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THE EDITORS,
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- ARTICLES -

FIGHTING OVER WORKER CLASSIFICATION: A CLASS ACTIVITY ABOUT WHETHER UFC FIGHTERS ARE EMPLOYEES OR INDEPENDENT CONTRACTORS AND WHY IT MATTERS

MICHAEL CONKLIN[*]

I. INTRODUCTION

Even after reading about worker classifications in a textbook and hearing about it in a lecture, students often maintain misconceptions as to how the classification is made and its relevance to workers and businesses. This case study describes an engaging and informative class activity that illustrates the practice using Ultimate Fighting Championship (UFC) fighters as the workers in question. First, students are given the necessary background on the UFC and the relationship it has created with its fighters (Appendix A). Second, an explanation is provided for how to apply the Internal Revenue Service (IRS) Twenty-Factor Test that distinguishes between employees and independent

[*] Powell Endowed Professor of Business Law, Angelo State University.

contractors (Appendix B). Third, the students go through the twenty factors (Appendix C), working in groups and tracking their results on the provided form (Appendix D). Fourth, the students present their findings to the class and engage in discussion over areas of disagreement. Fifth, an ultimate classification is determined based on the judgment criteria covered in step two. Finally, the relevance of the distinction is discussed.

This class activity sequence mimics "think-pair-share" pedagogy which has been shown to increase critical thinking,[1] class engagement,[2] information retention,[3] and student confidence.[4] This class activity is ideal for undergraduate or graduate courses in Legal Environment of Business, Business Law, Human Resource Management, and Employment Law, and it could be implemented in

[1] Mahmoud Kaddoura, *Think Pair Share: A Teaching Learning Strategy to Enhance Students' Critical Thinking*, 36 EDUC. RSCH. Q. 3 (2013).

[2] Aditi Kothiyal et. al., *Effect of Think-Pair-Share in a Large CS1 Class: 83% Sustained Engagement*, *in* ICER '13: PROCEEDINGS OF THE NINTH ANNUAL INTERNATIONAL ACM CONFERENCE ON INTERNATIONAL COMPUTING EDUCATION RESEARCH 137 (Ass'n for Computing Mach., 2014).

[3] Aditi Korhiyal et al., *Think-Pair-Share in a Large CS1 Class: Does Learning Really Happen?*, *in* ICER '14: PROCEEDINGS OF THE 2014 CONFERENCE ON INNOVATION & TECHNOLOGY IN COMPUTER SCIENCE EDUCATION 51 (Ass'n for Computing Mach., 2014).

[4] Ariana Sampsel, Finding the Effects of Think-Pair-Share on Student Confidence and Participation (Apr. 29, 2013) (Honors project), https://scholarworks.bgsu.edu/cgi/viewcontent.cgi?article=1029&context=honorsprojects.

both asynchronous and synchronous online modalities with minimal alteration.

Beyond just teaching about the worker-classification-determination process, this activity also demonstrates general principles of business law. These include how legal distinctions often contain subjective determinations, as the class will quickly learn when they see that their classmates often came to divergent positions on some of the factors. The real-world implications of business law principles are further illustrated in the activity because UFC fighters have always been classified as independent contractors despite the relevant test strongly pointing to an employee classification. This activity also affords the opportunity for students to better understand how businesses can best address the issue and the potential high cost for noncompliance. Advice on best practices for conducting this activity is provided, including potential exam questions to test student retention of the material.

A. Learning Objectives

Upon completion of this exercise, students should be able to (1) demonstrate a basic understanding of how worker classification determinations are made; (2) interpret legal standards and apply them to a specific, real-world industry; (3) evaluate the strengths and weaknesses of competing positions regarding amorphous legal standards; (4) appreciate the inherent subjectivity involved—and therefore the often-unpredictable nature of—the law; and (5) explain the significance

of a worker being classified as an employee compared to an independent contractor.

B. Teaching Notes

After familiarizing yourself with the background material contained herein, conduct the class activity in the following sequence: First, hand out and discuss Appendix A, the background information summary on the relationship between the UFC and its fighters. Second, hand out and discuss Appendix B, the directions for how to apply the IRS Twenty-Factor Test that distinguishes between employees and independent contractors. Third, hand out Appendix C, which contains the twenty factors, and have the students form groups and work through the factors, keeping track of their results on the provided form (Appendix D). Fourth, have the groups present their findings to the class and engage in discussion over areas of disagreement. Fifth, an ultimate worker classification for UFC fighters is determined based on the overall results from the Twenty-Factor Test. Finally, lead the class in a discussion regarding the relevance of this distinction based on the information contained in the "Relevance of Classification" section.

If time allows, it can be beneficial to first go through the twenty factors with two, more obvious examples, such as a McDonald's that hires a cashier (obviously an employee) and a McDonald's that hires a roofer to patch a leak on the roof (obviously an independent contractor). This provides a clear example of the differences between employees and

independent contractors, along with how the twenty factors apply.

This class activity is ideal for in-person classes but can be implemented in a variety of modalities. In a hybrid class, the handouts can be briefly discussed and given out either online or at the end of a face-to-face session. Then, the students' results can be argued in the next face-to-face class. Although more challenging, this activity can also be utilized in both asynchronous and synchronous online courses. This is accomplished by simply providing the student resources electronically, assigning groups to perform the determinations remotely, creating discussion boards for the groups to share and discuss their determinations, and then providing overall feedback to the class.

This case study starts by providing relevant background information to the instructor, including how UFC fighters compare to other, similar professions; relevant information regarding the IRS Twenty-Factor Test; the twenty factors with explanations; an explanation as to why the extensive training UFC fighters incur is not considered for purposes of worker classification; a cumulative assessment of the Twenty-Factor Test; a brief analysis of how important the employee/independent contractor distinction is for workers and employers; potential exam questions; and concluding thoughts on the exercise. This is then followed by the appendixes, which provide all the necessary handouts.

II. COMPARED TO OTHER PROFESSIONS

The following is a brief sampling of similar professions and how they are classified.

A. Team Sport Athletes

Players in the National Football League, National Basketball Association, Major League Baseball, and National Hockey League are all classified as employees.[5] This is consistent with the general rule that team sports participants are employees while individual sports participants are independent contractors. This is because "[i]n the case of individual type sports . . . the promoting organization normally provides no training or coaching, and has no right to influence the outcome of any competition."[6] Conversely, in team sports "there [is] generally an owner, manager, trainer, coach, or captain who had the right to direct and control the details of the player's activity."[7] There are some exceptions to this general rule, such as NASCAR drivers, pro volleyball players, and team

[5] Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 100 (2008).
[6] *Total and Partial Unemployment TPU 415.4: Professional Athlete*, CAL. EMP. DEV. DEP'T, https://www.edd.ca.gov/uibdg/Total_and_Partial_Unemployment_TPU_4154.htm (last visited July 22, 2022).
[7] *Id.*

sport Olympic athletes, which are all independent contractors.[8] While UFC fighters are certainly individual athletes, some argue that the stringent rules and near monopoly the UFC maintains result in the fighters being treated more like team sport athletes than individual athletes.[9]

B. Boxers

Professional boxers are similar to UFC fighters, not only in being a combat sport but also in that they generally only compete two or three times per year. And both UFC fighters and boxers are

[8] For NASCAR drivers and Association of Volleyball Professionals, see Rod Hilpirt et al., *Show Me the Money! A Cross-Sport Comparative Study of Compensation for Independent Contractor Professional Athletes*, SPORT J. (Mar. 14, 2008), http://thesportjournal.org/article/show-me-the-money-a-cross-sport-comparative-study-of-compensation-for-independent-contractor-professional-athletes/. For team sport Olympic athletes, see Megan Ormond, *#WeDemandChange: Amending International Olympic Committee Rule 40 for the Modern Olympic Games*, 5 CASE W. RES. J.L. TECH. & INTERNET 179, 188 (2014).

