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THE JOURNAL OF APPELLATE PRACTICE AND PROCESS DEVELOPMENTS

HOW COURTS USE WIKIPEDIA

Joseph L. Gerken*

I. INTRODUCTION

The research for the present article began innocently enough when a law student approached the reference desk and asked, “Can I cite Wikipedia in my moot court brief?” This author replied, confidently and authoritatively, “Of course not. Anybody can edit Wikipedia.” Then, in an exercise of caution, the author did a search in the ALLSTATES and ALLFEDS databases of Westlaw.¹ To his surprise, he retrieved almost 200 opinions in which courts referred to Wikipedia. Since that reference encounter several years ago, the number of cases citing Wikipedia has doubled.²

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1. The query was simply: “Wikipedia!”

2. As of May 4, 2010, the opinions in at least 117 state and 326 federal cases include citations to Wikipedia.

The sheer number of cases suggests that it is simply incorrect to say categorically that courts should not cite Wikipedia. Clearly, courts are finding Wikipedia to be an appropriate source in at least some contexts. However, the potential pitfalls of using Wikipedia are evident to anyone who has encountered erroneous or misleading information in a Wikipedia entry. The question then becomes whether there are times when the benefits of using Wikipedia can outweigh the risks of doing so.

Much has already been written about Wikipedia, including at least one excellent article regarding courts' use of the source.³ But this author sought to focus on a particular aspect of the question: How use of Wikipedia comports with traditional methodology employed by courts for determining relevant facts. The research was straightforward. The author read and summarized every case that cited Wikipedia. Particular attention was paid to why each court cited Wikipedia and how the Wikipedia-supported information functions in the context of its decision.

This review of cases citing Wikipedia shows that courts use information gleaned from that source in a variety of ways. The corresponding analysis focused on whether the use of Wikipedia might be categorized as innocuous or problematic. In particular, a court's use of Wikipedia to document a fact tangential to the case or related to its background was deemed innocuous, while use of Wikipedia was deemed problematic when it effectively became the deciding factor in the court's consideration of material factual issues in the case.

Typically, there is no discussion in these opinions of the propriety of using Wikipedia. The court simply declares a fact and cites Wikipedia as its source. However, in a steadily growing number of cases, the court addresses the question of whether it is proper to cite Wikipedia. Indeed, in one decision a lower court's citation of Wikipedia was declared to be reversible error. In consequence, this article also includes a discussion of the cases that explicitly address the propriety of citing Wikipedia. Finally, this article proposes a set of considerations

3. See Lee F. Peoples, *The Citation of Wikipedia in Judicial Opinions*, 12 Yale J. L. & Tech. 1 (2009). The article is a very insightful and thought-provoking overview of the issue.

to guide future courts in deciding whether to cite Wikipedia in particular contexts.

III. INNOCUOUS USE OF WIKIPEDIA

In many cases, the court's use of Wikipedia is unobjectionable. Indeed, there are times when a Wikipedia entry arguably enhances a court decision. The following segments discuss two such instances, namely (1) cases in which the Wikipedia citation supports a quip or a bit of trivia; and (2) cases in which Wikipedia serves to fill a gap in the evidentiary record.

A. Quips

Wikipedia has occasionally been used by judges to make a rhetorical point, or simply as support for a quip. Thus, in a case in which adequacy of notice was at issue, a dissenting justice questioned the majority's conclusion by observing that, "[a]s Sherlock Holmes might have said to Dr. Watson, 'It is elementary, my dear fellow,' that no meaningful public forum is provided citizens without meaningful notice," and cited the Wikipedia entry for Sherlock Holmes.⁴ And in a case involving an alleged securities scam, the court, in its recitation of facts, noted that "[a]pparently . . . P.T. Barnum was right when he quipped 'There's a sucker born every minute!', because the Defendants in a very short amount of time raised over \$32 million from 31 investors."⁵ The court then appended the following historical note, drawn from Wikipedia:

The phrase, "there's a sucker born every minute" is most often credited to circus entrepreneur, P.T. Barnum. However, his biographer could never verify that he made that remark and many of Barnum's friends and

4. *Pub. Util. Dist. v. N. Am. Foreign Trade Zone Ind., LLC*, 151 P.3d 176, 195 & 195 n. 1 (Wash. 2007) (Chambers J., dissenting) (citing Wikipedia, "Sherlock Holmes" (as of Jan. 24, 2007)).

5. *SEC v. Montana*, 464 F. Supp. 2d 772, 775 (S.D. Ind. 2006).

contemporaries said it would have been unlike him to make such a proclamation.⁶

One court used Wikipedia to support a sarcastic comment directed to the conduct of the lawyers before it, complaining that the plaintiffs repeatedly failed to provide pinpoint citations to documents in the 2500-page record, and then “put the length of the record in perspective” by quoting Wikipedia as authority for the fact that “Leo Tolstoy’s *War and Peace* is ‘typically over 1400 pages as a paperback.’”⁷ Similarly, a court will occasionally use Wikipedia when inserting an interesting bit of trivia into an otherwise mundane opinion. Consider, for example, the reference to Wikipedia in *Watson v. State*,⁸ which explains that “[t]he card game faro ‘enjoyed great popularity during the . . . 19th Century in the United States . . . where it was practiced by “Faro dealers” such as the infamous Doc Holliday.’”⁹ Along the same line is Judge Posner’s noting in an opinion that the defendant “is a former trainer of the Polish boxer Andrew Golota—the world’s most colorful boxer.”¹⁰

The Wikipedia entry cited in each of these decisions has absolutely no bearing on the core issues in the case. Wikipedia is utilized to inject humor or an interesting bit of trivia into an otherwise prosaic discussion. Given that no material facts are implicated, this use of Wikipedia seems quite innocuous. Indeed, inveterate readers of court decisions no doubt would welcome more instances of Wikipedia-supported humor.

6. *Id.* at 775 n. 3 (citing Wikipedia, “There’s a sucker born every minute” (no date noted)).

7. *Mann v. GTCR Golden Rauner, L.L.C.*, 483 F. Supp. 2d 884, 890 & 890 n. 5 (D. Ariz. 2007) (citing Wikipedia, “List of longest novels” (as of Mar. 7, 2007)); *cf. In re Kogler*, 368 B.R. 785, 786 n. 1 (Bankr. W.D. Wis. 2007) (citing Wikipedia, “May you live in interesting times” (as of Mar. 28, 2007) when commenting on provisions of Bankruptcy Abuse Prevention and Consumer Protection Act of 2005).

8. 204 S.W.3d 404 (Tex. App. 2006).

9. *Id.* at 424 n. 17 (Cochran, J., Keller, P.J., & Keasler & Hervey, JJ., dissenting) (quoting Wikipedia, “Faro” (as of Sept. 1, 2006)).

10. *U.S. v. Radomski*, 473 F.3d 728, 731 (7th Cir. 2007) (citing Wikipedia, “Andrew Golota” (no date noted)).

B. Gap Fillers

Courts have occasionally resorted to Wikipedia to fill gaps in the record attributable to the procedural posture of the case.

1. Using Wikipedia to Enhance Understanding of the Record in Pro Se Civil Rights Cases

Because many pro se complaints are drafted by prison inmates who do not have a high school—much less a law school—education, they are seldom models of pleading. Even when such a complaint survives the court's sua sponte review and is later subject to a motion to dismiss, the court is often left with a spotty record. Hence the need to fill gaps in the factual narrative. Courts have turned to Wikipedia to provide information that might have been supplied by the parties in a case with a more complete, professionally prepared record.

a. Medical Terms

In reciting the facts underlying an Eighth Amendment claim in *Crespo v. Laws-Smith*,¹¹ for example, the court noted that the defendant “repeatedly contract[ed] MRSA,”¹² and in a footnote citing Wikipedia, court explained that

Methicillin-resistant *Staphylococcus aureus* (MRSA) is a specific strain of the *Staphylococcus aureus* bacterium that has developed antibiotic resistance to all penicillins, including methicillin and other . . . antibiotics.¹³

And in reciting the history of the pro se plaintiff's post-surgical care in *Merinar v. Grannis*,¹⁴ the court noted that a neurological exam had disclosed “positive Tinel's sign on both wrists”¹⁵ and went on to explain:

According to the internet encyclopedia, Wikipedia,

Tinel's sign is a way to detect irritated nerves. It is performed by lightly banging (percussing) over the

11. 2007 WL 1469050 (E.D. Pa. 2007).

12. *Id.* at *1.

13. *Id.* at *1 n. 1 (citing Wikipedia, “MRSA” (no date noted)).

14. 2006 WL 436289 (N.D. Cal. 2006).

15. *Id.* at *5.

nerve to elicit a sensation of tingling or “pins and needles” in the distribution of the nerve.¹⁶

This explanation helps the reader understand the neurologist’s diagnosis and recommendations, and thus the court’s finding that Merinar should be permitted to proceed with his claim. One can appreciate that the court would not be inclined to call for an evidentiary hearing simply to confirm a commonly accepted definition of a medical term.

