

**ATLANTIC LAW JOURNAL**  
**VOLUME 18**  
**2016**

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## EDITORS' CORNER & INFORMATION FOR CONTRIBUTORS

Each of the articles in the *Atlantic Law Journal* was recommended for publication by the staff editors and reviewers using a double blind review process.

The *Atlantic Law Journal* attracts large numbers of submissions from professors and scholars located across the United States and overseas. The current acceptance rate for the Journal is less than 25% and has remained below that level throughout all of our recent history. The Journal is listed in Cabell's Directory of Publishing Opportunities in Management and Marketing, and is included in the "Secondary Sources" database on Westlaw, with archived Volumes beginning with Volume 11 (2009).

The review process and *Atlantic Law Journal* website were recently modified to streamline the processing of authors' submissions. Manuscripts received by October 15 will be reviewed by December 1 and the authors informed promptly thereafter. Manuscripts received by March 1, including those presented at the annual conference, will be reviewed by June 1 and the author(s) informed of the publication decision promptly thereafter.

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Please send your submission to Volume 19 and beyond to the *Atlantic Law Journal's* Managing Editor, Professor Keith Diener. Contact information is on the website. Please be sure that your submission meets the submission guidelines. For each submission, include a complete copy AND a blind copy with no author identification. Be sure to remove any identifying metadata. Name the files with the PRIMARY AUTHOR'S LAST NAME. For example, the primary author's last name is Jones, then the files should be named Jones.doc and Jones\_blind.doc.

We hope that you enjoy Volume 18 of the *Atlantic Law Journal*.

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### -ADVERTISING-

The *Journal* accepts both paid advertisements and exchanges of advertising or display space. Full and half page formats are welcome.

### -CONTENTS & OPINIONS-

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- ARTICLES -





## IN THE NEWS: THE PERFECT CLASS COMMENCEMENT

WILLIAM J. McDEVITT\*

### I. THE PROBLEM

There is no substitute for a good start. An old adage states, “You only have one chance to make a good first impression.” In baseball, the team that scores the first run wins the game two-thirds of the time.<sup>1</sup> This same principle applies to teaching a business law course.

Articles have been written about the importance of engaging students on the first day of class.<sup>2</sup> “[C]onnecting with students and presenting relevant course material”<sup>3</sup> is critical on that first day of class in order to set the tone for the entire course. But what about the second class and each class thereafter? How can a teacher tap into the natural energy and enthusiasm of the students from the first moment of class and ride that wave until the end? What would peak their interest and grab their attention immediately, while at the same time inform, inspire, and educate them? One exercise that has

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1 See Darrell Horowitz, *To the Sabermetric Know-It-Alls: The One Stat You Don’t Know That Matters Most*, Aug. 3, 2010, <http://bleacherreport.com/articles/429384-sabermetrics-theone-stat-they-don’t-know-that-matters-most>.

2 See Michael R. Koval, *Step Away from the Syllabus: Engaging Students on the First Day of Legal Environment*, 30 J. LEGAL STUD. EDU. 179 (2013).

3 *Id.* at 182.

proven to be an effective “class commencer” is what the author calls “In the News.”

## II. THE SOLUTION

“In the News” is an activity that starts each of my classes. It involves one or more students who make a brief PowerPoint presentation to the class on a law-related story that is both relevant to the topic of the day and “in the news.” The exercise requires students to search actively for recent stories that are directly related to the area of the law which the class is currently studying.

Much has been written over the years about effective learning, not only generally, but also with regard to business law. Scholars have noted the difference between conceptual learning and experiential learning.<sup>4</sup> As one commentator noted, “Learning is not a spectator sport.”<sup>5</sup> Indeed, there is strong evidence that effective learning should involve active, integrative, and experiential immersion on the part of students that both develops and transforms them.<sup>6</sup> Students learn best when they are actively involved in their own learning.<sup>7</sup>

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4 See Anne Tucker Ness, Susan Willey & Nancy R. Mansfield, *Enhancing the Educational Value of Experiential Learning: The Business Court Project*, 27 J. LEGAL STUD. EDU. 171, 175 (2010) (“While conceptual learning is important, the major leaps forward for students often occur when they encounter theories experientially. Students learn by doing.”).

5 See Linda A. Reid & Curt M. Weber, *Using Technology-Enabled Active Learning Tools to Introduce Business Ethics Topics in Business Law Courses: A Few Practical Examples*, 25 J. LEGAL STUD. EDU. 283, 292 (2008) (citing Arthur W. Chickering & Zelda F. Gamson, *Seven Principles for Good Practice in Undergraduate Education*, AM. ASSOC. HEALTH ED. BULL., Mar. 1987, at 3-7).

6 See Ness, Willey & Mansfield, *supra* note 4, at 173 (“Research on learning suggests that the most effective learning is active, integrative, and experiential, which both develops and transforms the student.”).

7 See Lucille M. Ponte, *The Case of the Unhappy Sports Fan: Embracing Student-Centered Learning and Promoting Upper-Level Cognitive Skills Through an Online Dispute Resolution Simulation*, 23 J. LEGAL STUD. EDU. 169

In response to these findings, many teachers of business law have abandoned the “talking head” lecture as the sole, if not the primary, method of transferring knowledge.<sup>8</sup> Instead, legal studies educators have embraced “active learning.”<sup>9</sup> Indeed, there is an infinite variety of active learning methods.<sup>10</sup> Education journals are replete with creative and engaging exercises that get students actively involved in learning that goes beyond the standard textbook.<sup>11</sup> When students can relate the principles and rules that they are learning to real life situations, they are apt to understand and remember those concepts better.<sup>12</sup>

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(2006) (“Pedagogical experts contend that students learn best when they are actively involved in and responsible for their own learning.”).

8 See Robert C. Bird, *Integrating Simulation Games into Business Law Teaching*, 19 J. LEGAL STUD. EDU. 203, 204 (2001) (“Business law teachers, like their law school brethren, have long since cast aside lectures as the sole instruction method.”).

9 See Larry A. DiMatteo & T. Leigh Anenson, *Teaching Law and Theory Through Context: Contract Clauses in Legal Studies Education*, 24 J. LEGAL STUD. EDU. 19, 20 (2007) (“This teaching methodology, called “active learning,” has become the new case method in college courses.”).

10 *Id.* at 21.

11 See, e.g., Regina Robson, *Breaking Out of the Box: An Exercise in “Extra-Cubicle” Thinking*, 11 J. ACAD. BUS. EDU. 54 (2010) (an ADR exercise that integrates legal knowledge and managerial decision making to arrive at an optimal solution to a problem); Robert b. Bennett, Jr., *Using a Jury Simulation as a Classroom Exercise*, 15 J. LEGAL STUD. EDU. 191 (1997) (using a mock trial conducted by the students); William J. McDevitt, *Active Learning Through Appellate Simulation*, 26 J. LEGAL STUD. EDU. 245 (2009) (an exercise using appellate court briefing and oral argument before a real judge in the classroom); Regina Robson, *An Entrepreneurial Strand in the Business Law Course: The Ice Cream Project*, 26 J. LEGAL STUD. EDU. 433 (2009) (an exercise where students negotiate against each other to arrive at the most advantageous contract).

12 See Susan J. Marsnik and Dale B. Thompson, *Using Contract Negotiation Exercises to Develop Higher Order Thinking and Strategic Business Skills*, 30 J. LEGAL STUD. EDU. 201, 203 (2013) (“In addition, content learned through a realistic exercise is more likely to be learned at a deeper level and remembered and used appropriately when it is needed later.”).

In the first class following the drop/add deadline, I circulate a sign-up sheet for “In the News.”<sup>13</sup> Using this sign-up sheet, students are assigned in the order in which their name appears to prepare the “In the News” presentation for the next class. Whether one or more students are assigned depends upon the number of students in the class and the number of class sessions.

The instructions are straightforward: find a current article related to or involving business law and prepare a PowerPoint presentation for the class.<sup>14</sup> Although students may present any business related story at the beginning of the semester, as the course moves into substantive areas of the law, students must present a recent story that relates to the topic that the course is covering during that class, such as contract law, tort law, employment law, etc. The students are directed to the local and national newspapers, news magazines, and websites for these publications, especially major outlets such as the *Wall Street Journal*, *Washington Post* and *New York Times*. For more esoteric areas of business law, such as corporate derivative law suits, I suggest that students use electronic databases that are available through the university library, such as Lexis-Nexis.<sup>15</sup>

The student decides the format of the PowerPoint presentation. Aside from a title slide that includes the student’s name and a final slide that reveals the date (in order to assure timeliness) and source of the story, students are free to design the presentation in the most effective way that they can.<sup>16</sup> While not expected, many students embellish their presentations with clip art, photos, logos or links to YouTube videos. Students are required to

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13 Students who want to be among the first presenters are urged to put their name on the top of the list. For students who procrastinate and/or are introverted, they can put their name towards the end of the list.

14 Sample instructions are located in Appendix A. Once the first students make their presentations, no further instructions are normally required.

15 Reflecting contemporary entertainment, many students access web sites such as Court TV (<http://www.courtstv.com>).

16 A sample is located in Appendix B.

submit their “In the News” presentations to me prior to class. This allows the professor to become familiar with the story, screen out irrelevant stories, and load them onto a flash drive or a network drive for easy access in the classroom.

“In the News” presentations are made at the start of class. All presentations are made from the front of the class and are directed to the students and *not* to the professor. Students are encouraged to prepare notes on the story and address the class using their notes. Although they may bring in the actual article upon which their story is based, they may only read excerpts from it as part of their presentation. Under no circumstances are they allowed to merely read the article to the class as the primary substance of their presentation. The presentation usually lasts less than 5 minutes, although the presentations sometimes trigger class discussions that require additional time.<sup>17</sup> At the conclusion of the presentation, I make relevant comments about the article, especially about how it relates to the topic at hand. The professor can also pose to or solicit questions from the class. When the presentations to the class are completed, one or more students are assigned for the next class and given the relevant topic to cover.

The “In the News” presentation is graded on several factors. First, and most importantly, is relevance. For example, if the class is covering contracts, then the story should have something to do with a case or dispute involving contract law. Topics involving administrative law may include an enforcement case, a proposed or new regulation, or a challenge to a regulation. Next, the story must be timely. Since one of the key goals of the exercise is to underscore the relevance of the law in everyday life, the story should be about something that is happening now or has just concluded. Professors should use their own judgment as to whether the story is “timely” based on the area of the law presented and the importance or

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<sup>17</sup> When a group makes an In the News presentation, the presentation takes longer since each member must participate, but there are fewer group presentations as compared to individual presentations over the course of the semester.

relevance of the story. Another factor is the quality of the presentation itself. Most students graduate, get jobs, and move into responsible positions. They will often be required to make presentations to supervisors, clients, and co-workers. PowerPoint presentations that are clear and eye-catching are prized. Finally, the oral part of the presentation is graded. Oral presentations that indicate a mastery of the subject and not merely reading from the PowerPoints are essential for effective communication.

The foregoing description contains the basics. There are several variations that can be used depending on the professor's style and the level, size, or dynamics of the class. For example, instead of each student making an individual presentation, they can be paired. Likewise if the class is already divided into groups, then the professor can require each group to make an "In the News" presentation.

### III. THE BENEFITS

The benefits of "In the News" are valuable and instructive for all parties concerned: the student, the class, and the professor.

#### A) To the Student

The first benefit to the student who is presenting the "In the News" report is to compel the student to read a newspaper or similar publication, either actual or online. A lament frequently voiced among faculty in describing our contemporary college students is their ignorance of current events. Many college students appear to be ill-informed as to events in the world beyond campus, or at least as knowledgeable as one would expect these future leaders to be. The student who is seeking an appropriate article to feature in his or her "In the News" presentation must pick up a newspaper or surf the Internet and peruse stories about events that are occurring in that mysterious world known as "beyond campus."

A second benefit of the exercise is to give the student practice in organizing a presentation. As stated earlier, “In the News” cannot consist merely of reading a story about a current legal issue. Rather, the student must create a PowerPoint presentation and must present a summary of the story in his or her own words. In order to do this, the student must read the article, digest its meaning, and relate it to the class in a concise and understandable manner. If the student does not understand the story, then he or she cannot relate it cogently to the class. Even if the student does understand the story, he or she still must convey the message with clarity. None of this is easy, but it is a skill that all educated persons must master if they want to be effective communicators.

The final benefit to the student is conducting the actual presentation itself. It is expected that our college-educated youth will move into leadership positions in both their professional and communal lives. In such a role, they will be called upon on numerous occasions to address groups of people in meetings of all sorts. Far from being natural, the ability to address a group of people, whether small or large, is a skill, and as a skill it requires significant practice in order to become proficient. Flushing students out from the comfort of their seats and placing them alone in the front of the class is a valuable exercise for developing presentation skills that they will need to succeed. Since “In the News” is relatively low key and no one “fails,” it serves as a confidence builder, especially for those students who are reluctant to be in the spotlight.

In short, “In the News” is an exercise that not only compels the students to become informed, but it also gives them an opportunity to practice and develop important public speaking and presentation skills.

## B) To the Class

The class is also a primary beneficiary of the “In the News” exercise. During the course of the semester, each student is required

to make a presentation. Most presentations involve legal stories that have happened within a few days of class. In our contemporary world where legal news is made every day, there is no shortage of interesting and important events. With between 20 to 40 students in a section making presentations over several months, a tremendous amount of timely legal information is conveyed to the class over the course of the semester. Collectively, the students become among the most informed persons at the college or university, not to mention in community at large, on contemporary legal issues by the end of the semester. There is virtually no major legal issue currently facing the region, state, or nation that is not at one time or another presented by a student to the class over the course of the semester during “In the News.”

A second major benefit of the exercise to the members of the class is their deepening appreciation of the relevancy of the law to their lives.<sup>18</sup> Simply put, “In the News” helps the students to appreciate that a legal environment course really matters! One of the most frequent complaints that students make to educators is that they cannot connect the course materials to their lives. There often appears to be no relevancy or link between certain types of knowledge and success, happiness, or fulfillment in life – goals toward which we all strive. Finding little or no relevance between course work and life, students quickly lose interest. The course, then, becomes an unpleasant ordeal that must be endured.

On the other hand, students who come to believe that the material that they are learning really matters in their lives are inspired. When students understand that there is a direct connection between the knowledge that they are acquiring and the quality of their lives, they are energized to learn as much as they can.

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18 See Susan J. Marsnik and Dale B. Thompson, *Using Contract Negotiation Exercises to Develop Higher Order Thinking and Strategic Business Skills*, 30 J. LEGAL STUD. EDU. 201, 203 (2013) (“In addition, content learned through a realistic exercise is more likely to be learned at a deeper and remembered and used appropriately when it is needed later.”).

Nothing relates the legal concepts found in a legal environment (or business law) course to real life like “In the News.” Class by class, presentation by presentation, students discover that principles of torts, contracts, agency, employment law, etc., are not irrelevancies to be eschewed. Rather, they learn that these concepts are the “stuff” of modern life that will confront them every day, not only in their business lives, but in their personal lives as well. With this connection firmly established in their minds, students are more motivated to optimize their learning in the course. And isn’t that what education is all about?

### C) To the Professor

The final beneficiary of “In the News” is the professor. These perquisites arise in several ways.

First, “In the News” gives the professor an opportunity to relate the material in the course to real life. In a course like Legal Environment that surveys many areas of the law, virtually every story that the students present touches on one aspect or another of the course material. By seizing upon the presentation, the teacher can reinforce legal principles that have been or will be covered in the course by relating them to an actual story that is in the news.

A second benefit is to allow the professor to deepen the students’ knowledge and appreciation of current events. Often, the “In the News” story will consist of a snippet of a legal controversy. Historical background, related issues, and prognosis of outcome are often omitted. The teacher can add to the students’ knowledge about the story by providing a frame of reference drawn upon years of study and experience, and thus aid students in seeing the problem within a larger historical or social context.<sup>19</sup>

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19 See Joshua E. Perry and Jamie Darin Prenkert, *Charting a Course to Effective Business Education: Lessons from Academically Adrift and Rethinking*

Another advantage is giving the faculty member the opportunity to editorialize. As professors, we enjoy sharing our insights on legal issues. Indeed, one of our most sacred charges as educators is to help our students to understand and make sense of the world around us. “In the News” provides us with a snapshot from which we can draw a more elaborate picture through our analysis and comments. Students can join in the dialectic, exchanging ideas as to how the matter at hand can, or should have been, fairly resolved.

The final benefit of “In the News” is that it provides a perfect segue into class. The students, now captivated by the presentation by their fellow student and the professor’s hopefully sagacious comments, are poised and motivated to learn more about the fascinating legal environment.

#### IV. THE PROOF IS IN THE PUDDING

Beginning in the spring 2012 semester, the hypothesis was put to the test. Twenty-five (25) students among two (2) sections of the course, Legal Environment of Business I, completed a survey evaluating the effectiveness of four aspects of the “In the News” activity. The survey was repeated in the fall 2012 semester (80 students), the spring 2013 semester (55 students), the spring 2014 semester (39 students), and the fall 2014 semester (92 students), bringing the total number of students involved in the study to two hundred ninety-one (291).

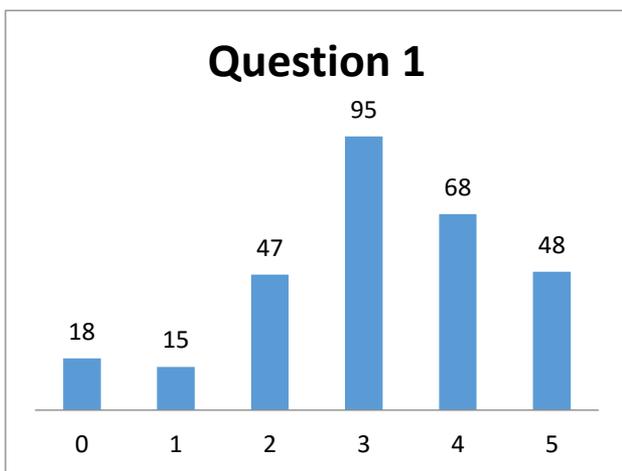
Using a 5-point Likert Scale, with 0 being the worst and 5 being the best, the students were asked to evaluate the following statements:

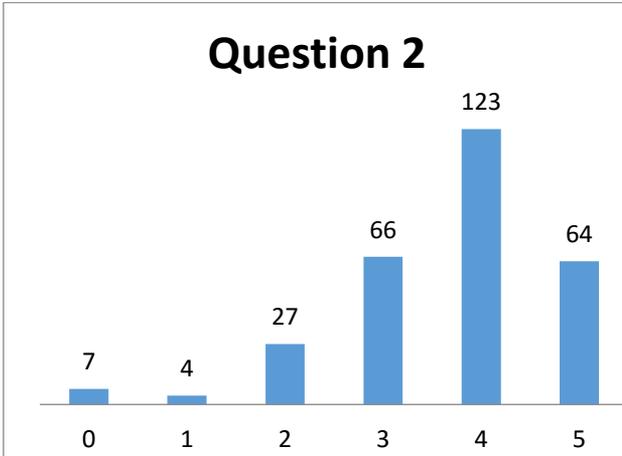
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*Undergraduate Business Education*, 29 J. LEGAL STUD. EDU. 127, 128 (2012) (“In short, many students may learn some measure of substantive course content but fail to develop fundamental critical, reflective, and analytical thinking and reasoning skills.”).

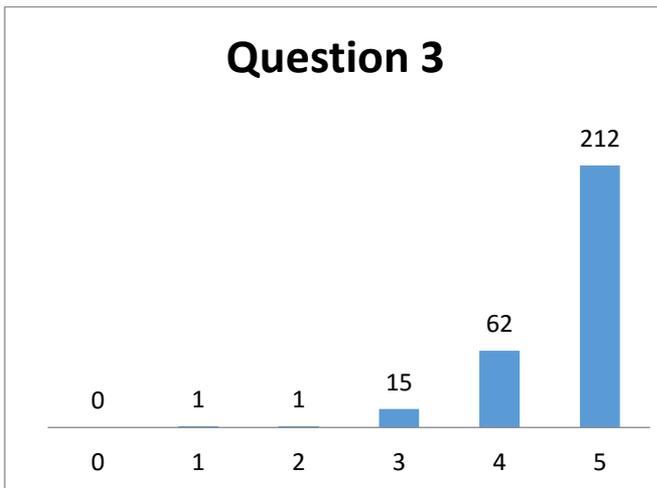
- 1) It improved my ability to compose a Power Point presentation.
- 2) It improved my ability to make a live presentation to a group.
- 3) It taught me about current legal issues.
- 4) It taught me about the relevancy of the law.