[9] *See, e.g.*, Josh Gross, *How the Ali Act Could Upset the Power Balance Between UFC and Its Stars*, GUARDIAN (May 2, 2016, 6:44 AM), https://www.theguardian.com/sport/blog/2016/may/02/ufc-muhammad-ali-act-mma-conor-mcgregor-dispute ("[B]y limiting endorsement opportunities and securing fighters to long-term contracts that include extension options, [the UFC] appear to be operating like a league instead of merely a fight promoter").

classified as independent contractors.[10] However, this classification makes more sense for boxers. Generally, boxers do not sign exclusive, multi-fight contracts with a promotion like UFC fighters do.[11] They typically have managers who negotiate one fight at a time for them.[12] Therefore, boxing promotions possess less control over boxers than the UFC does over its fighters.

C. Golfers

While the sport of golf has little in common with mixed martial arts in competition, it is very similar regarding elements of worker classification. Like UFC fighters, Professional Golfers Association Tour golfers are classified as independent contractors.[13] They are required to compete in a minimum number of tournaments each year, and they must obtain permission to play in a non-PGA event.[14] The Ladies Professional Golf Association exercises even greater control over its athletes, going so far as to require all competitors—of which many live in non-English-speaking countries—to learn and

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[10] Joel Calahan, *Boxing's Labor Problem*, BOSTON REV. (May 1, 2015), http://bostonreview.net/blog/joel-calahan-premier-boxing-champions-mayweather-pacquiao.

[11] *Id.*

[12] *Id.*

[13] *Does the PGA Tour Need a Players' Union?*, ESPN (Mar. 4, 2008), http://www.espn.com/golf/news/story?page=factfiction/080304.

[14] *Id.*

speak English.[15]

D. WWE Wrestlers

UFC fighters and WWE (formerly WWF) wrestlers have many similar features of employment even though professional wrestling is not a sport.[16] They are both classified as independent contractors and sign exclusive contracts lasting for years that forbid performing in rival promotions.[17] The WWE has final say regarding ring attire, props, and makeup worn by the professional wrestlers, although the wrestlers generally have to pay for these items themselves.[18] The wrestlers are given wide freedom in designing their in-ring performances and speeches, but the end results are determined by the WWE.[19] Arrangements for the demanding travel schedule are organized and paid for by the wrestlers.[20]

E. Exotic Dancers

While the worker classification of UFC fighters has yet to be adjudicated, there have been

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[15] *LPGA's English-only Policy Draws Criticism from PGA Members*, ASSOCIATED PRESS (Aug. 28, 2008), https://www.espn.com/golf/news/story?id=3558577.
[16] See Michael Conklin & Julia Goebel, *Wrestling with Employment Classifications: Are WWE Wrestlers Independent Contractors?*, 70 LAB. L.J. 165, 165 (2019).
[17] See *id.* at 166.
[18] *Id.* at 165.
[19] *Id.* at 166.
[20] *Id.*

many legal determinations regarding exotic dancers.[21] The dancers prevailed in a majority of these cases and were classified as employees.[22] And this is despite how, in some ways, exotic dancers have more freedom than UFC fighters. For example, they are generally free to perform at other clubs, do not sign long-term contracts, have less demanding promotional requirements, and have more flexible schedules.[23]

F. Actors and Entertainers

Commercial video production workers have their own IRS standard for determining worker classification.[24] While this test is not applicable to UFC fighters, it is worth noting that if it were, they would very likely be classified as employees. This is because a continued relationship between worker and employer is a "critical factor" that automatically leads to a determination of employee.[25] This critical factor would likely be met with UFC fighters since

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[21] *See* Michael H. LeRoy, *Bare Minimum: Stripping Pay for Independent Contractors in the Share Economy*, 23 WM. & MARY J. WOMEN & L. 249, 251–52 (2017).
[22] *Id.* at 260–61.
[23] Michael Conklin, *Two Classifications Enter, One Classification Leaves: Are UFC Fighters Employees or Independent Contractors?*, 29 S. CAL. INTERDISC. L. REV. 227, 236 (2020).
[24] Marilyn Barrett, *Independent Contractor/Employee Classification in the Entertainment Industry: The Old, the New and the Continuing Uncertainty*, 13 U. MIAMI ENT. & SPORTS L. REV. 91, 129 (1996).
[25] *Id.* at 129–33.

they sign forty-month contracts.

III. MAKING THE DETERMINATION

The IRS Twenty-Factor Test for determining whether a worker is an employee or an independent contractor helps provide some uniformity and therefore predictability. However, many of the twenty factors are subjective, and the final determination based on the factors is also subjective. There exists no quantifiable metric to ultimately distinguish employees from independent contractors. In other words, one does not simply add up the factors pointing toward employee status and if there are eleven or more, the worker is an employee. As the IRS explains, "[t]he degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed."[26] To further add to the uncertainty, labor law defines the terms in a circular nature.[27] One National Labor Relations Board (NLRB) judge described his frustration with the process of determining worker classification as follows: "Few

[26] See Rev. Rul. 87-41, 1987-1 C.B. 296.

[27] *See, e.g.*, 42 U.S.C. § 2000e(b) (2018) (defining "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees" for purposes of Title VII); 42 U.S.C. § 12111(5)(A) (2018) (defining employer as same for purposes of the ADA); 29 U.S.C. § 2611(2)(A) (2018) (defining "eligible employee" for purposes of FMLA); 29 U.S.C. § 206(a) (2018) (requiring employers to "pay to each of his employees" minimum wages under the Fair Labor Standards Act); 29 U.S.C. § 157 (2018) (granting employees the right to self-organize under the National Labor Relations Act).

problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing."[28]

Regardless of this inherent subjectivity, the consistent theme throughout the test is that the more control an employer has over the worker, the more likely the employee is to be an employee and not an independent contractor. The following are the twenty factors of the IRS test, along with a brief description of how each factor would likely apply to a UFC fighter.

A. Instructions

> *A worker who is required to comply with other persons' instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions.*[29]

The UFC clearly mandates "when" and "where" its fighters perform, including media appearances.[30] The UFC even dictates how many

[28] NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 121 (1944).

[29] Rev. Rul. 87-41, 1987-1 C.B. 296.

[30] Jonathan Snowden, *The Business of Fighting: A Look Inside the UFC's Top-Secret Fighter Contract*, BLEACHER REP. (May 14,

days before the fight a fighter must arrive at the hotel.[31] The exact level of control the UFC exercises over "how" fighters perform is less clear. The UFC implements numerous rules that restrict the types of attacks fighters are allowed to utilize, the number and duration of rounds, the gloves that must be worn, the behavior allowed at promotional events, the maximum weight allowed to compete, the clothing allowed to be worn at promotional events, and more. Within the rules of the sport, fighters are allowed to implement whatever strategy they choose. However, the UFC has been known to give favorable treatment to fighters with aggressive, crowd-pleasing fighting styles and poor treatment to fighters who do not use such styles. Because the UFC mandates "when," "where," and some of the "how" fighters perform, this factor overall appears to support an employee classification for UFC fighters.

B. Training

> *Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed*

2013), https://bleacherreport.com/articles/1516575-the-business-of-fighting-a-look-inside-the-ufcs-top-secret-fighter-contract#slide0.

[31] *Id.*

> *want the services performed in a particular method or manner.*[32]

The UFC produces *The Ultimate Fighter*, a reality television show in which fighters are trained by UFC-appointed coaches and compete for a UFC contract. But after winning the show, the fighter goes back to training on his or her own with no UFC involvement. Fighters select their own coaches who are not affiliated with the UFC, and all training decisions are made without the control of the UFC. The UFC provides instruction regarding media appearances and competition rules. And while this is technically "training," IRS materials explicitly exclude from consideration these types of "orientation or information sessions about the business's policies" for purposes of worker classification.[33] Because of the high level of autonomy provided to fighters regarding how they train for a fight, this factor overall appears to support an independent contractor classification for UFC fighters.

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[32] Rev. Rul. 87-41, 1987-1 C.B. 296.

[33] INTERNAL REVENUE SERV., DEP'T OF TREASURY, INDEPENDENT CONTRACTOR OR EMPLOYEE? TRAINING MATERIALS (1996), *https://www.irs.gov/pub/irs-utl/emporind.pdf (*"However, not all training rises to this level. The following types of training, which might be provided to either independent contractors or employees, should be disregarded: orientation or information sessions about the business's policies, new product line, or applicable statutes or government regulations.").