We can perhaps conclude that when confronted with a pro se complaint, the court’s turning to Wikipedia to define an essential medical term in the complaint seems reasonable, particularly when the definition is not subject to dispute.

b. Religious Practices

Pro se complaints asserting First Amendment freedom of religion claims do not always include detailed information regarding relevant religious rites or traditions. Courts reviewing such complaints have, for example, noted that “Jumu’ah” is “a congregational salat (prayer) that Muslims hold every Friday, just after noon”;¹⁷ that “Wudu” is “the act of washing parts of the body using clean water, performed by Muslims as part of the preparation for ritual worship”;¹⁸ and that a “Kufi” is “a short rounded cap, traditionally worn by persons of African descent to show pride in their heritage and [M]uslim religion.”¹⁹

2. *Using Wikipedia to Enhance Understanding of Police Investigations in Suppression Hearings*

Wikipedia has also been used as a gap filler in suppression hearings that review police investigations. Such investigations are often triggered by radio dispatches or other terse messages containing only basic information whose function is to alert

16. *Id.* at *5 n. 3 (citing Wikipedia, “Tinel’s sign” (no date noted)).

17. *Larry v. Goetz*, 2006 WL 1495784 at *1 n. 1 (W.D. Wis. 2006) (citing Wikipedia, “Jumu’ah” (no date noted)).

18. *Perez v. Frank*, 433 F. Supp. 2d 955, 959-60 (W.D. Wis. 2006) (citing Wikipedia, “Wudu” (as of May 22, 2006)).

19. *Booth v. King*, 2006 WL 287853 at *1 n. 3 (E.D. Pa. 2006) (citing Wikipedia, “Kufi” (as of Feb. 1, 2006)), *aff’d in part and rev’d in part*, 228 Fed. Appx. 167 (3d Cir. 2007).

officers to an imminent situation. When a suppression hearing is held to review the police investigation, the participants—attorneys, judge, police witnesses—are understandably focused on details that go to the dispositive issue, including whether police had probable cause to conduct a search. And of course they all use and understand the same jargon. It is only when a judge determines that the opinion deciding such a case merits publication that the description of otherwise tangential facts may require additional explanation.

At the suppression hearing in *U.S. v. Riley*²⁰ the officers testified that they had responded to a “radio dispatch [that] indicated that a reckless driver in a red Monte Carlo was . . . doing donuts.”²¹ In a footnote, citing Wikipedia, the court noted in its opinion that

a doughnut or a donut is a maneuver performed while driving a vehicle. Performing this maneuver entails rotating the rear or front of the vehicle around the opposite set of wheels in a continuous motion, creating (ideally) a circular skid-mark pattern of rubber on a roadway and possibly even cause[ing] the tires to emit smoke from friction.²²

Similarly, in the suppression hearing in *U.S. v. Coker*²³ witnesses testified that a “be-on-the-lookout” call had been issued for a black male driving a Nissan sports car with a T-roof.²⁴ Officers had testified that they observed Coker sitting in a car that matched this description, and in a footnote the court noted that

[a]ccording to *Wikipedia* . . . T-roofs “open a vehicle roof to the side windows, providing a wider opening than other sunroofs. [They] have two removable glass panels, and leave a T-shaped structural brace in the roof center.”²⁵

20. 2007 WL 3204063 (D. Neb. 2007).

21. *Id.* at *2.

22. *Id.* at *2 n. 1 (citing Wikipedia, “Doughnut (driving)” (as of Sept. 26, 2007)). Presumably, all the participants in the suppression hearing understood what a “donut” was, but when the magistrate decided to publish his opinion, he thought that an explanation for the general public was called for.

23. 433 F.3d 39 (1st Cir. 2005).

24. *Id.* at 40.

25. *Id.* at 40 n. 1 (citing Wikipedia, “Sunroof” (as of Oct. 27, 2005)).

The plaintiff in *Catlin v. DuPage County Major Crimes Task Force*²⁶ sued the authorities after he was arrested when police officers mistook him for a suspect in a drug investigation who was staying at a local Red Roof Inn and drove a yellow “crotch rocket” motorcycle. Police showed up at the motel and, seeing Catlin straddling a “crotch rocket,” presumed that he was the drug suspect.²⁷ The court, understandably concerned that the general reader might not be as conversant with biker slang as were those involved in the hearing, cited Wikipedia to explain that “crotch rocket” refers to “a ‘super sport’ or ‘super bike’ capable of great acceleration and with a distinctive seat shape.”²⁸

3. Using Wikipedia to Enhance Understanding of Examiners’ Findings in Social Security Cases

When a court reviews a decision denying Social Security benefits, it bases its decision on the record of an administrative hearing at which evidentiary rules are more relaxed than those in court. In addition, these hearings often involve questions of medical diagnosis and treatment, which can require use of terminology unfamiliar to lay readers, and hearing officers do not always require that medical experts explain terms used in their reports. Hence, when a district judge renders an opinion in a Social Security review, it is sometimes necessary to include explanatory notes summarizing the meaning of medical terms.

Thus, courts have cited Wikipedia in defining diagnostic tools such as the Global Assessment of Functioning Scale;²⁹ the Beck Depression Inventory;³⁰ the Minnesota Multiphasic

26. 2007 WL 2028336 (N.D. Ill. 2007), *aff’d sub nom Catlin v. City of Wheaton*, 574 F.3d 361 (7th Cir. 2009).

27. *Id.* at *1.

28. *Id.* (citing Wikipedia, “Crotch rocket” (as of July 9, 2007)).

29. *Montalvo v. Barnhart*, 457 F. Supp. 2d 150, 160 n. 5 (W.D.N.Y. 2006) (quoting Wikipedia, “Global Assessment of Functioning” (no date noted): “The Global Assessment of Functioning (“GAF”) Scale is a rating for reporting the clinician’s judgment of the patient’s overall level of functioning and carrying out activities of daily living. The GAF score is measured on a scale of 0-100, with a higher number associated with higher functioning.”).

30. *Kane v. Astrue*, 2008 WL 2776774 (M.D. Fla. 2008) at *4 n. 3 (quoting Wikipedia, “Beck Depression Inventory” (as of June 19, 2008): “The Beck Depression Inventory (BDI) is defined as a 21-question multiple choice self report inventory that is one of the most widely used instruments for measuring the severity of depression.”).

Personality Inventory,³¹ Bishop's Score,³² the Bruce protocol for assessing respiratory capacity,³³ and the "metabolic equivalent."³⁴ Courts have also cited Wikipedia in describing medications such as gabapentin³⁵ and Duragesic,³⁶ therapies such as intravenous immunoglobulin treatment,³⁷ diagnostic terms such as sixth nerve palsy³⁸ and hypertrophy,³⁹ and anatomical terms like extensor hallucis longus.⁴⁰ And a judge has also used a Wikipedia entry in determining that remand was warranted so that the hearing officer could develop a proper record in a case involving a complaint about trochanteric bursitis.⁴¹

31. *Winebarger v. Liberty Life Assurance Co.*, 571 F. Supp. 2d 719, 723 n. 6 (W.D. Va. 2008) (citing Wikipedia, "Minnesota Multiphasic Personality Inventory" (as of July 29, 2008): "the Minnesota Multiphasic Personality Inventory [is] a standardized written personality test, used to assist in diagnosing psychopathology").

32. *C.M. ex rel Lucius v. U.S.*, 2006 WL 3257915 (E.D. Mo. 2006) at *2 n. 3 (citing Wikipedia (no entry title or date noted): "Bishop's Score is a table used to determine how successful an induction of labor may be. A score of 9 is ideal.").

33. *Todman v. Astrue*, 2009 WL 874222 (S.D.N.Y. 2009), at *7 n. 4 (citing Wikipedia (no entry title or date noted): "The Bruce Test involves walking on a treadmill while the heart, ventilation volumes and respiratory gas exchanges are monitored by an electrocardiograph with various electrodes attached to the body.").

34. *Id.* at *7 n. 5 (citing Wikipedia (no entry title or date noted): "A 'MET' or 'metabolic equivalent' is the 'ratio of a person's working metabolic rate relative to the resting metabolic rate.'").

35. *Stemple v. Astrue*, 475 F. Supp. 2d 527, 531 n. 16 (D. Md. 2007) (citing Wikipedia, "Gabepentin" (no date noted): a "pain relief medication, especially for neuropathic pain, as well as . . . the treatment of migraines and its more controversial off-label usage in treating bipolar disorder").

36. *Roth v. Astrue*, 2008 WL 5585275 (D. Conn. 2008) at *8 n. 21 (citing Wikipedia, "Duragesic" (no date noted): "used for moderate to severe pain").

