Bud is aware that working with Gekko would involve him – at a minimum – in violating security regulations. He is even warned by the firm's avuncular elder who gives Bud unwelcome advice; he should avoid trading on rumors and short-term market swings – which is, of course, how Gekko makes his millions. Heedless and driven by ambition, Bud profits from the arrangement, harming those at the other end of Gekko's deals.

On the other hand, Bud's firm is a demanding and unforgiving employer. Successful traders are lavished with awards, and so when Bud excels he is publically praised and given a private office. But traders who do not meet sales targets, including a favorite long-term employee, are fired. Even novice traders must pay up when clients renege on agreements, as Bud learns the hard way. Outsize ambition and external pressure to succeed do not, however, excuse Bud's choice, and he remains solely responsible for his actions, deserving punishment. The firm is a tool used by Bud to execute Gekko's schemes. Its reputation stained, it is a victim of their frauds.

As *Wall Street* ends, Bud climbs the courthouse steps to receive his sentence, and moviegoers understand his future life will be an honest one. In biblical terms, he has been redeemed; a just resolution achieved, a balance restored, and societal values confirmed. It is

111. *See supra* note 34 and accompanying text (discussing *mens rea* element).

112. *See* Geraldine Szott Moohr, *On the Prospects of Deterring Corporate Crime*, 2 J. Bus. & Tech. L. 25, 30-31 (2007) (discussing the various factors that can contribute to ethically and legally questionable conduct in the institutional setting of a firm).

a familiar and comforting conclusion as good overcomes evil, wrongdoers face punishment, and the purposes of criminal law are met.[113]

B. Individual and Firm Culpability and Dual Responsibility

Boiler Room presents a more complicated relationship between the protagonist and the firm. Seth was not exactly innocent when he joined J.T. Marlin, and he embraces the firms' sales tactics without a whimper. Viewers watch his progress as he deceptively closes deals for his own gain. One might give Seth the benefit of the doubt during his first weeks at the firm, but it is soon obvious that Seth understands that he and the firm are violating the law. Despite this awareness, he remains at the job even as he cringes at the dilemma of his client, Henry. When he does decide to quit, he tellingly plans to cheat the firm and purposefully involves his judge-father in his scheme. With arrest imminent and to his credit, he stands up for his father and saves Henry. Yet Henry is actually saved by a colleague, from whom Seth extracts a favor. In the closing scene, Seth seems to realize there are no shortcuts.

Seth shares his knowledge of the firm's illegal activities with government prosecutors, enabling them to prosecute the principals of the firm and, perhaps, the firm. In this final deal, he profits by escaping arrest. Even so, Seth knowingly violated the law and is responsible for his unlawful conduct. Although Seth's conduct is neither excused nor justified, the firm's culture may explain and perhaps mitigate his behavior.

The firm in *Boiler Room* is run by corrupt principals, who cheat investors and encourage their sales staff to do the same, effectively demanding deceptive selling tactics. Moviegoers witness the firm's principals and executives as they manipulate an unsophisticated selling staff with promises of wealth, bully them, and humiliate them in meetings. The firm also participates in other crimes, as Seth discovers. Unlike Bud's firm in *Wall Street*, this company is, like Gekko's, a perpetrator, an organization that actively participates in and profits from fraud.

Whereas the resolution in *Wall Street* resonates with a sense of just results, *Boiler Room*'s ending is not so satisfying. Seth engaged in fraudulent conduct, profited from it and harmed his clients. Nevertheless, he escapes punishment; his knowledge of the firm will aid prosecutors in convicting others. Ironically, he gained that knowledge while deceiving others and sharing in the firm's illegal profits. While moviegoers may have some residual sympathy for Seth and understand the need for cooperating witnesses, it may seem unfair that Seth, unlike fellow-traders, evades responsibility. Nor is it clear that he is changed by the experience or will embark on a law-abiding path. In the final scene, Seth is again musing about getting a job; one can hope this will be a lawful one.

Much the same can be said about the protagonist and firm in *Wolf*. Belfort is not trained in deceit by a renegade firm, but instead he creates one. As the film begins, a young, naive Belfort works in a respected Wall Street firm and believes that clients' interests come first. On his first day, a senior trader corrects Belfort's notion, explaining that traders earn large commissions by hooking clients and then guiding them into multiple investments. He is also advised on using drugs and alcohol to enhance his performance—all at his first lunch. Audiences understand that Belfort once knew and was ready to obey the rules. A few frames and a few years later, Belfort operates his firm as ruthlessly as did the principals in

113. Moviegoers may doubt that Gekko will be deterred from future wrongdoing. This premonition comes true, in Hollywood fashion, as Gekko returns in *Wall Street: Money Never Sleeps*, again wreaking havoc on the life of an ambitious youth.

Boiler Room. Throughout, he directs his staff to ignore rules and revels in the wrongdoing. He is responsible for his own illegal conduct, and in many cases, for the frauds committed by the staff. His large organization routinely flaunts the law – as viewers understand by his brushes with regulators and FBI agents. His choice makes him responsible for his conduct and the harm he caused.

When Belfort is finally arrested, he provides evidence that implicates his former friends and colleagues. Here, an imperfect justice prevails. He serves only three years in prison, much less than a recommended sentence, which is based on the financial loss he caused.[114] Moviegoers may be uneasy that he received a relatively light prison term. Viewers are unlikely to think that Belfort is changed or redeemed by punishment. He shows little contrition and his only regret, seemingly, is that his former life is over.[115]

C. Systemic Problems

In *Margin Call,* a team of executives participate in a harmful decision and aid in its execution. The investment bank that the executives seek to save is a silent but insistent character in the film. The protagonists are committed to saving the bank even if it means causing enormous harm to competitors, clients, and the public. Only Sam hesitates, but loyalty to the firm overrides his instinct for fair dealing. The only way to avoid bankruptcy is to sell the securities. Finance is merely a game, as Tuld opines: "It is just money . . . made up . . . there is no wrong. . . We can't control or stop or even slow it; if we get it right we make money. If not, we don't."

Surprisingly, these well-off, very smart people see no other choice but to accept the priority of the bank. For instance, Peter, who has another choice—to resume a career in science—remains with the firm after a promotion. After successfully managing the sale, Sam wants to resign, but instead agrees to stay a few more years. He accepts Tuld's generous compensation, knowing it is foolish to oppose Tuld and needing the money. The once-fired Eric had at first refused to return to the firm, even to explain his analysis. But he agrees to return for a day, sequestered in an office to earn $176,000 an hour ("There was no choice, really"). When Tuld tells risk manager Sarah Robertson that she is to be blamed for the situation ("Sarah, I need a head"), she does not suggest he find another head or fight for her reputation.

Moreover, although some on the executive team view the sale as an unfair cost of the banking business, no one thinks it is wrong or illegal. *Margin Call* presents an ethical failure, and in truth the arms-length sales portrayed here are probably not criminal acts. Neither the staff nor the executives affirmatively deceive anyone, nor are they obliged to disclose the reasons for the sale to their trading partners. Without an agent's deception, made in the course of duty and for the benefit of the firm, the bank will not face criminal liability.[116] The events in *Margin Call* are the result of prior decisions to buy, combine, and sell financial instruments that were purportedly sound. No government agent raids the bank, and no one will be arrested. Yet the film makes clear—and in hindsight, moviegoers will understand—that grave harm has been unleashed. But there is no consequence, no redress,

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114. In most cases, the amount of money lost by victims of fraud largely determines the length of the prison term. *See* U.S. Sentencing Guidelines Manual §2B1.1(b)(1) (loss table for theft and fraud).

115. Belfort was banned for life from working in the financial industry. *See* JASON BELFORT, THE WOLF OF WALL STREET; *see* Sarbanes-Oxley Act of 2002, 116 Stat. § 745, 778-79 and § 1105. Courts may also prohibit any person from such service if the conduct demonstrates unfitness. *See* 15 U.S.C. § 78u(d)(2).

116 *See supra* text accompanying n. 33 (discussing standard for corporate liability).

no resolution, just or otherwise. The film resolves into a vague and pervasive threat of future trouble, a disquieting inevitability about unlawful conduct and societal harm. This system-wide flaw, really a set of flaws, is to remain a threat to individuals, firms, and the national economy.

The movies analyzed here present different levels of guilt, responsibility, and resolutions that reinforce and/or challenge public values. The concluding analysis that follows considers the challenges that the films, taken as a whole, present to viewers, private decision makers, and legislators.

IV. THE GREATER STORY

Taken together, white collar films form a temporal arc that tells a broader story than individual movies. This arc includes, in addition to the protagonists just reviewed, rogue traders,[117] embezzlers,[118] price-fixers,[119] influence peddlers,[120] and even rigging a game show.[121] The greater story moves from an easily understood threat posed by individual perpetrators to a more complex one that encompasses group criminality and systemic flaws. Thus, while tied to their own decade and signature frauds, white collar films trace a thirty-year evolution of white collar frauds.

The greater narrative begins with a morality tale, a backdrop to succeeding events and new films. As told in *Wall Street*, criminal law can deal effectively with criminal fraud, restoring faith in financial institutions and criminal law. This is a familiar, comforting story whose ending expresses and reinforces cultural values. Moviegoers leave theaters with their trust of criminal law enforcement and confidence in the financial system intact.[122]

As time passes, the greater story challenges moviegoers' confidence. This chapter, as exemplified by *Boiler Room* and *Wolf*, tells a more complicated tale of seemingly law-abiding businesses that train and reward employees who mislead and harm an unsuspecting public. Although perpetrators are apprehended, resolutions are less than perfect. Moviegoers may well leave these movies sensing that fairness requires some firms to bear criminal responsibility and penalties. They have seen, in varying degrees, how the deceptions by Bud, Seth, and the *Margin Call* team are molded and supported by their firms. These films show that group criminality is graver and more difficult to contain than crimes by individual players.[123] Nevertheless, white collar movies neglect the issue of whether corporate crimes, as opposed to individual crimes, can be suitably punished.

For those moviegoers who wonder, it is a good question. For one thing, large monetary penalties ultimately harm innocent shareholders and employees. But, so do civil

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117. *See* ROGUE TRADER (Granada Film Prod. 1999) (a hapless trader bankrupts a venerable British bank).

118. *See* OWNING MAHOWNY (Atlantic Alliance 2003) (a mid-level bank executive embezzles money to finance a serious gambling addiction).

119. *See* THE INFORMANT! (Warner Bros. Pictures 2009) (giant corporation violates antitrust law by setting price of food additives).

120. *See* CASINO JACK (Bagman 2010) (bribery of United States elected officials).

121. *See* QUIZ SHOW (Baltimore Pictures 1994).

122. As to inside trading, this confidence would seem to be justified. Manhattan U.S. Attorney, Preet Bharata, has secured 85 convictions and guilty pleas from traders, analysts, and industry consultants. *See* DealBook, *Preet Bharara's Key Insider Trading Cases*, updated, Dec. 10, 2014 at http://www.nytimes.com/interactive/2014/07/09/business/dealbook/09insider-timeline.html#/#time337_8876.