C. Integration

> *Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business*.[34]

This is one of the most definitive factors because the UFC could clearly not continue without the fighters. The UFC might attempt to refute this determination by claiming that any one fighter is not integral to the UFC. However, this is an incorrect application of the integration factor. "The integration factor must be applied to the class of workers as an aggregate, not to any one worker in isolation."[35] This factor clearly supports the classification of UFC fighters as employees.

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[34] Rev. Rul. 87-41, 1987-1 C.B. 296.

[35] David Cowley, Note, *Employees vs. Independent Contractors and Professional Wrestling: How the WWE Is Taking a Folding-Chair to the Basic Tenets of Employment Law*, 53 U. LOUISVILLE L. REV. 143, 160 (2014).

D. Services Rendered Personally

> *If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results.*[36]

UFC fighters are not allowed to delegate their duty to perform to another fighter and must render their services personally. If you have already covered assignments and delegations in class, this is an excellent opportunity to reinforce those principles. A UFC fighter's duty to perform is nondelegable because, as a personal service, delegating the duty to perform would substantially change the outcome of the contract.[37] Hundreds of thousands of consumers are willing to pay $75 to see star athlete Conner McGregor fight in a UFC main event, but much fewer would pay to see McGregor's delegatee fight, even if this delegatee was also a trained fighter. This factor clearly supports the classification of UFC fighters as employees.

[36] Rev. Rul. 87-41, 1987-1 C.B. 296.

[37] *See* 6A C.J.S. *Assignments* § 39 (2022) ("Subject to some exceptions, a contract for personal services requiring the exercise of knowledge, judgment, or skill generally is not assignable").

E. Hiring, Supervising, and Paying Assistants

> *If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job. However, if one worker hires, supervises, and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, this factor indicates an independent contractor status.*[38]

UFC fighters are responsible for acquiring and compensating their own coaches, training partners, nutritionists, and "cutmen."[39] While the UFC does pay for security at the events, this factor overall supports the classification of UFC fighters as independent contractors.

[38] Rev. Rul. 87-41, 1987-1 C.B. 296.

[39] A "cutman" (or "cutwoman") treats fighters between rounds in an effort to reduce the severity of injuries that might cause the fight to end, such as lacerations and excessive swelling around the eyes that limit a fighter's vision. Alex O'Meara, *How to Be a Cutman in Boxing*, LIVESTRONG.COM, https://www.livestrong.com/article/427989-how-to-be-a-cutman-in-boxing/ (last visited July 22, 2022).

F. Continuing Relationship

> *A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals.*[40]

The average time spent fighting in the UFC is between one and two years.[41] This factor is difficult to apply to UFC fighters because there is no explicit amount of time required to constitute a "continuing relationship." Hiring a plumber to fix a leaky roof at your house is clearly not a continuing relationship, while hiring a manager at Walmart clearly is, but a UFC fighter falls between these two extremes. In the recently overturned *FedEx Home Delivery, Inc.* case,[42] the NLRB determined that FedEx drivers' one-year contracts that contained automatic renewals constituted "a permanent working arrangement with

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[40] Cowley, *supra* note 35, at 160.

[41] The average length of a fighter's career in the UFC, WEC, and Strikeforce (the three main MMA promotions at the time of the article) is 533 days. Paul Gift, *Does the Length of Fight Careers Matter in the UFC Antitrust Lawsuit?*, SBNATION: BLOODY ELBOW (Dec. 30, 2014, 12:00 PM), https://www.bloodyelbow.com/2014/12/30/7465287/mma-ufc-antitrust-lawsuit-fighter-career-length.

[42] FedEx Home Delivery, Inc., 361 N.L.R.B. 610 (Sept. 30, 2014), *overruled by* SuperShuttle DFW, Inc., 367 N.L.R.B. No. 75 (Jan. 25, 2019).

the company under which they may continue as long as their performance is satisfactory."[43] Similarly, UFC contracts contain a "Champions Clause" that affords automatic renewal if it expires while the fighter is a champion.[44] But it is far more likely that a given FedEx driver will exhibit "satisfactory" performance than it is for a given UFC fighter to become a champion.

The IRS stipulates that workers engaged for a "seasonal, project, or [on an] 'as needed' basis" maintain a "temporary" relationship with their employers.[45] Since the average length of a UFC fighter's contract is almost two years, this seems to exceed the "temporary" status of "seasonal, project, or 'as needed'" workers. Therefore, this factor appears to support the classification of UFC fighters as employees.

G. Set Hours of Work

> *The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control.*[46]

UFC fighters have no control over the date of the UFC events, maximum allowable duration of

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[43] *Id.* at 623.

[44] Genevieve F.E. Birren & Tyler J. Schmitt, *Mixed Martial Artists: Challenges to Unionization*, 28 MARQ. SPORTS L. REV. 85, 96 (2017).

[45] Rev. Rul. 87-41, 1987-1 C.B. 296. at 2-28.

[46] Rev. Rul. 87-41, 1987-1 C.B. 296.

their fights, or the sequential order of their fights (and therefore the time of day they fight). The UFC also schedules mandatory media appearances and can require fighters to arrive at the hotel up to eight days prior to the event.[47] Therefore, this factor supports the classification of UFC fighters as employees.

H. Full Time Required

> *If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and impliedly restrict the worker from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he or she chooses*.[48]

UFC contracts contain an exclusivity clause that bars fighters from performing in any other combat sports promotion.[49] But excluding the two to three times per year when a fighter has a scheduled UFC bout, fighters are free to pursue other avenues of compensation. With the exception of promotional endorsements, most UFC fighters do not work outside of the UFC.[50] Therefore, this factor supports

[47] Snowden, *supra* note 30.
[48] Rev. Rul. 87-41, 1987-1 C.B. 296.
[49] Conklin, *supra* note 23, at 242.
[50] *Id.*

the classification of UFC fighters as employees.

I. Doing Work on Employer's Premises

> *If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere.*[51]

The UFC requires its fighters to perform at leased venues that the UFC selects, often located outside the United States. Furthermore, all UFC bouts are conducted in the trademarked Octagon provided by the UFC.[52] Therefore, this factor supports the classification of UFC fighters as employees.

J. Order or Sequence Set

> *If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own pattern of work but must follow the established routines and schedules of the person or persons for whom the services are*

[51] Rev. Rul. 87-41, 1987-1 C.B. 296.
[52] *The Octagon*, UFC (Oct. 31, 2018), https://www.ufc.com/octagon.

> *performed.*[53] *Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. It is sufficient to show control, however, if such person or persons retain the right to do so.*[54]

The UFC organizes numerous events that fighters must attend. Fighters are required to do the following in a specific, sequential order: make media appearances, weigh in the night before the bout, perform their bouts at a specified time, participate in the post-fight press conference, and provide samples for the post-fight drug test. Therefore, this factor supports the classification of UFC fighters as employees.

K. Oral or Written Reports

> *A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.*[55]

The UFC rarely checks in on fighters' training camps and generally does not require reports. One significant exception is that the UFC

[53] Rev. Rul. 87-41, 1987-1 C.B. 296.
[54] *Id.*
[55] *Id.*

requires its fighters to submit to U.S. Anti-Doping Agency (USADA) drug testing, the results of which are then reported to the UFC. This USADA drug testing requires fighters to report their locations at all times, to better facilitate random testing.[56] This factor is largely inconclusive because the nature of working as a professional fighter does not naturally lend itself to the filling out of numerous reports. For example, if there were another league that classified the fighters as employees, they would likewise probably not require daily or weekly reports from fighters.

L. Payment by Hour, Week, Month

> *Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the job or on a straight commission generally indicates that the worker is an independent contractor.*[57]

UFC fighters do not receive a consistent salary from the UFC. They are paid a flat rate for

[56] Debets, *The Obstacles to UFC Fighters' Unionisation*, LAWINSPORT (Aug. 26, 2017), https://www.lawinsport.com/topics/sports/item/the-obstacles-to-ufc-fighters-unionisation.
[57] Rev. Rul. 87-41, 1987-1 C.B. 296.

each fight with the opportunity to receive bonuses if they win their fights and if they are awarded the knockout of the night, submission of the night, or fight of the night. Elite fighters often receive a percentage of the pay-per-view purchases for the events they headline. Fighters who postpone a fight due to injury—or have their fight postponed from an injured opponent—are generally not compensated. This structure of only compensating fighters when they perform—and compensating them for how well they perform—is celebrated by the UFC as "eat what you kill."[58] It is often somewhat similar to "straight commission" as mentioned in the IRS standard for this factor. Therefore, this factor supports the classification of UFC fighters as independent contractors.