37. *Cahill v. Astrue*, 2008 WL 3978342, at *5 n. 8 (W.D. Mo. 2008) (citing Wikipedia, "Intravenous Immunoglobulin" (as of Aug. 15, 2008): "IVIG treatment is a blood product which is administered intravenously. It has been used to treat inflammatory, neurological, and muscle diseases. Treatment is rather expensive, running up to \$10,000 per treatment.").

38. *Anderson v. Astrue*, 569 F. Supp. 2d 902, 906 n. 12 (E.D. Mo. 2008) (citing Wikipedia, "Sixth nerve palsy" (as of Feb. 4, 2008): "Sixth nerve palsy is characterized by double vision and is caused by damage to the cranial nerve, which controls lateral eye movements.").

39. *Spratley v. Astrue*, 2008 WL 5330563 (S.D. Miss. 2008), at *3 n. 8 (citing Wikipedia, "Hypertrophy" (no date noted): "Hypertrophy is the increase of the size of an organ or in a select area of tissue.").

40. *Leon-Martinez v. Astrue*, 2009 WL 1833592 (W.D. Tex. 2009), at *8 n. 1 (citing Wikipedia (no entry title or date noted): "[T]he extensor hallucis longus is a thin muscle that functions to extend the big toe, dorsiflex the foot, and assists with foot inversion.").

41. *Devald v. Astrue*, 590 F. Supp. 2d 1184, 1203 (D. S.D. 2008) (citing Wikipedia, "Trochanteric bursitis" (no date noted): "[T]his bursitis 'is most common in middle aged

C. *What Have We Learned?*

In the majority of cases discussed in this section, Wikipedia was adduced to enlighten the reader with respect to a term or fact that was not subject to dispute between the parties. The Wikipedia entry served to fill a gap in the record and it was, typically, not subject to controversy among its various editors. Thus, there was little risk that the court's reliance on Wikipedia would, in any way, impact on the outcome of the case.

The use of Wikipedia as a gap filler in cases like these does not seem particularly problematic; indeed, in many instances, it enlightens readers about matters germane to, but not dispositive of, the issues in each case. But in a handful of cases, courts have utilized Wikipedia to rebut allegations in parties' pleadings.⁴² Depending on the procedural context, such a practice can run the risk of turning Wikipedia into an adversarial pleading. Courts should exercise caution when using the source in this fashion. Indeed, these cases remind us that a court exercising *sua sponte* review of a pro se complaint should scrupulously observe the requirement that factual assertions in the complaint are to be taken as true. Using Wikipedia to rebut such allegations creates the risk of improperly, and prematurely, converting the court's review into a dispositive summary judgment motion.

IV. WIKIPEDIA AS A DECIDING FACTOR

As the preceding discussion indicates, courts can and do

women and is associated with a chronic and debilitating pain which does not respond to conservative treatment.”).

42. See e.g. *Blount v. Jabe*, 2007 WL 3275150 (W.D. Va. 2007), at *4 n. 9 (citing undated Wikipedia entries for “Kosher,” “Halal,” and “Muslim dietary laws” in support of dicta suggesting that plaintiff's religious objections to the prison diet were unfounded); *State v. Alvarez*, 147 P.3d 425, 433 n. 5 (Utah 2006) (citing Wikipedia entry for Jesus Malverde as of October 6, 2006, in discussion of whether statues of this folk hero are uniformly associated with drug dealing or might just indicate their owners' associations with Mexican state of Sinaloa). *Alvarez* raises a series of interesting questions the analysis of which is beyond the scope of this article: What if police had testified that they focused on the defendant solely because of the Jesus Malverde image? And what if defense counsel had not been aware that the saint had significance to people for much more than his purported protection of drug dealers? Would it have been appropriate for the court to cite Wikipedia in order to ascertain for itself whether the police stop was justified? Or would the court have been bound by the record before it, in spite of its knowledge that police were basing the stop on misinformation?

cite Wikipedia with regard to a fact that is peripheral to the core issues and is not contested by the parties. But as this section will show, courts also cite Wikipedia with regard to material issues, which are often subject to dispute. When Wikipedia is adduced to decide the material facts in such cases, the roles of the participants may be seriously compromised. The following cases illustrate this concern.

A. Patel v. Shah

One of the earliest cases to cite Wikipedia used it as support for the court's finding with regard to the dispositive factual issue in the case. The litigants in *Patel v. Shah*⁴³ were doctors who ran against each other for hospital chief of staff. Some ballots were disallowed, a runoff was held, and the loser, Patel, sued the winner, Shah. At issue was whether the term "simple majority" means more than half of all votes cast, or more than half of all valid votes cast.

Following an evidentiary hearing, the trial court ruled that Patel had received a simple majority.⁴⁴ Shah appealed, but the appeals court rejected her arguments and affirmed the result below:

The medical executive committee had no authority to consult Robert's Rules of Order for the definition of *majority*. The bylaws do not refer to Robert's Rules of Order; furthermore, the bylaws qualify the term "majority" with the word "simple." As the parties conceded below, the term "simple majority" has myriad meanings to organizations all over the world. The trial court pointed out that Patel received more votes for than against of the votes that were counted. This meets a definition of "simple majority." (See, e.g., *Wikipedia, the Free Encyclopedia*).⁴⁵

There are a number of curious aspects to this decision. First, the court acknowledges that "the term 'simple majority' has myriad meanings." This would suggest that there is not one single unambiguous definition, and hence, that both doctors' interpretations of the term have some validity. If that is the case,

43. 2004 WL 2930914 (Cal. App., 4th Dist., 2004).

44. *Id.* at *3.

45. *Id.* at *5.

one might be inclined to defer to the ruling body's interpretation in the absence of an authoritative definition. Yet the court rejects the committee's interpretation.

Also, the court does not explain its ruling that the election committee "had no authority" to consult Robert's Rules of Order. The committee certainly did not have express authority to consult Wikipedia either. Why, then, did the court think it proper to rely on Wikipedia, not simply as a source for the meaning of the term, but as the dispositive source? The committee did not consult Wikipedia. The hospital's by-laws do not defer to Wikipedia. It simply appears out of nowhere to resolve the controversy in the penultimate paragraph of the opinion.

It bears noting as well that Wikipedia's definition of "simple majority" has by no means been uniform over the years. The entry in place at the time of the *Patel* decision defines "simple majority" as follows: "A 'simple majority' . . . means that, of those who cast a vote for or against a proposition or candidate, more than half the votes is necessary for election."⁴⁶ This definition seems to support the court's reasoning and its ruling in favor of Patel. However, the definition retrieved by the author in the summer of 2009 indicates that "simple majority" was then defined by Wikipedia to be synonymous with "majority," namely, "a voting requirement of more than 50% of all votes cast."⁴⁷ This definition seems to support Shah's interpretation.

B. *State v. Harris*

*State v. Harris*⁴⁸ is unique in that both the majority and dissent cited the same Wikipedia entry in support of their respective opinions. In fact, the Wikipedia citation directly supported the central thesis of each opinion.

46. Wikipedia, "Simple majority" (as of Dec. 1, 2004). The *Patel* decision, which is dated December 17, 2004, does not indicate the date on which the court consulted Wikipedia, but this entry remained the same until July 15, 2005.

47. *Id.* (as of June 11, 2009).

48. 2009 WL 129878 (Wis. App.), *review granted*, *State v. Harris*, 775 N.W.2d 100 (Wis. 2009) (tbl.).

The defendant stated at sentencing that he was not employed, but that the mother of his one-year-old daughter worked full time. The following colloquy ensued:

The Court: So, the mother works and you sit at home, right?

Defendant: Yeah.

...

Court: Is she going to college too?

Defendant: Yes.

Court: Where do you guys find these women[?] . . . I'd say about every fourth man who comes in here unemployed, no education, is with a woman who is working full time, going to school. Where do you find these women? Is there a club?⁴⁹

Later in the sentencing, the judge remarked, "Mr. Harris sits at home, gets high while his baby mama works and goes to school. I swear there's a club where these women get together and congregate."⁵⁰

The appellate court held, based on these comments, that the trial court

erroneously exercised its discretion when it made comments at sentencing that suggested to a reasonable person in the position of the defendant or a reasonable observer that it was improperly considering the defendant's race in imposing sentence.⁵¹

And the court continued:

While the term "baby mama" might well have non-racial meaning used in some situations in isolation, the totality of the comments are of concern because, in combination with references to "these women" and "you guys"—a short step from the phrase "you people"—which is commonly understood to be insulting to the group addressed—these terms could reasonably be understood by an African-American or other observer, or a defendant in Harris's

49. *Id.* at *1.

50. *Id.* at *2.