123. Those who create a threat of future crime are subject to conspiracy charges. The enhanced threat posed by group criminality justifies conspiracy law. *See* 18 U.S.C. § 371; Krulewitch v. United States, 336 U.S. 440 (1949); DRESSLER, *supra* note 14, at §29.02[B].

fines. Despite the same financial penalty, criminal liability, with its attendant denunciation of the firm, is viewed as a more effective deterrent. The concept of criminal corporate liability is, however, rather perplexing. This is not the occasion for an in-depth review of corporate criminal liability, but an overview illustrates some of the issues that attend it.[124]

As *Boiler Room* and *Wolf* illustrate, corporate prosecutions often depend on cooperating witnesses who actually engaged in the conduct at issue (or know about it) and are willing to testify against firms. This solution, however, is less than perfect. Such individuals (think of Belfort and Seth) are unlikely to cooperate with authorities unless rewarded with a lower sentence or no arrest at all. Such a result offends the principal of horizontal equality, that all who break the law should be treated the same. Thus while lower sentences for cooperating witnesses could contribute to convicting a corporate entity, such reduced sentences may not be harsh enough to deter other individuals. Finally, varying sentences introduces the flaw of uncertainty into sentencing.[125]

Moreover, there is significant disagreement about the basic point—whether criminal theory supports the imposition of criminal penalties on corporations.[126] A basic tenet of criminal law is that a person is not responsible for the crimes of another person. Corporations must, by definition, act through other persons, and criminal charges against corporate entities are necessarily inconsistent with doctrine. More pragmatic scholars argue that criminal punishment is necessary to deter other firms and to express societal values.[127] At the present, the former seem to be in the ascendancy. Perhaps chastened by the Arthur Andersen case,[128] federal prosecutors now negotiate non-prosecution agreements with government prosecutors in exchange for significant administrative fines.[129]

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124. Two symposia law review issues present varying perspectives on corporate criminal liability. *See Corporate Criminality: Legal, Ethical, and Managerial Implications*, 44 AM. CRIM. L. REV. (2007); *Achieving the Right Balance: The Role of Corporate Criminal Law in Ensuring Corporate Compliance,* 46 AM. CRIM. L. REV. (2009).

125. Research shows that uncertain punishment is a less effective deterrent than certainty of punishment, notwithstanding comparative penalties. *See* Miriam H. Baer, *Linkage and the Deterrence of Corporate Fraud*, 94 VA. L. REV. 1295, 1303-06 (2008) (explaining that increasing probability of punishment can be more effective than increasing sanctions); Geraldine Szott Moohr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 FLA. L. REV. 937, 954-56 (2003) (discussing deterrence value of enhanced penalties for fraud).

126. *See, e.g.*, WILLIAM S. LAUFER, CORPORATE BODIES AND GUILTY MINDS: THE FAILURE OF CORPORATE CRIMINAL LIABILITY (2006); Donald C. Langevoort, *On Leaving Corporate Executives "Naked, Homeless, and Without Wheels": Corporate Fraud, Equitable Remedies, and the Debate over Entity Versus Individual Liability,* 42 WAKE FOREST L. REV. 624 (2007); David A. Westbrook, *Corporation Law After Enron: The Possibility of a Capitalist Reimagination*, 92 GEO. L. J. 61 (2003); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996); Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 71 MINN. L. REV. 1095 (1991).

127. Perhaps the best iteration of the pragmatic view is the first one. *See* New York Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481 (1909) (reasoning that the law "could not be effectually enforced so long as individuals only were subject to punishment"); *see also* GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW § 11.4 (1998); Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV.J.L. & PUB. POL'Y 833 (2000).

128. Upon indictment for obstructing justice the accounting firm collapsed, reducing the number of public accounting firms from five to four. Other collateral consequences of Andersen's conviction devastated employees, retirees, and partners. *See* Geraldine Szott Moohr, *What the Martha Stewart Case Tell Us About White Collar Criminal Law*, 43 HOUSTON L. REV. 591, 594 (2006). The Supreme Court ultimately reversed the conviction because of faulty jury instructions that misinformed jurors about the *mens rea* element. *See* Arthur Andersen LLP v. United States, 544 U.S. 696 (1995).

129. *See* BRANDON GARRETT, TOO BIG TO JAIL (2015) (analyzing 303 non-prosecution and deferred

As the greater story reaches its last chapter in *Margin Call*, moviegoers are assaulted by another affront to their expectations about "how the world works." Even those who cause significant and grave harm are not always criminals. This time moviegoers left theaters with a disquieting sense of foreboding; there would be no criminal redress of the resulting economic harm—and there was little reassurance that harm would not be inflicted again.

As *Margin* Call shows, financial harm can flow from systemic flaws in the financial system and the firms that participate in and profit from it: mortgage brokers, borrowers, intermediate banks, and large investment banks. [130] The events in *Margin Call*, and in non-fictional firms, resulted from prior decisions to buy, combine, and sell unsound, risky financial instruments without full disclosure. The crime, if any, began deep within the system and progressed through it—mortgages were sold to unqualified buyers, banks initiating mortgages defrauded buyers, insurers over-extended their obligations, and rating agencies operated under a conflict of interest. All combined in a crisis that significantly damaged individuals and the world economy.

Here again, film and reality coalesce: no person or individual has yet been successfully prosecuted for conduct that precipitated the 2008 financial crisis.[131] Federal investigators of financial firms have yet to uncover evidence of knowing or intentional fraud. Yet, without some evidence of *mens rea*, a fraud prosecution will not succeed and it would be unwise and perhaps unfair to file charges.[132] Whether from wisdom or lack of will, the absence of criminal action has evoked significant criticism[133] and public anger.[134] A consensus is building that financial service companies are "too big to jail."[135]

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prosecution agreements with corporations between 2001 and 2014). For a light-hearted but seriously-intended commentary on Enron prosecutions, see Ellen S. Podgor, *White Collar Crime: A Letter from the Future*, 5 OHIO ST. J. CRIM. L. 247, 249-52 (2007).

130. *See* MORGENSON & ROSNER, *supra* note 105; LEWIS, *supra* note 105.

131. *See* William D. Cohan, *Instead of Wall St. Prosecutions, Holder Delivers a Deadline*, DealBook, N.Y. TIMES, Feb. 27, 2015 ("exactly zero individual[s] . . . have been prosecuted").

132. As Professor Donald Langevoort explains, "[y]ou can go back in time and see that there was broad responsibility . . . that makes it hard to send one or two people to the gallows, saying, "[t]his is all you fault." Anna Stolley Persky, *Great Recession: Where's the Punishment After the Crime?* WASH. LAWYER, May, 2014, at 18-25.

133. *See* The Honorable Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. OF BOOKS, Jan. 9, 2014; *see also* Randall D. Ellison, *We Need to Indict Them*, LEGAL TIMES, Sept. 22, 2008, at http://www.legaltimes.com.; Gretchen Morgenson & Louise Story, *In Financial Crisis, No Prosecutions of Top Figures*, N. Y. TIMES, April 4, 2011, at http://dealbook.nytimes.com; Peter J. Henning, *Is That It for Financial Crisis Cases?*, DealBook, N.Y. TIMES, Aug. 13, 2012, at http://dealbook.nytimes.com; William D. Cohan, *Instead of Wall St. Prosecutions, Holder Delivers a Deadline*, DealBook, N.Y. TIMES, Feb. 27, 2015 ("exactly zero individual[s]");

134. As one observer wrote in a letter to the editor, "[o]f all the urgent issues pressing America today, not one is more infuriating to me and everyone I know than our government's abject refusal to prosecute the powerful bankers and other financiers for the catastrophe that greed has inflicted on the lives of millions of innocent citizens." *See* Arlie Schardt, Letter to the Editor, *Sunday Dialogue: Harm, No Foul*, N.Y. TIMES, Aug. 5, 2012, at SR2.

135. Attorney General Eric Holder raised the possibility before the Senate Judiciary Committee Congress. *See* Anna Stolley Persky, *Great Recession: Where's the Punishment After the Crime?* WASH. LAWYER, May, 2014, at 18-25 (quoting Holder's statement regarding concern that a criminal charge "will have a negative impact on the national economy"); *see also* GARRETT, *supra* note 129.

As a result of federal regulations that increase the amount of capital held by large banks, some firms may voluntarily become smaller. See Nathaniel Popper & Peter Eavis, *On Wall St., Rules on Capital Humble Banks and Shrink Pay*, N.Y. TIMES, Feb. 20, 2015 (reporting that JP Morgan Chase may need to break into smaller pieces

The DOJ has pursued civil actions against large firms, securing record-breaking settlements.[136] These efforts have not placated the public or commentators who, like the CEO in *Margin Call*, "need a head."[137] Notwithstanding such sentiment, the belief that individual convictions are a greater deterrent to corporate crimes may be unfounded. Recall that by 2006, prosecutors of twenty-three Enron-era cases against forty-six defendants had secured eighty-one convictions of highly placed executives in seventeen firms.[138] Yet, this unprecedented record seems not to have deterred any of the multiple players in the 2008 financial crisis a mere few years later.

White collar movies are good at portraying crime "in the suites" and asking "what is to be done." Although not equipped to answer it, they have successfully presented the question to the tribunals of public culture and legal institutions.

CONCLUSION

This analysis of white collar movies begins with movies rather than with law. It is an inevitable choice – the films do not feature lawyers, law practice, or trials. Yet the law is a strong, abstract background against which protagonists are measured. Law and community standards are obliquely present through portraits of victims, parents, and mentors who embody values of the popular legal culture. Thus, stealing, even information, is wrong; providing inaccurate information, even in arms' length transactions, is wrong; saving a firm by sacrificing others is wrong. Nonetheless, these moral wrongs do not readily translate into criminal wrongs.

With movies that are about law but without legal proceedings, viewers are cast as virtual jurors, deciding whether and how protagonists violated the law. Moviegoers decide whether Bud, Gekko, Seth, Wolf, and the *Margin Call* team were criminally responsible for the harm they caused and whether they received just punishment. Moviegoers may identify with the protagonists as they make bad decisions, face a crisis of their own making, resolve it (or not), and (perhaps) ease into a changed persona. In a sense, moviegoers know more

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to stay competitive).

136. *See, e.g.*, Ben Protess, *Uneasy Pact for Agencies and for S&P*, N.Y. TIMES, Feb. 2, 2015 at B1 (reporting that the rating agency will pay a civil fine of $3.7 billion for giving some banks unjustifiedly high ratings); Alan Zibel, *Wells Fargo, J.P. Morgan Settle CFPB Case*, WALL. ST. J., Jan. 22, 2015 (Wells Fargo agreed to pay a $24 million fine and $10.8 million to compensate consumers for scheme to pay for mortgage referrals and J.P. Morgan agreed to pay a $600,000 fine and $300,000 to consumers); J.P. Morgan also admitted to making misrepresentations to investors as part of a $13 billion settlement. *Id.* Morgan Stanley reached a $2.6 billion settlement and Bank of America agreed to a $16.7 billion resolution. *See* Nathaniel Popper, *Bank Settles Federal Case Over Crisis in Mortgages*, N.Y. TIMES, Feb. 24, 2015 at B3; Alan Zibel, *Wells Fargo, J.P. Morgan Settle CFPB Case*, WALL. ST. J., Jan. 22, 2015 (Wells Fargo fined $24 million and to pay $10.8 million to compensate consumers for scheme to pay for mortgage referrals).

The Federal Housing Finance Agency, however, secured convictions of two foreign banks for misleading Fannie Mae and Freddie Mac when selling them mortgage bonds. *See* Peter Evans, Judge's Ruling Against 2 Banks Finds Misconduct in '08 Crash, N.Y. TIMES, May 12, 2015, at A1.

137. Polls suggest little change in opinion between 2008 and 2014. Sixty-three per cent of those queried in 2013 thought then that the U.S. economic system was no more secure than before the 2008 economic crisis. *See* Pew Research Center for the People and the Press Political Database, Sept. 2013 at http://www.people-press.org/question-search. In November 2008, the vast majority of Americans queried said the government is doing only a fair (44%) or poor (33%) job handling the problems on Wall Street. *See* Pew Research Center, *57% of Public Favors Wall Street Bailout*, Sept. 23, 2008, at http://www.people-press.org/2008/09/23.

138. *See* Kathleen F. Brickey, *In Enron's Wake: Corporate Executives on Trial*, 96 J. OF CRIM. L. & CRIMINOLOGY 397, 401-11 & Tables 1, 2 (presenting and analyzing individual and corporate trials and convictions between March 2002 and January 2006).

than would real-life jurors, due to the power and intimacy of the cinematic form to foster understanding of the human dramas.

As observed through the movie-window, the firm's conduct and policies may influence final judgment. For example, viewers watch firms that blatantly encourage and reward deceptive practices. They see that other business firms are more subtle, sending conflicting signals to employees. One message cautions against breaking rules that safeguard the public's interest in a fair financial system. A second message – that firms expect loyal employees to produce profit – is sent indirectly, through monetary and status rewards. This second message infects the first with ambiguity. Audiences understand that financial traders in these white collar movies were told to thread the needle that produces profit without becoming lawbreakers. A viewer-judge may decide that these firms share responsibility for their employees' conduct.