M. Payment of Business and/or Traveling Expenses

> *If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right*

[58] Jesse Holland, *Defiant Dana White Defends UFC Fighter Pay: 'In This Sport, You Eat What You Kill'*, SBNATION: MMA MANIA (Sept. 29, 2016, 10:54 AM), https://www.mmamania.com/2016/9/29/13105632/defiant-dana-white-defends-ufc-fighter-pay-in-this-sport-you-eat-what-you-kill-mma.

> *to regulate and direct the worker's business activities.*[59]

The UFC pays for travel, hotel, and meal expenses for promotional engagements and fights for the fighter and one additional associate.[60] Therefore, this factor supports the classification of UFC fighters as employees.

N. Furnishing of Tools and Materials

> *The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.*[61]

Fighting in the UFC does not require a set of physical tools like that of a roofer or plumber. But what is required is primarily provided by the UFC. The facilities, the Octagon, the in-ring clothing, and the gloves worn by the fighters are provided by the UFC. Therefore, this factor supports the classification of UFC fighters as employees.

O. Significant Investment

> *If the worker invests in facilities that are used by the worker in performing*

[59] Rev. Rul. 87-41, 1987-1 C.B. 296.
[60] Snowden, *supra* note 30.
[61] Rev. Rul. 87-41, 1987-1 C.B. 296.

> *services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends to indicate that the worker is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person or persons for whom the services are performed for such facilities and, accordingly, the existence of an employer-employee relationship.*[62]

Since the UFC only pays for the costs involved with one associate, a fighter could claim that the extra costs required to bring additional associates (i.e., another coach or training partner) is an investment in his or her performance in a UFC bout. Beyond this, the investments are all made by the UFC, with the exception of UFC fighters covering their own training costs.[63] Therefore, this factor supports the classification of UFC fighters as employees.

P. Realization of Profit or Loss

> *A worker who can realize a profit or suffer a loss as a result of the worker's services (in addition to the*

[62] *Id.*

[63] See Section IV, Training Issue, *infra* for more detail on this issue.

> *profit or loss ordinarily realized by employees) is generally an independent contractor, but the worker who cannot is an employee. For example, if the worker is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses, such as salary payments to unrelated employees, that factor indicates that the worker is an independent contractor . . . .*[64]

The IRS maintains that "[t]he ability to realize a profit or incur a loss is probably the strongest evidence that a worker controls the business aspects of services rendered."[65] This factor is difficult to apply to UFC fighters. For some entry-level fighters, it is possible to suffer a net loss on a bout. For example, in 2017 there were forty-seven UFC fighters who earned less than $12,500 for their one bout that year.[66] Training camps, which the fighters pay for themselves, can cost eight to twelve thousand dollars.[67] The UFC only pays travel expenses for the fighter and one associate, but

[64] Rev. Rul. 87-41, 1987-1 C.B. 296.

[65] INTERNAL REVENUE SERV., *supra* note 33, *at 2-21.*

[66] Jeff Fox, *2017 UFC Fighter Salaries – Complete List*, SPORTS DAILY (Jan. 6, 2018), https://thesportsdaily.com/2018/01/06/2017-ufc-fighter-salaries-complete-list-fox11/.

[67] Damon Martin, *John Cholish Explains How Much It Costs to Be a UFC Fighter*, BLEACHER REP. (May 23, 2013), https://bleacherreport.com/articles/1649483-john-cholish-explains-how-much-it-costs-to-be-a-ufc-fighter.

fighters usually bring more than one associate. Fighters also pay for their own medicals to get licensed for their bout.[68] Given this economic reality, it is easy to see that lower paid entry-level fighters may suffer a net loss.[69] To make matters worse, the UFC is free to cancel an event or a bout without any compensation to the fighter, in which case everything spent preparing for that fight would be a net loss.

However, the majority of UFC fighters make more than $12,500 per fight and may receive additional compensation. Additionally, if a UFC event were to result in a financial loss to the company, the fighters on that card would still receive their contractual compensation. Given the ambiguous nature of how this factor applies to a UFC fighter, it is unclear if it supports an employee or independent contractor classification.

Q. Working for More than One Firm at a Time

> *If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally*

[68] *Id.*

[69] Most fighters are compensated for their bouts on a scale in which there is a "show" amount and a "win" amount. These amounts are usually the same, meaning that a fighter who loses his or her bout receives half as much as if he or she had won. Lee Whitehead, *If It's Not Broke, Fix It Anyway: Can Bonuses Force Finishes in MMA?*, MMA WEEKLY (June 29, 2011), https://www.mmaweekly.com/if-its-not-broke-fix-it-anyway-can-bonuses-force-finishes-in-mma.

> *indicates that the worker is an independent contractor. However, a worker who performs services for more than one person may be an employee of each of the persons, especially where such persons are part of the same service arrangement.*[70]

UFC fighters are not allowed to compete in any other combat sports promotion. But they are allowed to seek unrelated work that does not interfere with their UFC obligations. Note that the IRS language does not refer to the mere opportunity or ability to work for other employers. It instead refers to the actual performance of this other work. Outside of endorsement deals, the majority of UFC fighters do not maintain employment outside of the UFC. Therefore, this factor supports the classification of UFC fighters as employees.

R. Making Service Available to General Public

> *The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship.*[71]

UFC fighters are allowed to make their services as a product spokesman available. But for

[70] Rev. Rul. 87-41, 1987-1 C.B. 296.
[71] *Id.*

most UFC fighters, it is unlikely that this type of work would be considered to be on a "consistent basis." And the fighter's primary service of competing in a combat sport is made available exclusively to the UFC. Therefore, this factor supports the classification of UFC fighters as employees.

S. Right to Discharge

> *The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications.*[72]

The UFC is allowed to terminate the contract of any fighter for a variety of reasons. Therefore, this factor supports the classification of UFC fighters as employees.

T. Right to Terminate

If the worker has the right to end his

[72] *Id.*

> *or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship.*[73]

UFC fighters cannot unilaterally terminate their UFC contracts. Therefore, this factor supports the classification of UFC fighters as independent contractors.

IV. TRAINING ISSUE

Some of the determinations above are contingent upon whether the training undergone by UFC fighters is considered as part of the job. While training is not technically a contractual requirement, it would be unheard of for a UFC fighter not to train for his or her fights. The UFC could use this to argue in favor of more independent contractor classifications in the twenty factors. It could claim that since training is essentially a requirement to fight in the UFC, the work performed by UFC fighters includes all of the training and not just the performing at two or three events per year. By framing the work done by UFC fighters in this more expansive light, the UFC could greatly reduce the perceived overall control it exerts. After all, most UFC fighters train for months—beyond the control of the UFC—for every one fight they perform in. Under such a theory the UFC could argue that the

[73] *Id.*

vast majority of work performed by UFC fighters is outside the control of the UFC.

Unfortunately for the UFC, this pro-independent-contractor interpretation of including training as part of the work is unlikely to be successful. The IRS explicitly references the common law standard for worker classification—which the Twenty-Factor Test is derived from—under which only training "provided by the business" is considered.[74] This standard, whereby unsupervised training is not included in worker classification considerations, is also a common-sense interpretation, as attempting to account for training would unnecessarily confuse the process. For example, lawyers receive extensive training in law school, but it would make little sense for a company that hires lawyers to be able to reference this unsupervised training—which may have occurred decades ago—as evidence of an independent contractor relationship.