51. *Id.*

position, to be expressions of racial bias, even though we assume they were not intended to be racially offensive.⁵²

The dissenting judge disputed the majority's parsing of the trial judge's comments. She reasoned that the court's remarks did not imply racial stereotyping. Rather, she opined, "the court is simply referring to the lazy, unmotivated, unproductive character of Harris in contrast to the hardworking, ambitious mother of his child."⁵³ The dissent specifically disputed the majority's interpretation of the term: "'Baby mama' does not refer to any particular race. It is currently a trendy pop-culture term for a single mother."⁵⁴ In a footnote, the dissenting judge also noted that

Wikipedia's definition (citing the Oxford English Dictionary) confirms that the meaning of "baby mama" is a single mother Because Wikipedia is a communally-created resource tool, its definition of "baby mama" provides some guidance as to the popular (objective) meaning of the phrase.⁵⁵

Here we have the majority and dissenting opinions citing the same Wikipedia entry⁵⁶ for diametrically opposite interpretations of the phrase "baby mama." Those contrasting interpretations led directly to the contrary conclusions reached in the two opinions. In other words, this is a case in which the Wikipedia entry is on the dispositive issue in the case, and yet is clearly subject to contradictory interpretations.

C. Platinum Links Entertainment v. Atlantic City Surf

Platinum Links Entertainment, which planned a rap and hip hop concert to be held at the Atlantic City Surf's stadium, sued

52. *Id.* at *3 (citing Wikipedia, "Baby mama" (as of Dec. 17, 2008): "The phrase 'baby mama' is said to have originated in Jamaican creole as a reference to an unmarried mother and is now common in American hip hop.").

53. *Id.* at *8 (Brennan J., dissenting).

54. *Id.*

55. *Id.* at *8 n. 7 (citing Wikipedia, "Baby mama" (as of Dec. 16, 2008), and Oxford English Dictionary, "Baby mama").

56. The majority indicated that its judges visited the Wikipedia entry on December 17, 2008. The dissenting judge visited the entry on December 16, 2008. Thus, the entry viewed by both sides was created on December 5, 2008; it was not edited again until December 19, 2008.

when the Surf cancelled the contract after receiving warnings from the Atlantic City police about possible gang violence at the concert. The concert was ultimately held on the planned date, after Platinum Links obtained a state court injunction, but the plaintiffs alleged that attendance suffered because of the publicity attending the planned cancellation.⁵⁷

Platinum Links, claiming that the cancellation had been motivated by racial animus, sued in federal court under 42 U.S.C. § 1981, which prohibits racial discrimination in the making and enforcement of contracts.⁵⁸ The plaintiffs cited defendants' use of terms like "gangsta rap" and "gang-related violence" that "are closely related with particular minorities."⁵⁹ In support of this argument, Platinum Links pointed to the warning memorandum from a deputy chief of police in which he stated that "[t]his Gangsta Rap group has an established history of violence and gang affiliation with the Bloods."⁶⁰

In granting the defendants' motion for summary judgment, the court rejected the contention that the defendants acted with racial animus.⁶¹ In a footnote, the court made the following observation:

Although this Court does not necessarily consider Wikipedia an authoritative source, Plaintiffs rely on a definition of the term "rap music" from this website in support of their argument. . . . Plaintiff's citation led this Court to look up, *sua sponte*, the term "gangsta rap" on the

57. *Platinum Links Entertainment, Inc. v. Atlantic City Surf Professional Baseball Club, Inc.*, 2006 WL 1459986 at *1-3 (D.N.J. 2006).

58. See 42 U.S.C. § 1981(a), (b) (providing that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts" and defining the right to "make and enforce contracts" as encompassing "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship") (available at <http://uscode.house.gov>).

59. *Platinum Links*, 2006 WL 1459986 at *16.

60. *Id.*

61. *Id.* Because the court did not discuss any other evidence adduced by either party on this issue, it is not clear whether Platinum Links proffered any evidence other than the deputy chief's memo in support of the assertion that the cancellation was racially motivated. Nor is it clear whether the Surf submitted any evidence in support of the deputy chief's assertion that the rap group had "a history of violence" or that it was "affiliat[ed] with the Bloods" gang.

same website, and this Court notes that the description does not make mention of race.⁶²

This statement was followed by an extended quotation from the Wikipedia entry.⁶³

There are a number of ambiguities in the court's use of Wikipedia here. The court starts with the disclaimer that it does "not necessarily consider Wikipedia an authoritative source," yet it is clear that the court intends the Wikipedia entry on gangsta rap to be considered credible, if not authoritative, because the court cites Wikipedia in support of its conclusion that gangsta rap does not implicate any racial animus. Another ambiguity goes to the weight that the court ascribed to the Wikipedia information: The Wikipedia entry stands as the only evidence tending to debunk the notion that the police intended gangsta rap to be a stand-in for a racial judgment, and the court admits consulting the entry *sua sponte*, without giving either side a chance to respond.

We are left, then, with a threshold question: Did the court base its grant of summary judgment on a Wikipedia entry, or was the ruling narrowly based on Platinum Links's failure to adduce relevant evidence in support of its claim?⁶⁴ The court quotes that entry as indicating that "[g]angsta rap is a subgenre of hip hop which involves a lyrical focus on the lifestyles of inner-city criminals,"⁶⁵ The entry for "Inner city" in effect on the date on which the court consulted Wikipedia stated that

the term is often applied to the poorer parts of the city centre and is sometimes used as a euphemism with the connotation of being an area, perhaps a ghetto, where people are less educated and wealthy and where there is more crime. . . . By the late 20th Century, many large American cities were largely black or Hispanic, while suburban areas were often heavily white.⁶⁶

62. *Id.* at n. 6 (citing Wikipedia, "Gangsta rap" (as of Apr. 27, 2006)) (internal citation omitted).

63. *Id.*

64. In this regard, the absence of evidence supporting the deputy chief's assertion that the rap group had a history of violence and was affiliated with the Bloods could be taken as suggesting his bias.

65. *Platinum Links*, 2006 WL 1459986 at *16.

66. Wikipedia, "Inner city" (as of Apr. 25, 2006). The next edit to this entry did not occur until June 21, 2006. *Id.*

Thus, the reference to “inner city” in the Wikipedia entry for “Gangsta rap” could be read as referring to black neighborhoods in American cities, known otherwise as “ghettos.”

The Wikipedia entry for “Gangsta rap” has been edited more than 2,000 times since it was viewed by the court in April 2006.⁶⁷ While content of these entries varies considerably, most have discussed the music’s focus on inner city themes such as crime, and the fact that the overwhelming majority of gangsta rap performers have been black males.⁶⁸ The court’s assertion that this Wikipedia entry “does not make mention of race”⁶⁹ is, then, simply not accurate.

The history for this entry suggests another potential problem: Entries occasionally get vandalized. Thus, one version of the “Gangsta Rap” entry described it as “[m]usic which sounds sooooooooooooooooooooo bad that it makes me want to SHOOT MYSELF IN THE [expletive deleted] HEAD.” Certainly, courts should be concerned that readers who review material cited in their opinions might encounter expletive-filled or otherwise offensive material. Entries that have been edited thousands of times are particularly susceptible to this risk.

D. Doe v. Liberatore

The plaintiff in *Doe v. Liberatore*⁷⁰ alleged that he had been sexually abused by a Catholic priest. The court dismissed a number of claims on summary judgment, but allowed the plaintiff to proceed with negligent supervision and breach of fiduciary duty claims against the bishop and diocese.⁷¹ In explaining its rationale for doing so, the court cited Wikipedia six times, four of them in an extended paragraph in which the court set out its understanding of relevant Church doctrine:

A Roman Catholic priest takes a vow of celibacy at his ordination and, therefore, is called to refrain from any and all sexual activity. Wikipedia, *supra*, “Clerical Celibacy” . .

67. See Wikipedia, “Gangsta rap.” Clicking the “history” tab on the article page will yield a list of edits in reverse chronological order.

68. *Id.*

69. *Platinum Links*, 2006 WL 1459986 at *16 n. 6.

70. 478 F. Supp. 2d 742 (M.D. Penn. 2007).

71. *Id.* at 774.

. . . While any sexual act outside the sacrament of marriage is forbidden by the Church, Wikipedia, *supra*, “Roman Catholic Church”, . . . homosexual acts are considered to be “intrinsically immoral” and “contrary to the natural law.” Wikipedia, *supra*, “Instruction Concerning the Criteria for the Discernment of Vocations with Regard to Persons with Homosexual Tendencies in view of their Admission to the Seminary and to Holy Orders” Indeed, the Church forbids the ordination of men to the priesthood who have “deeply rooted homosexual tendencies.” Wikipedia, *supra*, . . . “List of Christian denominational positions on homosexuality”. . . . Nevertheless, in general, homosexual behavior between consenting adults does not violate the rules of civil society.⁷²

Given the central importance of Church doctrine in a case in which the court concluded that the priest’s prior conduct should have alerted Church officials to a potential problem, the court’s reliance on Wikipedia is problematic. For example, the cited Wikipedia entry for “Roman Catholic Church” has been edited more than ten thousand times since the date of the *Doe* decision.⁷³ It was edited eight times on the date of the decision, and five times the day before.⁷⁴ The textual consistency of an entry that has been edited this frequently is certainly subject to question.