In addition to serving as windows, movies also mirror reality, here reflecting how temptation and ambition combine in law-breaking conduct. Like fun-house mirrors, movies can distort reality and render final judgment suspect. Having said that, the narratives of the films analyzed here are not particularly susceptible to distortion. Attuned to and checked by the historical record, they are more likely to illuminate reality rather than distort it.

In reaching judgment, moviegoers may be surprised and shocked by the reality reflected by white collar films. Justice is shown as elusive, subject to pragmatic compromise. Some of those responsible are not charged, others receive reduced sentences, and still others cannot be charged under existing laws. Upon evaluating conduct and responsibility, viewers realize that neither the criminal justice system nor the financial system is effective in preventing and redressing white collar crimes.

Movies matter, both individually and as genre, because these lessons are absorbed by the popular legal culture and ultimately influence social institutions like the criminal justice and financial systems. The decisions, compromises, and outcomes shown in these movies raise troubling issues that remain unaddressed. Their influence is unlikely to be positive; a popular legal culture marked by diminished confidence and distrust makes it more difficult to enforce existing laws and design new laws that would encourage law-abiding conduct.

APPENDIX
WHITE COLLAR CRIME FILMS

American Hustle (Atlas Entertainment 2013)
Arbitrage (Lionsgate 2012)
Barbarians at the Gate (Columbia Pictures Television 1993)
Boiler Room (New Line Cinema 2000)
Catch Me If You Can (DreamWorks SKG 2002)
Casino Jack (Bagman 2010)
Margin Call (Before The Door Pictures 2011)
Office Space (Twentieth Century Fox Film Corp. 1999)
Owning Mahowny (Atlantic Alliance 2003)
Quiz Show (Baltimore Pictures 1994)
Rogue Trader (Granada Film Prod. 1999)
The Informant! (Warner Bros. Pictures 2009)
The Insider (Blue Lion Entertainment 1999)
The Wolf of Wall Street (Paramount 2014)
Trading Places (Paramount 1983)
Wall Street (Twentieth Century Fox Film Corporation 1987)
Wall Street: Money Never Sleeps (Edward R. Pressman Film 2010)

FOUL BALL: MAJOR LEAGUE BASEBALL'S CBA EXPLOITS COLLEGE SENIORS IN THE MLB DRAFT

Jonathan C. Gordon*

INTRODUCTION

Trevor Frank played baseball for the University of California, Riverside.[1] The college senior, a right-handed pitcher, was selected in the eighth round (231st player overall) by the Cleveland Indians in the 2013 Major League Baseball (MLB) Draft.[2] Based on this slot in the draft, Frank's recommended signing bonus (as determined by the commissioner of Major League Baseball) was $158,300.[3] Frank signed for a bonus of $10,000, roughly 6% of what was recommended.[4] Prior to each draft, the MLB commissioner establishes recommended signing bonuses for each pick in the first ten rounds of the MLB Draft.[5] For the 2013 Draft, these recommended bonuses started at $7.79 million for the first pick and diminished to $135,500 for the last of the tenth round picks.[6] The recommended amount for each pick is more commonly called "slot money."[7] Players who receive more than the recommended amount are said to have signed "above slot," while players who receive less than the recommended amount are said to have signed "below slot."[8] Those who sign for the actual recommended amount are said to have signed "at slot."[9] Many players receive bonuses less than the recommended amount.[10] Some players are

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1. Trevor Frank, *UC Riverside Baseball,* http://gohighlanders.com/roster.aspx?path=baseball&rp_id=2635.

2. *Id.*

3. Eugene Tierney, *2013 MLB Draft Signing Tracker,* 85% SPORTS (June 8, 2013), http://www.85percentsports.com/2013/06/08/2013-mlb-draft-signing-tracker/.

4. *Id.*

5. Patrick O'Kennedy, *MLB's Draft Slotting System: How It Works,* SB NATION: BLESS YOU BOYS (June 26, 2013), http://www.blessyouboys.com/2013/6/26/4463258/MLB-draft-slotting-bonus-pools-penalties.

6. *Id.*

7. Associated Press, *High MLB draft picks sign for $1000 apiece,* FOX NEWS (July 4 2012), http://www.foxnews.com/sports/2012/07/04/high-mlb-draft-picks-sign-for-1000-apiece/.

8. Aaron Gleeman, *Mariners Sign No. 6 Alex Jackson for above-slot bonus,* HARDBALL TALK: NBC SPORTS (June 18, 2014), http://hardballtalk.nbcsports.com/2014/06/18/mariners-sign-no-6-pick-alex-jackson-for-above-slot-bonus/.

9. Clint Longenecker, *2014 Draft: How The Top Bonuses Lined Up,* BASEBALL AMERICA (July 19, 2014), http://www.baseballamerica.com/draft/2014-draft-top-bonuses-lined/.

10. Of the 271 players that were signed in the first ten rounds, 140 (51.6%) received bonuses less than the recommendation. *See* Appendices A and B. The information compiled in these tables was obtained from Eugene Tierney, *2013 MLB Draft Signing Tracker,* 85% SPORTS (June 8, 2013), http://www.85percentsports.com/2013/06/08/2013-mlb-draft-signing-tracker/.

simply willing to take less money immediately so they can begin playing sooner.[11] Others are represented by agents who are less skilled in negotiations and unable to negotiate higher bonuses.[12] In either case, many of these players still receive a fairly respectable bonus—somewhat *near* the recommended amount.[13] College seniors, however, do not fare as well. College seniors drafted in the first ten rounds of 2013 MLB Draft received an average bonus more than 80% lower than the recommended amount.[14] Fifty-five of the fifty-seven college seniors drafted—and signed—in the first ten rounds of the 2013 MLB Draft received bonuses less than the recommended amount.[15] Why? While MLB's Collective Bargaining Agreement (CBA) does not directly punish college seniors, it incentivizes teams to exploit them.[16] Trevor Frank is just one example of the drafted college seniors who are unfairly and wrongly impacted by MLB's CBA.[17] In Parts I and II, this paper will describe MLB's CBA and examine the effects of the recent CBA. Part III analyzes the concept of fair compensation and addresses possible counterarguments. Finally, in Part IV, this paper proposes a solution that would protect college seniors drafted in the MLB Draft.

I. MLB COLLECTIVE-BARGAINING AGREEMENT (CBA)

A. HISTORY OF THE CBA

The MLB's CBA governs the terms and conditions of employment between the MLB owners and the Major League Baseball's Players Association (MLBPA).[18] The MLBPA is responsible for protecting professional MLB players and negotiating labor agreements on their behalf.[19] The MLBPA is not, however, legally responsible for protecting minor league players or potential draftees (such as high school or college players).[20] The MLBPA only legally represents "players . . . who hold a signed contract with a Major League club."[21]

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11. Once a player agrees to a bonus and signs, that player can start playing professionally. A player cannot start playing until he agrees to a signing bonus.

12. Agents negotiate on behalf of players. Agents are paid on commission at around 5% of the player's contract. Darren Heitner, *Insight Into Being a Baseball Agent,* SPORTS AGENT BLOG, http://sportsagentblog.com/2009/02/10/insight-into-being-a-baseball-agent/.

13. On average, college juniors drafted in the first ten rounds of the 2013 MLB Draft received 4.17% less than the recommended amount. *See* Appendix B. While high school seniors received an average bonus above the recommended slot. *See* Appendix C.

14. *See* Appendix A.

15. *Id.*

16. Major League Baseball's CBA does not directly prohibit college seniors from receiving large bonuses. Seniors, as are other players, are allowed to receive a bonus of any monetary amount.

17. Fifty-seven college seniors were drafted – and signed – in the first ten rounds of the 2013 MLB Draft. Fifty-five of them received bonuses less than the recommended amount.

18. *See generally* Major League Baseball CBA (2012-2016), *available at* http://mlb.mlb.com/pa/pdf/cba_english.pdf

19. For more on the role of the MLBPA and the CBA, *see* Rick J. Lopez, Comment, *Signing Bonus Skimming and a Premature Call for a Global Draft in Major League Baseball,* 41 ARIZ. ST. L.J. 349, 355 (2009). Although MLB is exempted from antitrust laws, the Curt Flood Act of 1998, 15 U.S.C. § 26b (2006), requires certain protections for Major League Baseball players. *Id.*

20. *Id.*

21. *See* MLB, *Major League Baseball Players Association: Frequently Asked Questions, available at* http://mlb.mlb.com/pa/info/faq.jsp

However, the MLBPA has taken recent efforts to protect drafted players.[22] MLB's first CBA was negotiated in 1968 by MLB players with the help of Marvin Miller, a prominent economist focused on establishing a labor union for the players.[23] Miller would serve as the executive director of the MLBPA from 1966-1983.[24] During his tenure, Miller negotiated salary minimums, arbitration clauses, pension funds, licensing rights, and much more[25]—all of which changed the game of baseball forever.[26] Since its inception in 1871, MLB has never operated with a salary cap (unlike the National Basketball Association (NBA), National Hockey League (NHL), and National Football League (NFL)).[27] The absence of a cap has greatly influenced baseball and the way baseball's CBA is structured.[28] A salary cap limits the amount of money a team can spend on players' salaries.[29] With no salary cap, big-market teams are able to spend more money than their smaller-market counterparts.[30] This has created a large variation in the amount of money spent on players' salaries. In 2012, the New York Yankees spent more than $197 million on salaries, the highest in the league.[31] On the other end, the San Diego Padres spent just north of $55 million.[32] In 2013, the New York Yankees spent more than $232 million on salaries, again the highest in the league.[33] On the other end, the Houston Astros spent just shy of $18 million.[34] While small-market teams such as the Padres and Astros are still able to field competitive teams and achieve success, MLB has long dealt with this issue of parity.[35] In an attempt to create a more level playing field, MLB and the Players Association recently made several changes to the CBA.

B. THE 2011 CBA

22. In July 2014, the MLBPA filed a grievance against the Houston Astros on behalf of three players the team selected in the 2014 Draft. The MLBPA accused the Astros of rescinding an agreed-upon offer and negotiating in bad faith. *See* Baseball America, *Report: MLBPA Files Grievance Against Astros Over Aiken, Nix, Marshall,* BASEBALL AMERICA (July 24, 2014), http://www.baseballamerica.com/draft/report-mlbpa-files-grievance-astros-aiken-nix-marshall/

23. MLBPA, *History of the Major League Players Association*, MLB (2015), http://mlb.mlb.com/pa/info/history.jsp.

24. *Id.*

25. *Id.*

26. For more history of baseball's CBA, *see* Nicholas A. Deming, *Drafting a Solution: Impact of the New Salary System on the First Year Major League Baseball Amateur Draft*, 34 HASTINGS COMM. & ENT. L.J. 427 (2012), and Andrew P. Hanson, *The Trend Toward Principled Negotiation in Major League Baseball Collective Bargaining*, 15 SPORTS LAW. J 221 (2008).

27. Howard Bryant, *Off Balance,* ESPN, http://espn.go.com/mlb/story/_/id/8390834/mlb-2012-season-proves-salary-caps-not-necessary-espn-magazine

28. *See* Christopher D. Cameron & J. Michael Echevarria, *The Ploys of Summer: Antitrust, Industrial Distrust, and the Case Against a Salary Cap for Major League Baseball,* 22 FLA. ST. U. L. REV. 827 (1995)

29. *Id.*

30. *Id.* Big-market teams include teams from cities such as New York, Chicago, Los Angeles, and Boston. Small-market teams include teams from cities such as Oakland, Seattle, Tampa Bay, and San Diego.

31. *MLB Opening Day Team Payrolls,* YAHOO! SPORTS, http://sports.yahoo.com/news/mlb—mlb-opening-day-team-payrolls—infographic—172007462.html.