V. CUMULATIVE ASSESSMENT

The cumulative results from your students of this Twenty-Factor Test will vary slightly from semester to semester but will generally come out the way it is presented here, with fourteen factors favoring an employee classification, four factors favoring an independent contractor classification, and two factors being inconclusive. As previously mentioned, there is no quantitative threshold when implementing this test. Just because there are more

[74] INTERNAL REVENUE SERV., *supra note 33, at 2-8.*

factors in favor of one classification does not per se mean that that is the correct classification. Some factors may be interpreted as more relevant to the particular work being analyzed. And some factors may be interpreted as more definitive than others. For example, the third factor, "integration," comes out dispositively in favor of an employee classification as the UFC would be nothing without the fighters. However, the first factor, "instructions" is less dispositive. UFC fighters do receive numerous instructions which they must obey, but likely not as many as a traditional employee. So while the first factor was determined to be in favor of an independent contractor status and the third factor was determined to be in favor of an employee status, they are not equally weighted. Since factor three was far more definitive than factor sixteen, the employee determination in the former would likely be weighted more than the independent contractor determination in factor sixteen.

Regardless of the ambiguities involved in performing this Twenty-Factor Test, the overwhelming disparity in favoring an employee status means that this is likely the correct classification. This conclusion is supported by the vast majority of those who have analyzed the issue.[75]

[75] I was unable to locate any analysis that concluded UFC fighters are correctly classified as independent contractors. "[I]t is likely that, if a complaint were ever to be brought to the board, the athletes would be found to, in fact, be employees of the UFC . . . ." Genevieve F.E. Birren & Tyler J. Schmitt, *Mixed Martial Artists: Challenges to Unionization*, 28 MARQ. SPORTS L. REV. 85, 90 (2017). " Based on the totality of

VI. RELEVANCE OF CLASSIFICATION

Students often do not understand the importance of the distinction between an employee and an independent contractor. After all, if UFC fighters were recategorized as employees, little would change from the viewpoint of consumers. Therefore, it is important to discuss just how significant this distinction is, as students are likely to experience this first-hand in their professional careers, either as a worker or employer.

Classifying workers as independent contractors reduces legal liability. Under the doctrine of respondeat superior, employers are typically liable for the torts conducted by their employees if the behavior was within the scope of employment.[76] Employee protections such as the

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the contractual relationship, is seems that a court could consider fighters to be employees rather than independent contractors." Jeffrey B. Same, *Breaking the Chokehold: An Analysis of Potential Defenses Against Coercive Contracts in Mixed Martial Arts*, 2012 MICH. ST. L. REV. 1057, 1093 (2012). "[T]he totality of the circumstances overwhelmingly support the notion that [UFC] fighters are employees." Brandon Weber, *The Muhammad Ali Expansion Act: The Rise of Mixed Martial Arts and the Fight that Lies Ahead*, 14 DEPAUL J. SPORTS L. 106, 127 (2018). "[T]he results of the IRS Twenty-Factor Test as applied to UFC fighters produce a clear result: UFC fighters should be classified as employees." Conklin, *supra* note 23, at 246.

[76] *See, e.g.*, C. B. L., Annotation, *Nonliability of an Employer in Respect of Injuries Caused by the Torts of an Independent Contractor*, 18 A.L.R. 801 § 1 (1922).

Age Discrimination in Employment Act of 1967 (ADEA), the Family Medical Leave Act of 1993 (FMLA), Title VII of the Civil Rights Act, and the Occupational Safety and Health Act (OSHA) do not apply to independent contractors.[77] Classifying workers as independent contractors also means that the business avoids expenses such as Social Security, Medicare, and unemployment insurance.[78] Businesses that have classified workers as independent contractors have an additional incentive to maintain this classification because a judicial determination of an employee classification would likely result in retroactive liabilities. For example, Microsoft paid out $97 million in back pay and benefits to a group of workers who Microsoft misclassified as independent contractors.[79]

The distinction between employees and independent contractors is also relevant for purposes of worker unionization. Under the National Labor Relations Act, independent contractors are unable to unionize.[80] The ability to unionize significantly alters the power balance between worker and employer. UFC fighter unionization—or just the threat of unionization—could result in improvements to salary, health insurance, travel accommodations,

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[77] Susan Schwochau, *Identifying an Independent Contractor for Tax Purposes: Can Clarity and Fairness Be Achieved?*, 84 IOWA L. REV. 163, 174–75 (1998).

[78] *Id.* at 166.

[79] Settlement Agreement, Vizcaino v. Microsoft Corp., 120 F.3d 1006 (9th Cir. 1997) (No. 94-35770), ECF No. 702.

[80] Jeffrey B. Same, *Breaking the Chokehold: An Analysis of Potential Defenses Against Coercive Contracts in Mixed Martial Arts*, 2012 MICH. ST. L. REV. 1057, 1092 (2012).

the ability to compete in rival promotions, and scheduling. Note that all of these outcomes would in some way impose an additional burden on the UFC. This is why it is advantageous for employers to classify workers as independent contractors and not employees. The advantages are so significant that investors often push businesses to label workers as independent contractors.[81] Misclassification of employees as independent contractors affects more than just the worker and the business. It is estimated that they cost the Federal Treasury $4.7 billion annually in lost income tax revenue.[82]

VII. POTENTIAL EXAM QUESTIONS

The topic of worker classification in general, and this class exercise specifically, produce a number of potential exam questions to assess student understanding. The following are sample questions with brief explanations.

1. List at least three advantages to a business classifying workers as independent contractors rather than employees.

This question gets at the heart of why the

[81] Charlotte S. Alexander, *Misclassification and Antidiscrimination: An Empirical Analysis*, 101 MINN. L. REV. 907, 911 (2016).

[82] Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J.L. & SOC. CHANGE 53, 62 (2015).

distinction is so important. Potential advantages include removing the possibility of unionization; reduced legal liability for worker conduct; reduced costs from unemployment insurance, Social Security, and Medicare; reduced compliance costs from the inapplicability of FMLA, OSHA, ADEA; etc.

2. You are advising a business that has decided to classify a group of workers as independent contractors even though it appears they would more accurately be classified as employees. The business reasons that after a few years one of these workers may sue and the classification would likely be adjudicated as employee, but the business would still have received the advantages of classifying them as independent contractors up to that point. Explain to this business the error in their strategy.

This is an excellent question to illustrate the practical applicability of a legal principle. An ideal answer would point out that a judicial determination that a group of workers have been improperly categorized as independent contractors would likely include retroactive repercussions. For example, Microsoft had to pay $97 million in back pay and benefits for this reason.[83] Because independent contractors are generally paid a premium over similar workers classified as employees, the business

[83] *Vizcaino*, 120 F.3d 1006.

in this hypothetical is setting itself up for the worst of both worlds, paying higher salaries in lieu of benefits and then retroactively paying for the benefits as well.

3. A business that you advise tells you that, when conducting the IRS Twenty-Factor Test, it produces twelve factors in favor of an independent contractor status and eight factors in favor of an employee status for its workers. Therefore, it is confident that if the issue went to court it would prevail and its independent contractor classification would be upheld. What advice would you provide to this business regarding a potential oversight in their strategy?

This is another question that illustrates the practical applicability of the law. Like many legal determinations, worker classifications are somewhat subjective. Therefore, just because this business concluded that twelve of the factors favored an independent contractor status does not mean that a judge would agree. Additionally, the worker classification is not made solely based on which classification has more factors in its favor. Perhaps the eight factors that favored an employee status are more definitive and more relevant to the line of work being performed. Finally, the business should consider that even "winning" in court is not necessarily the best outcome, as that entails temporary uncertainty, potential negative publicity,

decreased worker morale from an adversarial process, and attorney's fees.

4. Which one of the following is true regarding worker classifications?

A. If a worker knowingly signs an employment contract that states he or she is an independent contractor, then he or she is unable to claim an employee status.
B. Generally, employers prefer to label workers as employees rather than independent contractors.
C. Generally, the more control an employer exerts over a worker, the more likely the worker is to be an employee and not an independent contractor.
D. Generally, independent contractors are allowed to unionize.

VIII. CONCLUSION

Performing the IRS Twenty-Factor Test with your class is an ideal activity to demonstrate the realities of the law. Many legal standards require such a step-by-step multi-pronged analysis. Furthermore, the subjectivity in the Twenty-Factor test provides a powerful reminder to students of the uncertain and often subjective nature of the law and how this affects business decisions. It also provides a welcome respite from the traditional, lecture-only teaching modality. The "think-pair-share" structure of the activity is a proven method for increasing

engagement and understanding.