The current unavailability of Wikipedia entries cited by the court is also problematic.⁷⁵ The *Doe* decision cites two Wikipedia entries that no longer exist, so it is impossible to use the “history” function in Wikipedia to identify the entries for these terms that were in place at the time of the decision.⁷⁶ A

72. *Id.* at 761-62 (internal citations to Wikipedia URLs omitted).

73. See Wikipedia, “Roman Catholic Church.” Clicking the “history” tab on the article page will yield a list of edits in reverse chronological order. Clicking “500” retrieves the prior 500 entries, and in the summer of 2009, it was necessary to click “older 500” more than twenty times to get from the then-current entry to the entries for March 19, 2007, when the case was decided.

74. *Id.*, “history” (as of Mar. 19, 2007 & Mar. 18, 2009).

75. This discussion is based on Wikipedia entries consulted during the writing of this article on August 3, 2009.

76. The Wikipedia entries cited by the court were for “spooning” and for “Christian denominational positions on homosexuality.” It is possible to use the Internet Archive to retrieve some Wikipedia entries by going to www.archive.org and typing in the URL provided in the court decision and selecting the date nearest the decision. Because Internet

court's citation to an entry that is unavailable to the reader is of no use to him or her.⁷⁷

Perhaps the most important problem illustrated by the opinion in *Doe* is simply that Wikipedia is not equally authoritative for all information. There are some subjects for which Wikipedia is probably as good as any other available source—recent developments related to web technology, for example, or current slang. However, for more scholarly information, there will usually be a source recognized as authoritative that ought to be used instead of Wikipedia. Thus, in each instance in which the *Doe* opinion cited a Wikipedia entry on Catholic doctrine, a more authoritative source such as the *Catechism*,⁷⁸ or perhaps the *Catholic Encyclopedia*⁷⁹ could—and arguably should—have been consulted. Indeed, given the importance of the religious concepts to the court's analysis, it might have been preferable to take testimony, possibly from an expert witness, to document accepted Church doctrine.

A court's considering the authoritative nature of a Wikipedia entry is particularly important where, as in *Doe*, the underlying subject matter is controversial. Church teachings on homosexuality and on sexuality generally are very controversial topics, particularly in the context of a child-abuse case. Thus, Wikipedia entries relating to such topics are likely to be subjected to persistent, and often, acrimonious editing. One can posit a rule of thumb: The more controversial the topic, the less likely that the Wikipedia entry can be viewed as authoritative.

Archive saves web pages from only selected dates, however, an entry retrieved in this manner might not correspond precisely to the one viewed by the court. And indeed, it might be quite different, as entries are sometimes edited multiple times in just twenty-four hours. See e.g. n. 74, *supra*, and accompanying text.

77. The court's opinion indicates that the defendants did not dispute the plaintiff's allegations regarding the instances of sex abuse. Rather the dispute went to the supervisory defendants' culpability. *Doe*, 478 F. Supp. 2d at 749-52. It bears noting that two other Wikipedia entries cited in *Doe* elaborated on terminology related to Liberatore's actions, "spooning" and "grooming." These seem to be instances in which Wikipedia was used appropriately as a gap filler. The parties did not contest the meaning of the terms, which were mentioned in the plaintiff's deposition; however, apparently no one thought to include a definition of either term on the record.

78. U.S. Catholic Church, *Catechism of the Catholic Church* (2d ed., Doubleday Religion 2003).

79. *New Catholic Encyclopedia* (Berard L. Marthaler, ed., 2d ed., Gale 2003).

Indeed, at least one Wikipedia entry for “Catholic church” included a highly inflammatory reference to the priest sex scandal.⁸⁰ The possibility that a reader of the *Doe* opinion would come across such an inflammatory entry should certainly give the court pause.

E. O’Grady v. Superior Court

O’Grady’s Power Page, a self-described “online magazine devoted to news about Apple computers,” published several articles describing Apple’s development and planned marketing of a new product. Apple demanded that *O’Grady’s* owner take down the articles and subsequently sued him, claiming that the articles disclosed trade secrets. The trial court ruled against O’Grady when he moved for a protective order to prevent his disclosing confidential sources, so he moved for a writ of mandate or prohibition in the court of appeal.⁸¹

The Court of Appeal reversed the trial court’s ruling in an opinion that includes a methodical recitation of the events leading up to the litigation and carefully reasoned rationales for deciding each of O’Grady’s claims. However, it appears that the appellate court may have been hamstrung, to some degree, by the fact that the trial court did not conduct an evidentiary hearing prior to issuing its decision; there are no references to any witness testimony in the appellate court’s extended recitation of the facts, and the facts are supported only by references to declarations filed in support of the motion papers,⁸² which do not seem to have addressed the numerous technical and definitional matters that proved to be critical to the outcome of the case.

Perhaps as a consequence of this undeveloped record, the appellate court turned repeatedly to Wikipedia, citing its entries for “firewire,”⁸³ “breakout box,”⁸⁴ “Garage band,”⁸⁵

80. See Wikipedia, “Roman Catholic Church” (as of Mar. 18, 2007 at 4:50 [second entry for this time] and at 4:51).

81. *O’Grady v. Sup. Ct.*, 44 Cal. Rptr. 3d 72, 76-82 (Cal. App. 6th Dist. 2006).

82. See e.g. *id.* at 77-79 (citing declarations by O’Grady, “Kaspar Jade,” and unnamed Apple investigators).

83. *Id.* at 78 n. 3 (citing Wikipedia, “Firewire” (as of May 23, 2006)).

84. *Id.* (citing Wikipedia, “Breakout box” (as of May 26, 2006)).

“Breakout,”⁸⁶ “Asteroids,”⁸⁷ “Arkanoid,”⁸⁸ “Forum moderator,”⁸⁹ “bulletin board,”⁹⁰ “blog,”⁹¹ “webzine,”⁹² and “electronic paper.”⁹³ Some of the entries have only a tangential relation to the core issues in the case. For example, “Breakout” and “Asteroids” are video games, mentioned in a discussion of Apple’s reasons for tentatively naming its product “Asteroid,” while “fire wire” and “breakout box” are technical terms used in one of the articles.

However, a few of the terms had a good deal of significance to the court’s reasoning. For example, the California Shield Law provides that

[a] publisher, editor, reporter or other person connected with or employed upon a newspaper, magazine or other periodical publication . . . shall not be adjudged in contempt [of court] . . . for refusing to disclose the source of information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication.⁹⁴

The parties contested whether *O’Grady’s Power Page* was a “periodical publication” under this statute. In the course of its erudite discussion of the issue, the court averred that *O’Grady’s* seemed to have more of the characteristics of a webzine than of a blog, citing the Wikipedia entries for those two terms.⁹⁵ Although the court did not base its decision specifically on this

85. *Id.* at 79 n. 4 (citing Wikipedia, “Garage band” (as of May 26, 2006)).

86. *Id.* at 79 n. 5 (citing Wikipedia, “Breakout” (as of May 26, 2006)).

87. *Id.* (citing Wikipedia, “Asteroids” (as of May 26, 2006)).

88. *Id.* (citing Wikipedia, “Arkanoid” (as of May 26, 2006)).

89. *Id.* at 91 n. 15 (citing Wikipedia, “Forum moderator” (as of May 26, 2006)).

90. *Id.* at 92 n. 16 (citing Wikipedia, “Bulletin board system” (as of May 26, 2006)).

91. *Id.* at 103 n. 21 (citing Wikipedia, “Blog” (as of May 26, 2006)).

92. *Id.* (citing Wikipedia, “Webzine” (as of May 26, 2006)).

93. *Id.* at 103 n. 22 (citing Wikipedia, “Electronic paper” (as of May 26, 2006)).

94. Cal. Const. art. I, § 2(b); *see also* Cal. Evid. Code § 1070 (LEXIS 2009).

95. *O’Grady*, 44 Cal. Rptr. 3d at 103 n. 21 (citing Wikipedia, “Blog” & “Webzine” (both as of May 23, 2006)). The court also distinguished between “posting” which “consists of directly placing material on . . . a web site” and providing information to a “reporter” who then constructs a story which is posted. *Id.* at 91-92. The court noted that “to be sure, there are grey areas,” such as web fora on which a moderator exercises some editorial power, and bulletin boards, where the web manager reserves the right to delete messages, citing the Wikipedia entries for “Moderator” and “bulletin board.” *Id.* at 91 n. 15 & 92 n. 16. However, it characterized the articles on *O’Grady’s* web site as more akin to traditional articles in print publications. *Id.* at 103 n. 21.

distinction, it is clearly significant, as webzines are generally thought to resemble traditional print magazines more than blogs typically do, and thus arguably are within the ambit of the shield law.

To some degree, all of the Wikipedia entries cited in the *O'Grady's* opinion could be classified as definitional. Each entry defines a term, most of which apply to Web communication. However, the court's use of these entries goes beyond merely defining terms. Instead, the terms utilized—blog, webzine, moderated forum, bulletin board—explicate concepts that go to the heart of the court's analysis.