32. *Id.*

33. *Baseball Salaries for 2013,* NEWSDAY, http://sports.newsday.com/long-island/data/baseball/mlb-salaries-2013/.

34. *Id.*

35. Small-market teams can still be successful by drafting well, finding relatively cheap and underappreciated players, excellent coaching, etc.

The CBA was most recently updated in 2011 and will remain in effect through 2016, ensuring twenty-one consecutive years of labor peace.[36] For comparison, the NBA,[37] NFL,[38] and NHL,[39] all experienced lockouts, work stoppages, and labor strikes in recent years (2011, 2011, and 2012 respectively). The current CBA brought various changes to scheduling, instant replay, playoff teams, and the MLB Draft.[40] Changing the MLB Draft was the main priority of MLB commissioner Bud Selig during CBA negotiations.[41] Prior to the 2011 CBA, teams were able to spend as much as they wished on signing bonuses in the draft.[42] The established "slot recommendations" were exactly that—recommendations.[43] Teams were not punished for exceeding the recommendations.[44] Under the 2011 CBA, however, teams must respect these recommendations and remain below a designated threshold.[45] Specifically, the 2011 CBA implemented a "signing allocation" for the first ten rounds of the draft.[46] Essentially, this is a designated amount that limits teams' spending ability in the MLB Draft by imposing harsh punishments on teams that exceed their allocated amount.[47] In 2013, the MLB commissioner recommended signing bonuses starting at $7.79 million for the top pick and dwindling to $135,000 for the last pick of the tenth round.[48] The "signing allocation" that a team must stay within is simply the sum of the recommended bonuses the team has in the first ten rounds of the draft.[49] For example, in 2013, the Chicago Cubs had ten picks in the first ten rounds.[50] Each pick came with a recommended signing bonus, ranging from $6.7 million to $139,000.[51] The sum of all these amounts ($10,556,500) is the maximum total the Cubs could spend on signing bonuses in

36. Nicholas A. Deming, *Drafting a Solution: Impact of the New Salary System on the First Year Major League Baseball Amateur Draft*, 34 HASTINGS COMM. & ENT. L.J., 427 (2012).

37. William B. Gould IV, *The 2011 Basketball Lockout: The Union Lives to Fight Another Day – Just Barely*, 64 STANFORD L. REV. ONLINE 51 (2012), *available at* http://www.stanfordlawreview.org/online/2011-basketball-lockout

38. Robert H. Lattinville, Robert A. Boland, & Bennett Speyer, *Labor Pains: The Effect of a Work Stoppage in the NFL on its Coaches*, 20 MARQ. SPORTS L. REV. 335 (2010), *available at* http://scholarship.law.marquette.edu/sportslaw/vol20/iss2/3.

39. Dan Gelston, *NHL Lockout 2012: League Imposes Fourth Work Stoppage Since 1992*, HUFFINGTON POST (Sept. 16, 2012), http://www.huffingtonpost.com/2012/09/16/nhl-lockout-2012-work-stoppage-hockey_n_1887536.html

40. Jayson Stark, *How the New CBA Changes Baseball*, ESPN (Nov. 22, 2011), http://espn.go.com/mlb/story/_/id/7270203/baseball-new-labor-deal-truly-historic-one.

41. *Id.*

42. *More Baseball Players Likely Choosing College Game Over Pros With Signing Bonuses Dwindling*, Associated Press (April 11, 2013), http://www.foxnews.com/sports/2013/04/11/more-baseball-players-likely-choosing-college-game-over-pros-with-signing/.

43. Maury Brown, *Inside the Numbers: Why MLB's Recommended Slotting System Is Failing*, The Biz of Baseball, (Aug. 19, 2009), http://www.bizofbaseball.com/index.php?view=article&catid=26:editorials&id=3494:inside-the-numbers-why-mlbs-recommended-slotting-system-is-failing&format=pdf.

44. *Id.*

45. *See supra* note 43.

46. MLBPA, *Summary of Major League Baseball Players Association – Major League Baseball Labor Agreement*, MAJOR LEAGUE BASEBALL, *available for download at* mlb.mlb.com/mlb/downloads/2011_CBA.pdf

47. *Id.*

48. Eugene Tierney, *2013 MLB Draft Signing Tracker*, 85% SPORTS (June 8, 2013), http://www.85percentsports.com/2013/06/08/2013-mlb-draft-signing-tracker/

49. MLBPA, *Summary of Major League Baseball Players Association – Major League Baseball Labor Agreement*, MAJOR LEAGUE BASEBALL, *available for download at* mlb.mlb.com/mlb/downloads/2011_CBA.pdf

50. Brett Taylor, *How Is the Cubs' Draft Bonus Pool Shaping Up So Far?*, BLEACHER NATION (June 21, 2013), http://www.bleachernation.com/2013/06/21/how-is-the-cubs-draft-bonus-pool-shaping-up-so-far/.

51. *Id.*

the first ten rounds.[52] For players drafted after the first ten rounds (11-40), teams may spend up to $100,000 to sign a player.[53] Anything in excess of this amount counts towards the team's "allocation pool."[54] In the 2013 Draft, the Cubs drafted high school pitcher Trevor Clinton in the 12th round and signed him for $375,000.[55] The Cubs' allocated pool (for the first ten rounds) then dropped by $275,000 from $10,556,500 to $10,529,000.[56] Additionally, if a team drafts but fails to sign a player in the first ten rounds, the team must deduct that player's "recommended bonus" from the team's total allocation.[57] In the 2013 draft, the Philadelphia Phillies drafted Ben Wetzler, a junior from Oregon State, in the fifth round with the 151st overall pick.[58] The recommended slot amount for the 151st pick was $315,200.[59] Because the Phillies failed to sign Wetzler, their allocated pool dropped by $315,200.[60] This rule increases the importance of signing a team's first ten picks. Teams that exceed their allocated totals are subject to certain punishments, including luxury taxes and the loss of future draft picks.[61] Specifically, the punishments are as follows: (1) a team that goes less than 5% over its allocation must pay a luxury tax of 75% of the amount exceeding the pool; (2) a team that goes between 5% and 10% over its allocation must pay a luxury tax of 75% AND forfeit its next first round pick; (3) a team that goes 10% to 15% over its allocation must pay a luxury tax of 100% AND forfeit its next first round pick AND forfeit its next second round pick; (4) a team that goes 15% or more over its allocation must pay a 100% luxury tax AND forfeit its next *two* first round picks.[62]

II. EFFECTS OF THE 2011 CBA

A. MLB DRAFT STRATEGY

As a result of the new rules and punishments established by the CBA, teams are increasingly more focused on staying within their allocated amount. Failure to do so results in strict punishments, as outlined above. To avoid these punishments, teams focus on drafting "signable" players who will sign well below the recommended slot.[63] By signing

52. *Id.*

53. *Id.*

54. *Id.*

55. Brett Taylor, *Cubs Officially Add Two Later Round Slots: Trevor Clifton and Will Remillard* (July 12, 2013), BLEACHER NATION, http://www.bleachernation.com/2013/07/12/cubs-officially-add-two-later-round-over-slots-trevor-clifton-and-will-remillard/comment-page-1/.

56. Neil, *Cubs Sign 12th Round Pick RHP Trevor Clifton and 19th Round Pick Will Remillard*, CHICAGO CUBS ONLINE (July 13, 2013), http://chicagocubsonline.com/archives/2013/07/cubs-sign-12th-round-pick-rhp-trevor-clifton-and-19th-round-pick-will-remillard.php#.VOd8_fnF9ah.

57. Adam Kilgore, *Erick Fedde, Two Other Nationals Draft Picks Remain Unsigned*, THE WASHINGTON POST (July 8, 2014), http://www.washingtonpost.com/blogs/nationals-journal/wp/2014/07/08/erick-fedde-two-other-nationals-draft-picks-remain-unsigned/.

58. Eugene Tierney, *2013 MLB Draft Signing Tracker*, 85% SPORTS (June 8, 2013), http://www.85percentsports.com/2013/06/08/2013-mlb-draft-signing-tracker/.

59. *Id.*

60. *Id.*

61. Proceeds from the tax go to smaller-market teams and teams that did not overspend in the draft. This is another attempt to establish parity and help teams from smaller markets with smaller payrolls.

62. *Summary of Major League Baseball Players Association – Major League Baseball Labor Agreement*, MAJOR LEAGUE BASEBALL, *available for download at* mlb.mlb.com/mlb/downloads/2011_CBA.pdf.

63. Many teams talk with players prior to the draft and see if they will sign for a certain amount. Adam

these players for low amounts, teams can pay their higher picks from top rounds the full recommended slot (or even more), without having to worry about exceeding their allocation pools. The following players are eligible to be drafted in the MLB Player Draft: (1) high school players, if they have graduated from high school and have not yet attended college or junior college; (2) college players, from four-year colleges who have either completed their junior or senior years or are at least 21 years old; (3) junior college players, regardless of how many years of school they have completed. [64] Who are the "signable" players that will sign for extremely low amounts? College seniors are the most "signable" players because they have the least leverage in negotiations. High school seniors have the most leverage in negotiations because they can enter college. College juniors also have some leverage because they can return to school. College seniors, however, have little (if any) leverage because they do not have the option to return to school if they do not choose to sign. If a team were to offer an extremely low amount to a high school player or college junior, the player will most likely refuse to sign because he can still go to school, re-enter the draft, and receive a higher bonus from a team willing to pay it. College seniors, however, are not afforded this luxury. If a college senior fails to sign, his dream of professional baseball all but comes to an end.[65] This lack of leverage leads to teams exploiting college seniors for strategic purposes. When the Cleveland Indians drafted Trevor Frank in the eighth round, an Indians beat writer explained this was a smart pick because Frank would sign "well underslot so the Indians [would] have extra money for their higher upside prep players they drafted earlier."[66]

B. IMPACT ON COLLEGE SENIORS

Appendix A lists all college seniors drafted in the first ten rounds of the 2013 MLB Draft. Bonuses for the following draftees represent some of the more extreme cases: Daniel Rockett, a college senior from University of Texas at San Antonio, was drafted in the ninth round of the 2013 MLB Draft by the Kansas City Royals.[67] Rockett signed for $5,000.[68] His recommended amount was $146,800.[69] Jacob Zokan was a college senior, left-handed pitcher at the College of Charleston.[70] Zokan was drafted in the ninth round of the 2013

Morris, *Will MLB's new rules cost baseball Kyler Murray?*, SB NATION (Jan. 19, 2015).

64. MLBPA, *First-Year Player Draft Official Rules,* MAJOR LEAGUE BASEBALL, http://mlb.mlb.com/mlb/draftday/rules.jsp.

65. J.D. Drew was considered one of the best college players available in the 1997 Draft. Drew, then a senior, was drafted with the second pick. Though he was looking for a reported $10 million, he was only offered $2 million (because he was a college senior with little leverage). Drew did not sign and, instead, played in an independent league. Drew re-entered the Draft in 1998 and signed for $3 million. Drew played professionally for 13 years, was nominated as an All-Star (2008), and won a World Series Championship (2007). J.D. Drew is one of the few exceptions of college seniors who are talented and brave enough to choose this option. It is worth noting that Drew still received well less than the $10 million he wanted. John Sickels, *Career Profile: JD Drew,* SB NATION MINOR LEAGUE BASEBALL (Apr. 30, 2011), http://www.minorleagueball.com/2011/4/30/2143308/career-profile-j-d-drew.

66. Tony Lastoria, *2013 Indians 8th Round Pick: RHP Trevor Frank,* INDIANS BASEBALL INSIDER (June 7, 2013), http://www.indiansbaseballinsider.com/blog/2013-indians-8th-round-pick-rhp-trevor-frank-49028.

67. Eugene Tierney, *2013 MLB Draft Signing Tracker,* 85% SPORTS (June 8, 2013), http://www.85percentsports.com/2013/06/08/2013-mlb-draft-signing-tracker/.