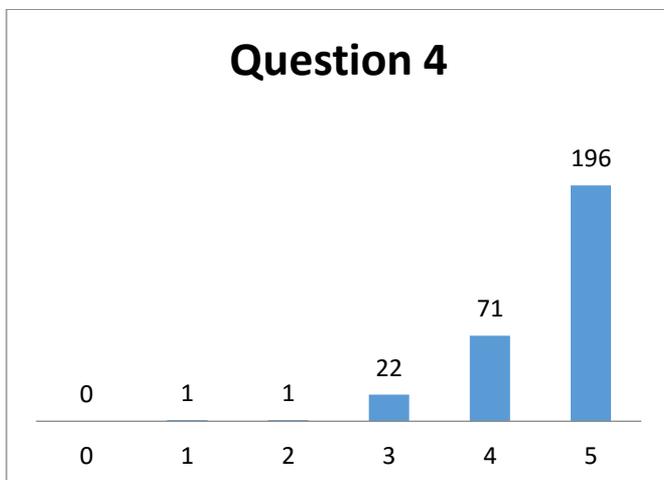
Not surprisingly, the exercise did not significantly help today's tech-savvy students to create a PowerPoint presentation. Only forty (40%) percent of students rated the exercise at 4 or 5 in terms of improving their ability to create a PowerPoint presentation (see table for Question 1, below). In terms of making a live presentation to a group, the students found this aspect of the activity somewhat more helpful, with sixty-four (64%) percent rating this component of the exercise at 4 or 5 (see table for Question 2, below).





The most significant benefit of the assignment was related to the legal aspects. An amazing ninety-four (94%) percent of the students rated the feature of the exercise dealing with learning about current legal issues at either 4 or 5. The questions about learning the relevancy of the law was equally impressive, with ninety-two (92%) percent of the students giving this attribute of the exercise the highest two rating numbers.





## Frequencies

N = 291	0	1	2	3	4	5	Average
Q1	18	15	47	95	68	48	<b>3.113402</b>
Q2	7	4	27	66	123	64	<b>3.670103</b>
Q3	0	1	1	15	62	212	<b>4.659794</b>
Q4	0	1	1	22	71	196	<b>4.580756</b>

Another way to analyze the aggregated data is to look at the average score that the students gave to each question.<sup>20</sup> Here again, there is a significant difference between the technical questions and the legal questions. With regard to improving the students' ability to compose a PowerPoint Presentation, the reaction was modest (3.11), and in terms of making a presentation, there was likewise tepid affirmation (3.67). However, when it came to learning about current legal issues and learning about the relevancy of the law, the students found the exercise extremely valuable, rating these features 4.66 and 4.58, respectively (see table above).

## V. CONCLUSION

“In the News” is a simple exercise. It presents a moderate challenge to the student, and little burden on the professor. Nevertheless, it is a potent tool that provides great pedagogical benefits to the presenting student, to the class as a whole, and to the faculty member. Its ability to inform students about current legal issues and to impress upon them the critical importance and extreme relevancy of the law in their lives and future careers is remarkable.

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<sup>20</sup> The author thanks and acknowledges Saint Joseph University professors Dr. Lucy Ford and Dr. Ronald Klimberg for their advice in presenting the data from the student surveys.

It is also an excellent way to segue into the material for that particular class.

Assessing the students' opinion about the knowledge that they were acquiring and the skills that they were learning from the "In the News" assignment was straightforward. The data reveal that the students found the exercise to be of great benefit to them. As faculty, we have all constructed projects, assignments and exercises that are designed to "add value" to our students' educational experience. Collecting data in much the same way as it was collected for the "In the News" assignment could produce valuable feedback to faculty as to how students perceive and benefit from the various exercises that we have created for them. Such data could reinforce the value of, or reveal deficiencies in, what we hope to attain with our students.

In the case of "In the News," the students have confirmed that it is a great way to start a class – the "perfect class commencement."

## **Appendix A: Instructions “In the News”**

### **Instructions:**

- Find a current story “in the news” related to business law. Unless otherwise instructed, the story should relate to the material that we are currently covering (e.g., contract law, employment law, etc.).
- Prepare a PowerPoint presentation outlining the main features of the story.
- The first slide should include the title of the story and your name
- The last slide should include:
  - your source(s)
  - the date of your source/story
  - E-mail the PowerPoint presentation to the professor prior to class, who will have it available in class for you.
  - Present the story to the class on your assigned day.

### **Grading:**

- Relevancy of the story to the area of law assigned
- Timeliness of story
- Quality of your Power Point presentation
- Quality of your verbal presentation

Appendix B: “In the News” Sample<sup>21</sup>

Case Law: Void Contract >>>

**Miami Coca-Cola Bottling Co. v. Orange Crush Co.**



**Terms & Conditions:**  
**License Agreement**

Coca-Cola Bottling Co.	Both	Orange Crush Co.
<ul style="list-style-type: none"><li>• Granted “exclusive right”... to manufacture, bottle, and distribute “OrangeCrush” (Under Coca-Cola trademark)</li><li>• Purchase concentrate from O.C.</li><li>• Bottling Plant</li><li>• Solicit orders</li><li>• Promotions</li></ul>	<ul style="list-style-type: none"><li>• Either party can RESCIND the contract (at anytime)</li></ul>	<ul style="list-style-type: none"><li>• Supply concentrate for manufacturing product</li><li>• Advertisements</li></ul>

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## FACTS:

- » Coca Cola Bottling Co (P) & Orange Crush Co. (D) had entered into a *business contract*
- » C.C. was granted a Contractual License to manufacture O.C.'s product under (C.C. Trademark)
- » O.C. writes to C.C. 1 year later: "contract could no longer be bound"



## Issue & Answer:

- » Is the contract (License) between C.C. & O.C. **unenforceable** due to **lack of mutuality**?
  - » YES; (District Court rule)
1. The contract can be terminated at the will of one or more parties
  2. Lack of mutual understanding of the contract
  3. *Bilateral Contract*, but with no *Consideration* on the part of Coca-Cola Bottling Co
- » District Court: the contract is *Void*

## Additional Thoughts:

1. Could C.C. argue that their promise to promote O.C.'s product (effort to increase sales volume) is a form of *Consideration*?
2. Orange Crush is produced by Pepsi Co.... (Could Pepsi Co. make an actionable lawsuit against O.C. for breach of contract / Coca-Cola Bottling Co. for Interference with a business relationship?)



## Sources:

- » "Miami Coca-Cola Bottling Co. v. Orange Crush Co. – Case Brief." *Lawnix Free Case Briefs RSS*. Lawnix, n.d. Web. 27 Oct. 2015. <<http://www.lawnix.com/cases/miami-coca-cola-orange-crush.html>>.
- » Miami Coca-Cola Bottling Co. v. Orange Crush Co." *Casebriefs Miami CocaCola Bottling Co v Orange Crush Co Comments*. N.p., n.d. Web. 27 Oct. 2015. <<http://www.casebriefs.com/blog/law/contracts/contracts-keyed-to-california/consideration-contracts-keyed-to-california-contracts-law/miami-coca-cola-bottling-co-v-orange-crush-co/>>.





**LAW SCHOOL-BUSINESS SCHOOL COLLABORATION: AN  
EXAMINATION OF INTERDISCIPLINARY COURSES IN JD/MBA  
PROGRAMS**

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Public perceptions of lawyers are frequently summarized in cliché jokes and jests: “Why won’t sharks attack lawyers?” “How can you tell when a lawyer is lying?” and “What do you call 10,000 lawyers at the bottom of the ocean?” Despite these clichés, these sentiments are often shared by corporate managers.<sup>1</sup> Such views seemingly marginalize the connection between legal strategy and firms’ success. Given that corporate executives devote an incredible 25% of their time to addressing legal issues,<sup>2</sup> there is a growing need to challenge adverse managerial attitudes towards the legal profession and the lawyer’s strategic role within the firm itself. Simply put, the progressively complex association between law and commerce demands a new breed of legal professionals who possess a collective grasp of legal and business strategies. In recognition of

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1 See, e.g., Larry A. DiMatteo, *Strategic Contracting: Contract Law as a Source of Competitive Advantage*, 47 AM. BUS. L.J. 727, 737 (2010).

2 See, e.g., George J. Siedel, *Six Forces and the Legal Environment of Business: The Relative Value of Business Law Among Business School Core Courses*, 37 AM. BUS. L.J. 717, 729 (2000).

the emerging need to produce multifaceted legal graduates, over 75% of ABA-accredited law schools offer joint JD/MBA programs.<sup>3</sup> Notwithstanding curricular variances among individual institutions, a growing number of JD/MBA programs are beginning to offer collaborative, cross-listed specialty courses with other interdisciplinary elements.

In this paper, we describe our recent study on the collaborative efforts between law and business schools in the United States that offer JD/MBA programs. Specifically, we address three research questions: (1) What is the extent of perceived collaboration between law and business schools within institutions that offer such programs? (2) Is there a connection between the perceived level of collaboration and the availability of cross-disciplinary courses? (3) And, if perceived level of collaboration does not translate into cross-disciplinary courses, what is the greatest impediment?

## I. BACKGROUND

To varying degrees, managers have traditionally regarded legal issues as necessary costs of doing business and occasionally even possess negative attitudes and views toward the legal environment.<sup>4</sup> Business clients often view attorneys as a necessary evil, effectively comparing legal issues to costly distractions that divert management's attention.<sup>5</sup> These negative perceptions are especially dominant among entrepreneurs.<sup>6</sup> Consequently, antagonistic perspectives of the law have the potential to hinder effective organizational decision-making and development.

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3 See, e.g., Anthony J. Luppino, *Minding More than Our Own Business: Educating Entrepreneurial Lawyers Through Law School-Business School Collaborations*, 30 W. NEW. ENG. L. REV. 151, 177 (2007).

4 See, e.g., GEORGE J. SIEDEL & HELENA A. HAPIO, *PROACTIVE LAW FOR MANAGERS: A HIDDEN SOURCE OF COMPETITIVE ADVANTAGE* (2011).

5 See Luppino, *supra* note 3, at 151.

6 *Id.*

There is growing recognition nevertheless of the dynamic intersection between law and business. Senior managers from diverse industries, companies, and countries rank law as one of the three most valuable subjects in the core business curriculum.<sup>7</sup> As law is a substantial contributor to firm value creation,<sup>8</sup> it becomes essential to examine legal strategy and business strategy concurrently.<sup>9</sup> For example, patent laws permit inventors to realize the monetary rewards of innovation, while trademarks protect respected brands from misperception and dilution.<sup>10</sup> Similarly, the business judgment rule customarily insulates corporate directors from judicial scrutiny and the risk of litigation.<sup>11</sup> Legal knowledge fosters a unique capacity to enhance shareholder wealth.<sup>12</sup> The ability to ask critical questions in a business transaction, to understand the entrepreneur's viewpoint, and to clearly describe complex regulations in business jargon allows business lawyers to drive company success.<sup>13</sup> Consequently, the ability to effectively collaborate with business professionals is increasingly essential to legal practice.

In order to produce graduates with such skills and capabilities, institutions of higher learning have responded with a variety of measures. Several institutions have founded law-business centers, such as the NYU Pollack Center for Law & Business, the Syracuse University Center for Law and Enterprise, and the

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7 See Siedel & Haapio, *supra* note 4, at 2.

8 See DiMatteo, *supra* note 1, at 738.

9 See, e.g., Constance E. Bagley, *What's Law Got to Do with It: Integrating Law and Strategy*, 47 AM. BUS. L.J. 587 (2010).

10 See Robert C. Bird, *Law, Strategy, and Competitive Advantage*, 44 CONN. L. REV. 61, 73 (2011).

11 See Fred W. Triem, *Judicial Schizophrenia in Corporate Law: Confusing the Standard of Care with the Business Judgment Rule*, 24 ALASKA L. REV. 23, 27 (2007).

12 See, e.g., Tom Hinthorne, *Predatory Capitalism, Pragmatism, and Legal Positivism in the Airlines Industry*, 17 STRATEGIC MGMT. J. 251 (1996).

13 See Luppino, *supra* note 3, at 152.

Washburn University Business and Transactional Law Center.<sup>14</sup> Other schools have established journals concentrating on law and business issues, such as Pepperdine's *Journal of Business, Entrepreneurship and the Law*.<sup>15</sup> Nevertheless, the most unique development is the use of interdisciplinary collaborative courses.

Interdisciplinary collaboration improves the substantive knowledge and skills training of students who seek careers as business lawyers or perhaps even as business executives.<sup>16</sup> Consequently, numerous law schools have created collaborative, cross-listed specialty courses with interdisciplinary elements. For example, in Howard University's seminar course on contemporary developments, students learn to apply corporate law, intellectual property law, agency law, and tax law to the entrepreneurial process, while simultaneously examining how to develop, finance, and market emerging business enterprises.<sup>17</sup> At Columbia Law School, students in the deals workshop course explore the business lawyer's role in value creation and risk management in a complex regulatory environment.<sup>18</sup> Over the last several years, Columbia, Harvard, the University of Pennsylvania, Vanderbilt and other schools have offered cross-disciplinary negotiation courses.<sup>19</sup> Despite these initiatives, interdisciplinary courses that place students and faculty

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14 *Id.* at 178 n.92.

15 The goal of this journal is to foster interdisciplinary exploration of the legal issues pertaining to business and entrepreneurship. See JOURNAL OF BUSINESS, ENTREPRENEURSHIP AND THE LAW, PEPPERDINE SCH. LAW, <https://law.pepperdine.edu/jbel/> (last visited Mar. 14, 2016).

16 See Luppino, *supra* note 3, at 153.

17 See Howard Univ. Sch. of Law, *Upper-Level Course Offerings*, [http://www.law.howard.edu/dictator/media/53/fall2015\\_courselist\\_040315.pdf](http://www.law.howard.edu/dictator/media/53/fall2015_courselist_040315.pdf) (Apr. 3, 2015).

18 See *Deals Workshops*, Columbia Law Sch., <http://web.law.columbia.edu/transactional-studies/deals-courses-and-workshops/deals-workshop> (last visited Mar. 14, 2016).

19 See, e.g., Seth Freeman, *Bridging the Gaps: How Cross-Disciplinary Training with MBAs Can Improve Transactional Education, Prepare Students for Private Practice, and Enhance University Life*, 13 FORDHAM J. CORP. & FIN. L. 89, 95 (2008).

from the law and business schools regularly in the same classroom are still uncommon and face a number of potential impediments to growth.<sup>20</sup>

Academics have examined a variety of impediments to the development and implementation of interdisciplinary courses involving law students. Generally, these impediments fall into six categories: (a) discipline-specific student learning experiences, (b) interdisciplinary stereotypes, (c) rigor and accreditation considerations, (d) logistical difficulties, (e) faculty preferences, and (f) insufficient institutional incentives.<sup>21</sup> However, there is scant research on which obstacle is the greatest hindrance to the widespread execution of such courses. In light of the potential benefits of interdisciplinary study, it is necessary to examine the impact of these impediments to collaboration in greater detail. The goal of this study is to examine the connection between institutional collaboration and the use of cross disciplinary courses within JD/MBA programs.

## II. JD/MBA PROGRAM COLLABORATION AND INTERDISCIPLINARY COURSES

In order to examine the extent of collaboration in JD/MBA programs, a list of schools was compiled using information from the American Bar Association's (ABA) approved list and individual school program websites. To ensure consistent results, only U.S. institutions with ABA approved law schools were surveyed in this study. We distributed a focused questionnaire assessing the extent of JD/MBA program collaboration by email. Job titles for questionnaire recipients included graduate program directors, joint program directors, associate and assistant deans, and college deans. The survey requested information about institutional collaboration efforts, specifically on the use of cross-disciplinary courses. A

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<sup>20</sup> See Luppino, *supra* note 3, at 159.

<sup>21</sup> See *Id.* at 163.

cover letter sent with each survey indicated the purpose of the survey, brief instructions, and a statement of confidentiality. In order to increase the response rate, follow up email reminders were used as necessary. A total of 109 surveys were distributed, and 40 were returned, for an overall response rate of approximately 37%.

Based on the literature reviewed in the area of interdisciplinary collaboration, survey information was collected from respondent JD/MBA institutions to address the following research questions: (1) What is the extent of collaboration between law and business schools within institutions that offer JD/MBA programs? (2) Is there a connection between the level of collaboration and the availability of cross disciplinary courses? (3) If the level of collaboration does not translate into cross disciplinary courses, what is the greatest impediment?

As noted in Table 1, 70% of law school survey respondents rated the collaboration efforts at 7 or higher, as compared to only 50% of business school respondents. Nearly half of combined law school and business school respondents reported a level of collaboration of at least 8 out of 10 between law and business school. With such a high number, it is important to focus on whether the programs and practices reflect these perceptions.

Table 1

Overall Collaboration Rating

<b>On a scale of 1 to 10, how would you rate the efforts of overall collaboration between your institution's law and business schools?</b>		
<i>Collaboration Rating</i>	<i>Law School</i>	<i>Business School</i>
10	0	1
9	2	1
8	8	7
7	4	1

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6	2	3
5	3	4
4	0	0
3	0	0
2	1	0
1	0	3

Table 2

Availability of Cross-Disciplinary Courses

<b>Does your institution's JD/MBA program offer cross-disciplinary courses?</b>		
<i>Response</i>	<i>Law School</i>	<i>Business School</i>
Yes	7	5
No	7	15
Maybe	1	5

Table 3

Obstacles to Cross-Disciplinary Courses

<b>Which of the following is an obstacle to the development and implementation of cross-disciplinary courses? Check all that apply.</b>	
<i>Obstacle</i>	<i>Percentage</i>
Insufficient Institutional Incentives	43.4%
Discipline Specific Student Learning Experiences	27.5%
Differences in Teaching	26.6%
Scheduling and Logistical Issues	25%

Accreditation Considerations	14.1%
Interdisciplinary Stereotypes	14.1%

Table 2 contains a variety of illuminating statistics on respondents' collaboration. Thirty-five percent of law school respondents indicated that their institution offered cross-disciplinary courses as compared to 25% of business school respondents. In light of the self-described level of collaboration in Table 1, these results seem surprising. Table 3, however, describes non-mutually exclusive obstacles to offering cross-disciplinary courses. Although a seventh option, 'other,' was listed on the survey instrument, it was not selected by any respondent. Respondents were given instructions to check as many that applied. Forty-three percent of respondents indicated that insufficient institutional incentives hinder the development of cross-disciplinary courses, followed by discipline specific student learning experiences (27.5%), differences in teaching (26.6%), scheduling and logistical issues (25%), interdisciplinary stereotypes (14.1%), and accreditation considerations (14.1%).

A potential limitation of this study is that the data were self-reported, leading to potential concerns regarding reliability. Survey confidentiality, however, reduces the likelihood of social desirability bias. Respondents were ensured that answers would not be associated with their institutions in any way, decreasing the incentive to exaggerate and embellish. In addition to concerns surrounding self-reported data, the survey was distributed to only one segment of the institutional hierarchy: administration. Questionnaire responses from a dean, assistant dean, or program director may differ from responses given by faculty members. Given that only administrators were surveyed, it is appropriate to exercise caution when generalizing these results.

### III. CONTRIBUTIONS OVERVIEW AND IMPLICATIONS

In this study we sought to examine the connection between JD/MBA program collaboration and the offering of cross-disciplinary courses. Despite positive perceptions of the role of collaboration and the efforts by numerous schools to offer cross-disciplinary courses, there are a variety of hindrances to widespread implementation of such courses. As indicated by the survey results, the largest obstacle is insufficient institutional incentives.

A variety of factors influence the roles and motivations of faculty members at today's colleges and universities. Faculty members largely engage in activities that are perceived as central to the promotion, tenure, and reward process.<sup>22</sup> At many academic institutions, faculty service and teaching innovations produce negligible financial incentives.<sup>23</sup> In contrast, faculty research productivity has a positive influence on faculty compensation.<sup>24</sup> Institutions receive positive long-term benefits from faculty research.<sup>25</sup> As a result, monetary incentives are used to encourage higher levels of faculty research productivity.<sup>26</sup> Successful publishing leads to greater salary rewards, tenure, and promotion.<sup>27</sup> Accordingly, it's also argued that today's top business schools primarily oblige faculty research interests and career goals with slight regard for the interests of other stakeholders.<sup>28</sup>

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22 See Earl D. Honeycutt, Shawn T. Thelen & John B. Ford, *Evaluating and Motivating Faculty Performance: Challenges for Marketing Chairs*, 20 *MARKETING EDUC. REV.* 203, 203 (2010).

23 *Id.* at 205.

24 See James S. Fairweather, *The Mythologies of Faculty Productivity: Implications for Institutional Policy and Decision Making*, 73 *J. HIGHER EDUC.* 26, 44 (2002).