The *O'Grady's* court was required to apply state and federal law to technological uses that likely were not anticipated when the statutes were passed. This raises a critical question: Given the novelty and importance of the issues, and the dearth of testimony related to the key concepts, should the court have remanded the case so that the trial court might have developed a more complete record? Doing so would have assured the parties a hand in generating that record, would have allowed them to respond to the court's take on these conceptual issues, and would also have enabled the appellate court to issue its opinion without relying so heavily on Wikipedia.

F. What Have We Learned?

Given the ready availability of information on Wikipedia, it is not surprising that judges—and their clerks—are tempted to turn to that source to document facts. When the facts are peripheral to the core issues of the case, use of Wikipedia is arguably harmless, and may even improve the quality of the decision. However, when the Wikipedia entry relates to a material factual issue, courts must take care not to turn Wikipedia into the decider. As the decisions discussed in this section suggest, this concern can arise in a variety of procedural contexts. The common element in all of these cases is that the court has at its disposal a means of putting testimony and evidence on the record, so that the factual issue can be resolved by the appropriate fact-finder.

This concern is particularly critical when the Wikipedia entry relates to a controversial topic or is frequently edited. A

court citing such an entry runs the risk that a reader who consults Wikipedia will retrieve an entry that is dramatically different from the entry cited by the court.

V. DECISIONS CRITICIZING OR CRITIQUING WIKIPEDIA

Most courts that cite Wikipedia do not discuss the propriety of doing so. They simply make factual assertions and cite Wikipedia as supporting authority. However, a number of courts have addressed the question whether courts should cite Wikipedia, and in some of these cases, the court has explicitly rejected Wikipedia. On the other hand, a number of decisions have offered rationales for relying on Wikipedia.

A. Judicial Notice

In *Palisades Collection v. Graubard*,⁹⁶ plaintiff's counsel offered into evidence a Wikipedia entry stating that Bank One, the holder of the account at issue, had been purchased by J.P. Morgan. Counsel then offered evidence that J.P. Morgan sold defendant's account to Palisades. The trial court, relying on the Wikipedia article, took judicial notice of the fact that "banks are frequently purchased" and that "defendant's account landed at J.P. Morgan . . . [and] was assigned or sold to Palisades Assets."⁹⁷

On appeal, the court reversed the decision below, reasoning that "[t]he trial court's acceptance of Wikipedia was . . . contrary to the principle that judicial notice must be based upon sources whose accuracy cannot be reasonably questioned." The court noted that it reached this conclusion "after reviewing Wikipedia's own self-assessment".⁹⁸

Wikipedia bills itself as the "online encyclopedia that anyone can edit." Anyone with an internet connection can create a Wikipedia account and change any entry in Wikipedia. In fact, Wikipedia warns readers that "[t]he

96. 2009 WL 1025176 (N.J. Super. App. Div. 2009).

97. *Id.* at *1-*2. The trial court also found, based on a New York Times article, that the debt originally had been owned by Chevy Chase Bank, which sold it to Bank One. *Id.* at *2.

98. *Id.* at *3 (citing N.J. R. Evid. 201(b)(3)).

content of any given article may recently have been changed, vandalized or altered by someone whose opinion does not correspond with the state of knowledge in the relevant fields.” Thus, it is entirely possible for a party in litigation to alter a Wikipedia article, print the article, and thereafter offer it in court in support of any given position. Such a malleable source of information is inherently unreliable, and clearly not one “whose accuracy cannot be reasonably questioned.”⁹⁹

The court went on to hold that “[p]urged of this inadmissible material, plaintiff has not produced sufficient evidence to show it has the right to collect this claim from defendant,” and reversed the decision below.¹⁰⁰

Thus, *Palisades Collection* suggests that (1) Wikipedia is not sufficiently reliable to be the basis for a court’s taking judicial notice of facts; (2) use of Wikipedia in this fashion deprives a party of his or her right to contest material facts; and therefore, (3) taking judicial notice of material facts based on Wikipedia is reversible error. But it is important to appreciate the limitations of this ruling. The decision applies only to the use of Wikipedia to resolve contested issues of material fact. The *Palisades Collection* court said nothing about using Wikipedia to support assertions of fact that are peripheral to the core issues of a case, nor does its opinion preclude using Wikipedia as a source for uncontested facts. Despite those limitations, however, *Palisades Collection* is undeniably an important case, as it is an instance in which a trial court’s use of Wikipedia was held to be reversible error on appeal.

Using a similar approach, the court in *Steele v. McMahon*¹⁰¹ held that Wikipedia does not meet the requirements for judicial notice. Steele sued a member of the California Highway Patrol, claiming that the officer used excessive force in arresting him. Responding to defendants’ motion for summary judgment, he requested that the court take judicial notice of, among other things, a Wikipedia entry on “tunnel vision.” The court rejected this request.¹⁰²

99. *Id.* (footnotes omitted; internal quotation marks in original).

100. *Id.*

101. 2007 WL 2758026 (E.D. Cal. 2007).

102. *Id.* at *8 n. 5 (citing Fed. R. Evid. 201).

On the other hand, the court in *Thomas v. Sifers*¹⁰³ took judicial notice of the Wikipedia definition of “gastric dumping syndrome,” citing it with the following disclaimer:

The court wishes to specifically note that it is not endorsing the use of Wikipedia as a reliable source for citation, but the general nature of gastric dumping syndrome appears to be fairly generally accepted and provides context to understanding the parties' dispute here.¹⁰⁴

This analysis stands in striking contrast to that in *Steele* and *Palisades Collection*, in which the focus was on the source, and the key question was whether Wikipedia was a source whose accuracy cannot reasonably be questioned. The focus in *Thomas* was instead on the specific fact of which the court took notice, the court finding that, although in general Wikipedia was not necessarily reliable, there was no real controversy on this issue.

One might expect that future cases considering whether to take judicial notice of information in Wikipedia will be determined by which mode of analysis the court uses. Thus, a court focusing on Wikipedia as a whole will be unlikely to use it a basis for judicial notice; however, a court focusing on a specific Wikipedia entry may well find that the entry is sufficiently reliable.

B. A Thoughtful Analysis

Among the most detailed and thoughtful analyses of the propriety of citing Wikipedia is contained in *Campbell ex rel. Campbell v. Secretary H.H.S.*,¹⁰⁵ in which the plaintiffs filed a claim under the National Childhood Vaccine Injury Act.¹⁰⁶ The special master denied the claim, rejecting the reports filed by the plaintiffs' experts and denying their request for a hearing.¹⁰⁷ On appeal, the Court of Claims was critical of the master's reliance on articles that she had found on a variety of online sources. The court noted that it was appropriate to rely on “reputable medical

103. 535 F. Supp. 2d 1200 (D. Kan. 2007).

104. *Id.* at 1203 n. 3 (citing Wikipedia, “Gastric dumping syndrome” (no date noted)).

105. 69 Fed. Cl. 775 (Ct. Claims 2006).

106. *See* 42 U.S.C. § 300aa-10 et seq. (available at <http://uscode.house.gov>).

107. *Campbell*, 69 Fed. Cl. at 777.

or scientific explanation,”¹⁰⁸ but found that “[t]he articles that the Special Master culled from the internet do not—at least on their face—remotely meet this reliability requirement.”¹⁰⁹ In particular, the court offered the following critique of Wikipedia:

Wikipedia.com [is] a website that allows virtually anyone to upload an article into what is essentially a free, online encyclopedia. A review of the Wikipedia website reveals a pervasive and, for our purposes, disturbing series of disclaimers, among them, that: (i) any given Wikipedia article “may be, at any moment, in a bad state: for example it could be in the middle of a large edit or it could have been recently vandalized;” (ii) Wikipedia articles are “also subject to remarkable oversights and omissions;” (iii) “Wikipedia articles . . . are liable to be incomplete in ways that would be less usual in a more tightly controlled reference work;” (iv) “[a]nother problem with a lot of content in Wikipedia is that many contributors do not cite their sources, something that makes it hard for the reader to judge the credibility of what is written;” and (v) “many articles commence their lives as partisan drafts” and may be “caught up in a heavily unbalanced viewpoint.”¹¹⁰

The court seemed to be particularly concerned that the special master declined to hold an evidentiary hearing while basing her findings of fact on less-than-reliable web sources. Doing so, the court reasoned, effectively vitiated the parties’ ability to present the evidence and testimony that they determined to be relevant and probative:

[T]he Special Master relied on these materials not at her risk, but at *petitioners’* risk. At the least, an evidentiary hearing would have provided an opportunity for expert witnesses to corroborate or refute the information contained in the articles. Without such a hearing, reliance on these web materials involved an extraordinary risk that cannot be squared with the Special Master’s responsibility for

108. *Id.* at 781 (quoting *Althen v. Secy. H.H.S.*, 418 F.3d 1274, 1278 (Fed. Cir. 2005)).