68. *Id.*

69. *Id.*

70. *Id.*

MLB Draft by the Seattle Mariners and signed for $5,000.[71] His recommended amount was $145,900.[72] Jerad Grundy, a senior left-handed pitcher from the University of Kentucky, was drafted in the tenth round of the 2013 MLB Draft by the Oakland Athletics.[73] Grundy received a signing bonus of $5,000.[74] His recommended amount was $135,300.[75] Garret Customs was a senior from the United States Air Force Academy.[76] Customs was drafted in the tenth round by the Toronto Blue Jays.[77] He received a signing bonus of $1,000.[78] His recommended amount was $136,800.[79] Even the top pick (a college senior) in the 2013 MLB Draft received less money than recommended.[80] This player, Mark Appel, a right-handed pitcher from Stanford University, received a signing bonus of $6.35 million, 18% less than the recommended amount of $7.79 million.[81] Contrast Appel's bonus with that received by Kris Bryant, a third baseman from the University of San Diego, who was drafted second in the 2013 MLB Draft.[82] Bryant, a college junior, was drafted by the Chicago Cubs and received the slot recommendation of $6.7 million.[83] Despite being drafted higher, Appel received less money than Bryant simply because Appel was a college senior with less leverage. Both had the same agent negotiating for them.[84] The last pitcher to be taken first over all in a draft was Gerrit Cole in 2011.[85] Cole, then a college junior, received a record-breaking signing bonus of $8 million.[86] Thus, Appel's playing position would also seem not to account for his smaller bonus. Cole and Appel also had the same agent.[87] Had Appel been a junior, one could argue that he would have received a similar contract to Cole ($8 M). Instead, Appel received less money than the second overall pick, Bryant ($6.7 M). These are just several examples of college seniors who signed for bonuses less than the recommended amounts. Of the fifty-seven college seniors drafted in the first ten rounds, all fifty-seven signed.[88] Fifty-five of the fifty-seven signed "below slot," while two signed "at slot."[89] These fifty-seven players received a signing bonus worth, on average, 19.77% of the recommended amount.[90] In the first ten rounds, college seniors

71. *Id.*

72. *Id.*

73. Tierney, *supra* note 67.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. Tierney, *supra* note 67.

80. *Id.*

81. *Id.*

82. Aaron Gleeman, *Cubs sign No. 2 Overall Pick Kris Bryant for $6.7 Million*, HARDBALL TALK NBC SPORTS (July 10, 2013), http://hardballtalk.nbcsports.com/2013/07/10/cubs-sign-no-2-overall-pick-kris-bryant-for-6-7-million/

83. *Id.*

84. Scott Boras represented both players. Boras is widely considered the premier agent in all of professional sports. Jesse Rogers, *Bryant Deal in Holding Pattern near Deadline*, ESPN CHICAGO (Jul. 8, 2013)

85. *Gerrit Cole Signs Contract with Pittsburg Pirates that Includes $8 Million Signing Bonus,* HUFFINGTON POST, (Aug. 16, 2011), http://www.huffingtonpost.com/2011/08/16/gerrit-cole-pirates-sign-contract_n_927969.html.

86. *Id.*

87. Scott Boras represented both players. *See supra* note 84.

88. *See* Appendix A.

89. "Below slot" represents signing bonuses that fall below the recommended amount. "At slot" represents bonuses that exactly match the recommended amount. *See* Appendix A for signing bonuses and slot values.

90. *See* Appendix A.

received bonuses more than 80% less than the recommended amount.[91] These statistics for college seniors differ drastically from those for college juniors and high school seniors. College juniors drafted in the first ten rounds received an average signing bonus worth 95.83% of the recommended amount.[92] On the other hand, high school seniors drafted in the first ten rounds received an average signing bonus worth 119.40% of the recommended amount, nearly 20% more than the slot value.[93] Table 1 summarizes these figures:

Table 1. Bonus Averages for 2013 MLB Draft.

Type	Players Drafted	Players Signed	Below Slot	At Slot	Above Slot	Average Percentage of Slot
High School	98	95	33	24	38	119.40%
NCAA Junior	123	119	52	52	15	95.83%
NCAA Senior	57	57	55	2	0	19.77%

C. IMPACT ON COLLEGE BASEBALL

Despite hurting college seniors, the 2011 CBA has actually improved college baseball as it has encouraged more high school graduates to attend college.[94] With teams now unlikely to throw very large bonuses at high school graduates due to the allocation pool limits, more and more of these players are forgoing the draft and entering college (in hopes of receiving a larger bonus once they are drafted out of college).[95] "In the first draft under the new rules, the number of high school players rated among Baseball America's top 200 draft-eligible prospects that went unsigned or undrafted increased slightly to 35, up from 26 in the 2011 draft. Of those 35 unsigned or undrafted players, 33 are now playing Division I college baseball."[96] College players and their agents understand the troubles college seniors face when trying to negotiate a signing bonus. As a result, college players often sign after junior year (if they are drafted and given the opportunity).[97] Forced to choose between finishing school with a degree and agreeing to a large signing bonus, many players choose the latter. For example, Johnny Field was a junior at the University of Arizona[98] when he was drafted in the fifth round of the 2013 Draft. Field signed for $247,500[99] even though the recommended amount was $294,600.[100] When asked to explain why he left school early to enter the draft, Field responded:

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91. *See id.*
92. *See* Appendix B.
93. *See* Appendix C.
94. *See supra* note 42.
95. *Id.*
96. *Id.*
97. *Id.*
98. 2013 MLB Draft Database, BASEBALL AMERICA, http://www.baseballamerica.com/draftdb/2013name.php?lname=/ (last visited Feb. 21, 2015).
99. *Id.*
100. *Id.*

> For me, it was always my goal to go to college for 3 years and hopefully perform well enough to put myself in a position to be selected high enough in the draft as a junior to sign. Some people absolutely love college and want to stay as long as they can before starting their professional careers. However, for the most part it comes down to money. Juniors know if they get selected in the top ten rounds that they have leverage with scouts. If the scouts cannot work with them and meet the number they're looking for, then have the option not to sign and return to school for their senior year. When seniors get drafted, they don't have any leverage and are forced to sign for whatever the scouts offer them, or they won't get the chance to play professional baseball.[101]

Those who wish to finish college with a degree must do so with an understanding they will likely receive a tremendously small signing bonus when drafted—much less than what is recommended. The current CBA, thus, hurts players who wish to earn a degree. Ironically, the MLB and the 2011 CBA has encouraged more players to start college—yet, it indirectly punishes the ones who finish.

III. UNFAIR COMPENSATION

As described above, college seniors are severely and negatively impacted by the 2011 CBA. But, is this impact "unfair?" This section will present and reject four arguments that claim this impact is fair. College seniors are, indeed, treated unfairly.

A. IS THIS IMPACT "UNFAIR?"

Argument I: These signing bonuses are just part of a total compensation package. Players still receive salaries and benefits.

Response II: After the draft, minor league players are continuously exploited.[102] Minor leaguers are subject to extremely small salaries.[103] The base minimum salary per month for a AAA player (the highest minor league) is $2,150.[104] The base minimum per month for a Rookie player (the lowest minor league) is $1,150.[105] Additionally, minor league players receive a daily stipend of only $20-$25 for meals.[106] These salaries and stipends are only given to players during the season (April-September). Players are not paid during the offseason or spring training—when they continue to train and play baseball.

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101. I spoke directly with Field on Jan. 22, 2014. This information was exchanged via Facebook messages.

102. For more on the exploitation of minor league players, *see* Garrett R. Broshuis, *Touching Baseball's Untouchables: The Effects of Collective Bargaining on Minor League Baseball Players,* HARVARD J.S.E.L 51 (2013) *AVAILABLE at* http://harvardjsel.com/wp-content/uploads/2013/06/Broshius.pdf.

103. Ted Berg, *Most Minor League Ballplayers Earn Less Than Half as Much Money as Fast-Food Workers,* USA TODAY (Mar. 6, 2014) http://ftw.usatoday.com/2014/03/minor-leaguers-working-poor-lawsuit-mlb-bud-selig/.

104. Harold Ulhman, *Life in the Minor Leagues,* THINK BLUE LA (Jan. 29, 2013), http://www.thinkbluela.com/index.php/2013/01/29/life-in-the-minor-leagues/.

105. *Id.*

106. *Id.*

These small living wages make it very difficult for players to live comfortably.[107] In February of 2014, three former minor league players filed a class-action lawsuit against MLB claiming minor league players are paid below minimum wage.[108] The lack of sufficient wages further emphasizes the importance of signing bonuses.

Argument II: As defined by Merriam-Webster, "fair" actions are those that are "conforming with the established rules."[109] According to this definition, teams that offer college seniors low signing bonuses are being fair because they are conforming with the rules established in the 2011 CBA, which allow teams to pay drafted players a signing bonus of any amount—at, above, or below the recommendation.[110]

Response II: Today the concept of "fairness" extends beyond legal standards or definitions.[111] Scholars have recognized the normative aspects of compensation.[112] Fairness in matters of employment, including wages, implies ethical duties of trust, honesty, and respect.[113] As Professor Moriarty, an ethics scholar from Bentley University, notes, "the efficiency of a compensation package or policy does not guarantee its justice."[114] Moriarty also states that "paying an employee is a way of *treating* them, and this treatment can be assessed morally. It can be a promise kept or a promise broken. It can betray a lack of respect for the workers and their contributions, or it can respect them."[115] Paying a college senior only 20% of what is recommended hardly seems "fair" or respectful. This lack of "fairness" is further exaggerated when college seniors are compared to college juniors and high school seniors—both of whom earn substantially higher signing bonuses. While leverage may lessen the impact, fairness becomes more problematic when these differences become too large. Professor Bloom, an ethics scholar from the University of Notre Dame, believes that "when they do, both individual and team performance are likely to suffer" because people find such differences "not only unfair, but immoral."[116]

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107. Phil Coke is a pitcher for the Chicago Cubs. During his six years in the minors, Coke was forced to live on a steady diet of cheap and unhealthy fast food. Currently listed at 215 pounds, Coke ballooned to 245 pounds during his time in the minors. In an interview with Jonah Keri, Coke said: "For minor leaguers, being broke also means subsisting just about entirely on fast food, a curious way for teams to develop finely tuned athletes." *Id.*

108. Michael McCann, *In Lawsuit Minor Leaguers Charge They Are Members of 'Working Poor'*, SPORTS ILLUSTRATED (Feb. 12, 2014) http://sportsillustrated.cnn.com/mlb/news/20140212/minor-league-baseball-players-lawsuit/.

109. "fair." Merriam-Webster.com. 2013. http://www.merriam-webster.com (Aug. 3, 2013).

110. *See supra*, text accompanying note 13.

111. Matt Bloom, *The Ethics of Compensation Systems,* 52 J. BUS. ETHICS 149, 149 (2004).

112. *Id. See also* Jeffrey Moriarty, *Justice in Compensation: A Defense,* 21 BUS. ETHICS: A EUROPEAN REV. 64, 68 (2012).

113. Bloom, *supra* note 111.

114. Moriarty, *supra* note 112 at 65. *See also* David R. Francis, *High Wages, Low Wages, and Morality,* The CHRISTIAN SCI. MONITOR (Jan. 30, 2006), *available at* http://www.csmonitor.com/2006/0130/p14s01-cogn.html. Francis talks about a public advocacy group, ACORN, which has been "winning a higher 'living wage' for workers in state after state, city after city, by appealing to voters' sense of justice." Jen Kern, director of ACORN's Living Wage Resource Center, says that appealing to voters' sense of justice is a strategy that has proven successful. "It's probably the best [argument] we have. A decent income is a moral matter of fairness."

115. Moriarty, *supra* note 112 at 68. *See also* D.G. Arnold & N.E. Bowie, *Sweatshops and Respect for Persons*, BUS. ETHICS Q., 13:2, 221-242.

116. Bloom, *supra* note 111, at 150.

Argument III: Compensation is "fair" if it has been agreed to by the employer and the employee without "force or fraud."[117] Players (who choose to sign) and their respective teams must both agree to the signing bonus. Thus, the signing bonus must be "fair."