25 See Debanjan Mitra & Peter N. Golder, *Does Academic Research Help or Hurt MBA Programs?*, 72 *J. MARKETING* 31, 43 (2008).

26 See Honeycutt, Thelen & Ford, *supra* note 22, at 211.

27 *Id.*

28 See Warren G. Bennis & James O' Toole, *How Business Schools Lost Their Way*, 83 *HARV. BUS. REV.* 96, 103 (2005).

Evolving accreditation practices nevertheless offer a potential impetus for change. According to the Association to Advance Collegiate Schools of Business (AACSB),<sup>29</sup> the standards and processes for accreditation are designed not only to endorse impactful faculty research, but also to provide support for change in business schools. Although current accreditation standards continue to emphasize faculty scholarship, accrediting bodies now attribute greater weight to faculty innovation in teaching. For example, AACSB accreditation standards challenge business schools to innovate and pursue continuous improvement in educational programs through the development of new programs, curricula, and courses.<sup>30</sup> As a result, institutions are encouraged to develop teaching innovations that produce graduates with the necessary skills to compete in an increasingly complex business environment.

Customarily, institutions use nonfinancial methods to motivate improvements to faculty teaching.<sup>31</sup> Accordingly, this begs the question: why not apply financial incentives toward the creation of teaching innovations? For example, institutions can provide stipends, awards and other financial prizes to faculty members who develop innovative collaborative courses that increase program enrollments. In the alternative, institutions may offer greater research stipends to faculty who publish articles outlining innovations in teaching. Finally, professors' union representatives can advocate for annual salary increases to reward faculty members who engage in teaching in support of the institution's mission. However, given the dependence of increased financial incentives on institutional budgetary constraints, weightier nonfinancial methods constitute an alternative approach. For example, institutions may

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29 Ass'n to Advance Collegiate Schs. of Bus., *Eligibility Procedures and Accreditation Standards for Accounting Accreditation* (2012), available at <http://www.aacsb.edu/~media/AACSB/Docs/Accreditation/Standards/2003%20Standards/2012-accounting-accreditation-standards-tracked-changes.ashx>.

30 *Id.*

31 See Honeycutt, Thelen & Ford, *supra* note 22, at 211.

offer preferred teaching schedules, letters of appreciation, web exposure, and nominations for annual awards.<sup>32</sup>

While the above suggestions may have some merit, they nevertheless fail to provide a solid solution to the underlying obstacle posed by a lack of institutional incentives. Thankfully, business law centers provide another potential avenue for the development and implementation of interdisciplinary courses. A common goal of business law centers is to build bridges between law schools, business schools, and nonprofit organizations. Business law centers not only lead to greater recognition for the affiliated institutions and faculty directors, but also attract world-renowned visiting scholars, promote academic conferences and research, and facilitate interdisciplinary courses. A July 2015 search of the institutional websites for ABA approved law schools revealed the following law and business centers:

Table 4

Business Law Centers at ABA Accredited Law Schools

Albany Law School Institute for Financial Market Regulation	Harvard Law School John M. Olin Center for Law, Economics, and Business	Rutgers Center for Corporate Law and Governance
Brooklyn Law School - Dennis J. Block Center for the Study of International Business Law	University of Hawaii Institute of Asian-Pacific Business Law	St. John's University Center for Labor and Employment Law

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<sup>32</sup> *Id.* at 212–13.

Berkeley Law Center for Law, Business and the Economy	University of Iowa Innovation, Business & Law Center	St. Louis University School of Law William C. Wefel Center for Employment Law
UCLA School of Law - Lowell Milken Institute for Business Law and Policy	Mississippi College Law School Business and Tax Law Center	University of San Diego Center for Corporate and Securities Law
Case Western - Center for Business Law and Regulation	New England Law Center for Business Law	Seattle University Adolf A. Berle, Jr. Center on Corporations, Law & Society
Chicago-Kent College of Law Institute for Law and the Workplace	NYU Center for Business and Financial Law	Stanford Law School Arthur and Toni Rembe Rock Center for Corporate Governance
University of Cincinnati Corporate Law Center	NYU Center for Labor and Employment Law	University of Texas School of Law Center for Law, Business & Economics
Columbia University Center on Corporate Governance	NYU Center for Transnational Litigation, Arbitration, and Commercial Law	University of Texas School of Law Kay Bailey Hutchison Center for Energy, Law, and Business

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Columbia University Richard Paul Richman Center for Business, Law, and Public Policy	NYU Pollack Center for Law & Business	Touro Center for Innovation in Business, Law & Technology
Cornell Law School Clarke Business Law Institute	Northern Kentucky University Chase Law Informatics Institute	Western State College of Law Business Law Center
Duke Law School-Global Financial Markets Center	Notre Dame Research Program on Law and Market Behavior	William Mitchell College of Law Center for Law and Business
Fordham Law School Corporate Law Center	Ohio State University Law, Finance and Governance Program	Yale Law School Center for the Study of Corporate Law
Georgetown Center on Transnational Business and the Law	Pace - Institute of International Commercial Law	Yeshiva University Samuel & Ronnie Heyman Center on Corporate Governance
Gonzaga Commercial Law Center	Penn State - Center for the Study of Mergers and Acquisitions	

In order to be included in the above list, a center had to meet several criteria. First, the central focus of the center had to rest on topics related to business law. Centers that only implicated business law, such as centers involving human rights, intellectual property, or economics, were excluded from the search results. Second, the

activities of the center had to include collaborative research efforts on issues jointly impacting the legal and business communities. Consequently, law clinics, experiential learning clinics, student associations, or centers that purely offered degrees or certificates were also excluded.

Our research uncovered several interesting trends with respect to the business law centers noted in Table 4. Specifically, we grouped the centers into three categories according to their activities and demonstrated commitment to interdisciplinary courses: low, moderate, and high. Centers in the low category are connected to the offering of joint degrees or certificates but participate in limited research and do not demonstrate the endorsement of interdisciplinary courses.<sup>33</sup> Centers in the moderate category support or participate in integrative business law research, sponsor academic conferences or journals, and demonstrate greater encouragement for interdisciplinary courses.<sup>34</sup> Centers in the high category actively host integrative business law discussion conferences, panel discussions and outreach efforts, as well as undertake proactive efforts to advance interdisciplinary course offerings.<sup>35</sup>

Institutions that house business law centers invite increased standing in the annual rankings published by U.S. News & World

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33 Examples of centers in the low category include: Western State College of Law Business Law Center; Rutgers Center for Corporate Law and Governance; Mississippi College Law School Business and Tax Law Center; Case Western Center for Business Law and Regulation; Albany Law School Institute for Financial Market Regulation.

34 Examples of centers in the moderate category include: University of Texas School of Law Center for Law, Business & Economics; St. John's University Center for Labor and Employment Law; University of San Diego Center for Corporate and Securities Law; Gonzaga Commercial Law Center.

35 Examples of centers in the high category include: Yale Law School Center for the Study of Corporate Law; Harvard Law School John M. Olin Center for Law, Economics, and Business; University of Texas School of Law Kay Bailey Hutchison Center for Energy, Law, and Business; Stanford Law School Arthur and Toni Rembe Rock Center for Corporate Governance.

Report,<sup>36</sup> thereby accruing greater recognition and income while also providing a forum for faculty to engage in research centered on bridging the gap between law and business.<sup>37</sup> As noted above, there is a direct connection between faculty research productivity, faculty compensation and institutional benefits. Moreover, academic institutions that host business law centers foster academic environments that encourage interdisciplinary curricular innovation.<sup>38</sup>

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36 See Sam Flanigan & Robert Morse, *Methodology: 2016 Best Law Schools Rankings*, U.S. NEWS & WORLD REP., <http://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology> (Mar. 9, 2015, 9:58 PM). Law school rankings are based on a weighted average of 12 quality measures: peer assessment score, assessment score by lawyers/judges, selectivity, median LSAT scores, median undergraduate GPA, acceptance rate, placement success, bar passage rate, faculty resources, expenditures per student, student-faculty ratio, and library resources. *Id.*

37 See, e.g., *Working Papers*, Yale Law Sch. Center Study Corp. L., <http://ccl.yale.edu/working-papers> (last visited Mar. 14, 2016); Faculty Discussion Papers, Harv. L. Sch. John Olin Center L. Econ. & Bus., [http://www.law.harvard.edu/programs/olin\\_center/papers/](http://www.law.harvard.edu/programs/olin_center/papers/) (last visited Mar. 14, 2016); *Research*, Stan. L. Sch. Rock Center Corp. Governance, <https://law.stanford.edu/arthur-and-toni-rembe-rock-center-for-corporate-governance/research/#slsnav-rock-center-at-the-social-science-research-network-ssrn> (last visited Mar. 14, 2016).

38 See, e.g., *Courses*, Univ. Tex. Sch. Law Center L. Bus. & Econ., <https://law.utexas.edu/clbe/courses/> (last visited Mar. 14, 2016) (listing interdisciplinary courses in financial markets and institutions, investment theory and practice, the art and science of negotiation, and corporate governance); Pace Univ. Inst. Int'l Com. L., <http://www.law.pace.edu/institute-international-commercial-law> (last visited Mar. 14, 2016) (highlighting the Vis International Commercial Arbitration Moot, which unites arbitrators, law students, academics, and international sales practitioners by merging characteristics of moot court competitions, academic conferences and networking events); Yale Law Sch. Center Study Corp. L., <http://ccl.yale.edu/business-law-curriculum-yale> (last visited Mar. 14, 2016) (showing interdisciplinary course offerings in business law expose students finance, financial accounting, statistics, and microeconomics and statistics).

#### IV. CONCLUSION

The growing interconnected nature of law and business mandates that law school graduates have a holistic understanding of the corporate world and the capability to collaborate with business professionals. Many ABA accredited law schools have responded by offering joint JD/MBA programs. The results of our study indicate that a majority of key individuals connected to JD/MBA programs, including joint program directors, assistant deans, associate deans, and deans, have positive views with respect to the level of collaboration between the law and business school at their corresponding institutions. Such views however, do not necessarily play out in practice. Due to the constraints placed on the development and implementation of effective interdisciplinary efforts, only a handful of schools possess a joint program in the true sense of the word. A growing number of JD/MBA programs nevertheless are beginning to offer collaborative, cross-listed specialty courses with interdisciplinary elements. A driving force behind such innovations rests with the increased emphasis placed on collaboration by institutions that sponsor business law centers. Consequently, interdisciplinary course innovators are encouraged to look to these institutions for direction and inspiration.



**FOSTERING INTEGRATIVE AND INTERDISCIPLINARY  
LEARNING: A BUSINESS LAW EXERCISE IN SOCIAL  
ENTREPRENEURSHIP, GLOBAL HEALTH INNOVATION  
AND CLOUD TECHNOLOGY**

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T. NOBLE FOSTER\*\*

INTRODUCTION

Many business law faculty seek to encourage and support their undergraduate business students in developing leadership skills. Building on the foundation of a liberal arts core, we hope to inspire our students to develop a sense of social responsibility that will inform their future business leadership, and to see the law as an ally in promoting the role of business in society as that of a positive change agent. We intend that our students understand that today social responsibility means significantly more than following the dated “maximize profits for shareholders”<sup>1</sup> adage, and even more than allegiance to Google’s “don’t be evil”<sup>2</sup> motto. Instead, we want our students to embrace a “do good wherever and however you can”

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1 See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962).

2 Google Inc., Registration Statement (Form S-1), at 32 (Aug. 18, 2004), available at

[http://www.sec.gov/Archives/edgar/data/1288776/000119312504142742/ds1a.htm#toc59330\\_1](http://www.sec.gov/Archives/edgar/data/1288776/000119312504142742/ds1a.htm#toc59330_1).

ideal as part of their academic and ethical formation. How to best teach ethics and corporate social responsibility has been a topic of concern for the academy of business law faculty for many years.<sup>3</sup>

An exemplary factual context for teaching these principles was presented in a report published by Global Washington.<sup>4</sup> The report described the devastation of the 2010 earthquake in Haiti, and envisioned the opportunity for creative business leaders to collaborate with the citizens, businesses and government institutions in Haiti in their mission to rebuild. It was a call to create socially entrepreneurial solutions to a global economic crisis that resulted from the lack of infrastructure and social services in the wake of the earthquake.<sup>5</sup>

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3 See, e.g., Daniel T. Ostas & Stephen E. Loeb, *Teaching Corporate Social Responsibility in Business Law and Business Ethics Classrooms*, 20 J. LEGAL STUD. EDUC. 61 (2002); Marianne M. Jennings, *Teaching Stakeholder Theory: It's for Strategy, Not Business Ethics*, 16 J. LEGAL STUD. EDUC. 203 (1998); Lucien J. Dhooge, *Creating a Course in Global Business Ethics*, 28 J. LEGAL STUD. EDUC. 207 (2011).

4 Global Washington is a broad-based membership association that promotes and supports the global development sector in the state of Washington. Composed of non-profit organizations, foundations, businesses, government and academic institutions, our members work collectively to build a more equitable and prosperous world. Global Washington convenes members to generate new opportunities for growth; strengthens member organizations to increase their impact; and advocates across key global development issues at the local, national, and global level. *Who We Are*, Global Wash. (Feb. 21, 2014, 4:41 AM), <https://web.archive.org/web/20140221044155/http://globalwa.org/who-we-are/> (accessed by Web Archive).

5 The four-year anniversary of Haiti's massive earthquake was marked on January 12. While the disaster left over 200,000 people dead and several million homeless, inspiring themes are emerging from Haiti in early 2014. Technology is one theme that is emerging from the rubble. Despite the financial challenges that have plagued Haiti, many start-up companies are dedicated to helping solve the country's ongoing issues as citizens struggle to regain a sense of normalcy. Along with the technology theme that is becoming prevalent in Haiti is the need for more collaborators to come to the table. As [the U.S.] Congress continues to review the progress being made and the challenges that still exist in Haiti following the earthquake disaster four years ago, businesses

Additional insights into the events in Haiti arose from one of the author's ties to a Seattle-based medical practice that in fact responded to the challenge by creating a partnership with a Haitian nonprofit to deliver much needed cervical cancer diagnostic and treatment services to women in-country. The practice in Seattle specializes in pathology. It has adopted a strategy of collaborating with nonprofits in developing countries in order to advance its socially entrepreneurial mission of establishing an international global pathology network to advance digital pathology so that all patients, regardless of their ability to pay or their location, receive timely, accurate and potentially life-saving diagnoses.

The 2010 earthquake in Haiti made the challenge of diagnosis and treatment for women in Haiti exponentially greater due to the infrastructure destruction and critical lack of qualified Haitian pathologists. Cervical cancer is the fourth most common cause of cancer death in women worldwide.<sup>6</sup> It is on the rise in Haiti, as it is in the developing world which hosts seventy-six percent of

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can help development efforts by providing basic health care needs and empowering local citizens to take control of the country's future. Kelly Gibbs, *Haitian Recovery Takes a Turn for the Innovative*, in January 2014 Policy Update, GLOBAL WASH. (Feb. 21, 2014, 4:41 AM), <https://web.archive.org/web/20140221044101/http://globalwa.org/2014/01/january-2014-policy-update> (accessed by Web Archive).

<sup>6</sup> *Press Release*, World Health Org. Int'l Agency for Research on Cancer, Latest world cancer statistics: Global cancer burden rises to 14.1 million new cases in 2012: Marked increase in breast cancers must be addressed (Dec. 12, 2013), available at [http://www.iarc.fr/en/media-centre/pr/2013/pdfs/pr223\\_E.pdf](http://www.iarc.fr/en/media-centre/pr/2013/pdfs/pr223_E.pdf) (indicating 266,000 deaths in 2012). The World Health Organization cancer statistics state that cervical cancer is the fourth most common cancer affecting women worldwide, notably in the lower resource countries in Sub-Saharan Africa and with increasing incidence in India According to the International Agency for Research on Cancer, which is housed in the World Health Organization, "[c]ervical cancer can have devastating effects with a very high human, social, and economic cost, affecting women in their prime. But this disease should not be a death sentence, even in poor countries." *Id.* (quoting Dr. Rengaswamy Sankaranarayanan, a lead investigator for an IARC research project with a focus on cervical cancer screening in rural India).

the cases, most of which are found in women under fifty years of age.<sup>7</sup>

In this factual setting, the authors found a rich collection of issues that would provide the basis for the creation of a multi-faceted lesson to teach our students about the possibility for creative actors to “do good,” both for Haiti, and for their businesses.

The result of our efforts is a business law project (the “Project”) for upper-level undergraduate business students. The Project is a complex, research-driven exercise which integrates liberal arts learning (“liberal learning”)<sup>8</sup> with business law and social entrepreneurial theory. Students are given a mission: to strategize a cross-sector partnership between a for-profit medical practice and a nonprofit healthcare organization that will use current technology to solve a global health problem, the diagnosis and treatment of cervical cancer for women in the developing world. In this Project students learn about social entrepreneurship as well as the substantive legal issues relating to business entities, privacy and confidentiality of medical records, and contracts. The Project also engages students in learning about cloud technology and its expanding use for social innovation.

Part I of this article presents the assignment itself with accompanying research questions. Presenting the Project assignment first sets the context for the reader to comprehend the pedagogical intentions of the authors in their design. While Part I briefly introduces the thematic components of the exercise, namely liberal learning and contemplation of the leadership role of business in society, Part II examines these in further detail as well as the reasons for their importance to undergraduate business education. Part II also provides instructors a current research overview of the two substantive areas that are the subject matter for the assignment:

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<sup>7</sup> *Health: Cervical cancer on the rise in developing world*, IRIN, <http://www.irinnews.org/report/93767/health-cervical-cancer-on-the-rise-in-developing-world> (last visited June 13, 2015).

<sup>8</sup> Liberal learning is a defined term explained with specificity in Part I of the paper.

(1) new forms of business entities for social enterprise, and (2) an explanation of cloud technology, its impact on the privacy of personal data, and its role in facilitating social innovation. Part III provides guidance to instructors on best practices for incorporating the Project into a class on business law, including qualitative reflection and insight based on the authors' experience.

Although we have chosen to focus our case scenario on a global health care partnership that relies on cloud computing technology, there are many other options. The structure of the project makes it possible for instructors to adapt the *content and context* by selecting different non-profit organizations and/or business enterprises to form a cross-sector partnership consistent with the instructor's own industry interests. Part III of this article includes more insight on this point.

## I. THE PROJECT

This Project is principally one of students advising a social enterprise that seeks to tackle a global health issue through entrepreneurial strategies, including the application of cloud computing technology. This multi-level assignment provides students an opportunity to learn deeply through research and application of the business law topics of business entities, privacy, and contracts while also providing students opportunity to learn about social entrepreneurship. Additionally, it provides instructors a means to integrate liberal learning into a course on business law, an increasingly important pedagogical objective for undergraduate business students.<sup>9</sup>

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<sup>9</sup> See Elizabeth Segran, *Why Top Tech Ceos Want Employees With Liberal Arts Degrees*, Fast Company (Aug. 28, 2014), <http://www.fastcompany.com/3034947/the-future-of-work/why-top-tech-ceos-want-employees-with-liberal-arts-degrees>; Mark Koba, *Why Businesses Prefer a Liberal Arts Education*, CNBC (Apr. 15, 2013), <http://www.cnbc.com/id/100642178>; Fareed Zakaria, *In Defense Of A Liberal Education* (2015); Nicholas Kristof, *Starving for Wisdom*, N.Y. TIMES, Apr. 16,

What exactly is “liberal learning”? According to the Association of American Colleges and Universities:

Liberal Education is an approach to learning that empowers individuals and prepares them to deal with complexity, diversity, and change. It provides students with broad knowledge of the wider world (e.g. science, culture, and society) as well as in-depth study in a specific area of interest. A liberal education helps students develop a sense of social responsibility, as well as strong and transferable intellectual and practical skills such as communication, analytical and problem-solving skills, and a demonstrated ability to apply knowledge and skills in real-world settings.<sup>10</sup>

Social entrepreneurship, in turn, is the application of innovative business solutions to the world’s most pressing problems.<sup>11</sup> Social entrepreneurs are “pragmatic visionaries”<sup>12</sup> who use business strategies with a profound sense of dedication and perseverance to achieve a social mission. They act as change agents for society by:

- adopting a mission to create and sustain social value;

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2015, at A27, available at

<http://www.nytimes.com/2015/04/16/opinion/nicholas-kristof-starving-for-wisdom.html>.

10 *What is a 21st Century Liberal Education?*, Ass’n of Am. Colleges and Univs., [http://www.aacu.org/leap/what\\_is\\_liberal\\_education.cfm](http://www.aacu.org/leap/what_is_liberal_education.cfm) (last visited June 13, 2015).