109. *Id.*

110. *Id.* (citing Wikipedia.com (no date noted)). But Wikipedia was not the only web-based source of information that came in for criticism by the court. *See id.* (quoting disclaimers found on www.iowahealth.org, www.webmd.com, and www.nim.nih.gov/medlineplus).

conducting a proceeding consistent with the principles of fundamental fairness.¹¹¹

The *Campbell* decision is important for a number of reasons. First, it is the most detailed and cogent analysis of the reasons why reliance on Wikipedia as a source for factual findings can be problematic. Second, it puts the issue in the context of a judge's obligation to employ traditional evidentiary methods in fact finding. Finally, it couches the risk in terms of fundamental fairness. Thus, it seems that reliance on Wikipedia to the exclusion of witness testimony can effectively deny litigants their day in court.

C. Evidence of a Common Usage

In the above-discussed cases, Wikipedia was proffered as a source for factual information. Several other cases suggest another way of utilizing Wikipedia: as a basis for showing the way a particular word or phrase is commonly used.

*1. LaAsmar v. Phelps Dodge Insurance Plan*¹¹²

In *LaAsmar*, an insurer denied a claim under a vehicle accident policy on the ground that the driver's death was not due to an accident, but rather was due to his voluntary decision to drive while intoxicated. The case hinged on the meaning of the term "accident" in the insurance policy.¹¹³ The court pointed out that "[t]he plaintiffs use the word 'accident' in a colloquial context—to mean a crash, rollover or other incident involving a motor vehicle,"¹¹⁴ and went on to note that

[t]he colloquial meaning of the term "accident" in the automobile context is also demonstrated by the definition of "car accident" in the collaborative encyclopedia known as Wikipedia. It defines "car accident" as "an incident in which an automobile collides with anything that causes damage to the automobile, including other automobiles,

111. *Id.* (emphasis in original; footnote omitted).

112. *LaAsmar v. Phelps Dodge Corp. Life, Accidental Death & Dismemberment & Dependent Life Ins. Plan*, 2007 WL 1613255 (D. Colo. 2007).

113. *Id.* at *1-*4.

114. *Id.* at *4.

telephone poles, buildings or trees, or in which the driver loses control of the vehicle and damages it in some other way, such as driving into a ditch or rolling over.¹¹⁵

As this colloquial meaning of “accident” had been consistently employed by the investigating police officer, the coroner, and even a benefits specialist at the defendant insurance company, the court held that the claimants’ construction of the term was consistent with the use of “accident” in the policy and that they should recover.¹¹⁶

There are two ways of looking at the court’s use of Wikipedia in *LaAsmar*. On the one hand, this is precisely the type of situation that other courts have warned about: a party relying on Wikipedia to prove a point critical to the outcome. If this practice were widely adopted, potential litigants would be tempted to edit Wikipedia to suit their purposes and then call the court’s attention to the edited entry. On the other hand, assume that a Wikipedia entry had been edited hundreds of times by numerous people, and that virtually every edit was consistent with one litigant’s interpretation of a term. Might this not be compelling evidence of common usage of that term in that way? Certainly, it would suggest a consensus among that sub-set of the population who are inclined to edit Wikipedia. Absent evidence that these people are in some way unrepresentative of the general public, Wikipedia might prove in these circumstances to be a reliable indicator of common usage. The key is that Wikipedia should not be used to show the truth of a factual assertion, but rather to demonstrate a consensus among its contributors, whether that consensus is “true” or not.

2. Seventh-Day Adventists v. McGill¹¹⁷

In *Adventists* the plaintiff claimed that the defendant infringed its trademark by incorporating “Adventist” into his church’s name. Defendant argued that “adventist” had a generic meaning not protected by trademark. The court found “a triable issue of fact after considering evidence—from the dictionary

115. *Id.* at *4 n. 5 (citing Wikipedia, “Car accident” (no date noted)).

116. *Id.* at *5.

117. *Genl. Conf. Corp. of Seventh-Day Adventists v. McGill*, 2009 WL 1505738 (W.D. Tenn. 2009).

and Wikipedia—that indicated that this term could refer to a broader religious doctrine.”¹¹⁸

Here, Wikipedia is again cited to suggest a common understanding of a term. The generic use of adventist in the Wikipedia entry was deemed sufficient to demonstrate that there was a triable issue of fact. In other words, the entry was not taken as “true”; rather it suggested that reasonable minds might differ as to the term’s significance, trial of the issue was appropriate, and summary judgment was properly denied. Wikipedia was thus used to raise a factual issue, not to resolve that issue.

3. *Paul v. Ashbury Automotive Group, LLC*¹¹⁹

The court rejected defendant’s attempt to use Wikipedia to establish common understanding in *Paul*. The plaintiff, who won at trial, claimed that co-workers had created a hostile work environment. He alleged among other things that the general manager of the auto dealership where he worked repeatedly called himself a “redneck,” using the term “in a bullying way” when addressing African-American employees.¹²⁰ On appeal, the court “reject[ed] the defendant’s suggestion, relying on Wikipedia, that ‘redneck’ does not connote racist beliefs as a matter of law,” ruling that the jury could find that the term, in context, connoted racial prejudice.¹²¹

4. *What have we learned from LaAsmar, Adventists, and Paul?*

In *Adventists*, the court cited Wikipedia as evidence of a possible understanding of the term “adventist,” while noting that other meanings could also apply. In *Paul*, the court rejected defendants’ assertions that the term “redneck” never had racist connotations. And in *LaAsmar*, the court used Wikipedia as evidence that “accident” is widely used to describe a car crash resulting from any cause. These cases, taken together, suggest

118. *Id.* at *6 (citing Wikipedia (no term or date visited noted)).

119. 2009 WL 188592 (D. Ore. 2009).

120. *Id.* at *3

121. *Id.* at *5.

that it makes more sense to use Wikipedia to show what a term *may* mean than to suggest what it *must* mean.

D. Concerns about the Open-Edit Feature of Wikipedia

A number of decisions have focused on the anyone-can-edit aspect of Wikipedia in rejecting it as an authority. One court quoted a *Wall Street Journal* article maintaining that “anyone can edit [a Wikipedia] article anonymously, hit and run. From the beginning that has been its greatest strength and *its greatest weakness*.”¹²² Another court ruled that “Wikipedia disclaims any validity of the content listed on its website, and is therefore not a reliable source of technical information.”¹²³ A third reasoned that “[a]rticles in the online encyclopedia Wikipedia can be edited by anyone at any time. . . . Wikipedia is not a sufficiently reliable source.”¹²⁴ Yet another took the position that Wikipedia “is open to virtually anonymous editing by the general public, the expertise of its editors is always in question, and its reliability is indeterminable,” and wrote that “we do not find that it constitutes persuasive authority.”¹²⁵

E. Endorsement of Wikipedia

Although many courts discourage citation to Wikipedia, courts that explicitly discuss the admissibility of Wikipedia entries are not unanimous in disparaging it as a source.

1. Booth v. King¹²⁶

The opinion in *Booth*, a case involving prison guards’ confiscation of an inmate’s kufi, contains a ringing endorsement

122. *Flores v. State*, 2008 WL 4683960 at *2 (Tex. App. 2008) (quoting James Glerick, *Wikipedians Leave Cyberspace, Meet in Egypt* Wall Street J. W1 (Aug. 8, 2008)) (italics and brackets in original).

123. *Techradium, Inc. v. Blackboard Connect, Inc.*, 2009 WL 1152985 at *4 n. 5 (E.D. Tex. 2009).

124. *In re S.G.*, 2009 WL 875510 at *4 (Cal. App. 3d Dist. 2009).

125. *English Mt. Spring Water Co. v. Chumley*, 196 S.W.3d 144, 149 (Tenn. App. 2005) (citing *Patel*).

126. 2006 WL 287853 (E.D. Pa. 2006), *aff’d in part and rev’d in part on other grounds*, 228 Fed. Appx. 167 (3d Cir. 2007).

of Wikipedia. Because the plaintiff did not define kufi in his prose complaint, the court scoured various dictionaries for a definition:

After searching (unsuccessfully) for a more thorough definition in the *Oxford English Dictionary*, *Webster's Third New International Dictionary*, the *Random House Dictionary of the English Language* and *Encyclopedia Britannica*, we found one online that not only is more thorough but also more apt: "A Kufi is a short rounded cap, traditionally worn by persons of African decent [*sic*] to show pride in their heritage and muslim religion." See Wikipedia the Free Encyclopedia.¹²⁷

This endorsement suggests a possible niche for Wikipedia in court opinions as a source for information that simply is not available in more traditional authoritative sources, particularly when that information is not subject to dispute.