APPENDIX A: BACKGROUND OF THE UFC

The Ultimate Fighting Championship (UFC) is the world's largest mixed martial arts (MMA) promotion, in which athletes compete one-on-one attempting to kick, punch, or submit their opponents. UFC matches take place in an eight-sided cage, which the UFC trademarked as "the Octagon."[84] Early UFC events in the mid-1990s had minimal rules; some of the competitors had minimal training; and the events were promoted in a somewhat salacious fashion, lauding how the events were "deadly."[85] The brutality and vulgarity present in early events led to politicians labeling the sport as "human cockfighting" and successful bans in numerous states.[86] The UFC initially struggled financially, selling in 2001 for only $2 million.[87] After adopting regulations, the UFC grew in popularity. It grew in market share by purchasing competing promotions and in 2017 the UFC sold for

[84] *The Octagon*, *supra* note 52.
[85] TheMontageKing MMA, *Remembering UFC 1*, YOUTUBE (Nov. 23, 2016), https://www.youtube.com/watch?v=2jid5GNXZUk.
[86] Jonathan Strickland, *How the Ultimate Fighting Championship Works*, HOW STUFF WORKS, https://entertainment.howstuffworks.com/ufc4.htm (last visited July 22, 2022).
[87] Chris Isidore, *UFC Owners Turn $2 Million into $4 Billion*, CNNMONEY SPORT (July 11, 2016, 1:57 PM), https://money.cnn.com/2016/07/11/news/companies/ufc-sold/index.html.

$4 billion.[88] Now the UFC has over 1,000 male and female fighters under contract.[89] The UFC maintains nearly 90% of the total market share of MMA revenue.[90] Put another way, UFC fighters have very little power when negotiating their contracts with the UFC. This one-sided nature to contract negotiations is reflected in the terms of the contract. One labor law professor referred to the standard UFC contract as the worst he had ever seen in sports.[91] Furthermore, as a percent of league revenue, UFC fighters are paid much less than athletes in the National Football League, Major League Baseball, National Basketball Association, and National Hockey League.[92]

The UFC exerts a great deal of control over its fighters. UFC fighters used to be able to earn money from sponsors by putting their logos on their clothing, but in 2015 the UFC signed an exclusive

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[88] *Dana White on $4 Billion UFC Sale: 'Sport is Going to the Next Level'*, ABC NEWS (July 11, 2016, 1:40 AM), https://abcnews.go.com/Sports/dana-white-billion-ufc-sale-sport-level/story?id=40483372.

[89] *See Athletes*, UFC, https://www.ufc.com/athletes/all?filters%5B0%5D=status%3A23 (last visited July 22, 2022).

[90] Kartikay Mehrotra & Eben Novy-Williams, *UFC's $4 Billion Sale Is Fodder for Fighters' Antitrust Suit*, BLOOMBERG (July 12, 2016, 1:21 PM), https://www.bloomberg.com/news/articles/2016-07-12/ufc-s-4-billion-sale-is-new-fodder-for-fighters-antitrust-suit.

[91] Snowden, *supra* note 30.

[92] Conklin, *supra* note 23, at 229.

sponsorship deal with Reebok.[93] Also in 2015, the UFC implemented a strict anti-doping policy that mandates fighters inform them of their location at all times for purposes of random testing.[94] Long-time UFC president Dana White is a polarizing figure. His own mother described him as "egotistical, self-centered, arrogant, and cruel."[95] He was a speaker at the 2016 Republican National Convention, where he praised Donald Trump as "a fighter."[96] When asked about fighters who want health insurance and better pay White responded, "We're in this [expletive] society now where everybody should win a trophy. No, everyone doesn't win a [expletive] trophy."[97]

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[93] This Reebok deal cost some fighters hundreds of thousands of dollars in lost sponsorship deals per year. Jacob Debets, *The Obstacles to UFC Fighters' Unionisation*, LAWINSPORT (Aug. 26, 2017), https://www.lawinsport.com/topics/sports/item/the-obstacles-to-ufc-fighters-unionisation.

[94] *Id.*

[95] Joshua Molina, *Dana White's Mom Calls Him a "Prick" and "Tyrant," Who Turned His Back on His Family*, FULL CONTACT FIGHTER (July 19, 2011), http://fcfighter.com/dana-white%e2%80%99s-mom-calls-him-a-%e2%80%9cp-%e2%80%9d-and-%e2%80%9ctyrant%e2%80%9d-who-turned-his-back-on-his-family/.

[96] Alex Shephard, *The UFC's Dirties Move Yet: Union Bashing*, NEW REPUBLIC (Oct. 21, 2016), https://newrepublic.com/article/137122/ufcs-dirtiest-move-yet-union-bashing.

[97] *Id.*

APPENDIX B: IRS TWENTY-FACTOR TEST APPLICATION

The task of classifying a worker as either an employee or an independent contractor is not as easy as it may first appear. The IRS Twenty-Factor Test was first implemented in 1987 to help courts make this determination. The test consists of twenty factors that, when applied to a worker in question, either point toward an employee classification or an independent contractor classification. It is also possible that a factor will be inconclusive given the details of the worker under consideration and therefore ultimately non-applicable.

Performing the IRS Twenty-Factor Test is further complicated in that each factor is not evenly weighted and there is no objective formula for determining if the test ultimately results in a determination of employee or independent contractor. For example, if the test produces twelve factors that point to an employee classification and only eight that point to an independent contractor classification, that does not preclude the possibility that such a worker will be determined to be an independent contractor on the grounds that those eight factors for independent contractor are more significant and more dispositive than the twelve for employee. As the IRS explains, "[t]he degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed."[98]

Therefore, when performing the IRS Twenty-

[98] Rev. Rul. 87-41, 1987-1 C.B. 296.

Factor Test, a holistic, totality of the circumstances approach must be taken. And remember that the overall principle that guides the process is that the more right to control exercised by the employer, the more likely the worker will be considered an employee and not an independent contractor.

APPENDIX C: PERFORMING THE IRS TWENTY-FACTOR TEST

The following are the twenty factors of the test. With the provided information on UFC fighters, go through each factor and conclude whether it favors either an employee classification or an independent contractor classification or is inconclusive to UFC fighters. Also, be sure to note the weight of each factor, as some will be more conclusive than others. Feel free to use outside resources about the UFC to aid in your determinations.

A. Instructions

> A worker who is required to comply with other persons' instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions.

B. Training

> Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend

meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner.

C. Integration

Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business.

D. Services Rendered Personally

If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results.

E. Hiring, Supervising, and Paying Assistants

If the person or persons for

whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job. However, if one worker hires, supervises, and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, this factor indicates an independent contractor status.

F. Continuing Relationship

A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals.

G. Set Hours of Work

The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control.

H. Full Time Required

If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and impliedly restrict the worker from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he or she chooses.

I. Doing Work on Employer's Premises

If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere.

J. Order or Sequence Set

If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own pattern of work but must follow the established routines and schedules of the person

or persons for whom the services are performed.[99] Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. It is sufficient to show control, however, if such person or persons retain the right to do so.

K. Oral or Written Reports

A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.

L. Payment by Hour, Week, Month

Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the job or on a straight commission generally indicates that the worker is an independent contractor.

[99] Rev. Rul. 87-41, 1987-1 C.B. 296.

M. Payment of Business and/or Traveling Expenses

If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities.

N. Furnishing of Tools and Materials

The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.

O. Significant Investment

If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends to indicate that the worker is an independent contractor. On the other hand, lack of

> investment in facilities indicates dependence on the person or persons for whom the services are performed for such facilities and, accordingly, the existence of an employer-employee relationship.
>
> *P. Realization of Profit or Loss*
>
> A worker who can realize a profit or suffer a loss as a result of the worker's services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the worker who cannot is an employee. For example, if the worker is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses, such as salary payments to unrelated employees, that factor indicates that the worker is an independent contractor . . . .
>
> *Q. Working for More than One Firm at a Time*
>
> If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. However, a worker who performs services for

more than one person may be an employee of each of the persons, especially where such persons are part of the same service arrangement.

R. Making Service Available to General Public

The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship.