11 *What is a Social Entrepreneur*, Ashoka, [https://www.ashoka.org/social\\_entrepreneur](https://www.ashoka.org/social_entrepreneur) (last visited June 13, 2015); *see also What is a Social Entrepreneur?*, Schwab Found. for Soc. Entrepreneurship, <http://www.schwabfound.org/content/what-social-entrepreneur> (last visited June 13, 2015).

12 *What is a Social Entrepreneur?*, Schwab Found. for Soc. Entrepreneurship, <http://www.schwabfound.org/content/what-social-entrepreneur> (last visited June 13, 2015).

- recognizing and relentlessly pursuing new opportunities to serve that mission;
- engaging in a process of continuous innovation, adaptation, and learning;
- acting boldly without being limited by resources currently in hand;
- exhibiting a heightened sense of accountability to the constituencies served and for the outcomes created.<sup>13</sup>

For this Project, students must advise a social entrepreneurial medical practice that seeks to expand its healthcare mission globally by partnering with a foreign nonprofit organization and applying the latest technology, cloud computing, to efficiently and effectively sustain operations. Students are exposed to their client's sense of social responsibility while having an opportunity to develop more strongly their own. And they are given additional possibility to apply to a real-world scenario the liberal education skills learned from freshman year forward in communication, critical thinking and problem-solving.

The Project itself is a complex, research-driven consulting exercise used ideally as the capstone in an upper-level undergraduate course in business law, legal environment or international business law.<sup>14</sup> The Project assignment follows. Instructor resources and a grading rubric are included in appendices.

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13 Samuel M. Hines Jr., *The Practical Side of Liberal Education: An Overview of Liberal Education and Entrepreneurship*, 7 PEER REV. 4 (2005), available at <http://www.aacu.org/publications-research/periodicals/practical-side-liberal-education-overview-liberal-education-and> (citing J. Gregory Dees, *The Meaning of Social Entrepreneurship* (1998), available at [http://www.caseatduke.org/documents/dees\\_sedef.pdf](http://www.caseatduke.org/documents/dees_sedef.pdf)).

14 The course is adaptable to an MBA course and has been piloted in a new “bridge” MBA program at Seattle University. Bridge MBA students are those who have no undergraduate business degree to support participation in a professional MBA program. The Bridge MBA at Seattle University is a one-year, intensive cohort program typically comprising students with degrees in arts and sciences.

### *The Project Assignment*

*You have recently been hired to consult with the business development office of a Seattle-based medical practice specializing in pathology, NW Partners in Pathology, LLC (NWPP).<sup>15</sup> This innovative for-profit practice is exploring a business relationship with a nonprofit organization in Haiti that provides obstetrical and gynecological services to women (Cap Haitian Women’s Health Group, or CHWHG). As that nonprofit grows, it needs a way to provide pathology lab services to analyze and diagnose disease and illness specific to women, in particular cervical cancer, the incidence of which in Haiti is 30 times higher than in the U.S. Because NWPP is a for-profit organization structured as a professional LLC in Washington State, and CHWHG is a non-profit organization established under the law of Haiti, this relationship will be a cross-sector global partnership.*

*Pathology is “the scientific study of the nature of disease and its causes, processes, development, and consequences.”<sup>16</sup> Anatomical pathology is “a medical specialty that is concerned with the diagnosis of disease based on the gross, microscopic, chemical, immunologic and molecular examination of organs, tissues, and rarely whole bodies (autopsy).”<sup>17</sup> Digital pathology is “an image-based information environment enabled by computer technology that allows for the management of information generated from a*

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15 While the project is based on a real world scenario, the names of the parties are changed to protect confidentiality. The information provided in the footnotes accompanying this section may be useful both to instructors contemplating the use of the Project and to students. The authors recommend that instructors who wish to assign the Project to students retain footnotes 15–18 when formatting the assignment for distribution to students.

16 Definition, *Pathology*, The Free Dictionary, <http://www.thefreedictionary.com/pathology> (last visited June 13, 2015).

17 *Anatomical Pathology*, Wikipedia, [http://en.wikipedia.org/wiki/Anatomical\\_pathology](http://en.wikipedia.org/wiki/Anatomical_pathology) (last updated Mar. 15, 2015).

*digital slide. Digital pathology is enabled in part by virtual microscopy, which is the practice of converting glass slides into digital slides that can be viewed, managed, and analyzed.”<sup>18</sup>*

*Digital pathology, while not approved by the U.S. Food and Drug Administration (FDA) for primary diagnosis in the U.S., has, in the opinion of some prominent pathologists, changed the field of anatomical pathology. For example, it is not unusual for a pathologist located in a remote part of the U.S. to digitally convene a room of diverse specialists to review international ob/gyn cases. Cases can be reviewed collaboratively using image and workflow management software and virtual meeting software. All that is needed is a laptop and a connection to the internet.*

*NWPP wants to capitalize on advances in technology as it continues the growing practice of digital pathology. To that end, NWPP wants to explore the possibility of forming a relationship with CHWHG that operates “in the cloud.” The earthquake obliterated Haiti’s infrastructure and fueled a shortage of qualified pathologists. Today, with cloud services available, the NWPP and CHWHG collaboration (the “Partnership”) can use a combination of digital pathology and a cloud-based information system to connect the Seattle-based and Cap Haitian offices. Cases in Haiti will be reviewed entirely in the cloud. The total turnaround time is expected to be just days, as compared to the six months required with physical specimens, a dramatic difference in beginning treatment for female cancer patients resulting in significant improvements in recovery and potentially life-saving outcomes for Haitian women.*

*In your consulting role you have been asked by the officers of NWPP to provide detailed guidance concerning the legal issues raised by their relationship with CHWHG. NWPP intends to build on the hoped-for success of its partnership with CHWHG by replicating the model with indigenous nonprofits in countries in*

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18 *Digital Pathology*, Wikipedia, [http://en.wikipedia.org/wiki/Digital\\_pathology](http://en.wikipedia.org/wiki/Digital_pathology) (last updated June 11, 2015).

*Sub-Saharan Africa, India, and others as dictated by the research of such organizations as the World Health Organization.*

*This report will serve as a guide for NWPP as it looks beyond this particular collaboration and considers other nonprofits globally to advance its social entrepreneurial mission of creating an international global pathology network to advance digital pathology that will be widely accessible and affordable to patients and will result in faster, more effective treatment in responding to the increasing global health crisis created by cervical cancer in the developing world.*

*Your consulting report should include the following components: an executive summary, overview of the facts and the research questions presented (see below), a response to the research questions and recommendations based on your findings, and a conclusion. The report should be no longer than twelve pages, eleven point font, double-spaced. Please cite all references in endnotes, which are not to be counted in the twelve-page paper length maximum.*

*Here are the questions you need to address in your report. You should assume that U.S. law controls so there is no need to research the law of Haiti for this report.*

- 1) While the collaboration could be formed contractually, the parties want to form a new venture that will operate independent of each of them. What entity options currently exist and which would you recommend? Why?*
- 2) What business issues are specific to the new venture's operations?*
- 3) What legal issues are raised by the new venture's proposed operation specifically diagnoses and data storage in the "cloud"? How should that legal risk be managed in any contract that the new venture negotiates with a cloud services provider?*

## II. PEDAGOGICAL OBJECTIVES

### A. *Integration of Liberal Learning Into Business Law*

A liberally educated person engages the world in diverse ways, drawing on three modes of thinking, plus practical reasoning.<sup>19</sup> These three modes of thinking are analytical thinking, multiple framing, and the reflective exploration of meaning. Business school curriculums generally do very well in developing analytical thinking skills in students and those skills become a foundation for practical reasoning, or an ability to draw on skills, theory and rules-based frameworks to address problems.<sup>20</sup> However, without multiple-framing (an understanding of diverse viewpoints and an ability to reconcile competing perspectives) and reflective exploration of meaning (self-reflection about how one engages the world), practical reasoning is basically void of values. It is also somewhat artificial as the reasoning is applied to often one-dimensional hypothetical business problems lacking in real-world complexity. Expert practical reasoning, by contrast, draws on all three modes of thought and “provides the ability to make decisions that are both thoughtfully reflective and exhibit the highest ideals of professional judgment.”<sup>21</sup>

Liberal learning is important for business students who are our future leaders in business as well in our global democracies as they need to have opportunity to learn about the world and their place in the world if they are to be effective leaders for responsible business. This learning includes the reality that real-world problems are not neatly presented to generate obvious solutions that appear in black and white, like the quantitative answer to an accounting or finance problem. It truth, opportunity arises out of obscurity.

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19 Joshua E. Perry & Jamie Darin Prekert, *Charting a Course to Effective Business Education: Lessons from Academically Adrift and Rethinking Undergraduate Business Education*, 29 J. LEGAL STUD. EDUC. 127, 137 (2012).  
20 *Id.*

21 *Id.* at 137–38.

Students must be able to discern, analyze and decide in the midst of ambiguity.<sup>22</sup> The Aspen Institute sums up the challenge well:

Tomorrow's business leaders must be equipped to deal with the changing global economy. To do this, they must be able to think critically, accommodate and evaluate multiple perspectives, and use their knowledge of multiple disciplines to generate innovative solutions to new problems. A business education melded with the liberal arts provides students with these skills.<sup>23</sup>

The important role that business law educators have in meeting this challenge has been observed recently by Joshua R. Perry and Jamie Darin Prekert in their review of the critiques in *Academically Adrift* and *Rethinking Undergraduate Education*.<sup>24</sup>

Citing *Rethinking*, Perry and Prekert note:

The primary curricular site for these broader discussions is the area of business law. These courses often provide avenues through which students are encouraged to consider business as an institutional sector that influences, and is influenced and regulated by, other social sectors. Courses in law and business tend to require more reading and to provide more experience with extended writing assignments than most other business program offerings, and in this sense they help prepare student for the complexity of roles demanded by modern business enterprise.<sup>25</sup>

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22 See Elizabeth Segran, *Why Top Tech CEOs Want Employees With Liberal Arts Degrees*, Fast Company (Aug. 28, 2014), <http://www.fastcompany.com/3034947/the-future-of-work/why-top-tech-ceos-want-employees-with-liberal-arts-degrees> for CEO commentary on the value of liberal arts education in the technology industry.

23 The Aspen Inst. Ctr. for Bus. Educ., *Undergraduate Business Education Teaching Materials Portal*, Caseplace.org (2012), <http://www.caseplace.org/d.asp?d=6503>.

24 See Perry & Prekert, *supra* note 19.

25 *Id.* at 141–42 (quoting Anne Colby et al., *RETHINKING UNDERGRADUATE BUSINESS EDUCATION: LIBERAL LEARNING FOR THE PROFESSION*, 43 (2011)).

There are rich opportunities in the design of business law courses for infusing liberal learning. “Liberal learning, at its best, involves exposure to a range of academic disciplines in an atmosphere where active inquiry, critical thinking, interdisciplinary integration, and effective, ethical communication are emphasized.”<sup>26</sup> The very nature of business law invites opportunity to think critically about complex global problems and apply analytical thinking, multiple framing, and the reflective exploration of meaning to create solutions to those problems. The Project described here is one such example as it provides students with a simulation based on a real-world business opportunity in healthcare innovation that requires them to apply the three modes of thinking and ultimately recommend a practically-reasoned solution that is innovative in its use of current technological advances.

## 1. The Importance of Liberal Learning for Business Students

According to recent statistics, business is the most popular major for undergraduate students in the United States.<sup>27</sup> While this is good news for business educators, including business law instructors, it comes with a responsibility to ensure that the education provided positions students as skillful, thoughtful and responsible future business professionals. According to a recent survey of employers who were asked about which learning outcomes they want colleges to emphasize, it was clear that understanding business skills is simply not enough.<sup>28</sup>

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26 E-mail from Ronald S. Kaufmann, Assoc. Professor, Univ. of San Diego, to Geneva Lasprogata, Assoc. Professor, Seattle Univ. (July 28, 2014, 11:47 AM PDT) (on file with author).

27 See *The Aspen Inst. Ctr. for Bus. Educ., Undergraduate Business Education Teaching Materials Portal*, CasePlace.org (2012), <http://www.caseplace.org/d.asp?d=6503>.

28 Hart Research Assocs., *It Takes More Than a Major: Employer Priorities for College Learning and Student Success* (Apr. 10, 2013), available at [https://www.aacu.org/sites/default/files/files/LEAP/2013\\_EmployerSurvey.pdf](https://www.aacu.org/sites/default/files/files/LEAP/2013_EmployerSurvey.pdf).

The quality of business education in the U.S. has been criticized for focusing too much on skills and substantive rules-based learning of the business disciplines at the expense of developing critical thinking, reflective, analytical and reasoning capabilities.<sup>29</sup> In a recent survey, over 300 employers were asked to tell colleges which skills to impart to their students. Critical thinking, analytical reasoning, and clear communication skills were ranked most important.<sup>30</sup>

One prominent solution offered by the critics to rectify these problems and enhance the learning environment for business students is to infuse the business school curriculum with liberal learning. “The purpose of liberal learning is to enable students to make sense of the world and their place in it, preparing them to use knowledge and skills as a means to engage responsibly with the life of their times.”<sup>31</sup> For business students who are our future business leaders, the objective is to “ensure that students understand the relation of business to the larger world and can act on that understanding as business professionals and as citizens.”<sup>32</sup>

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29 See, e.g., Richard Arum & Josipa Roksa, *ACADEMICALLY ADRIFT: LIMITED LEARNING ON COLLEGE CAMPUSES* (2011); Anne Colby et al., *RETHINKING UNDERGRADUATE BUSINESS EDUCATION: LIBERAL LEARNING FOR THE PROFESSION* (2011). See also Perry & Prekert, *supra* note 19.

30 See Hart Research Associates, *supra* note 28.

31 Colby et al., *supra* note 29, at 60 n.8.

32 Aspen Inst., Aspen Undergraduate Business Education Consortium: Inaugural Convening (2012), available at [http://www.aspeninstitute.org/sites/default/files/content/upload/Aspen%20Undergraduate%20Business%20Education%20Consortium%20-%20Inaugural%20Convening%20Report\\_2.pdf](http://www.aspeninstitute.org/sites/default/files/content/upload/Aspen%20Undergraduate%20Business%20Education%20Consortium%20-%20Inaugural%20Convening%20Report_2.pdf). One of us had the privilege of attending the Aspen Institute’s Undergraduate Business Education Consortium hosted at the Robins School of Business at the University of Richmond in June, 2014, and again in June 2015 at the Ross School of Business at the University of Michigan. The Consortium is just one program hosted by the Aspen Institute’s Center for Business Education, which seeks to equip business leaders with “the vision and knowledge to integrate corporate profitability and social value. Center for Business Education, Aspen Inst., <http://www.aspeninstitute.org/policy-work/business-society/center-business->

## 2. How the Three Modes of Thinking are Facilitated by the Project

The three modes of thinking that are the foundation of liberal learning are connected to the Project in the following ways. First, with respect to analytical thinking, the Project requires students to conduct legal research and draw on in-class content learning that is applied in three principal contexts: the law of business entities, including new options designed for social innovation; the law of privacy as it relates to sensitive health data; and the law of contracts, including identification of necessary contract terms in the novel area of cloud computing.

With respect to multiple-framing, students completing the Project are required to reconcile for purposes of establishing a cross-sector partnership the often competing perspectives of the nonprofit and for-profit business sectors. Students must also consider the diverse cultural contexts of the U.S., a developed country, and Haiti, a lesser-developed country still plagued dramatically in its post-earthquake state. And all of this is processed within an implicit

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education (last visited June 13, 2015). The mission of the Aspen Institute's Undergraduate Business Education Consortium is "to strengthen undergraduate education in both the liberal arts and business, by focusing on curricular and co-curricular approaches that integrate the two." Aspen Undergraduate Business Education Consortium, Aspen Inst., <http://www.aspeninstitute.org/policy-work/business-society/undergraduate-business-education> (last visited June 13, 2015). For other efforts at liberal arts integration, *See, e.g., The BELL Project*, Carnegie Found. for the Advancement of Teaching, <http://www.carnegiefoundation.org/business-education> (last visited June 13, 2015). The purpose of faculty and dean participation in the Undergraduate Business Education Consortium is to better understand what liberal learning means, its value for our students and how to integrate such learning into existing business school curriculums. The work is more expansive than including ethics modules across the business core, or adding more writing assignments to increase the practice of business communications skills. It is an entirely new paradigm for business student development which, in its essence, is a commitment to develop the whole person, intellectually and morally.

context of contemplation of the role of business in society, contrasting shareholder primacy with stakeholder theory.

With respect to reflective exploration of meaning, students are challenged to consider their own values as they consider the role of business to innovate solutions for a health crisis in a distant developing country. As they learn about the divergent views on the propriety of business taking responsibility for addressing social and economic problems, they must consider what role business should have in collaborating with nonprofit organizations to generate solutions for external stakeholders such as the Haitian patients in this case.

In designing a course of action for NW Partners in Pathology, students must draw on analytical thinking, multiple-framing and reflective exploration to strategize a concrete course of action for recommendation about how to successfully engage in a collaborative effort with Cap Haitian Women's Health Group.

### *B. Substantive Law, Business, and Technology Issues for the Project*

#### 1. New Business Entities for Social Innovation – An Overview

A social enterprise is an organization that advances a social mission through entrepreneurial, profit-making and strategic business activities.<sup>33</sup> As noted earlier, business leaders who are “social entrepreneurs” are visionary, creative and entirely committed to the social mission they seek to advance. Unlike a business enterprise that pursues social endeavors or corporate responsibility initiatives to enhance a business purpose, the business

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33 Keren G. Raz, *Toward an Improved Legal Form for Social Enterprise*, 36 N.Y.U. REV. L. & SOC. CHANGE 283, 285 (2012); Aurélien Loric, *Designing a Legal Vehicle for Social Enterprises: An Issue Spotting Exercise*, 5 COLUM. J. TAX L. 100, 102 (2013); Gail A. Lasprogata & Marya N. Cotten, *Contemplating "Enterprise": The Business and Legal Challenges of Social Entrepreneurship*, 41 AM. BUS. L.J. 67 (2003).

of a social enterprise actually exists to support its social mission.<sup>34</sup> This is a critical distinction in understanding the difference between organizations that are socially responsible and those whose business is to advance a social purpose. Social responsibility treats contribution to a healthy society as incidental to its profitmaking core business activity.<sup>35</sup> Social enterprise understands that companies can “primarily and profitably promote social causes.”<sup>36</sup>

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34 Raz, *supra* note 33, at 303. By way of example, a business organized as a computer reseller that also operates an electronic-waste recycling program, pays ninety percent of its employees’ health insurance premiums and matches its customers’ donations to charities is an organization practicing social responsibility. Its core business remains computer reselling, regardless of its charitable initiatives. Compare that to an organization whose stated purpose is to assist former addicts in transitioning to a productive life that retrains and employs as laborers and project managers in the construction industry those who have successfully completed a recovery program. The first organization’s endeavors exist to support its social mission. The second’s social endeavors exist to support its core business purpose. *See Id.*

35 Loric, *supra* note 33, at 102.

36 *Id.*; Marya N. Cotten & Gail A. Lasprogata, *Corporate Citizenship & Creative Collaboration: Best Practice for Cross-Sector Partnerships*, 18 J. L. BUS. & ETHICS 9 (2012). This form of business enterprise would fall within what Bill Gates has coined as “creative capitalism.” Cotten & Lasprogata, *supra*, at 10 n.3. There is a surprisingly longer history of social entrepreneurship dating back as far as 1963 when Bill Drayton, the founder of Ashoka, began articulating a social innovation model that “combine[s] the pragmatic and results-oriented methods of a business entrepreneur with the goals of a social reformer.” Loric, *supra* note 33 (citing Caroline Hsu, *Entrepreneur For Social Change*, U.S. NEWS & WORLD REP. (Oct. 31, 2005), <http://www.usnews.com/usnews/news/articles/051031/31drayton.htm>). In 1980 Drayton founded Ashoka, a nonprofit that “aims to find change-making leaders around the world, provide them with support and modest ‘social venture capital’, thus creating a ‘community for people seeking to make change, encouraging them to inspire, mentor and challenge each other to come up with the best ideas in social innovation.” Loric, *supra* note 33 (citing Tom Dawkins, HUFFINGTON POST *Gamechangers Poll Recognizes Ashoka Community*, Ashoka (Nov. 5, 2009), <http://www.ashoka.org/story/6142>). Today Ashoka continues to thrive and has created a program for universities called AshokaU.