Response III: While it is true that the teams are not practicing fraud and there certainly is no physical force, college seniors are often in a situation where they do not have practical choices other than to agree to whatever bonus is offered by a team. Moreover, as Professor Moriarty observed, "agreement" does not necessarily imply fairness.[118] There are limits to the concept of freedom of contract.[119] The law has often recognized the limits of "freedom of contract" in the context of wages. For example, the Equal Pay Act mandates equal wages for people who do the same job, regardless of sex.[120] Minimum wage laws also require employers pay employees at least a certain wage, even if the two agreed to a lower one.[121] Similarly, although the bonuses paid to colleges seniors are not contrary to legislation, the CBA's slot recommendations indicate fair bonuses. Bonuses far below these slots should be recognized as unfair.

Argument IV: The market establishes the compensation of workers through the laws of supply and demand. Firms are "wage-takers," not "wage-makers." They simply take the wage suggested by the market equilibrium; they do not make the wage.

Response IV: This argument would hold (somewhat) more weight for regular contracts during the season.[122] After the draft, if a player is vastly underpaid, he can leave the team (once his contract expires) for a team willing to pay him better. If teams pay too low, they will not be able to capture or retain top talent. If teams pay too high, they will incur unnecessary expenses. The MLB Draft, however, presents a different story. First, MLB, with regards to the draft, acts as a monopsonist, a single buyer for a product or service of many sellers.[123] MLB is the only professional baseball league in the United States and acts as a single buyer of baseball players. Professor Richard Craswell of the University of Chicago noted that "monopolized markets may not behave as well as markets where there's lots of competition."[124] Second, because of the structure of the draft, there is not a market amongst the thirty individual teams, like how there might be in the regular season. Once a team drafts a player, that team is the only "buyer" for that player. The player cannot accept any offers from the twenty-nine other teams. As a league, MLB does not operate in a proper market, nor do teams in the draft. MLB and its teams are "price-makers" in the draft,

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117. Moriarty, *supra* note 112, at 68.

118. Moriarty, *supra* note 112, at 69. "A just wage is not necessarily whatever wage is agreed to by employers and employees without force or fraud."

119. "A person who would give away too much of his own liberty must be protected from himself, no matter how rational his decision or compelling the circumstances." Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 775 (1983.)

120. *The Equal Pay Act of 1963,* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/laws/statutes/epa.CFM

121. *The Fair Labor Standards Act of 1938, As Amended,* U.S. DEPARTMENT OF LABOR, http://www.dol.gov/whd/regs/statutes/FairLaborStandAct.pdf

122. Even in a perfect market, this argument is still faulty. *See* Moriarty, *supra* note 112.

123. *Flood v. Kuhn*, 316 F.Supp. 271, 273 (S.D.N.Y. 1970), *aff'd* 443 F.2d 264 (2nd Cir. 1971), *aff'd* 407 U.S. 258 (1972).

124. Richard Craswell, *Freedom of Contract*, 5, available at http://www.law.uchicago.edu/files/files/33.Craswell.FrdmCntrct_0.pdf

not "price-takers." The three counterarguments mentioned above are weak for the reasons mentioned. The responses to each suggest that college seniors are, indeed, treated unfairly.

B. COLLEGE SENIORS ARE TREATED UNFAIRLY

While Mark Appel, the aforementioned number one draft pick, did receive less than the recommended amount, the underpayment was not severe enough to be considered "unfair."[125] With no salary cap and no "hard slot" system, there will be bonuses that fall above and below the recommendation as a result of negotiations and the system that is in place. Like Appel's, not all bonuses that fall below the recommendation are "unfair." Appel, and several other draftees, received fair bonuses. However, for college seniors, Appel is the exception—not the norm. Most college seniors are unfairly treated with bonuses extremely below the recommendation. Of the 57 college seniors who were drafted and signed in the first ten rounds, 51 of them received bonuses more than 50% less than the recommendation.[126] Forty-eight of them received bonuses more than 70% less than the recommendation.[127] With little leverage in negotiations, these college seniors are taken advantage of and given bonuses that do not accurately reflect their position in the draft.[128] Teams exploit these players so they have more money to offer their other picks. Treatment of the lower-paid players smacks of coercion. College seniors are primarily treated as a means to an end. College seniors in the MLB Draft are valued as helpless, cheap opportunities for teams attempting to comply with the new draft regulations. Paul Sewald, a pitcher from University of San Diego, was drafted by the New York Mets as a college senior in the tenth round of the 2012 Draft.[129] Sewald received a signing bonus of $1,000 – substantially below the recommended slot of $125,000.[130] When asked to describe the negotiation process, Sewald commented:

> There was a small opportunity to negotiate. With the [2011] CBA, many teams want to negotiate deals before the draft to let them know exactly who they can and cannot draft as to not waste a pick therefore wasting the money slot. . . . When the Mets called on draft day, the scout merely offered the $1,000 bonus to be picked in the 10th round and do a favor for the organization. . .It's a little depressing receiving a mere $1,000 while many players are getting $100, $200, $500 thousand, even $1 million.[131]

IV. PROPOSAL: A MINIMUM GURANTEE FOR COLLEGE SENIORS

A solution to this unjust treatment is possible, easily implemented, and greatly needed. Just as the law has mandated minimum wages and prohibited certain types of wage

125. Appel only received about 20% less than the recommended slot. *See* Appendix A.

126. *Id.*

127. *Id.*

128. In the first ten rounds, college seniors received bonuses that averaged more than 80% less than the recommended amounts. *Id.*

129. James Watkins, *High MLB Draft Picks Sign for $1,000 Apiece,* ASSOCIATED PRESS (July 4, 2012), http://bigstory.ap.org/article/high-mlb-draft-pifederalcks-sign-1000-apiece

130. *Id.*

131. Interview by Jonathan with Paul Sewald, via text message (Aug. 10, 2013).

discrimination to mandate a level of "fairness," it would be appropriate for MLB and the Players Association to put protections for college seniors in place.[132] For college seniors drafted in the first ten rounds, the CBA needs to guarantee a certain percentage of the recommended slot. For example, a college senior drafted in the first ten rounds would have a minimum guarantee of 50% of the recommended slot. This percentage is fairly arbitrary and can be left to the discretion of MLB and the MLBPA. However, it should fall somewhere between 20% (the percentage college seniors currently receive, on average) and 95% (the percentage college juniors currently receive, on average). Thus, 50% appears to be a reasonable percentage.

For college seniors drafted outside the first ten rounds (where recommended bonuses do not exist), the CBA needs to guarantee a minimum amount dependent on the round drafted. For example, a college senior drafted in the eleventh round may have a minimum guarantee of $30,000. A college senior drafted in the 30th round may have a minimum guarantee of $10,000.

Players would still be able to negotiate higher bonuses, however, a base guarantee would set a floor for each college senior. This differs significantly from a "hard-slotted system" where players receive an exact pre-determined amount based on the slot drafted.[133] This proposal still allows for players and teams to negotiate bonuses and would not apply to other draft-eligible players such as college juniors, high school seniors, and junior college players. Unlike a "hard-slotted system", this proposal would maintain the spirit of a free market with no salary cap.[134]

One objection would be the possible negative effect on players taken early in the draft. If teams were forced to pay more to college seniors in the draft, they would have less money available to pay their top picks. However, these top picks would still be paid extremely well, making this effect negligible. For example, if a team gave its drafted seniors a total of $100,000 more, this team would theoretically have $100,000 less to spend on higher picks. Mark Appel, for instance, may have received $6.25 million instead of $6.35 million. Another option would be for the team to spread this $100,000 across multiple picks, making the effect even more negligible. This hardly seems to be a problematic issue, especially when compared to the positive effects. With this proposal, the MLB would: (1) protect student-athletes who wish to finish with a degree,[135] (2) improve the college game, as more talented juniors would stay in college, (3) foster the importance of education and a college degree, and (4) improve the quality of athletes in the minor and major leagues.

Under the current CBA, college baseball players drafted after their junior year are faced with two options: (1) sign with the team and, in doing so, leave college, or (2) remain in school and re-enter the draft as a senior.[136] College seniors, as explained earlier, often

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132. Moriarty, *supra* note 112 at 69.

133. A "hard-slotted" system establishes bonuses for each pick and bonuses are not open for negotiation. *See* Nicholas A. Deming, *Drafting a Solution: Impact of the New Salary System on the First Year Major League Baseball Amateur Draft*, 34 HASTINGS COMM. & ENT. L.J., 427 (2012).

134. For more on the problems and disadvantages of a hard-slotted system, *see* Bradley R. Bultman, *Drafted Player Compensation: Incorrectly Hidden in the Afternoon Shadow of the Nonstatutory Labor Exemption,* 11 FL. COASTAL L. REV. 687 (2010).

135. For more on protecting college players. *See* Glenn M. Wong, Warren Zola, & Chris Deubert, *Going Pro in Sports: Providing Guidance to Student-Athletes in a Complicated Legal & Regulatory Environments*, 28 CARDOZO ARTS & ENT L.J. 553 (2011)

136. As per draft eligibility rules, some may be drafted after sophomore year if they meet the age requirement (21 years old). *See supra* note 55.

receive very low signing bonuses if they are drafted.[137] As a result, many college juniors choose the first option, forgoing their final year of school. Unfortunately, student-athletes who wish to complete school—and do so—are forced to sacrifice large signing bonuses in exchange for their degrees. This proposed solution would protect these students by guaranteeing them a certain monetary amount and allowing them to complete school without making such a substantial sacrifice.

Secondly, if college seniors were protected by the CBA, more college juniors would remain in school. Currently, many drafted juniors choose to sign and leave college because they understand the troubles seniors face when trying to negotiate a signing bonus.[138] If these troubles were solved, more juniors would be more inclined to remain in school. With more talented juniors staying in school, the overall college game would improve. Johnny Field, the aforementioned player who left for the draft and signed after his junior year, commented:

> If seniors could still get *slot* (the recommended amount) like they could as juniors and not worry about losing money or falling lower in the draft, then I believe a lot of juniors would come back for their senior year to try and improve and compete for a championship and, most importantly, receive their degree and enjoy another year of college. I would have highly considered returning for my senior year if this [solution] was implemented.[139]

Thirdly, MLB would continue to emphasize the importance of a college education. The latest CBA has encouraged more players to start school.[140] With the restrictions on draft eligibility, it also forces student-athletes to stay in school (usually for three years).[141] The CBA encourages players to both start and stay in school. With this proposal, the CBA would finally encourage students to finish school.

Lastly, teams can actually help themselves by paying college seniors a larger signing bonus (as long as they remain within their allocated amounts). In doing so, teams would let these players live more comfortable lives with a larger budget. With a larger signing bonus, these players would be able to eat, train, and live better—giving them a better opportunity to reach the big leagues and help their respective teams. In today's workplace, research shows that employees provide more value to the employer when they are valued and respected.[142] By giving these seniors signing bonuses that are more reflective of the recommended amount, these players will feel more appreciated—empowering them to perform better and provide more value to the organization. "People expect more from their organizations than economic rationality or meeting minimal standards for appropriate conduct. People aspire to be a part of organizations that they see as just, moral, even virtuous."[143]

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137. College seniors receive bonuses roughly 80% less than the recommended amount. *See* Appendix A.

138. Darren Heitner, *Money Extremely Limited for College Seniors Seeking to Play Professional Baseball*, FORBES (Mar. 30, 2014, 10:13AM), http://www.forbes.com/sites/darrenheitner/2014/03/30/money-extremely-limited-for-college-seniors-seeking-to-play-professional-baseball/

139. Facebook Messages from Johnny Field (Jan. 22, 2014) (on file with author).

140. *See supra* note 42.

141. *See supra* note 141.