S. Right to Discharge

The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications.

T. Right to Terminate

If the worker has the right to end his or her relationship with the

person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship.

APPENDIX D: RESULTS FORM

Factor	**E**	**IC**	**Notes**
1. Instructions			
2. Training			
3. Integration			
4. Services rendered personally			
5. Hiring, supervising, & paying assistants			
6. Continuing relationship			
7. Set hours of work			
8. Full time required			
9. Doing work on employer's premises			
10. Order or sequence set			
11. Oral or written reports			
12. Payment by hour, week, month			
13. Payment of business/traveling expenses			
14. Furnishing of tools and materials			
15. Significant investment			
16. Realization of profit or loss			

17. Working for more than one firm			
18. Making service available to public			
19. Right to discharge			
20. Right to terminate			

TEACHING THE THREATENED FALL OF NEW YORK TIMES V. SULLIVAN: PRIMING STUDENTS TO USE CURRENT LOWER COURT DECISIONS TO PREDICT THE NEXT PHASE OF AMERICAN DEFAMATION LAW

BRIAN J. HALSEY, J.D., LL.M., CISSP *
JULIE D. PFAFF, J.D., M.A.**
and
CYNTHIA M. GENTILE, J.D., SHRM-CP ***

I. INTRODUCTION

In 2019, the first two co-authors on this paper published a pedagogical review of the then-current national anthem controversies within the National Football League. The review examined the trend of "taking a knee" during the national anthem and the limits of a professional football player's workplace free speech.[100] During that discussion, the authors utilized

* Professor of Business Law and MBA Coordinator, West Chester University of Pennsylvania, West Chester, Pennsylvania.
** Adjunct Professor of Business Law & Communications, West Chester University of Pennsylvania, West Chester, Pennsylvania.
*** Associate Professor of Management, American Public University System, Charles Town, West Virginia; Adjunct Professor of Business Law, West Chester University of

contemporary examples to illustrate both the limits of the First Amendment and workplace speech.[101] That implementation in the classroom has been successful.

However, in the intervening years the co-authors have noted a trend amongst students to conflate current sensitivities negatively described in some quarters as "cancel culture," the strictures of defamation law, and 1st Amendment freedom of speech issues. This occurs at both the undergraduate and graduate level. The stresses of civil unrest and the Covid-19 lockdowns, amplified by the reliance on digital media necessitated by the same have impacted students' perceptions of the First Amendment. In its worst presentation, the current environment has fostered incongruent perceptions that simultaneously hold that one may state derogatory "facts" or opinions that one may feel appropriate at any given time, while at the same moment exercising a right not to be offended by others exercising that same perceived right to speech. This dynamic quite often on display on social media. In short, the attitude of this subset of students is that they can say what they will on social media without proof or consequence, and no one else may say anything to the contrary. That is not the state of law and as a practical matter is unsustainable. As the authors noted in the original article:

> The First Amendment of the United

Pennsylvania, West Chester, Pennsylvania; Adjunct Professor, DeSales University, Allentown, Pennsylvania.

[100] *See* Julie D. Pfaff & Brian J. Halsey, *Teaching the Intersection of the First Amendment and Employment Law: Professional Football as a Classroom Illustration of the Limits of Political Speech*, 21 ATLANTIC LAW JOURNAL 193 (2019). (Very brief portions of that article are reproduced here as appropriate for content, grammar, and context).

[101] *Id.*

States Constitution is only a single sentence. Explicitly, it states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[102] Yet despite its relative brevity, the First Amendment at present engenders more discussion, debate and downright consternation than any other Constitutional Amendment (save perhaps the Second Amendment, but that is a subject for another day[103]). A 2018 survey conducted by the Freedom Forum Institute found that while 77% of Americans are supportive of the First Amendment and the freedoms it guarantees most Americans cannot articulate or apply those freedoms.[104] When Americans were asked to name the freedoms granted to them by the First Amendment 40% of survey respondents could not name a single freedom and

[102] *See* U.S. Const. amend. I.

[103] The authors anticipate teaching notes on the 2nd 4th, 10th Amendments in the near future. All will address current events.

[104] First Amend. Ctr. of the Freedom F. Inst, *2018 State of the First Amendment Survey Report*, (2018), https://www.freedomforuminstitute.org/first-amendment-center/state-of-the-first-amendment/. More recent survey results can be found at: https://survey.freedomforum.org/2022-update/

> 36% could name only one.[105] Only one respondent of the 1,009 Americans surveyed was able to name all five freedoms guaranteed by the First Amendment.[106]

Consequently, the authors have developed a project that may be implemented at both the Master of Business Administration level and the undergraduate level that requires the students to survey the current state of defamation law. Defamation law is directly impacted by the First Amendment when the circumstances include either the government or the press. The project includes current and recent cases supporting and criticizing the current standard. It requires student researchers to analyze the arguments both for and against the relevant parts of today's legal landscape, and, if the students are so inclined, to make and support proposals for a new defamation standard.

II. PREPARATION

The authors find it axiomatic that students should form their own, well-reasoned legal opinions as they make proposals to retain or reform the national defamation standards. They should not be tainted by the predilections of the professor in these discussions. The authors avoid revealing their personal or political opinions regarding the state of current law, or the students' putative proposals. To the extent possible, students are deliberately prevented from discovering what the instructor thinks about the issue. Instead, the assignment sets guiderails that encourage the students to draw their own legal conclusions independent of their pre-

[105] *Id*.
[106] *Id.*

conceived political opinions, and independent of the understandable urge to parrot the assumed opinions of the professor in pursuit of a higher grade.

Most students, especially those in the Master of Business Administration courses, have a baseline familiarity with these current events, and many have a general unformed sense that the current law is "not right." However, they seldom can articulate *why* without basic research. The authors generally require students to read brief current articles on the topic prior to the start of the project or to watch short topical videos.[107] The authors

[107] For website articles that may be useful for students to read in preparation for this assignment: *See* Julia Jacobs, *Jury reaches verdict in Johnny Depp-Amber Heard Trial: What to know*, THE NEW YORK TIMES (2022), https://www.nytimes.com/2022/04/21/arts/johnny-depp-amber-heard-trial.html (last visited Mar 6, 2023); Helen Coster, Jack Queen & Reuters, *New Dominion Filing Made Public as Defamation Lawsuit Heads to Trial*, NASDAQ (2023), https://www.nasdaq.com/articles/new-dominion-filing-made-public-as-defamation-lawsuit-heads-to-trial (last visited Mar 6, 2023); Cheryl Teh, *Kyle Rittenhouse's Lawyer Plans to Target Facebook and Mark Zuckerberg in a Slew of 'at Least 10' defamation suits*, BUSINESS INSIDER (2022), https://www.businessinsider.com/rittenhouse-lawyer-plans-sue-facebook-zuckerberg-for-defamation-2022-6 (last visited Mar 6, 2023); David Folkenflik, *Judge to dismiss Sarah Palin's defamation suit against 'New York Times'*, NPR (2022), https://www.npr.org/2022/02/14/1080610992/sarah-palin-new-york-times-defamation-suit (last visited Mar 6, 2023); Jonathan Turley, *The Mary Poppins of Defamation? Nina Jankowicz Solicits Funds to Sue Fox News, Res Ipsa Loquitur – The Thing Itself Speaks* (2023), https://jonathanturley.org/2023/03/05/the-mary-poppins-of-litigation-nina-jankowicz-solicit-funds-to-sue-fox-news/ (last visited Mar 8, 2023); The Associated Press, *Donald Trump Deposed in Defamation Suit Filed by E. Jean Carroll*, NPR (2022), https://www.npr.org/2022/10/20/1130131679/donald-

have found that a few short film clips viewed during class time and a few visual aids summarizing the salient/relevant points of each topic work well for their purposes and are sufficient to give students the background they need to discuss the issues. Real world examples are especially effective.

The authors attempt to use examples from across the political/social spectrum. Students must be aware of the possibility that multiple facts may hold true at the same time. In the sample cases, one or both sides may be difficult, unsympathetic, irascible, or downright despicable. Conversely, the parties may be sainted, innocent as a newborn babe, and deserving of the upmost sympathy and concern. But none of that background impacts the legal analysis. Part of the exercise is to train students to place a well-reasoned legal analysis, and the

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trump-deposed-in-defamation-suit-filed-by-e-jean-carroll (last visited Mar 8, 2023).