This way of doing business is oft referred to as “the double bottom line” – furthering the “dual and co-equal purposes of making profit and contributing to the public good,” and seeking both an economic and social return on investment.<sup>37</sup>

Early definition of social enterprise focused on the nonprofit sector as the work of social causes was historically housed in that space.<sup>38</sup> However entrepreneurial the leaders of nonprofits may be, there are inherent limitations in that state organizational structure which often hinder the ability of nonprofits to achieve real and long-term success at applying entrepreneurial strategies to accomplish their social missions. Nonprofits, most of whom seek tax-exempt status under the federal Internal Revenue Code as 501(c)(3) charitable organizations, are generally restricted by the Code in their funding and investor options, and in any revenue-generating capabilities that may be considered unrelated to their charitable purpose.<sup>39</sup>

It is possible to organize a social enterprise as a traditional C corporation. However, the risk in such entity choice for organizations pursuing a social purpose is that the purpose may conflict with the profit-making, investor-benefit mandate imposed on the directors and managers of such firms. Although shareholder primacy is a subject of considerable debate in the context of defining the role of business in society, the mandate is at least well-articulated for corporations under corporate statutes and in court interpretation of the duties of directors to advance shareholder

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37 Loric, *supra* note 33, at 104.

38 *See*, e.g., Lasprogata & Cotten, *supra* note 33.

39 *Id.*; *see* also Raz, *supra* note 33, at 293; Loric, *supra* note 33, at 107–12.

Nonprofit organizations have no owners. Any revenue generated by a nonprofit is directed back into the organization’s operations to support its mission, whether that mission be social, environmental or economic in nature. As such, it is not possible to attract investor funds. There is no return on economic investment. Rather, nonprofits support their financial requirements with foundation grants, charitable contributions and their revenue-generating activities.

wealth.<sup>40</sup> According to this directive, decisions made by directors are governed by their fiduciary duties to the corporation and are to be made principally to increase the value of the shareholders' investment.<sup>41</sup> Although directors enjoy freedom under the business judgment rule to make decisions that benefit non-investor stakeholders, market realities and the demands of investors to prioritize profit over social purpose put the social purpose at risk of being backburnered in a traditional corporate form.<sup>42</sup> When management changes or if there is a change in control of the corporation, there is no law that protects the social bottom line.<sup>43</sup>

Social enterprises possess characteristics that make them unique and not in perfect alignment with existing choices for business entities. Those characteristics include:

- 1) A governing social mission that guides organizational decisions and behavior;

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40 For a general discussion of the evolution of corporate decision-making applying corporate responsibility practices and the role of corporate law in this regard, See Cotten & Lasprogata, *supra* note 36, at 9–19; Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163 (2008).

41 A majority of states have adopted “corporate constituency statutes” which permit directors to consider non-investor stakeholder interests in determining what they believe to be in the best interests of the corporation. This includes consideration of employees, customers, creditors, suppliers and community and societal interests. See Cotten & Lasprogata, *supra* note 36, at 17–18.

42 See Loric, *supra* note 33, at 111–17. Directors enjoy freedom to consider non-shareholder considerations, particularly in decisions that do not involve the sale of the corporation. Under *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), and its progeny, when a company is at auction, only shareholder value is an appropriate consideration. This is why the directors of Ben & Jerry's (a quintessential socially responsible business) felt they needed to accept Unilever's bid even though it jeopardized the corporation's social endeavors. See *Id.* at 114.

43 Loric, *supra* note 33, at 116.

- 2) A sophisticated business model (which is typically associated with traditional, purely for-profit companies) serves as the primary tool to achieve the mission;
- 3) Attract grant, debt, and equity financing; and
- 4) Must balance the mission and profit motives of the various managers, investors, and stakeholders.<sup>44</sup>

Does social enterprise, because of these unique characteristics, need a new business entity choice to facilitate its special combination of social purpose and profit-making functions? This question opens up learning for business law students about business entity choice that might better support the role of business in society as an agent for positive social change. Because of the challenges facing social entrepreneurs in traditional for-profit entities, state legislators have enacted laws adopting hybrid vehicles that better support the double-bottom line, notably the Low Profit Limited Liability Company (“L3C”) and the benefit corporation.

a. The Low Profit Limited Liability Company

The L3C is a seeming hybrid of the limited liability company and a nonprofit tax-exempt corporation. It combines the legal structure of a limited liability company with the mission of a nonprofit; hence, its attraction to social innovators.<sup>45</sup> The L3C is a for-profit entity that cannot receive tax-exempt status from the IRS, but possibly can access a type of foundation grant called program-

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<sup>44</sup> Raz, *supra* note 33, at 287.

<sup>45</sup> See Ashley Schoenjahn, *New Faces of Corporate Responsibility: Will New Entity Forms Allow Businesses to Do Good?*, 37 J. CORP. L. 453, 460 (2012). See *Here's the latest L3C Tally*, interSector Partners, L3C, [http://www.intersectorl3c.com/l3c\\_tally.html](http://www.intersectorl3c.com/l3c_tally.html) (last updated Mar. 15, 2015) for the updated status of L3C state and business adoption.

related investments (“PRIs”).<sup>46</sup> In fact, the L3C was first proposed to help social purpose businesses compete for such investments. PRIs are loans or equity investments made by foundations for a charitable purpose in either nonprofits or for-profits.<sup>47</sup> The tax rules governing foundations are complex; however, the PRI regulations do allow foundations to loan or invest, and earn a return so long as the pursuit of the return is incidental to the “charitable purpose.”<sup>48</sup> To date, the IRS has not classified the L3C model as a nonprofit entity, immediately eligible for PRIs. Although this new entity has qualities that align it with the unique characteristics of social enterprise, the funding ambiguities and uncertainties with respect to governance issues have restricted its use.<sup>49</sup>

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46 Raz, *supra* note 33, at 297. See Laws, Ams. for Cmty. Dev., <https://www.americansforcommunitydevelopment.org/laws.html> (last visited June 13, 2015), for access to the state and federal jurisdiction (Native American tribe) legislation. North Carolina repealed its law in January, 2014. See Anne Field, *North Carolina Officially Abolishes the L3C*, FORBES (Jan. 1, 2014), <http://www.forbes.com/sites/annefield/2014/01/11/north-carolina-officially-abolishes-the-l3c/>. For critique of the L3C model, See J. William Callison & Allan W. Vestal, *The L3C Illusion: Why Low-Profit Limited Liability Companies Will Not Stimulate Socially Optimal Private Foundation Investment in Entrepreneurial Ventures*, 35 VT. L. REV. 273 (2010).

47 Raz, *supra* note 33, at 297.

48 *Id.* The “charitable purpose” must be one of the enumerated charitable purposes in the Internal Revenue Code. *Id.* at 298. For an informative and clear discussion of PRIs and foundation rules, see Loric, *supra* note 33, at 116–21. PRIs generate substantial transactional, legal and administrative costs for foundations and therefore are not widely used. See Loric, *supra* note 35, at 120–21. The hope of supporters of the L3C model is that the IRS would issue a ruling acknowledging all L3Cs as qualifying PRIs, thus incentivizing foundations to partake more readily. As of this writing, there has been no such IRS rule making.

49 See Raz, *supra* note 33, at 297–301. Raz notes that the ABA Committee on Limited Liability Companies, Partnerships and Unincorporated Entities has urged states not to adopt L3C legislation. Raz, *supra* note 33, at 300 (citing *Am. Bar Ass’n, Resolution of the ABA Committee on Limited Liability Companies, Partnerships and Unincorporated Entities*, Section of Business Law (2010), available at <http://meetings.abanet.org/webupload/commupload/>

b. The Benefit Corporation

The benefit corporation is a variation of a C corporation that is required to create a material positive impact on society (the “benefit”).<sup>50</sup> Twenty-seven states have adopted benefit corporation legislation, making it a more popular choice for social enterprise than the L3C.<sup>51</sup> Although there is some differentiation among the states, the major characteristics of the form are:

- 1) a requirement that a benefit corporation must have a corporate purpose to create a material positive impact on society and the environment;
- 2) an expansion of the duties of directors to require consideration of non-financial stakeholders as well as the financial interests of shareholders; and
- 3) an obligation to report on its overall social and environmental performance using a comprehensive, credible, independent and transparent third-party standard.<sup>52</sup>

The predominant reason benefit corporation legislation has been so prolific since Maryland adopted the first statute in 2010 is

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RP519000/relatedresources/ABA\_LLC\_Committee-L3C\_Resolution\_and\_explanation-2-17-10.pdf).

50 See Benefit Corp Information Center, <http://benefitcorp.net/> (last visited June 13, 2015).

51 See *27 States Adopt Benefit Corp Laws: Michigan Still in Limbo, CORP! MAG.* (Sept. 18, 2014), <http://www.corpmagazine.com/sales-and-marketing/27-states-adopt-benefit-corp-laws-michigan-still-in-limbo/>; Benefit Corp Information Center, *supra* note 50 (showing updated status of state adoption).

52 See William H. Clark et al., *The Need and Rationale for the Benefit Corporation: Why it is the Legal Form That Best Addresses the Needs of Social Entrepreneurs, Investors, and Ultimately, The Public* (2013), available at [http://benefitcorp.net/storage/documents/Benecit\\_Corporation\\_White\\_Paper\\_1\\_18\\_2013.pdf](http://benefitcorp.net/storage/documents/Benecit_Corporation_White_Paper_1_18_2013.pdf).

the perception that the C corporation is a vehicle that exists only to advance the shareholder primacy doctrine.<sup>53</sup> The debate about directorial discretion to adopt a stakeholder approach to corporate governance has lead legislators to respond with an alternative model, the benefit corporation, which specifically allows and even promotes the role of the corporation in society as an agent for positive social change.

The Maryland statute defines “public benefit” as a “material, positive impact on society and the environment, as measured by a third party standard.”<sup>54</sup> Examples of activities which create such an impact include: (1) Providing individuals or communities with beneficial products or services; (2) Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business; (3) Preserving the environment; (4) Improving human health; (5) Promoting the arts, sciences, or advancement of knowledge; (6) Increasing the flow of capital to organizations with a public benefit purpose; or (7) The accomplishment of any other particular benefit for society or the environment.<sup>55</sup>

Directors governing benefit corporations are generally protected from personal liability for consideration of non-investor stakeholders in their decisions.<sup>56</sup> “The law(s) protect directors who make socially or environmentally beneficial decisions that have

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53 See Raz, *supra* note 33, at 300–01.

54 *Id.* at 301 (*citing* Md. Code Ann., Corps. & Ass’ns § 5-6C-01(c) (West 2012)). Minnesota very recently adopted its benefit corporation law in 2014. The law acknowledges that a corporation may be formed for either a general or a specific public benefit. “Specific public benefit” means “one or more positive impacts, or reductions in negative impact, on specified categories or natural persons, entities, communities, or interests, other than shareholders in their capacity as shareholders, as enumerated in the articles of a public benefit corporation.” Minn. Stat. 304A.21(9) (2015).

55 Md. Code Ann., Corps. & Ass’ns § 5-6C-01(d) (West 2012); *see also* Raz, *supra* note 33, at 300–01.

56 *See, e.g.*, Minn. Stat. 304A.201 (2015).

neutral or even negative effects on the bottom line.”<sup>57</sup> This principle has to be in place to support the argument that social purpose businesses need this new form of business entity to solidify the corporation’s commitment to its social mission.

The benefit corporation is a legal entity for raising capital for social enterprise and is certainly a model for supporting socially responsible business.<sup>58</sup> However, the statutes permit, but do not require a specific social mission. Directors are protected from personal liability in their governance, but the mission itself is not so safeguarded.<sup>59</sup> The broad discretion given to management can result in opportunism at the expense of the social purpose, particularly where there is a conflict between investors and directors in their vision, or where there are challenging economic issues that pressure management to focus more on the financial than social bottom line.<sup>60</sup>

Benefit corporations are subject to third-party assessment of their performance in accomplishing social and environmental purposes, and must annually make a public report on that assessment. While this can be applied as a valid accountability tool, management has discretion in selecting that third-party to independently review their performance, which is based on management’s self-reporting. In other words, this is not an independent audit of the corporation’s performance but more in line with existing reporting methodologies in the corporate social responsibility realm.<sup>61</sup> It is not certain that the annual report

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<sup>57</sup> Raz, *supra* note 33, at 304.

<sup>58</sup> Benefit corporations can source funding from a diverse group of equity investors, lenders and even foundations as they, like L3Cs, are ostensibly qualified to receive PRIs. *See Id.* at 303.

<sup>59</sup> *Id.* at 305.

<sup>60</sup> *See Id.*

<sup>61</sup> *See* B Lab, <http://www.bcorporation.net> (last visited June 13, 2015). This is the nonprofit organization behind the benefit corporation legislative movement. It is easy to confuse B Corp with benefit corporations. B Lab is a tax exempt organization that, in addition to lobbying for benefit corporation legislation, offers services as an independent reviewer for measuring a benefit corporation’s success at achieving its public benefit. It also offers to any socially minded

requirement and the third party review process will be enough to secure the corporation's social purpose from dilution.<sup>62</sup>

The only real enforcers of the social purpose in a benefit corporation are the shareholders and the directors, not the intended beneficiaries of the social purpose (i.e., external stakeholders).<sup>63</sup> As in a traditional C corporation, shareholders can use derivative litigation to hold directors accountable for gross negligence in their management. What is yet to be determined is if failure of the directors to prioritize the social benefit will constitute gross negligent misconduct. And it is not certain that shareholders will even want to hold directors accountable for prioritizing the social benefit over the value of their shares, or that a change in ownership

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organization the opportunity to become a B Corp, which is basically a certification that the organization is a responsible business. Certification as a B Corp by B Lab is to business what Fair Trade certification is to coffee and what LEED certification is to green building. *See What are B Corps?*, B Lab, <http://www.bcorporation.net/what-are-b-corps> (last visited June 13, 2015). B Lab targets the global movement of social entrepreneurs who *see* to use the power of business to solve social and environmental problems. *See The Non-Profit Behind B Corps*, B Lab, <http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps> (last visited June 13, 2015). For information on the certification process, *See How to Become a B Corp*, B Lab, <http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp> (last visited June 13 23, 2015).

62 Raz, *supra* note 33, at 306 (citing Dana Brakman Reiser, *Benefit Corporations – A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 617 (2011)).

63 Compare the legislation in the State of Washington, which adopted the “social purpose corporation.” The social purpose corporation may be organized for a general social purpose which is at least protected from shareholder pressures by a rule that requires 2/3 majority vote of the shareholders to eliminate said purpose. Additionally, the Washington State law acknowledges that shareholders who are aligned with the social purpose and *seek* to enforce it may sue the company for failure to achieve a material positive impact. This is referred to as a “benefit enforcement proceeding.” Wash. Rev. Code § 23B.25.080 (2012).

will not bring with it a change in intention to pursue the social purpose for which the corporation was originally created.<sup>64</sup>

The debate is ongoing about the need for new business entity models for social entrepreneurial ventures and their ultimate utility for supporting and protecting social purpose missions in business firms. As legislators, attorneys and business leaders continue their deliberation, exposing business students to the L3C and benefit corporation provides a rich opportunity for analytical thinking in examination of the legislative objectives of each model, their requirements for formation and the contrast with long-standing entity options such as the LLC and the C corporation. Consideration of these new entities also makes possible student discussion about social purpose relevance in business, stakeholder priorities versus shareholder dominance, and the greater role of business in society.

### 1. The Use of New Technologies for Social Innovation- An Overview

Cloud computing is widely-used but it is not well understood. The image of a cloud has become the standard way of marketing the concept in order to create the impression that the cloud computing experience is wireless, seamless, effortless, and available in an instant from anywhere, at any time, “from the cloud.” However, the complex reality of the inner workings of cloud computing are drastically different from the fluffy imagery used in advertising campaigns.<sup>65</sup>

The National Institute of Standards and Technology (NIST) defines cloud computing this way:

Cloud computing is a model for enabling convenient, on-demand network access to a shared pool of configurable

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64 Raz, *supra* note 33, at 306.

65 See, e.g., Image Search Results for “Cloud Computing,” Google, <http://images.google.com> (search “Cloud Computing”) (last visited June 13, 2015).

computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction.<sup>66</sup>

In cloud computing, some or nearly all of an organization's computing resources are "rented" from an external cloud provider on a scalable, pay-per-use or subscription basis. Software and data are stored on the provider's servers at a remote location. Cloud computing providers deliver "instances" of computing power to users on demand via the internet to any location. By using cloud computing organizations avoid the initial cost of purchasing hardware, software and other physical infrastructure, and the associated ongoing costs for system maintenance and software upgrades.<sup>67</sup>

Most cloud computing services are delivered through shared data-centers. A cloud user needs a device such as a laptop or desktop computer, pad computer, smart phone, or other computing resource with a web browser (or other approved access route) to access a cloud system. Computational power and data storage are divided among the remote computers in order to handle large volumes of both. From the user's perspective, the performance of the cloud applications is dependent upon the network speed and reliability, the number of simultaneous users, as well as the processing speed of the user's device.

A cloud service provider may pool the processing power of multiple remote servers in a cloud data center to accomplish routine

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66 Peter Mell & Timothy Grance, Nat'l Inst. of Standards & Tech. (NIST), *The NIST Definition of Cloud Computing* (2011), available at <http://csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf>; see also Lee Badger et al., Nat'l Inst. of Standards & Tech., *NIST Cloud Computing Architecture and Reference Architecture*, in *U.S. Government Cloud Computing Technology Roadmap Volume II Release 1.0* (Draft), at 16 (2011), available at [http://www.nist.gov/itl/cloud/upload/SP\\_500\\_293\\_volumeII.pdf](http://www.nist.gov/itl/cloud/upload/SP_500_293_volumeII.pdf).

67 T. Noble Foster, *Navigating Through the Fog of Cloud Computing Contracts*, 30 J. MARSHALL J. INFO. TECH. & PRIVACY L. 13, 14 (2013).

tasks such as backing up of large amounts of data, word processing, or other computationally intensive work. These tasks might normally be difficult, time consuming, or expensive for an individual user, small company or new social enterprise, especially with limited computing resources and funds.<sup>68</sup>

Despite the perceived advantages of cloud computing, users of cloud computing are subject to risks of disruption of service that can occur at any point in the complex infrastructure that provides the essential connections from the user to the cloud.<sup>69</sup> Additionally,

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68 Cloud computing can be structured as private, community, public, or a hybrid cloud. The most used model is the private cloud, followed by the hybrid model (thirty-one percent) and the public cloud model (eleven percent). See *Intel IT Ctr., Intel's IT Manager Survey on Cloud Security 5* (2011), available at <http://www.intel.com/content/dam/www/public/us/en/documents/reports/cloud-computing-security-for-it-strategic-planning-report.pdf>.

69 Ilana R. Kattan, *Cloudy Privacy Protections: Why the Stored Communications Act Fails to Protect the Privacy of Communications Stored in the Cloud*, 13 VAND. J. ENT. & TECH. 617 (2011).

In contrast to the PC model, cloud computing leverages economies of scale: In the cloud, everyday processes and information that are typically run and stored on local computers—email, documents, calendars—can be accessed securely anytime, anywhere, and with any device through an Internet connection. Rather than invest in expensive and specialized IT equipment and personnel, customers can rely on the scale and security offered by the cloud providers to access data anywhere Internet access is available.

Businesses have shifted from local to cloud computing to capture a variety of efficiencies, which they can then pass on to end-users. First, businesses entrusting customer and other data to cloud service providers benefit from the providers' ability to aggregate large volumes of data electronically, which enables targeted advertising to Customers. Second, businesses storing information in the cloud reap cost savings, because they need not invest in information-technology (IT) infrastructure, and can instead "customize and rapidly scale their IT system for their particular needs." Cloud computing allows businesses to buy only the services they want, and offers the flexibility to set and reset their computing capacities within seconds. These attributes of cloud computing lower market barriers, and help stimulate innovation among developers and small businesses.

Third, cloud services enable businesses and other users to access their data "anytime, anywhere," through the Internet. Fourth, cloud computing services

there are several persistent concerns about cloud computing that have been identified.<sup>70</sup> Among these concerns, privacy and security top the list for most cloud users, especially in the context of storage, retrieval, and transmission of digital medical records such as those involved in the Project. Customers of cloud services attempt to manage their concerns and seek to mitigate the risks when they negotiate cloud services agreements with the providers.<sup>71</sup>

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are typically free for the user or at least less expensive than local computing services, and the costs, if any, are often more predictable. Finally, cloud computing providers regularly back up users' files and store them on multiple servers, thereby protecting users from losing data when their hardware fails. While cloud computing capitalizes on various efficiencies, it also create "dependency," because users must rely on their service providers to maintain and protect their data. Some businesses, therefore, may want to maintain data in-house rather than outsource their computer storage and processing services. Furthermore, once a user shifts to the cloud for his data storage and processing, return to the PC model may be too onerous. Finally, users must depend on the telecommunications infrastructure that transmits their data to and from the cloud. Despite these limitations, cloud computing may present a more efficient model of computing for some businesses and end-users. *Id.* (internal citations omitted).