142. Bloom, *supra* note 111.

143. *Id.*

CONCLUSION

Major League Baseball and its Players Association continue to promote labor peace with the latest collective-bargaining agreement, signed in 2011.[144] This CBA brought several changes to the game of baseball, the biggest, arguably being the new rules regarding the MLB Amateur Player Draft.[145] Specifically, the CBA enforced a "spending pool" for the first ten rounds for all teams.[146] While this has improved the college game and has encouraged more high school players to enter college, it exploits players who finish college.[147] Drafted college seniors are consistently given singing bonuses that fall extremely below the recommended amount.[148] These players are mostly looked upon as helpless, affordable options so teams can comply with new draft regulations.[149] The 2011 CBA will be in effect through the 2016 season.[150] Then, the Players Association and MLB will negotiate a new CBA. This presents an optimal time to consider the above proposal and have it in place for the 2017 MLB Draft. Furthermore, the MLBPA and MLB both have new executives negotiating this upcoming CBA. The Players Association has a new executive director, Tony Clark.[151] Rob Manfred succeeded Bud Selig as MLB's new commissioner in January 2015.[152] Agreeing to a proposal such as this would allow Clark and Manfred to immediately have a positive impact. By implementing a minimum guarantee for college seniors, MLB and its Players Association would protect these players while improving college baseball, Minor League Baseball, and Major League Baseball.

144. Adam Kilgore, *MLB. Players Announce New Collective Bargaining Agreement, Extend Labor Peace,* WASH. POST (Nov. 22, 2011). http://www.washingtonpost.com/sports/nationals/mlb-players-announce-new-collective-bargaining-agreement-extend-labor-peace/2011/11/22/gIQArYhSmN_story.html.

145. *See id.*

146. Stark, *supra* note 42.

147. *See supra* Part II.C.

148. *See supra* Part II.C

149. *See supra* Part II.A.

150. *Supra* note 19.

151. Barry Svrluga, *Tony Clark Named Executive Director of Major League Baseball Players Association,* WASH. POST (Dec. 3, 2013), http://www.washingtonpost.com/sports/nationals/tony-clark-named-executive-director-of-major-league-baseball-players-association/2013/12/03/e876855a-5c66-11e3-bc56-c6ca94801fac_story.html.

152. Paul Hagen, *Manfred to succeed Selig as next* Commissioner, MLB.com (Aug. 14, 2014), http://m.yankees.mlb.com/news/article/89636642/rob-manfred-to-succeed-bud-selig-as-next-commissioner.

APPENDIX A: COLLEGE SENIORS (2013 MLB DRAFT ROUNDS 1-10)

Pick	Player	Signed	Slot	+/-	Percent
1	Mark Appel	$6,350,000	$7,790,400	($1,440,400)	-18.49%
68	Jake Johansen	$820,000	$820,000	$0	0.00%
116	L.J. Mazzilli	$300,000	$441,800	($141,800)	-32.10%
125	Mason Katz	$95,000	$405,100	($310,100)	-76.55%
156	Buck Farmer	$225,000	$300,400	($75,400)	-25.10%
174	Luke Farrell	$75,000	$252,500	($177,500)	-70.30%
175	Matt Boyd	$75,000	$250,100	($175,100)	-70.01%
182	Garrett Cooper	$30,000	$233,700	($203,700)	-87.16%
183	James Dykstra	$30,000	$231,500	($201,500)	-87.04%
185	Jimmy Reed	$40,000	$227,100	($187,100)	-82.39%
194	John Murphy	$20,000	$208,300	($188,300)	-90.40%
203	Mike Adams	$150,000	$191,100	($41,100)	-21.51%
204	Kyle Bartsch	$10,000	$189,200	($179,200)	-94.71%
216	Connor Harrell	$55,000	$168,700	($113,700)	-67.40%
231	Trevor Frank	$10,000	$158,300	($148,300)	-93.68%
233	Forrestt Allday	$10,000	$157,500	($147,500)	-93.65%
234	Cody Stubbs	$75,000	$157,200	($82,200)	-52.29%
235	Kendall Graveman	$5,000	$156,900	($151,900)	-96.81%
237	Tyler Smith	$20,000	$156,100	($136,100)	-87.19%
241	Justin Parr	$15,000	$154,700	($139,700)	-90.30%
244	Kyle Farmer	$40,000	$153,600	($113,600)	-73.96%
245	Andrew Pierce	$10,000	$153,300	($143,300)	-93.48%
247	Nate Smith	$12,000	$152,600	($140,600)	-92.14%
252	Tyler Horan	$150,900	$150,900	$0	0.00%
254	Brandon Thomas	$75,000	$150,200	($75,200)	-50.07%
255	Scott Brattvet	$15,000	$149,900	($134,900)	-89.99%
256	David Napoli	$15,000	$149,500	($134,500)	-89.97%
260	Mitchell Garver	$40,000	$148,100	($108,100)	-72.99%
263	Kyle Martin	$10,000	$147,200	($137,200)	-93.21%
264	Daniel Rockett	$5,000	$146,800	($141,800)	-96.59%
265	Chad Girodo	$5,000	$146,500	($141,500)	-96.59%
266	Patrick Biondi	$10,000	$146,200	($136,200)	-93.16%
267	Jacob Zokan	$5,000	$145,900	($140,900)	-96.57%
268	Adam Cimber	$5,000	$145,500	($140,500)	-96.56%
270	Grant Nelson	$10,000	$144,800	($134,800)	-93.09%
271	Shane Martin	$5,000	$144,400	($139,400)	-96.54%
273	Nick Blount	$10,000	$143,800	($133,800)	-93.05%

274	Henry Yates	$5,000	$143,500	($138,500)	-96.52%
275	Nick Petree	$40,000	$143,100	($103,100)	-72.05%
280	Jose Samayoa	$10,000	$141,500	($131,500)	-92.93%
286	Jake Joyce	$15,000	$139,700	($124,700)	-89.26%
288	Zachary Godley	$35,000	$139,000	($104,000)	-74.82%
289	Michael Tauchman	$10,000	$138,700	($128,700)	-92.79%
293	Taylor Grover	$10,000	$137,400	($127,400)	-92.72%
295	Garrett Customs	$1,000	$136,800	($135,800)	-99.27%
297	Emilio Pagan	$5,000	$136,200	($131,200)	-96.33%
301	Jon Prosinski	$5,000	$135,300	($130,300)	-96.30%
302	Michael Ratterree	$25,000	$135,300	($110,300)	-81.52%
303	Brad Goldberg	$10,000	$135,300	($125,300)	-92.61%
307	Grant Gordon	$5,000	$135,300	($130,300)	-96.30%
308	Aaron Griffin	$3,000	$135,300	($132,300)	-97.78%
309	Austin Wynns	$10,000	$135,300	($125,300)	-92.61%
311	Jerad Grundy	$5,000	$135,300	($130,300)	-96.30%
312	Tyler Rogers	$8,000	$135,300	($127,300)	-94.09%
314	Tyler Webb	$30,000	$135,300	($105,300)	-77.83%
315	Daniel Wright	$10,000	$135,300	($125,300)	-92.61%
316	Brennan Middleton	$10,000	$135,300	($125,300)	-92.61%

APPENDIX B: COLLEGE JUNIORS (2013 MLB DRAFT ROUNDS 1-10)

Pick	Player	Signed	Slot	+/-	Percent
2	Kris Bryant	$6,708,400	$6,708,400	$0	0.00%
3	Jonathan Gray	$4,800,000	$5,626,400	($826,400)	-14.69%
6	Colin Moran	$3,516,500	$3,516,500	$0	0.00%
7	Trey Ball	$2,750,000	$3,246,500	($496,500)	-15.29%
8	Hunter Dozier	$2,200,000	$3,137,800	($937,800)	-29.89%
13	Hunter Renfroe	$2,678,000	$2,678,000	$0	0.00%
15	Braden Shipley	$2,250,000	$2,434,500	($184,500)	-7.58%
17	Tim Anderson	$2,164,000	$2,164,000	$0	0.00%
18	Chris Anderson	$2,109,900	$2,109,900	$0	0.00%
19	Marco Gonzalez	$1,850,000	$2,055,800	($205,800)	-10.01%
20	Jonathan Crawford	$2,001,700	$2,001,700	$0	0.00%
23	Alex Gonzalez	$2,215,000	$1,920,600	$294,400	15.33%
26	Eric Jagiello	$1,839,400	$1,839,400	$0	0.00%
27	Phil Ervin	$1,812,400	$1,812,400	$0	0.00%
29	Ryne Stanek	$1,758,300	$1,758,300	$0	0.00%
31	Jason Hursh	$1,704,200	$1,704,200	$0	0.00%

32	Aaron Judge	$1,800,000	$1,677,100	$122,900	7.33%
34	Sean Manaea	$3,550,000	$1,623,000	$1,927,000	118.73%
36	Aaron Blair	$1,435,000	$1,547,700	($112,700)	-7.28%
38	Michael Lorenzen	$1,500,000	$1,470,500	$29,500	2.01%
39	Corey Knebel	$1,433,400	$1,433,400	$0	0.00%
40	Andrew Thurman	$1,397,200	$1,397,200	$0	0.00%
41	Rob Zastryzny	$1,100,000	$1,361,900	($261,900)	-19.23%
43	Ryan Eades	$1,294,100	$1,294,100	$0	0.00%
44	Trevor Williams	$1,261,400	$1,261,400	$0	0.00%
49	Austin Wilson	$1,700,000	$1,110,000	$590,000	53.15%
53	Andrew Knapp	$1,033,100	$1,033,100	$0	0.00%
56	Tom Windle	$986,500	$986,500	$0	0.00%
58	Kevin Ziomek	$956,600	$956,600	$0	0.00%
63	Dillon Overton	$400,000	$885,600	($485,600)	-54.83%
70	Alex Balog	$795,200	$795,200	$0	0.00%
71	Chad Pinder	$750,000	$782,900	($32,900)	-4.20%
73	Colby Suggs	$600,000	$759,200	($159,200)	-20.97%
74	Kent Emanuel	$747,700	$747,700	$0	0.00%
77	Sam Moll	$600,000	$713,900	($113,900)	-15.95%
78	Stuart Turner	$550,000	$703,000	($153,000)	-21.76%
79	Dace Kime	$525,000	$692,200	($167,200)	-24.15%
86	Bryan Verbitsky	$400,000	$621,400	($221,400)	-35.63%
87	JaCoby Jones	$612,000	$612,000	$0	0.00%
88	Daniel Palka	$550,000	$602,600	($52,600)	-8.73%
90	Barrett Astin	$584,300	$584,300	$0	0.00%
91	Jacob May	$525,000	$575,400	($50,400)	-8.76%
92	Brandon Dixon	$566,500	$566,500	$0	0.00%
93	Mike Mayers	$510,000	$557,900	($47,900)	-8.59%
94	Jeffrey Thompson	$549,400	$549,400	$0	0.00%
99	David Ledbetter	$350,000	$520,600	($170,600)	-32.77%
100	Ryon Healy	$500,000	$525,600	($25,600)	-4.87%
101	Chase Johnson	$440,000	$510,600	($70,600)	-13.83%
103	Michael O'Neill	$500,900	$500,900	$0	0.00%
107	Conrad Gregor	$481,900	$481,900	$0	0.00%
108	Tyler Skulina	$800,000	$477,300	$322,700	67.61%
109	Jordan Patterson	$425,000	$472,600	($47,600)	-10.07%
111	Kyle Crockett	$463,600	$463,600	$0	0.00%
113	Myles Smith	$400,000	$454,800	($54,800)	-12.05%