2. Alfa Corporation v. OAO Alfa Bank¹²⁸

Alfa Corporation, an American company, sued OAO Alfa Bank, a Russian-based financial services group, claiming that the English transliteration of the defendant's name caused confusion as to the identities of the two companies. The plaintiff proposed to have an expert witness testify as to the proper transliteration of the defendant's name. Defendants objected,¹²⁹ citing the Second Circuit's stricture that an expert should not be permitted to testify when his "opinion is based on data . . . that are . . . inadequate to support the conclusions reached,"¹³⁰ and contending that the expert's conclusions were based on "inherently unreliable" internet sources¹³¹ that included Wikipedia.

The court rejected this argument. It noted that "[c]ountless contemporary judicial opinions cite . . . Wikipedia," and reasoned that

127. *Id.* at *1 n. 3 (citing Wikipedia, "Kufi" (as of Feb. 1, 2006)) (italics and brackets in original).

128. 475 F. Supp. 2d 357 (S.D.N.Y. 2007).

129. *Id.* at 358-59.

130. *Id.* at 360 (citing *Amorgianos v. Natl. R.R. Passenger Corp.*, 303 F.3d 256, 266 (2d Cir. 2002)).

131. *Id.* at 361.

[w]hile citing a website in a judicial opinion is not analytically identical to basing an expert opinion on such a source . . . the frequent citation of Wikipedia at least suggests that many courts do not consider it to be inherently unreliable. In fact, a recent and highly-publicized analysis in the magazine *Nature* found that the error rate of Wikipedia entries was not significantly greater than in those of the *Encyclopedia Britannica*. . . . And, indeed, the defendants do not point to any actual errors in the entry cited by [the expert]. Thus, despite reasonable concerns about the ability of anonymous users to alter Wikipedia entries, the information provided there is not so inherently unreliable as to render inadmissible any opinion that references it.¹³²

An interesting phenomenon is at work in this case. While most court decisions that cite Wikipedia do not address its reliability, simply citing it in support of a factual premise, *Alfa* suggests that these decisions have a cumulative effect. Thus, the simple fact that dozens (indeed hundreds) of cases cite Wikipedia lends it an aura of credibility.

3. *Goodreau v. Williams*¹³³

One last use of Wikipedia ought to be mentioned. Reviewing a party's submission that included a reference to the Wikipedia entry on chelation therapy, the court in *Goodreau* noted that "[w]hile this encyclopedia is itself controversial, it does provide citation to a number of studies and articles on" the therapy.¹³⁴ Here, the court focuses, not on the contents of the Wikipedia entry, but rather on the sources cited in the entry. This certainly suggests another potential use of Wikipedia, namely as a starting point in the court's quest for authoritative information, even where the actual content of the Wikipedia entry is subject to challenge.

F. The Bottom Line

It seems safe to conclude that the jury is still out with

132. *Id.* at 361-62 (internal citations omitted).

133. 2009 WL 819487 (M.D. Tenn. 2009).

134. *Id.* at *2 n. 1 (citing Wikipedia, "Chelaton [sic] therapy" (no date noted)).

regard to the validity, authenticity, or reliability of Wikipedia as a basis for judicial fact-finding. Some cases have explicitly rejected Wikipedia as a source. One appellate court has reversed a trial court decision specifically because it relied on Wikipedia. Yet courts in a number of cases have explicitly endorsed Wikipedia as a credible source.

If there is a pattern to be discerned in these cases, it is that courts are beginning to recognize the need to address the question of Wikipedia's reliability. And at least in cases in which Wikipedia is adduced in support of a contested material fact, it is likely that future decisions will increasingly proffer an opinion as to the propriety of doing so.

VI. SOME QUESTIONS FOR COURTS TO ASK ABOUT WIKIPEDIA

It would be simplistic simply to ask whether courts should cite Wikipedia. The cases demonstrate that there are at least some occasions when citing Wikipedia is at worst harmless and at best potentially beneficial. The more important questions, summarized below, are contextual. They can help a court decide whether, in a particular situation, citing Wikipedia makes sense.

A. How Critical Is the Fact to the Outcome?

A fact supported by Wikipedia can be classified based on its relation to the defining issues of the case. Thus, a fact may be

- tangential to the case, as when it is used in connection with a quip;
- a background fact or "gap filler";
- a material fact; or even
- the decisive fact.

As the significance of the fact moves along the spectrum from tangential to decisive, the consequences of citing Wikipedia and the impact of that citation on the judicial process become more and more significant. Courts should exercise greater caution

when the Wikipedia citation is offered to support a fact that is decisive or material.

B. Is the Fact Disputed?

Where there is no serious dispute over a particular fact, citing Wikipedia in support of the fact is not likely to prejudice a party. However, a fact contested by the parties ought to be resolved according to the rules of procedure and evidence. Not surprisingly, there is a rough correspondence between the importance of a fact to the outcome and the likelihood that it will be contested, with parties much more likely to contest material facts than tangential ones. In situations in which it is not yet clear whether the parties will contest a fact, as when a judge conducts a sua sponte review of a plaintiff's pro se complaint, the court probably ought to shy away from using Wikipedia unless it is with relation to a tangential or background fact.

C. How Reliable is the Wikipedia Entry?

Many Wikipedia entries are quite reliable, but some signals may indicate that an entry is problematic. Here are some questions that may help in evaluating the reliability of an entry:

- How frequently has the entry been edited? Frequent editing suggests little consensus.
- Are edits to an entry substantial? Minor edits—those made, for example, to correct grammar—are less of a concern than changes regarding key events in an individual's life or a theory's history. If a reader cannot count on Wikipedia for consistency with regard to such key facts, the entry is problematic.
- Does the entry bear evidence of edit wars, in which two or more factions compete for control of the content? Sometimes, edit wars are resolved, and a consensus entry is achieved; however, an

entry subject to such conflict should be approached with caution.

- Has the entry been vandalized? A once-only incident that was corrected within minutes need not, in itself, be cause for concern. However, frequent vandalization of an entry creates a risk that the reader of a court opinion citing that entry will encounter a later version that has been vandalized, thus undermining the court's credibility.
- Is the entry composed mainly of facts or does it consist primarily of opinion? Straightforward facts, such as the population of a city or the defining symptoms of a medical condition, are easily subject to confirmation. An entry that consists mainly of the author's opinions is more problematic.
- Does the entry cite to authoritative sources? This is a two-edged sword. On the one hand, a Wikipedia entry unsupported by citations to recognized authorities should be treated with suspicion. On the other hand, if one encounters a well-sourced entry, it may be advisable to consult the cited authorities and, perhaps, to cite them rather than the Wikipedia entry.

D. What Are the Alternatives to Citing Wikipedia?

In the legal context, alternatives to Wikipedia can be divided into two general categories: (1) testimony and evidence proffered to the court and (2) print or online sources other than Wikipedia. When a material fact is disputed, it is clearly up to the litigants to adduce admissible testimony and exhibits in support of their respective allegations. Use of Wikipedia in such situations is almost always problematic. Even when the court is tempted to use Wikipedia to support uncontested background facts, it may be advisable to put testimony on the record instead.

The greatest problem, of course, arises when a court is confronted after the fact with the need to fill in an evidentiary gap. When Wikipedia is adduced to fill such a gap, the question of whether the court can and should cite another, more authoritative, source sometimes arises. Often, a Wikipedia entry will include footnotes or links to other sources. In such instances, the court may be better served by going to those primary sources. Wikipedia would in such a case serve a valuable role by providing the needed information that leads the court to an acceptable authority.

*E. Is Wikipedia Displacing Witnesses, Counsel,
Jury, or Judge?*

This is the ultimate bottom-line question. Rules of procedure and evidence have evolved over time as means of ensuring that parties, counsel, witnesses, juries, and judges are able to play their respective roles in litigation. A court must take special care that, in using Wikipedia, it is not either displacing witnesses and the jury by taking a contested factual issue out of the trial arena or depriving counsel of the opportunity to rebut and respond to a factual assertion by introducing a Wikipedia entry sua sponte.

These questions related to displacement of roles are of primary importance because disregarding them could lead the court to commit reversible error. Thus, the question whether Wikipedia is the preferable source to cite with regard to a background fact is unlikely to impact the outcome of a case. However, when a court, in citing Wikipedia, deprives a party of its right to contest evidence, or supplants the role of witnesses in demonstrating material or dispositive facts, that decision could conceivably be considered a reversible error. Only one appellate court had, at the time of this writing, reversed a lower court specifically because of a cite to Wikipedia.¹³⁵ However, it is only a matter of time before appellate courts are confronted repeatedly with similar scenarios.

135. See *Palisades Collection*, 2009 WL 1025176.

VII. CONCLUSION

These questions about Wikipedia's reliability when used for particular purposes are intended to help guide judges who are considering whether to cite Wikipedia. They can, of course, also guide litigants, counsel, and others involved in the litigation process in determining whether to cite Wikipedia. A better contextual awareness of the likely implications of citing Wikipedia in any court document will go a long way toward assuring that such citations, when used, are appropriate and helpful.