70 Paul T. Jaeger et al., *Where is the Cloud? Geography, Economics, Environment, and Jurisdiction in Cloud Computing*, *First Monday* (Apr. 8, 2009), <http://firstmonday.org/ojs/index.php/fm/article/view/2456/2171>; see also Michael Armburst et al., *Above the Clouds: A Berkeley View of Cloud Computing* (2009), available at <http://www.eecs.berkeley.edu/Pubs/TechRpts/2009/EECS-2009-28.pdf>.

71 Jaeger, *supra* note 70. For cloud users, these concerns can be grouped into categories that reflect certain expectations about cloud computing, including: Access — users expect to be able to access and use the cloud where and when they wish without hindrance from the cloud provider or third parties. Reliability — users expect the cloud to be a reliable resource, especially if a cloud provider takes over the task of running “mission-critical” applications. Data Security — users expect that the cloud provider will prevent unauthorized access to both data and code, and that sensitive data will remain secure from electronic as well as physical threats such as floods, earthquakes, fire, explosion, etc.

Data confidentiality and privacy — users expect that the cloud provider, other third parties, and governments will not monitor their activities, except when cloud providers selectively monitor usage for quality control purposes.

a. The Importance of Teaching Cloud Computing to Undergraduate Business Students

Forbes has reported that over half of U.S. businesses use cloud computing services.<sup>72</sup> Any business student not familiar with the basic features, benefits, and risks of cloud computing will be ill-prepared to enter the workforce. Therefore, it is important and appropriate to make cloud computing a key subject matter area of this comprehensive and highly integrative Project.

As future business professionals, students should be aware that cloud computing contracts typically comprise two parts: a general subscription agreement, and a service level agreement that provides specific guarantees on the reliability of the contracted services. Contractual provisions such as protection of privacy, security, and accessibility are points of serious negotiation which are accentuated in the context of sensitive health data such as that involved in this Project.

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Liability — users expect clear delineation of liability if serious problems do occur.

Intellectual property — users and third party content providers expect that their intellectual property rights will be upheld.

Ownership of data — users expect to be able to regulate and to control the information that is created, modified, and disseminated using cloud services

Portability — users expect that data and resources stored in one area of the cloud can be retrieved in a format that can be easily moved or transferred, if necessary, to another similar service with little or no effort, and that there are no unfair or unduly burdensome contractual obligations that hinder the process of moving the data.

Auditability — users, particularly business users, expect that providers will comply with regulations or at least be able to provide users with the necessary means to comply with any audits per government requirements.

*Id.*

72 Reuven Cohen, *The Cloud Hits the Mainstream: More than Half of U.S. Businesses Now Use Cloud Computing*, FORBES (Apr. 16, 2013, 9:23 AM), <http://www.forbes.com/sites/reuvencohen/2013/04/16/the-cloud-hits-the-mainstream-more-than-half-of-u-s-businesses-now-use-cloud-computing/>.

## b. Cloud Computing for Social Entrepreneurship

In this section we consider how effectively cloud computing helps advance the social entrepreneurship mission plan of the NWPP-CHWHG partnership. The IBM SmartCloud for Social Business provides an excellent model of the way cloud computing facilitates social entrepreneurship. There is nothing technologically distinctive in the IBM platform. The company has simply done well at marketing the concept to the social enterprise niche.

IBM has an exemplary relationship with an organization called Colleagues in Care, which like our NWPP-CHWHG partnership, facilitates quality medical care in Haiti.<sup>73</sup> In our Project, and in the case of Colleagues in Care, medical data collected from patients in Haiti is uploaded to the IBM cloud, where it is accessed and evaluated in real time by multiple physicians in numerous locations in North America, Europe and elsewhere. The collective expertise in the team is engaged in order to transmit diagnostic findings, treatment options, and best practices back to the medical delivery team on the ground in Haiti in the shortest time possible.<sup>74</sup>

Although our example is in the medical field, social entrepreneurship is benefitting from cloud computing technology in other important areas, including environmental protection and economic development programs in impoverished regions of the world. The connections between social enterprise and cloud

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<sup>73</sup> *IBM Collaborates with Colleagues in Care to Empower Medical Workers in Haiti*, IBM (May 17, 2012),

<http://www.03.ibm.com/press/us/en/pressrelease/37743.wss>.

The organization is using IBM cloud-based social analytics and collaboration services to provide the global network of healthcare volunteers with immediate access to critical data and information for the current healthcare needs of the Haitian citizens. The network consists of approximately 200 doctors, nurses, and business professionals coming together virtually from all around the globe including Canada, China, Haiti, France, Ireland, Italy, the United Kingdom, and the United States. *Id.*

<sup>74</sup> *Id.*

computing have become so well-recognized that major mainstream business consulting firms have published glossy guidebooks on how to use technology to accomplish social goals.<sup>75</sup>

Social entrepreneurial ventures, including the cross-sector partnership in the Project, can benefit from the use of cloud computing technology in several important ways, including cost savings, accessibility, uniformity, security, compatibility, and analytical capability. The pay-as-you-go cost structure of cloud services allows social enterprises to avoid expensive capital investment in computer systems, software, maintenance and upgrades, and the associated staffing costs. Additionally, by using cloud technology, any employee or member of the organization can access mission-critical data and the software needed for processing anytime, from anywhere in the world. Since the organization uses software which is located in the cloud rather than installed on individual machines, everyone in the system is always using the current version of that software. When new software programs are installed it is often the case that they do not integrate with the pre-existing system. In cloud computing, the integration is managed by the cloud provider so that the organization does not have to spend time and money on this distracting task.

Cloud computing can provide social enterprises with the analytical tools necessary to analyze large data compilations in order to generate insights that can lead to more effective and efficient use of their typically limited resources. While storing sensitive patient medical data in the cloud has certain inherent risks, those risks are now well-known to cloud providers, and they are in a better position to respond to new threats. Cloud services providers are *constantly* engaged in developing enhanced data security measures to an extent

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75 Accenture, *Mapping Out Your Journey to Become a Social Enterprise* (2012), available at

<http://www.accenture.com/SiteCollectionDocuments/PDF/Accenture-Mapping-Out-Your-Journey-To-Become-A-Social-Enterprise.pdf>.

that is far more effective than an end user social enterprise could provide.<sup>76</sup>

## 1. HIPAA and the Role of Privacy Law in the Project

The Health Insurance Portability and Accountability Act (“HIPAA”) provides a federal law framework to protect health privacy interests. The law predates cloud services and therefore did not specifically address how these services impact the rules and regulations for the management of protected health information (“PHI”) in the cloud.<sup>77</sup> This void was partially filled in January of 2013 with the passage of the Omnibus HIPAA Rule which is intended to “strengthen the privacy and security protections established under [HIPAA] for individual’s health information maintained in electronic health records and other formats.”<sup>78</sup> The

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76 Steve Shattuck, *How #Cloud Computing Will Single-handedly Save the Nonprofit Sector*, TECHNORATI (Apr. 7, 2014), <http://technorati.com/how-cloud-computing-will-single-handedly-save-the-nonprofit-sector/>.

77 *See Id.* Navigating the rules of HIPAA, the Security Act (which applies to electronic or digitized data) and HITECH is complicated. For a basic understanding of their differences, *See Mary Pat Whaley, Clearing Up the Confusion Between Security, Privacy, HIPAA and HITECH: An Interview With Steve Spearman*, MANAGE MY PRACTICE (Feb. 17, 2013), <http://managemypractice.com/clearing-up-the-confusion-between-security-privacy-hipaa-and-hitech-an-interview-with-steve-spearman/>.

78 Frank Pasquale & Tara Adams Ragone, *Protecting Health Privacy in an Era of Big Data Processing and Cloud Computing*, 17 STAN. TECH. L. REV. 595, 607 (2014) (citing *Modifications to the HIPAA Privacy, Security, Enforcement, and Breach-Notification Rules Under the Health Information Technology for Economic and Clinical Health Act and the Genetic Information Nondiscrimination Act: Other Modifications to the HIPAA Rules*, 78 Fed. Reg. 5566, 5566 (Jan. 25, 2013) (to be codified at 45 C.F.R. pts. 160, 164), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-01-25/pdf/2013-01073.pdf>). The U.S. Department of Health and Human Services (HHS) Office for Civil Rights announced the final rule that implements a number of provisions of the Health Information Technology for Economic and Clinical Health (HITECH) Act, enacted as part of the American Recovery and Reinvestment Act of 2009, to strengthen the privacy and security protections for health information

consensus now seems to be that this final rule extends liability for misuse of PHI down the chain from “covered entities” (e.g., healthcare providers such as the NWPP-CHWHG collaboration in the Project)<sup>79</sup> to reach “business associates,” which includes subcontractors such as cloud services providers.<sup>80</sup> Under the law, covered entities and business associates must enter into contracts called “business associate agreements” or BAAs to address risks and liability under HIPAA and ensure HIPAA compliance.<sup>81</sup>

A general understanding of HIPAA and the attendant HIPAA Privacy Rule, Security Rule and the recent Omnibus Rule is helpful for instructors who assign the Project. A list of resources which may assist instructors in their own learning is included in Appendix A. Depending on the text used by the instructor, it may be appropriate to assign additional resource materials for student research and/or cover the topic in the classroom to support student

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established under the Health Insurance Portability and Accountability Act of 1996 (HIPAA). See *Omnibus HIPAA Rulemaking*, U.S. Dep’t of Health & Human Servs., <http://www.hhs.gov/ocr/privacy/hipaa/administrative/omnibus/> (last visited June 13, 2015). The text of the final rule is available in the Federal Register. See *Genetic Information Nondiscrimination Act: Other Modifications to the HIPAA Rules*, *supra*.

79 See Christine A. Williams, *Cloud Computing and HIPAA Privacy and Security* (2013), available at

<http://www.perkinscoie.com/images/content/2/8/v2/28082/pl-13-01-c.a.williamshipaaarticle.pdf>; Pasquale & Ragone, *supra* note 78, at 607 (*citing* the HIPAA Privacy Rule, 45 C.F.R. § 160.103 (2013)).

80 Pasquale & Ragone, *supra* note 78, at 638. “Business Associates” are generally persons who perform functions or activities on behalf of, or certain services for, a covered entity that involve the use or disclosure of protected health information. See *Business Associates*, U.S. Dep’t of Health & Human Servs.,

<http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/businessassociates.html> (last revised Apr. 3, 2013) (*citing* 45 C.F.R. § 160.103).

81 Pasquale & Ragone, *supra* note 78, at 638. There is much guidance about what business associate agreements should include to minimize risks for cloud service providers under HIPAA and to ensure HIPAA compliance. See *Id.* Interestingly, some of the dominant players in the cloud services industry refused to execute BAAs with covered entities. See *Id.* at 639–43.

participation in the exercise. What should be noted, however, is that this Project does not require detailed statutory analysis that would certainly be beyond the scope of reasonable expectation of undergraduate student competencies. The objective is that students will identify the issue of privacy protection for sensitive health data such as cervical cancer lab samples, research to learn the federal regulatory law that applies to such data, inquire and analyze if the law reaches extraterritorially to the Haitian patients who are not U.S. citizens, and decide if the contract with the intended cloud service provider should include provisions about risk management for misuse of the data.

The landscape of federal privacy regulation on point includes HIPAA's Privacy Rule and the Security Rule. The Privacy Rule regulates covered entities' use and disclosure of PHI. Any time a covered entity uses or discloses PHI, that use or disclosure must comply with HIPAA's privacy provisions. The Security Rule requires covered entities to "maintain reasonable and appropriate administrative, technical, and physical safeguards to prevent intentional or unintentional use or disclosure of protected health information in violation of the Privacy Rule and to limit its incidental use and disclosure pursuant to otherwise permitted or required use and disclosure."<sup>82</sup> Essentially the Security Rule guards the confidentiality, integrity and availability of electronic PHI.<sup>83</sup> Covered entities are allowed to disclose PHI to business associates (e.g., cloud services providers) with appropriate contractual assurances (in the BAA) that the business associate will appropriately safeguard the data.<sup>84</sup>

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82 Pasquale & Ragone, *supra* note 78, at 608 (citing 45 C.F.R. §§ 164.302–318 (2013) and Alden J. Bianchi et al., *Advisory: The New HIPAA Omnibus Rule & Your Liability*, Mintz Levin P.C. (Feb. 15, 2013),

<http://www.mintz.com/newsletter/2013/Advisories/2663-0213-NAT-HL/index.html>).

83 *Id.*

84 *Id.* (citing 45 C.F.R. § 164.502(e)(1)(i) (2013)).

If a covered entity fails to comply with the federal regulations, it will be liable for now increased civil and in some cases criminal penalties.<sup>85</sup> With the issuance of the Omnibus HIPAA Rule, business associates are also directly liable for compliance with certain of the HIPAA Privacy and Security Rules.<sup>86</sup> Business associates are thus now clearly responsible for complying with HIPAA's administrative, physical and technical safeguard provisions.<sup>87</sup>

David Holtzman of the Health and Human Services Office for Civil Rights has indicated that cloud service providers are business associates if they perform functions that maintain PHI for a covered entity.<sup>88</sup> This expansion of HIPAA makes business associates such as cloud service providers directly liable for violations of HIPAA.<sup>89</sup>

Understanding the basic rules regarding privacy protection for the Haitian health data under HIPAA, and whether and how these rules apply to covered entities like those in the Project, and by extension to the intended cloud services provider, is the first component of learning about the privacy law implications for the Project. Next and related is the responsibility for covered entities to apply the rules and regulations of HIPAA to foreign patient data. Here there is some instruction in the U.S. Department of Health and Human Services ("HHS") advice regarding human research

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85 *Id.* at 608, 619–21. In April 2012, the Office of Civil Rights in Health and Human Services reached a \$100,000 settlement with a small cardiology practice, Phoenix Cardiac Surgery, P.C., that allegedly violated HIPAA for failing to enter BAAs with cloud service providers that stored and had access to electronic PHI, and for failing to establish adequate policies to protect PHI. *Id.* at 620.

86 *Id.* at 609 (*citing* 45 C.F.R. § 160.102(b) (2013)).

87 *Id.* at 610.

88 *Id.* at 612 (*citing* Kedra Casey Plank, *Cloud Providers Often Are Business Associates Under HIPAA, Officials Say*, 22 HEALTH L. REP. (BNA) 858 (2013)). What is not yet determined is whether HIPAA will bind an entity that maintains encrypted data for a covered entity but which does not have the key to access that data. *See Id.*

89 *Id.* at 615.

subjects. According to HHS, the Privacy Rule has narrow exclusions which when combined with the broad definitions of individuals, covered entities and PHI, has led to the conclusion by some that HIPAA's requirements *do* attach to the use and disclosure of a foreign national's PHI by U.S. covered entities, even if that use and disclosure occur outside of U.S. jurisdiction.<sup>90</sup> However, others have reached the opposite conclusion based on conflicts of law principles and a conclusion that foreign laws such as the European Union's Privacy Directive would supercede application of HIPAA.<sup>91</sup> This makes for an interesting inquiry for students who must consider whether the rules apply to Haitian PHI in a cloud lacking any clear geographical location. Learning the intricacies of HIPAA is not the primary objective of the exercise; it is a vehicle for teaching students more broadly about the impact of regulatory law on business operations of all kinds. Again, the richness of the Project is in the discernment and analysis of privacy issues in the context of ambiguity; not in reaching the "right" conclusion which in this case is not determinable.

### III. INSTRUCTOR NOTES

The authors' experience in using the Project as a capstone exercise is that it is tremendously helpful in integrating the course content in business law while also drawing on student learning across the business core curriculum. Additionally, the very nature of the assignment as a social innovation in the field of global health compliments the students' liberal education foundation in the university core curriculum. The fact that the partnership itself is created and directed by business leaders inspires reflection by the students about the role of business in society and allows them to contemplate that role as one of change agent for the common good.

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90 Secretary's Advisory Comm. on Human Research Protections, Appendix H, U.S. Dep't of Health & Human Servs.,

<http://www.hhs.gov/ohrp/sachrp/appendixh.html> (last visited Jun. 13, 2015).

91 *Id.*

Finally, although challenging and time consuming, the Project's deliverable requires students to apply the three modes of thinking of liberal learning (analytical, multiple framing and reflective meaning described in Part II A) to reason a practical, detailed report for the client medical practice.

With respect to the content of business law, students learn deeply through this exercise about business entities, privacy and contract law. In our courses we cover business entities routinely. Today the coverage of LLCs, C corporations, partnerships, nonprofit corporations and so forth is updated to include L3Cs and benefit corporations discussed in Part II B. This content prepares the students well for investigating question one of the Project's assignment and for engaging in analysis and critical thinking about the best choice for the new venture given its social purpose mission. Some textbooks have not yet incorporated these new entity choices, but there are many online and law review databases that offer content. Resources we provide to our students are included in Appendix A.

With respect to privacy law, coverage of information privacy and specifically HIPAA is also within the normal expanse of curriculum in business law courses, particularly for law faculty who enjoy diving deep into the ever-evolving nuances of privacy law like many of us in the academy. Innovations in information sharing technology pose a threat to information privacy, and the widespread adoption of cloud computing technology continues to outpace the law. Privacy is the central legal issue the students should address in answering the assignment's question three.

In the Project's scenario, it is unclear if HIPAA protects the sensitive health information of the Haitian patients. Students might consider the various scenarios and legal implications of the location of the cloud (in the U.S. or a foreign country), the data, and the doctors involved. They might also build on principles of business ethics and social responsibility to consider if the Haitian patients should receive the same protection of their human right to privacy as U.S. citizen patients covered by the law. This sort of rights

inquiry and comparison is squarely within the meaning of multiple-framing, a critical yet often difficult mode of liberal learning to encapsulate in other business courses.

Finally, with respect to the law of contracts and part two of the assignment's question three, students are presented a practical problem of risk management in identifying which contract provisions should be negotiated with the cloud service provider, and more importantly, how those provisions should protect the interests of the new venture. This part of the assignment builds well on the foundations of contract law learned in every course of business law, as well as on learning in core business information technology classes. Again, where textbook materials are not current, law review and business articles on the subject may be assigned such as those included in Appendix A. Additionally, to the extent available, inviting guest speakers from local cloud services companies is extremely useful for students to comprehend what cloud computing is and the legal and business position of cloud services providers with respect to their customers.

Students appreciate the social business aspect of the Project, most of them finding passion for business that can be innovative while tackling a problem of justice in global health. Should we not all be entitled to expert medical care, regardless of our financial resources and nationality? What is the role of business in equalizing access to quality healthcare for all? These concerns emanate from question two of the assignment. Consideration inspires student contemplation about the role of business in society and their role as future business leaders; both inquiries tapping into reflective exploration of meaning as a mode of liberal learning.

For-profit collaboration with nonprofits is a growing trend in social entrepreneurship as firms in both sectors realize that they can do more and better as partners than as adversaries. While effective, cross-sector partnerships bring forth an array of legal and business challenges. In answering question two of the Project's assignment, students must learn the history of for-profit and nonprofit relationship. The once polarized worldviews of nonprofits

and for-profits do not suddenly merge when firms decide to collaborate. The legal and business issues uncovered by students in researching question two draw on principles of management and from the law of business entities and governance. To assist the research needed here, students are directed to resources that explain the history of cross-sector partnerships and provided therein with case examples of best practices of existing collaborations.<sup>92</sup>

The Project deliverable is a written consulting report to the client, NW Partners in Pathology. Typically we allow students twelve to fifteen pages to provide their findings and recommendations. A sample grading rubric is provided in Appendix B. Distributing the rubric with the assignment is effective. In our opinion, students appreciated clear direction about our expectations, particularly given the breadth and depth of this capstone assignment.

As noted in the Introduction, we have chosen to focus the Project on a global health care partnership; however, instructors can modify it consistent with their own interests. It is the intent of the authors to provide the reader with an adaptable real-world business law assignment that includes a combination of components integrated into an exercise that facilitates different modes of student learning. The structure of the Project makes it possible for instructors to adapt the content and context by selecting different non-profit organizations and/or business enterprises to form a cross-sector partnership consistent with the instructor's own industry interests.