114	Zane Evans	$400,000	$450,400	($50,400)	-11.19%
119	Cody Dickson	$375,000	$429,200	($54,200)	-12.63%
122	Taylor Williams	$400,000	$417,000	($17,000)	-4.08%
123	Andrew Mitchell	$413,000	$413,000	$0	0.00%
126	Austin Kubitza	$401,200	$401,200	$0	0.00%
131	Dylan Covey	$370,000	$382,300	($12,300)	-3.22%
132	Brian Ragira	$415,000	$378,600	$36,400	9.61%
135	Ben Lively	$350,000	$367,900	($17,900)	-4.87%
137	Tony Kemp	$250,000	$360,800	($110,800)	-30.71%
138	Trey Masek	$357,400	$357,400	$0	0.00%
140	Aaron Slegers	$380,000	$350,500	$29,500	8.42%
142	Chad Wallach	$343,900	$343,900	$0	0.00%
143	Corey Littrell	$300,000	$340,500	($40,500)	-11.89%
146	Jared King	$450,000	$330,800	$119,200	36.03%
147	Jack Reinheimer	$327,600	$327,600	$0	0.00%
151	Ben Wetzler	N/A	$315,200	N/A	N/A
152	Joshua Uhen	$250,000	$312,200	($62,200)	-19.92%
157	Kyle McGowin	$270,000	$297,600	($27,600)	-9.27%
158	Johnny Field	$247,500	$294,600	($47,100)	-15.99%
160	Joe Jackson	$175,000	$289,000	($114,000)	-39.45%
161	Bobby Wahl	$500,000	$286,200	$213,800	74.70%
162	Dan Slania	$283,500	$283,500	$0	0.00%
166	Austin Voth	$272,800	$272,800	$0	0.00%
168	Scott Frazier	$267,600	$267,600	$0	0.00%
176	Champ Stuart	$300,000	$247,700	$52,300	21.11%
178	Trevor Gott	$200,000	$242,900	($42,900)	-17.66%
179	Adam Frazier	$240,600	$240,600	$0	0.00%
181	Jason Monda	N/A	$236,000	N/A	N/A
187	Harrison Cooney	$222,800	$222,800	$0	0.00%
191	Kyle Finnegan	$200,000	$214,300	($14,300)	-6.67%
192	Nick Vander Tuig	$218,000	$212,300	$5,700	2.68%
193	Steve Janas	$210,200	$210,200	$0	0.00%
195	Zack Weiss	$180,000	$206,200	($26,200)	-12.71%
197	James Ramsay	$175,000	$202,300	($27,300)	-13.49%
198	David Garner	$175,000	$200,400	($25,400)	-12.67%
199	Konner Wade	$198,500	$198,500	$0	0.00%
200	Brian Gilbert	$120,000	$196,600	($76,600)	-38.96%
206	Matthew Oberste	$325,000	$185,700	$139,300	75.01%

209	Buddy Borden	$180,400	$180,400	$0	0.00%
210	Daniel Gibson	$178,600	$178,600	$0	0.00%
214	Brandon Trinkwon	$171,000	$171,900	($900)	-0.52%
218	Ty Young	$162,900	$165,400	($2,500)	-1.51%
219	Drew Dosch	$218,500	$163,800	$54,700	33.39%
222	Brandon Bednar	$161,500	$161,500	$0	0.00%
224	Nick Rumbelow	$100,000	$160,800	($60,800)	-37.81%
226	Jimmy Yezzo	$160,100	$160,100	$0	0.00%
230	Dustin DeMuth	N/A	$158,600	N/A	N/A
236	Ricky Knapp	$130,000	$156,500	($26,500)	-16.93%
249	Trey Mancini	$151,900	$151,900	$0	0.00%
251	Tyler Marincov	$100,000	$151,300	($51,300)	-33.91%
253	Kyle Wren	$150,500	$150,500	$0	0.00%
257	Brian Holberton	$150,000	$149,200	$800	0.54%
259	Patrick Valaika	$148,500	$148,500	$0	0.00%
269	Chad Kuhl	$145,000	$145,200	($200)	-0.14%
272	Tyler Linehan	$125,000	$144,100	($19,100)	-13.25%
277	Stephen McGee	$60,000	$142,500	($82,500)	-57.89%
279	Mitch Horacek	$100,000	$141,900	($41,900)	-29.53%
282	Donald Snelten	$140,900	$140,900	$0	0.00%
284	Conner Kendrick	$115,000	$140,200	($25,200)	-17.97%
290	Charles Irby	$138,400	$138,400	$0	0.00%
291	Ross Kivett	N/A	$138,100	N/A	N/A
299	Shane Carle	$100,000	$135,600	($35,600)	-26.25%
300	Jimmie Sherfy	$100,000	$135,300	($35,300)	-26.09%
304	Nick Keener	$5,000	$135,300	($130,300)	-96.30%
306	Kasey Coffman	$135,300	$135,300	$0	0.00%

APPENDIX C: HIGH SCHOOL SENIORS (2013 MLB DRAFT ROUNDS 1-10)

Pick	Player	Signed	Slot	+/-	Percent
4	Kohl Stewart	$4,544,400	$4,544,400	$0	0.00%
5	Clint Frazier	$3,500,000	$3,787,000	($287,000)	-7.58%
7	Trey Ball	$2,750,000	$3,246,500	($496,500)	-15.29%
9	Austin Meadows	$3,029,600	$3,029,600	$0	0.00%
10	Phil Bickford	N/A	$2,921,400	N/A	N/A
11	Dominic Smith	$2,600,000	$2,840,300	($240,300)	-8.46%
14	Reese McGuire	$2,369,800	$2,569,800	($200,000)	-7.78%
16	J.P. Crawford	$2,299,300	$2,299,300	$0	0.00%
17	Tim Anderson	$2,164,000	$2,164,000	$0	0.00%

21	Nick Ciuffo	$1,974,700	$1,974,700	$0	0.00%
22	Hunter Harvey	$1,947,700	$1,947,700	$0	0.00%
24	Billy McKinney	$1,800,000	$1,893,500	($93,500)	-4.94%
25	Christian Arroyo	$1,866,500	$1,866,500	$0	0.00%
28	Rob Kaminsky	$1,785,300	$1,785,300	$0	0.00%
30	Travis Demeritte	$1,900,000	$1,731,200	$168,800	9.75%
33	Ian Clarkin	$1,650,100	$1,650,100	$0	0.00%
35	Matt Krook	N/A	$1,587,700	N/A	N/A
37	Josh Hart	$1,450,000	$1,508,600	($58,600)	-3.88%
42	Ryan McMahon	$1,327,600	$1,327,600	$0	0.00%
47	Clinton Hollon	$467,300	$1,168,200	($700,900)	-60.00%
48	Andrew Church	$850,000	$1,138,800	($288,800)	-25.36%
50	Dustin Peterson	$1,400,000	$1,082,000	$318,000	29.39%
51	Blake Taylor	$750,000	$1,065,400	($315,400)	-29.60%
52	Justin Williams	$1,050,000	$1,049,200	$800	0.08%
54	Devin Williams	$1,350,000	$1,017,300	$332,700	32.70%
55	Tyler Danish	$1,001,800	$1,001,800	$0	0.00%
57	Oscar Mercado	$1,500,000	$971,400	$528,600	54.42%
59	Hunter Green	$942,000	$942,000	$0	0.00%
60	Riley Unroe	$997,500	$927,500	$70,000	7.55%
61	Chance Sisco	$785,000	$913,300	($128,300)	-14.05%
62	Akeem Bostick	$520,600	$899,400	($378,800)	-42.12%
64	Rider Jones	$880,000	$872,100	$7,900	0.91%
66	Gosuke Kotah	$845,700	$845,700	$0	0.00%
67	Kevin Franklin	$675,000	$832,700	($157,700)	-18.94%
69	Jordan Paroubeck	$650,000	$807,500	($157,500)	-19.50%
72	Tucker Neuhaus	$771,000	$771,000	$0	0.00%
76	Ivan Wilson	$624,900	$724,900	($100,000)	-13.80%
81	Jonathan Denney	$875,000	$671,200	$203,800	30.36%
82	Carter Hope	$560,900	$660,900	($100,000)	-15.13%
83	Patrick Murphy	$500,000	$650,800	($150,800)	-23.17%
84	Casey Meisner	$500,000	$640,900	($140,900)	-21.98%
85	Tyler O'Neill	$650,000	$631,100	$18,900	2.99%
89	Cord Sandberg	$775,000	$593,400	$181,600	30.60%
96	Jan'Hernandez	$550,000	$535,800	$14,200	2.65%
97	Thomas Milone	$528,100	$530,600	($2,500)	-0.47%
102	Carlos Salazar	$625,000	$505,700	$119,300	23.59%
104	Mark Armstrong	$496,000	$496,000	$0	0.00%

105	Drew Ward	$850,000	$491,200	$358,800	73.05%
106	Chris Kohler	$486,600	$486,600	$0	0.00%
110	Stephen Gonzalves	$700,000	$468,200	$231,800	49.51%
112	K.J. Woods	$459,200	$459,200	$0	0.00%
115	Evan Smith	$350,000	$446,100	($96,100)	-21.54%
118	Mason Smith	$415,000	$433,300	($18,300)	-4.22%
120	Matt McPhearson	$500,000	$425,100	$74,900	17.62%
121	Jake Sweaney	$400,000	$421,000	($21,000)	-4.99%
124	Cody Bellinger	$700,000	$409,000	$291,000	71.15%
128	Kean Wong	$391,000	$393,500	($2,500)	-0.64%
129	Jonah Heim	$389,700	$389,700	$0	0.00%
133	Tanner Murphy	$250,000	$375,000	($125,000)	-33.33%
134	Tyler Wade	$371,300	$371,300	$0	0.00%
141	Sean Brady	$800,000	$347,100	$452,900	130.48%
144	Amalani Fukofuka	$175,000	$337,300	($162,300)	-48.12%
148	Josh Van Meter	$308,000	$324,500	($16,500)	-5.08%
149	Trae Arbet	$425,000	$321,400	$103,600	32.23%
150	Jamie Westbrook	$450,000	$318,300	$131,700	41.38%
153	Thaddius Lowry	$400,000	$309,200	$90,800	29.37%
155	Ian McKinney	$227,100	$303,300	($76,200)	-25.12%
159	Travis Seabrooke	$291,800	$291,800	$0	0.00%
165	Cory Thompson	$367,900	$275,400	$92,500	33.59%
167	Jacob Nottingham	$300,000	$270,200	$29,800	11.03%
169	Dominic Nunez	$800,000	$265,000	$535,000	201.89%
170	Brian Navarreto	$262,500	$262,500	$0	0.00%
171	Casey Shane	$150,000	$259,900	($109,900)	-42.29%
173	Jordon Austin	$254,900	$254,900	$0	0.00%
177	Corey Simpson	$400,000	$245,300	$154,700	63.07%
188	Stephen Woods	N/A	$220,600	N/A	N/A
189	Alex Murphy	$275,000	$218,500	$56,500	25.86%
205	Conner Greene	$100,000	$187,400	($87,400)	-46.64%
208	Jake Bauers	$240,000	$182,100	$57,900	31.80%
213	Trey Michalczewski	$500,000	$173,600	$326,400	188.02%
215	Chris Rivera	$150,000	$170,300	($20,300)	-11.92%
221	Dustin Driver	$500,000	$162,000	$338,000	208.64%
223	Ian Stiffler	$210,000	$161,200	$48,800	30.27%
225	Tyler Mahle	$250,000	$160,500	$89,500	55.76%

227	Jason Martin	$159,700	$159,700	$0	0.00%
229	Terry McClure	$250,000	$159,100	$90,900	57.13%
232	Iramis Olivencia	$135,000	$158,000	($23,000)	-14.56%
238	Adrian de Horta	$425,000	$155,800	$269,200	172.79%
239	Neil Kozikowski	$425,000	$155,400	$269,600	173.49%
240	Brad Keller	$125,000	$155,100	($30,100)	-19.41%
242	Brandon Diaz	$150,000	$155,400	($5,400)	-3.47%
248	Roel Ramirez	$127,500	$152,200	($24,700)	-16.23%
258	Charcer Burks	$170,000	$148,900	$21,100	14.17%
283	Dylan Manwaring	$140,600	$140,600	$0	0.00%
287	Austin Nicely	$610,000	$139,400	$470,600	337.59%
296	Luis Guillorme	$200,000	$136,400	$63,600	46.63%
305	Malik Collymore	$275,000	$135,300	$139,700	103.25%
313	Ian Hagenmiller	$200,000	$135,300	$64,700	47.82%