Regardless of instructor choice, the structure of the assignment includes the following components:

- 1) A liberal learning opportunity is provided through the process of creating a hypothetical cross-sector collaboration involving a business enterprise working together with a non-profit organization. The non-profit organization can be

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<sup>92</sup> See *infra* Appendix A.

selected by the instructor. The scale of the scenario can be local or global depending on the objectives of the instructor and the course. Examples abound, whether the focus is climate change, basic education, food distribution, forest preservation, water conservation, global security and stability, or sustainable economic development. For an extensive list the cross-sector collaboration efforts see The Partnering Initiative.<sup>93</sup>

- 2) The for-profit business enterprise can likewise be selected by the instructor on the basis of familiarity with the industry or company, or the potential impact that a particular company might be expected to produce due to its unique history and characteristics and its alignment with the mission of the selected nonprofit. For example, Starbucks has a long-term partnership with Conservation International and has a record of accomplishments in sustainable farming that has served as inspiration to other coffee companies.<sup>94</sup>
- 3) An opportunity for deep learning of typical traditional business law topics is an integral part of the Project. The topics of choice of business entity, contract law, employment law, intellectual property, and dispute resolution are embedded in the assignment. These may be modified according to the instructor's selection of industry and organizations for the partnership; however, the choice of entity and contract law principles will remain a constant.
- 4) The Project includes a learning opportunity for students to better understand business processes and data management,

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<sup>93</sup>The Partnering Initiative, <http://thepartneringinitiative.org/> (last visited Dec. 7, 2015).

<sup>94</sup>Marya N. Cotten & Gail A. Lasprogata, *Corporate Citizenship & Creative Collaboration: Best Practice for Cross-Sector Partnerships*, 18 J. L. BUS. & ETHICS 9 (2012); Conservation International, <http://www.conservation.org/stories/Pages/Better-coffee-better-lives.aspx> (last visited Dec. 7, 2015).

storage, and retrieval needs. Cloud computing is a popular choice for many enterprises, and although it is the most widely used practice, it is not the only choice. Instructors can adapt this part of the scenario and substitute other data management solutions in place of cloud computing. We use cloud computing in this scenario as a platform for raising the issues around data privacy and security for students to consider. In our particular case, the data involves personal health information, which requires students to become familiar with HIPAA requirements. Here again, the scenario could be adapted by focusing on different types of data and the laws related to protecting it. For example, if personal financial data is involved, compliance with other regulatory regimes would need to be addressed.<sup>95</sup>

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<sup>95</sup> See *Data Security*, Fed. Trade Comm'n, <https://www.ftc.gov/tips-advice/business-center/privacy-and-security/data-security> (last visited Dec. 7, 2015).

**APPENDIX A: RESOURCES FOR NW PARTNERS IN  
PATHOLOGY CONSULTING PROJECT**

Marya N. Cotten & Gail A. Lasprogata, *Corporate Citizenship & Creative Collaboration: Best Practice for Cross-Sector Partnerships*, 18 J. L. BUS. & ETHICS 9 (2012).

T. Noble Foster, *Navigating Through the Fog of Cloud Computing Contracts*, 30 J. MARSHALL J. INFO. TECH. & PRIVACY L. 13 (2013).

Frank Pasquale and Tara Adams Ragone, *Protecting Health Privacy in an Era of Big Data Processing and Cloud Computing*, 17 STAN. TECH. L. REV. 595 (2014).

Keren G. Raz, *Toward an Improved Legal Form for Social Enterprise*, 36 N.Y.U. REV. L. & SOC. CHANGE 283 (2012).

**APPENDIX B: GRADING RUBRIC FOR NW PARTNERS IN  
PATHOLOGY CONSULTING PROJECT**

Scored as: 1= not present; 2= needs extensive revision;  
3= satisfactory; 4 = strong; 5 = outstanding

***Issue Identification*** (thorough identification of issues for each question presented in the assignment)

Question One: new venture options for the proposed partnership including LLC, nonprofit corporation, for-profit corporation, L3C and benefit corporation

Question Two: contrast of nonprofit mission and for-profit goals, identify possible problems in collaboration and suggest ways to resolve; resource and leadership requirements for effective collaboration; intellectual property management

Question Three: privacy law in general, HIPAA's application or not to the partnership's clients and basic rules that apply for management of sensitive health data; consideration of ethical reasons to treat data of stakeholder patients with same rigor as HIPAA; contract provisions relevant to agreement with cloud services provider, notably privacy, security, access, reliability, and liability

***Organization & Coherence*** (logical structure that responds to the questions presented in the assignment and guides the audience/business client through a chain of reasoned ideas and conclusions that are the consulting team's recommendations)

***Integration of Source Material*** (complete and appropriately referenced use of articles, cases studies and materials distributed with the assignment for student research and use in responding to the questions presented in the assignment)

***Support*** (use of source material, text material and course content; understanding of rules, precedent and reasoning to support recommendations in report)

***Grammar & Mechanics*** (spelling, punctuation, and sentence structure)



## DEVELOPING THE LEGAL ENVIRONMENT OF HEALTHCARE COURSE

DONALD R. MONG\*

### I. INTRODUCTION

I was asked to develop a course in healthcare law for a new major in Healthcare Administration and Management. The major was in our undergraduate School of Business. The course provided legal context for a curriculum that prepared students for entry-level management positions with organizations like hospitals, nursing homes, insurance companies, medical-records administrators, and drug companies. With that audience in mind, I began to develop the course.

A number of authors had commented on the challenges of teaching healthcare law. Some challenges stemmed from the massiveness and diversity of the field itself,<sup>1</sup> some from frequency of legal changes needed for rapidly advancing medical technology,<sup>2</sup> and some from the historical way in which American healthcare law

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1 Nicholas D. Richie, *American College of Legal Medicine's Legal Medicine: Legal Dynamics of Medical Encounter*, 71 HOSPITAL TOPICS 44, 44 (1993) (book review); Robert Gatter, *Robert I. Field's Health Care Regulation in America*, 28 J. LEG. MED. 593, 593 (2007) (book review).

2 Catherine J. Jones, *Teaching Bioethics in the Law School Classroom: Recent History, Rapid Advance, The Challenge of the Future*, 20 AM. J. L. & MED. 417, 419 (1994).

developed. Other difficulties were due to the infancy of healthcare law as a distinct discipline of law.<sup>3</sup> Healthcare law had not yet evolved into the cohesive body of law characteristic of the law's older disciplines.

My course would face an additional challenge. Faculty who taught law in business schools were accustomed to teaching from the integrated, management-oriented perspective. The vast majority of business schools used the integrated legal-environment approach, rather than the business-law approach of teaching only black-letter law.<sup>4</sup> Healthcare law, however, lagged considerably behind other legal disciplines in terms of integrating literature and teaching.<sup>5</sup> This gap was reflected in the potential textbooks that I reviewed for the course. To deliver a meaningful course, I would have to first understand numerous disjointed topics and then integrate those topics in ways relevant to undergraduate business majors. We thus begin this article with that somewhat extended discussion.

## II. WHAT IS HEALTHCARE LAW?

Healthcare law was traditionally classified as either private healthcare, the healthcare of individuals, or public healthcare,<sup>6</sup> the healthcare of the overall populations.<sup>7</sup> The private side of healthcare

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3 Arnold J. Rosoff, *Health Law at Fifty Years: A Look Back*, 14 Health Matrix: J. L. MED. 197, 211 (2004).

4 Carol J. Miller & Susan J. Crain, *Legal Environment v. Business Law Courses: A Distinction without a Difference?* 28 J. LEGAL STUD. EDUC 149, 200 (2011).

5 Wendy E. Parmet & Anthony Robbins, *A Rightful Place for Public Health in American Law*, 30 J. L. MED. & ETHICS 302, 302 (2002).

6 Wendy K. Mariner, *Lawrence O. Gostin's, Public Health Law: Power, Duty, Restraint*, 28 J. HEALTH POL., POL'Y & L. 525, 525 (2003); Arnold J. Rosoff, David Mechanic, Lynn B. Rogut, David C. Cohen, & James R. Kickmen, *Eds's. Policy Challenges in Modern Health Care*, 26 J. LEG. MED. 523, 524 (2005) (book review).

7 Many authors would use the term, public health, instead of public healthcare, to emphasize that public health involves more than direct patient care. For example, public health attorneys and administrators also advocate broad health policy through legislation, regulations, and funding.

was characterized by occasional visits to sole-practitioner physicians.<sup>8</sup> Legal topics related to those relationships included contracts, the learned professions, and informed consent for treatment.<sup>9</sup> Infrequent hospital and nursing-home relationships were covered by such additional legal topics as entities and charities.<sup>10</sup> While litigation was less prevalent than in recent decades,<sup>11</sup> litigation topics were always relevant.

The public side of healthcare was defined by the Institute of Medicine as “what we, as a society, d(id) collectively to ensure the conditions in which people c(ould) be healthy.”<sup>12</sup> Those collective efforts were matters of local, rather than federal or state concern, until the Civil War.<sup>13</sup> The state’s police power was the foundation of public healthcare-law topics,<sup>14</sup> but more specific topics varied according to location and local epidemics.<sup>15</sup> The Civil War began a slow shift toward national emphasis on public healthcare<sup>16</sup> as wide-scale treatments of battlefield casualties produced wide-scale understandings of germs and infections. Public healthcare itself grew and evolved from its 19<sup>th</sup> Century focus on eliminating vice and squalor, to its 20<sup>th</sup> Century focus on preventing the spread of

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8 Peter J. Hammer, Deborah Haas-Wilson, & William M. Sage, *Kenneth Arrow and the Changing Economics of Health Care: Why Arrow? Why Now?* 26 J. HEALTH POL. 835, 836 (2001).

9 Robert M. Veatch, *Abandoning Informed Consent*, 25 HASTINGS CENTER REPORT 0930334 (1994).

10 James Stacey Taylor, *Market-Based Reforms in Health Care Are Both Practical and Morally Sound*, 40 J. L. MED. & ETHICS 537, 537 (2012).

11 Mary Eta C. Mills, *Medispute: Resolving Health Care Conflicts*, 5 J. HEALTH CARE L. & POL’Y 502, 505 (2002).

12 Mariner *supra* note 6, at 505.

13 Jason A. Smith, *Training Individuals in Public Health Law*, 36 J. L. MED. & ETHICS 50, 51 (2008).

14 Lawrence O. Gostin, *The Model State Emergency Health Power Act: Public Health and Civil Liberties in a Time of Terrorism*, 13 HEALTH MATRIX 3, 4 (2003).

15 Smith, *supra* note 12, at 51.

16 *Id.*

germ-borne diseases, to its current focus on improving personal lifestyles and preventing chronic illnesses.<sup>17</sup>

Public healthcare law, on the other hand, was much slower to evolve. It was not until 1905 that the United States Supreme Court declared mandatory vaccinations to be a constitutional exercise of the state's police power.<sup>18</sup> The topics of healthcare law remained narrowly focused and locally based well into the 21<sup>st</sup> Century.<sup>19</sup> That situation began creating problems in the 1960's.

That decade began three cosmic shifts in the nature of healthcare. First, the Medicare and Medicaid laws were passed.<sup>20</sup> Second, healthcare expenditures grew from 6% of America's Gross Domestic Product in 1963<sup>21</sup> to over 14% by the start of the 21<sup>st</sup> Century.<sup>22</sup> Third, the infusion of money spurred a rapid advancement in medical technology. Those three shifts combined to blur traditional distinctions between private and public healthcare law,<sup>23</sup> to dramatically increase the legal topics relating to healthcare law,<sup>24</sup> and to overwhelm legal scholars' abilities to address those topics sufficiently. Healthcare law's practice, its literature, and its teaching were all affected.

### A. Post-1960's Practice

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17 Mariner, *supra* note 6, at 527-529.

18 *Id.* at 543.

19 Robert Gatter, Robert I. Field's *Health Care Regulation in America*, 28 J. LEG. MED. 593, 593 (2007); Ross D. Silverman, *Enhancing Public Health Law Communication Linkages*, 36 J. L., MED. & ETHICS 29, 30 (2008).

20 Kenneth R. Wing, *Health Care Reform in the Year 2000: The View from the Front of the Classroom*, 26 AM. J. L. & MED. 277, 277 (2000).

21 Hammer, Haas-Wilson, & Sage, *supra* note 8, at 836.

22 Mark A. Rothstein, *The Growth of Health Law and Bioethics*, 14 Health Matrix: J. L. MED. 213, 214 (2004).

23 Wing, *supra* note 20, at 289, 291.

24 Rothstein, *supra* note 22, at 215.

After the 1960's, healthcare-law practice continued to focus on litigation<sup>25</sup> and localized topics.<sup>26</sup> Cristoffel and Tenet examined the litigation side by tracking the mass-exposure lawsuits that had followed the government's swine-flu vaccinations.<sup>27</sup> Even with those lawsuits involving a rare nationwide topic, litigation skills remained paramount. Cristoffel and Tenet commented on the need for lawyers and non-lawyers to better understand each other's perspectives as they examined the interplay between differing legal and medical standards of proof used during the trials.<sup>28</sup>

On the localization side, Goldner found that most public-health attorneys learned their craft through indirect mentoring by older, local attorneys.<sup>29</sup> Those older attorneys presumably would have emphasized whatever litigation skills were needed for current cases. Silverman followed with results of a Public Health Law Association survey showing that the primary sources of public-healthcare-law information were localized.<sup>30</sup> Smith referenced the same study and attributed part of the narrowness problem to public-healthcare funding being directed toward one healthcare problem at a time. Attorneys would then tailor their practices to what Smith called 'silo funding.'<sup>31</sup>

In 2013, Kaufman, Allan, and Ibrahim found that most public-healthcare lawyers still lacked formal training in public health, and that most public-healthcare managers still lacked formal

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25 Tom Christoffel & Stephen P. Tenet, *Public Health and the Law: Epidemiology and the Law: Courts and Confidence Levels*, 81 AM. J. PUB. HEALTH 1661, 1661 (1991).

26 Silverman, *supra* note 18, at 30.

27 Christoffel & Tenet, *supra* note 25, at 1661.

28 *Id.* at 1665.

29 Jesse A. Goldner, *A Tribute to Mentors*, 14 Health Matrix: J. L. MED. 92, 92 (2004).

30 Silverman, *supra* note 19, at 30.

31 Smith, *supra* note 13, at 57.

training in healthcare law.<sup>32</sup> At the same time, the researchers noted that modern healthcare management was increasingly requiring those lawyers and managers to work together on management teams.<sup>33</sup> To better train the lawyers to talk with the managers, Kaufman, Allan, and Ibrahim proposed offering lawyers a post-JD certificate program in public health. To better train the managers to talk with the lawyers, the authors proposed adding a healthcare-law course to the requirements for Masters of Public Health degree programs.<sup>34</sup> While the authors focused on the public-health side of healthcare law, the need for better lawyer/non-lawyer communications was just as relevant to the private-healthcare side. This critical need became a learning goal for my course.

### *B. Post-1960's Literature*

After the 1960's, healthcare-law literature struggled to deal with a slew of challenges. Jones attributed many of those challenges to the rapid advancement of medical technology and to healthcare law thus involving an unusually high number of cases of first impression.<sup>35</sup> To bridge legal gaps in those cases, courts and scholars borrowed topics from older, established legal disciplines. Jones gave the name, "applied law," to that practice of borrowing topics and then applying them to healthcare situations.<sup>36</sup> The problem, however, was not that topics were adopted topics from other disciplines; the problem was that healthcare literature too often left those terms as orphans. Authors made too few attempts to

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32 Nancy Kaufman, Susan Allan, & Jennifer Ibrahim, *Using Public Health Legal Counsel Effectively: Beliefs, Barriers and Opportunities for Training*, 41 J. L. MED. & ETHICS 61, 61-62 (2013).

33 *Id.* at 63.

34 *Id.*

35 Catherine J. Jones, *Teaching Bioethics in the Law School Classroom: Recent History, Rapid Advances, the Challenge of the Future*, 20 AM. J. L. & MED. 417, 419, 437 (1994).

36 *Id.* at 420.

integrate the borrowed terms into a cohesive body of healthcare literature.

Part of the problem was the simple immaturity of healthcare law. In 2004, Rosoff documented that healthcare law was only 50 years old as a distinct legal discipline.<sup>37</sup> Healthcare law was therefore far younger than traditional disciplines like property or torts or contracts. Rosoff also determined that healthcare law showed no signs of slowing its rapidity of change.<sup>38</sup> Healthcare law had thus not coalesced into the integrated body of law characteristic of older disciplines, and many of healthcare law's topics remained narrow and isolated.

One indication of that isolation was found in the nature of the source that was most cited in healthcare-law articles. I had expected that source to be an integrative law-journal article. Instead, it was a sociological book, *The Social Transformation of American Medicine*. Between the book's 1982 publication and 2003, it was cited more than 1400 times in law-journal articles.<sup>39</sup> In this book, the author addressed the practice of doctors leveraging their social positions into legal and economic power through the mid-twentieth century, only to be challenged by lawsuits and managed care thereafter.

Jost believe that the book's vast influence on healthcare-law literature stemmed from its publication at roughly the same time that healthcare law was evolving into a distinct legal discipline.<sup>40</sup> He noted how *The Social Transformation of American Medicine* was soon followed by several healthcare law textbooks that defined the modern healthcare-law course.<sup>41</sup> Those textbooks focused respectively on regulation, market competition, and patient access

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37 Arnold J. Rosoff, *Health Law at Fifty Years: A Look Back*, 14 Health Matrix: J. L. MED. 197, 211 (2004).

38 *Id.*

39 Timothy Stoltzfus Jost, *The Uses of The Social Transformation of American Medicine: The Case Law*, 29 J. HEALTH POL. 799, 799, 801 (2004).

40 *Id.* at 805.

41 *Id.*

to healthcare, but did not provide a full integration of healthcare-law topics. That narrowness, in turn, would eventually affect my own literature search for the course, as much of the available literature remained focused on topics more suitable for graduate-level teaching.<sup>42</sup>

### *C. Post-1960's Teaching*

After the 1960's, healthcare-law teaching was often narrowly focused<sup>43</sup> and healthcare-law instructors were often isolated from their colleagues.<sup>44</sup> Parmet and Robbins's research focused on the teaching of tort law, a major topic of healthcare-law instruction when the overall emphasis was on litigation skills. Parmet and Robbins observed that the analysis of torts was an allocation of risks, and yet law students lacked the skills needed to fully analyze those risks.<sup>45</sup> The researchers attributed that lack of skills to the failure of healthcare law scholars and practitioners to embrace the law-and-economics approach used by other legal disciplines. The law-and-economics approach, popularized by Oliver Wendell Holmes in the 1890's, had used economics and other social-science training to contextualize legal topics. By contrast, Parmet and Robbins observed that most healthcare law

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42 See, e.g. Michael Preston-Shoot & Judy McKimm, *Toward Effective Outcomes in Teaching, Learning, and Assessment of Law in Medical Education*, 45 MED. EDUC. 339, 340 (2011); James G. Hodge, Jr., *Public Health and the Law: A Modern Survey on Teaching Public Health Law in the United States*, 40 J. L. MED. & ETHICS 1034, 1037 (2012).

43 David J. Wexler, *Training in Law and Behavioral Sciences: Issues from a Legal Educator's Perspective*, 8 BEHAV. SCI. & L. 197, 199 (1990); Wendy E. Parmet & Anthony Robbins, *A Rightful Place for Public Health in American Law*, 30 J. L. MED. & ETHICS 302, 302 (2002).

44 Marshall B. Kapp, *Teaching Health Law: Health Law Teaching in Medical Schools: Balancing the Different Roles*, 38 J. L. MED. & ETHICS 863, 863 (2010).

45 *Id.*

continued to be taught as only black-letter law.<sup>46</sup> Earlier, Wexler identified the same lack of interdisciplinary healthcare-law training in the separate field of mental healthcare.<sup>47</sup>

The narrowness problem was aggravated by the isolation of healthcare-law instructors. Preston-Shoot and McKimm and Hodge both found an absence of suitable information on undergraduate teaching,<sup>48</sup> whereas Kapp studied the isolation problem in medical schools. Kapp noted that most other medical courses were taught by teams of physicians organized into departments. By contrast, healthcare law was usually taught by a single professor.<sup>49</sup> Without the collegiality that could spur integrative thinking, it is not hard to see how healthcare-law instructors might revert to teaching the narrower topics with which they themselves were most comfortable.

This situation was not unlike the isolation that undergraduate business-law professors might have felt before the 2007 Carnegie Foundation Report. That report contained recommendations that built upon the 1992 McCrate Report and led to increased integration of legal environment courses with other parts of the business-school curriculum.<sup>50</sup> We who teach law in business schools today are accustomed to that integration. Recommendations to teach from integrated, management-oriented perspectives have now been widely adopted.<sup>51</sup> Whatever the course title, the vast majority of business schools now teach their introductory law courses using the integrated approach of Legal Environment of Business, rather than

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46 Parmet & Robbins, *supra* note 43, at 302.

47 Wexler, *supra* note 43, at 199.

48 Preston-Shoot & McKimm, *supra* note 39, at 340; Hodge, *supra* note 42, at 1037.

49 Kapp, *supra* note 44, at 863.

50 Lawrence E. Singer & Megan Bess, *Teaching Health Law: Combining Pedagogy and Practice: Creating a 21st Century Health Law Curriculum*, 37 J. L. MED. & ETHICS 852, 852 (2009).

51 Carol J. Miller & Susan J. Crain, *Legal Environment v. Business Law Courses: A Distinction without a Difference?* 28 J. LEG. STUD. EDUC. 149, 200 (2011).

the older, black-letter law approach of Business Law.<sup>52</sup> Such would not be the case in healthcare law. Despite calls from authors,<sup>53</sup> healthcare law lagged behind other legal disciplines in adopting the integrated, management-oriented approach.<sup>54</sup>

That problem was reflected in the textbooks that I reviewed for the course. Textbooks written by lawyers often delved too deeply on individual topics while neglecting the integrated, management-oriented approach. Although textbooks written by non-lawyers paid greater attention to the integration and management orientation, their authors often confused legal topics. With hesitation, I ultimately settled on a non-lawyer-written text<sup>55</sup> due to its management orientation. To teach the course, however, I would then have to mine the scattered literature of healthcare law for relevant topics and integrate those topics into a model understandable to undergraduates.<sup>56</sup>

### III. INTEGRATING THE TOPICS

Integration of healthcare-law topics is no small matter. The sheer scope of healthcare law is overwhelming and difficult to capture in any one textbook. *Legal Medicine: Legal Dynamics of Medical Encounter* was an early attempt to organize healthcare-law topics. The result was a 700+/- page textbook that categorized topics into 15 legal-background topics and 16 clinically related topics.<sup>57</sup> Richie's 1993 review of that book noted both the breadth

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52 *Id.*

53 David J. Wexler, *supra* note 43, at 199; Singer & Bess, *supra* note 50, at 852-853; Jonathan Todres, *Beyond the Case Method: Teaching Transactional Law Skills in the Classroom*, 37 J. L. MED. & ETHICS 375, 375 (2009).

54 Parmet & Robbins, *supra* note 43, at 302.

55 George Pozgar, LEGAL ASPECTS OF HEALTH CARE ADMINISTRATION (2012).

56 For a more in-depth discussion of that substantive model, *See* the author's upcoming Economics and the Development of American Healthcare Law.

57 Nicholas D. Richie, *American College of Legal Medicine's Legal Medicine: Legal Dynamics of Medical Encounter*, 71 HOSPITAL TOPICS 44, 44 (1993) (book review).

and the depth of topics needed to understand healthcare law. While focusing more on the cost of the book than its scope, Richie nonetheless concluded that the whole of *Legal Medicine: Legal Dynamics of Medical Encounter* was better suited for graduate teaching than for undergraduate teaching.<sup>58</sup>

Wing followed with an article on Clinton-era healthcare reforms and the emergence of competition among healthcare providers. Wing was direct in concluding that the details of healthcare law could become overwhelming. Wing's advice was to avoid attempts to fit details into a grand scheme, as well as attempts to cover frequently changing details.<sup>59</sup> Seven years later, Gatter referred to healthcare law an incoherent hodgepodge of regulations.<sup>60</sup> Gatter believed that the hodgepodge was due, in large part, to the incorporation of diverse and scattered topics in healthcare law. He included tort, professional and insurance regulation, antitrust, tax, intellectual property, and corporate law on his list of topics.<sup>61</sup> O'Reilly and Berry later encountered similar problems related to overwhelming, frequently changing details in their assessment of the "tsunami of regulations" resulting from the passage of the Affordable Care Act.<sup>62</sup>

In an attempt at integration, Jost categorized healthcare law as a bundle of rights. Property-law instructors were undoubtedly familiar with that approach, but Miller's review of Jost's work bemoaned the incompleteness of coverage and "failure to provide a

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58 *Id.*

59 Kenneth R. Wing, *Health Care Reform in the Year 2000: The View from the Front of the Classroom*, 26 AM. J. L. & MED. 277, 283 (2000).

60 Robert Gatter, *Robert I. Field's Health Care Regulation in America*, 28 J. LEGAL MED. 593, 594 (2007) (book review).

61 *Id.* at 593.

62 James T. O'Reilly & Melissa D. Berry, *The Tsunami of Health Care Rulemaking: Strategies for Survival and Success*, 63 ADMIN. L. REV. 245, 246 (2011).

neat wrap-up of an eclectic collection of materials.”<sup>63</sup> While that criticism was directed at a particular textbook, a fairer target would have been the complexity and disjointedness of healthcare law itself.

### A. *How to Integrate?*

To address that complexity and disjointedness, authors began calling for an overall shift in healthcare-law teaching. Wexler was an early advocate of teaching from an integrated approach. He promoted interdisciplinary training for graduate-level students in the specific field of mental-healthcare law. Wexler wrote at a time when virtually all healthcare-law teaching focused on litigation, arguing for the use of more interdisciplinary teaching through social-science exposure.<sup>64</sup> After the McCrate and Carnegie Foundation reports, Singer and Bess renewed the call for more integrative teaching in healthcare law and for more emphasis on transactional skills.<sup>65</sup>

Todres went deeper in his own call for transactional-skill training. Due to the nature of most patient-provider relationships, Todres referred to healthcare law as an ideal antidote to the normal litigation training and case-method teaching emphasized in law school.<sup>66</sup> He believed healthcare-law teaching should focus on such transactional skills as understanding industry norms and financial structures, risk assessments, and lay-level communications. Todres advocated the increased use of drafting exercises in courses to promote writing precision, statutory interpretation, and the

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63 Frances H. Miller, *Stumbling on Options: A Review of Readings in Comparative Health Law & Ethics*, by Timothy Stolfus Jost, 36 HEALTH CARE 851, 855 (2008) (book review).

64 David J. Wexler, *Training in Law and Behavioral Sciences: Issues from a Legal Educator's Perspective*, 8 BEHAV. SCI. & L. 197, 199 (1990).

65 Lawrence E. Singer & Megan Bess, *Teaching Health Law: Combining Pedagogy and Practice: Creating a 21st Century Health Law Curriculum*, 37 J. L. MED. & ETHICS 852 (2009).

66 Jonathan Todres, *Beyond the Case Method: Teaching Transactional Law Skills in the Classroom*, 37 J. L. MED. & ETHICS 375, 375 (2009).

translation of complex legal topics into lay-level understandings. Nevertheless, he acknowledged the obstacles of student and faculty buy-in to the increased workload of such types of courses.<sup>67</sup>

In 2011, Jacobson switched the focus of healthcare-law teaching to our target—managers. Teaching healthcare law in a graduate-level school of public health, Jacobson had experienced the challenges of trying to teach the numerous topics of healthcare law to managers working in the healthcare field. Jacobson observed the significant differences in perspectives between healthcare managers and the law students studying the same course material. Jacobson therefore built his own course around the manager’s duty to set strategic priorities and the lawyer’s duty to help that manager achieve those priorities legally.<sup>68</sup> He encouraged better communication skills between managers and lawyers and advised a course of action for the managers that favored breadth of legal-topic coverage over depth of coverage. Jacobson also recognized the resulting need to caution managers about the significant limits of their legal knowledge compared to law students.<sup>69</sup>

Essentially, Jacobson applied the Legal Environment of Business approach to his healthcare-law course, teaching the course in an integrative, management-oriented style. While Jacobson acknowledged that he struggled with an integrative model for the course,<sup>70</sup> and although his specific course organization was tailored to a graduate-level audience, I could still use his overall Legal Environment of Business approach to teach my own undergraduate course.

### *B. My Integration Approach*

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<sup>67</sup> *Id.* at 377-378.

<sup>68</sup> Peter D. Jacobson, *Teaching Health Law: Personal Reflections on Teaching Health Law in a School of Public Health*, 39 *J. L. MED. & ETHICS* 285, 285-287 (2011).

<sup>69</sup> *Id.* at 287.

<sup>70</sup> *Id.* at 286.

Although various authors have commented on the difficulties of teaching healthcare law, Preston-Shoot and McKimm and Hodge determined that much of the available information on healthcare law was geared for graduate level study.<sup>71</sup> Perhaps, then, many of those difficulties resulted from the very nature of graduate-level teaching. Graduate students and graduate professors both have the skills and the tendencies to examine topics deeply. Such depth is admirable, but sometimes comes at the cost of breadth and integration. Unless that breadth and integration have been established through previous courses, few students—and few professors—have the capacity to simultaneously examine a topic deeply and integrate it with other topics. The result can be the narrow isolation of healthcare-law topics revealed by such researchers as Parmet and Robbins and Kapp.<sup>72</sup>

By contrast, the goals of undergraduate teaching place less emphasis on students developing deep understandings of individual topics. In my opinion, the goals of undergraduate teaching are to expose students to the many topics that they will encounter in their early careers, as well as to provide the students with a comprehensive means for integrating those topics. Deeper understandings of individual topics can come in later graduate-level courses. In other words, the goals of the undergraduate teaching of healthcare law are similar to the goals of the Legal Environment of Business approach. Teaching healthcare law from the integrated, management-oriented perspective can both prepare students to become entry-level healthcare managers and prepare students for later graduate-level courses needed to advance their careers.

Such a teaching approach would only work for my course if I could strike the right balance between breadth and depth of topic

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71 Michael Preston-Shoot & Judy McKimm, *Toward Effective Outcomes in Teaching, Learning, and Assessment of Law in Medical Education*, 45 MED. EDUC. 339, 339-340 (2011); James G. Hodge, Jr., *Public Health and the Law: A Modern Survey on Teaching Public Health Law in the United States*, 46 J. L. MED. & ETHICS 1034, 1037 (2012).

72 Parmet and Robbins, *supra* note 43, at 302; Kapp, *supra* note 44, at 863.

coverage.<sup>73</sup> Fortunately, the authors discussed so far in this article provided valuable advice. I would have to avoid Wing's trap<sup>74</sup> of overwhelming undergraduates with an incoherent hodgepodge of detail-oriented regulation,<sup>75</sup> as well as avoid integrative models that relied too heavily on deep legal concepts.<sup>76</sup> Graduate-level practices like some of the drafting exercises described by Todres,<sup>77</sup> and some of Singer and Bess's recommended skills<sup>78</sup> would be beyond the class levels of my students. We could still, however, use some of those drafting exercises and recommended skills by adapting them to the undergraduate level.

First, however, I needed an integrative model. As previously noted, Jacobson had struggled in finding one. He suggested organizing course topics around the Affordable Care Act, or alternately around a particular concept, such as fiduciary duties or conflicts of interest. In the absence of an integrative model, Jacobson organized his own course into the following five modules: legal-system background, liability, management issues, regulations, and duties to patients and employees.<sup>79</sup> This approach reflected Field's textbook organization scheme that focused on three themes—healthcare quality, access to healthcare, and cost containment.<sup>80</sup> My experience with other one-semester, 400-level courses suggested that three evenly spaced modules of learning and a comprehensive project would work well.

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73 For a fuller discussion of breadth and depth of topics for this specific course, see the author's upcoming Topic Selection for the Legal Environment of Healthcare Course.

74 Kenneth R. Wing, *Health Care Reform in the Year 2000: The View from the Front of the Classroom*, 26 AM. J. L. & MED. 277, 283 (2000).

75 Robert Gatter, *Robert I. Field's Health Care Regulation in America*, 28 J. LEG. MED. 593, 594 (2007) (book review).

76 Miller, *supra* note 63, at 855.

77 Todres, *supra* note 66, at 377.

78 Singer and Bess, *supra* note 50, at 853.

79 Jacobson, *supra* note 68, at 286.

80 Gatter, *supra* note 75, at 594, 596.

I chose to think blatantly as a business manager and to organize my three course modules around the major revenues and expenditures of healthcare providers. The first module focused on the government, the major source of revenue for healthcare facilities, but a source that also had to be understood from its police-power role. The second module focused on patients, the heart of operations, but a heart that had to also be understood due to the obvious human implications. The final module focused on employees and subcontractors, a major expenditure for healthcare facilities, but an expenditure that also had to be understood from the differing legal statuses and codes of ethical conduct among its members. The final module served to consolidate the semester's topics through a comprehensive student project.<sup>81</sup>

#### IV. ORGANIZING THE COURSE

Over 60 legal topics were needed for the course, far too many to adequately cover in one semester. At the same time, my experience in directing healthcare organizations had taught me that entry-level managers would encounter virtually all of those topics in the first years of their careers. Thus, it was necessary to at least survey each of the topics from the healthcare perspective. To accommodate that coverage, the curriculum committee and I decided to require a Legal Environment of Business course as a prerequisite for the Legal Environment of Healthcare course. From my perspective, this decision had two purposes. First, given that the Legal Environment of Business course would ground students in the integrative basics of law, students could begin the Legal Environment of Healthcare course with an immediate relating of numerous legal topics to the healthcare setting.

Second, since students in the first semesters of the new Healthcare Administration and Management (HCAM) major entered as upper-level students from departments outside the School

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81 Inspired by Parmet and Robbins, *supra* note 43, at 302.

of Business, the Legal Environment of Business course also helped to transition them into business's challenging substance and workloads. As expected, the first semester of HCAM students in my Legal Environment of Business course complained about the heightened workloads and grading rigor compared to previous majors. The intermingling of students with students pursuing other majors in the School of Business, however, quickly produced the peer pressure to work hard. By the time the students entered the all-HCAM Legal Environment of Healthcare course in the following semester, they had already been socialized into the rigor required for that course.

We began the Legal Environment of Healthcare course with the government module. Because of government's varied and complex relationships with healthcare providers, that module was an ideal setting to start relating diverse legal topics to healthcare management. The passage of the Medicare and Medicaid acts in the 1960's began to blur the traditional distinctions between private and public healthcare<sup>82</sup> and subsequently required government to be understood as much from a contracts perspective as from a police-power perspective. We started with the basic concept of the hospital (or nursing home, clinic, etc.) as the entity and the healthcare managers as its agents. We then looked at how those entities organized themselves, both to maximize government funding and to minimize tort liability. The next topic was managed healthcare which encompassed both government-funded healthcare and private, insurance-funded healthcare.

The police-power side of the healthcare provider's relationship with the government covered such topics as regulatory compliance, criminal law, statutory-vs.-regulatory authority, and the Affordable Care Act.<sup>83</sup> A final topic in the first module, procreation,

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82 Wing, *supra* note 69, at 277; Mark A. Rothstein, *The Growth of Health Law and Bioethics*, 14 Health Matrix: J. L. MED. 213, 215 (2004).

83 James T. O'Reilly & Melissa D. Berry, *The Tsunami of Health Care Rulemaking: Strategies for Survival and Success*, 63 ADMIN. L. REV. 245 (2011).

set the stage for the interplay between government authority and private authority—i.e. between public healthcare and private healthcare<sup>84</sup>—that would impact many of the topics in the course’s second module on patients.

The second module began with the basic topic of the patient/provider contract, followed by consent for treatment.<sup>85</sup> Consent was a vehicle for comparing legal requirements with actual practices in healthcare facilities and for driving practical discussions of how students would soon have to manage those practices. For example, Rees & Monrouxe found that 82% of medical students were perfectly willing to examine patients without consent and in clear violation of known hospital policies when instructed to do so by their medical supervisors.<sup>86</sup> Subsequent topics encompassed information management and the patient’s right to privacy under the Health Insurance Portability and Accountability Act. Finally, end-of-life topics included such practical tools as wills, powers of attorney, and advance healthcare directives with surrogates.

As a bridge into the final employees-and-subcontractors’ module, we concluded the patients’ module with discussions that were relevant to those who provided direct patient care. Key topics included differences in professional-insurance needs and respective legal statuses among doctors, nurses, and other allied health professionals, like pharmacists.<sup>87</sup> The employees-and-subcontractors module then began with the respective codes of ethics that were followed by each of the individuals providing direct

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84 D. Price, J. Samanta, B. Harvey, & P. Healey, *Clinical Autonomy: Doctor’s Orders*, 2 CLINICAL ETHICS 124, 124-125 (2007).

85 Alicia Fernandez, *Improving the Quality of Informed Consent: It’s Not All About the Risks*, 153 ANN. INTERNAL MED. 342, 342. (2010).

86 Charlotte E. Rees & Lynn V. Monrouxe, *Medical Students Learning Intimate Examinations without Valid Consent: A Multicentre Study*, 45 MED. EDUC. 261, 261 (2011).

87 Joshua E. Perry & Larry R. Churchill, *The Buying and Selling of Health Care: Medical Versus Fiscal Gatekeeping: Navigating Professional Contingencies at the Pharmacy Counter*, 42 J. L. MED. & ETHICS 518, 519-520 (2014).

patient care.<sup>88</sup> We examined how those respective codes of ethics could lead to conflicts of interest and to other legal problems. For example, de Wit, Marks, Natterman, and Wu found that doctors who had lost patients traumatically were often reluctant to seek support from colleagues for fear that those discussions would not be covered by the physician-patient privilege in any resulting lawsuits.<sup>89</sup>

The employees-and-subcontractors module then moved to the more routine topics of the Fair Labor Standards Act in healthcare settings, employee benefits, and employee discipline. We concluded the classroom portion with a recap of the litigation process and, most importantly, the financial and managerial benefits of avoiding it. That recap set the stage for a team project on identifying and communicating to employees a broad spectrum of legal standards. The project itself was based on Todres's drafting exercises for law students.<sup>90</sup> Recall that Todres had emphasized the need to translate complex legal issues into laymen's terms. My undergraduate students focused on how to convey the most basic of healthcare-law knowledge to their future employees.

## V. EPILOGUE

Preston-Shoot and McKimm and Hodge identified assessment gaps and overall lack of information about undergraduate healthcare law teaching.<sup>91</sup> Since I have only taught my course for two semesters, it is difficult to assess the overall success of the course. However, limited feedback so far appears positive.

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88 See e.g. Jeffrey P. Spike, *Who's Guarding the Henhouse? Ramifications of the Fox Study*, 7 AM. J. BIOETHICS 48, 48-49 (2007).

89 Melanie E. de Wit, Clifford M. Marks, Jeffrey P. Natterman, & Albert W. Wu, *Supporting Second Victims of Patient Safety Events: Shouldn't These Communications Be Covered by Legal Privilege?* 41 J. L. MED. & ETHICS 852, 852-855 (2013).

90 Todres, *supra* note 66, at 377.

91 Preston-Shoot & McKimm, *supra* note 67, at 339; Hodge, *supra* note 39, at 1037.

The course syllabus for Legal Environment of Healthcare listed four learning goals. Those goals, structured to comply with the School of Business's program goals, consisted of the following:

- 1) Analytic Skills: Students in this course would learn basic healthcare law concepts, the interplay of those concepts with other parts of the healthcare curriculum, and the effect of those concepts on healthcare ventures.
- 2) Professional Skills: Students in this course would learn how healthcare managers must work within a variety of laws to be successful in healthcare ventures and would acquire common-sense tips for avoiding legal trouble in those ventures.
- 3) Ethics: Students in this course would learn to identify ethical conflicts in healthcare decisions and to apply applicable laws to resolve those conflicts.
- 4) Communication: Students in this course would learn common healthcare law terms and concepts needed to effectively communicate with business lawyers, government regulators, and courts.

Preliminary assessment results include only course-embedded questions, student evaluations of learning, and student feedback from later healthcare-management courses and internships.<sup>92</sup> To establish meaningful assessment baselines and to prevent cross-contamination of results in back-to-back assessments, different sets of course-embedded questions were used in the two semesters. In the first semester, 92% of students correctly answered

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92 These internal sources provided to editor by author.

a question about the legal topics relating to a provider's relationship with the government, 100% of students correctly answered a question about end-of-life documents, and 79% of students correctly answered a question about parties to an insurance contract. The second-semester questions were intentionally more complex and produced respective results of 50%, 64%, and 92%. Multiple semesters of assessment using both baselines will be needed before any conclusions can be drawn.

Student evaluations of learning were positive, with 97% of students believing that they had learned valuable information in the course and 97% believing that the teaching approach was effective. Negative comments were centered on the heavy workload and grading rigor. Perhaps most telling, however, was feedback given in later internships and capstone courses with another professor. A number of students made unprompted comments about how the Legal Environment of Healthcare course had better prepared them for challenges encountered in those internships and capstone courses. While those comments were anecdotal, they nonetheless gave hope for the future of the course.





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