For videos that may be useful for students to view in preparation for this assignment: *See* CBS News, *Sandy Hook Parents Address Alex Jones in Defamation Case* CBS NEWS (2022), https://www.cbsnews.com/video/sandy-hook-parents-address-alex-jones-in-defamation-case/ (last visited Mar 6, 2023); Brian Flood, *CNN Settlement with Covington Student Nick Sandmann a Win for the 'Little Guy,' Expert Says*, FOX NEWS (2020), https://www.foxnews.com/media/cnn-covington-nick-sandmann-settlement (last visited Mar 6, 2023); *TIKTOK User Sued By Idaho Professor for Defamation Surrounding Death of College Students*, NBC NEWS.COM (2023), https://www.nbcnews.com/now/video/tiktok-user-sued-by-idaho-professor-for-defamation-surrounding-death-of-college-students-158811205914 (last visited Mar 6, 2023); *Brett Favre Files Defamation Lawsuits Tied to Mississippi Welfare Scandal*, MSNBC (2023), https://www.msnbc.com/deadline-white-house/deadline-legal-blog/favre-defamation-lawsuits-mississippi-welfare-rcna70165 (last visited Mar 9, 2023).

attendant risk analysis, above their personal feelings.[108]

The timing of this project is crucial to success. The authors present the project as either an individual or group project that is due at the end of the semester. The authors opted for a semester-based project, rather than one timed for an individual course unit, because the topic incorporates elements of constitutional law, court structure and "political science," employment law, civil rights law, risk analysis, and cost/benefit decision-making. In the authors' opinion, comprehensive projects such as this are better due at the end of the course, when the learner may incorporate all the concepts addressed in same, rather than in a discrete course unit.

III. THE LAW – NEW YORK TIMES V. SULLIVAN AND THE NEW DISSENTS

A. Background – New York Times v. Sullivan as the Current Legal Standard

Students are initially introduced to *New York Times v. Sullivan*[109] as the seminal and controlling case regarding defamation in the United States. The facts of the case are well known, but it is necessary to provide a thorough background here for context, and to educate the reader for a potential presentation to future students.

Prior to the 1963 decision in this case, defamation law in the United States was governed by the common

[108] Regardless of whether a particular business program emphasizes legal analysis or legal risk management, the value of the project is in its ability to assess a student's facility in analyzing disparate information and articulating a cogent understanding of how such affects legal environments of business.

[109] 376 U.S. 254 (1964).

law.[110] The general rule, with variations across the states, was that public officials were permitted to sue for defamation if a statement made about them was false, defamatory, and published with fault, even if it was made without malice.[111] As a practical matter this standard burdened the defendant to prove the truth of the statement or that they acted with due diligence in verifying its accuracy.

At the height of the civil rights movement in 1960, when emotions justifiably were running very high, the New York Times published a prominent full-page advertisement regarding events in the segregated south.[112] That advertisement, entitled "Heed Their Rising Voices" criticized the actions of Montgomery, Alabama law enforcement officials.[113] The ad contained several factual errors and defamatory statements about the officials, prompting Sullivan, an elected official in Montgomery that was putatively targeted in the advertisement, to file a libel suit against the newspaper.[114] The case eventually reached the Supreme Court after several victories for the Plaintiff under Alabama's plaintiff-friendly defamation law (which was similar to those of many other states). [115] The justices were presented with the opportunity to define "[w]hether restrictive state rules of … liability, as applied to an action brought by a public official against critics of

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[110] *See, e.g.,* E. E. M., *Television Defamation. Libel or Slander?*, 42 VA. L. REV. 63 (1956).

[111] For examples of pre- New York Times v. Sullivan state caselaw s*ee generally,* Bower v. Daily Gazette Co., 143 W.Va. 719, W.Va., July 03, 1958, rehearing denied (Nov 25, 1958); Gibler v. Houston Post Co., 310 S.W.2d 377 (1958); *Kennedy v. Item Co*., 34 So.2d 886 (1948).

[112] New York Times v. Sullivan*,* 376 U.S. at 256.

[113] *Id.*

[114] *Id.*

[115] *Id.* at 261.

his official conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments."[116] The court noted that "[i]t is uncontroverted that some of the statements contained in the two paragraphs were not accurate descriptions of events which occurred in Montgomery.[117]

However, the Supreme Court took this opportunity to redefine the legal standard for defamation involving public officials.[118] The Court held that for a public official to successfully bring a defamation suit against a media outlet, that official must prove not only that the statement was false and defamatory, but also that the defendant acted with *actual malice* in publishing the statement.[119] That standard is exceedingly high. The Court justified its decision by recognizing the importance of protecting the First Amendment's guarantees of free speech and press, which are essential to the healthy function of a democratic society.[120] The Court opined that public officials have a greater responsibility to withstand criticism and scrutiny than private citizens, and that the fear of being sued for defamation would have a chilling effect on the media's ability to report on matters of public interest.[121] The Court went much further and defined actual malice as a statement made "[w]ith knowledge that it was false or with reckless disregard of whether it was false or not" or with reckless disregard for the truth [122] This standard places a heavy burden on the plaintiff to prove that the defendant had a *subjective* knowledge of the statement's falsity or that the defendant acted in the

[116] *Id.* at 268.
[117] *Id.* at 258.
[118] *Id.* at 287.
[119] *Id.* at 288.
[120] *Id.* at 271.
[121] *Id.* at 283.
[122] *Id.* at 280.

face of obvious awareness of the statement's probable falsity. It is, in many ways, an impossible standard. This standard is significantly more stringent than the general standard that applies to defamation claims brought by private individuals, who only need to prove that the defendant acted negligently in making the false statement.

Since *New York Times v. Sullivan*,[123] courts have expanded and refined the application of the actual malice standard to impact all public figures, not just public officials.[124] This means that celebrities, politicians, and other individuals who have achieved a certain level of fame or notoriety must also prove actual malice to succeed in a defamation lawsuit. In the age of social media, it is exceptionally easy to reach the status of a "public figure."

In retrospect, *New York Times v. Sullivan*[125] has had a deep impact on the way defamation cases are litigated in the United States. In short, the standard is so high that defamation cases are seldom brought. The actual malice standard established by the case has served to protect the First Amendment rights of media outlets and individuals who engage in public discourse, while also providing a minimal level of protection to public figures against false and defamatory statements. As a result, the case remains a critical precedent in defamation law, and its legacy continues to shape the way courts approach free

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[123] *Id.*

[124] For examples of the continual refining of the standard *see:* Curtis Publishing Co. v. Butts, **388 U.S. 130 (1967); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Dun and Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985); Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986); *see also* Marian L. Carlson, *Philadelphia Newspapers, Inc. v. Hepps: A Logical Product Of The New York Times Revolution*, 64 DENV. U. L. REV. 65 (1987).

[125] 376 U.S. 254 (1964).

speech and press issues in the modern era.

However, there are rumblings of change that are illustrated by recent dissents from influential figures within the federal court system. Before the students are presented with their assignment, they are required to review current federal defamation cases and to research and review current critiques from within the system. This approach serves to crystalize the pros and cons of the current defamation regime within the United States and the criticisms thereof, allowing the students to begin the critique and proposed "solution" process.

B. Tah v. Global

Tah v. Global Witness Publishing Inc.[126] is recent, remarkably factually dense, defamation claim. It is influential because the case was decided by the District of Columbia Court of Appeals, arguably the most important federal court save the Supreme Court itself. The majority opinion and the basic facts of the case are not relevant to the assignment contemplated by the authors for their students. As the syllabus for the case states succinctly:

> [t]wo former Liberian officials allege that Global Witness, an international human rights organization, published a report falsely implying that they had accepted bribes in connection with the sale of an oil license for an offshore plot owned by Liberia. The district court dismissed the complaint for failing to plausibly allege actual malice.[127]

The majority opinion and the judgement itself are unremarkable. Judge Laurence Silberman issued a

[126] 991 F.3d 231 (D.C. Cir. 2021).
[127] *Id.* at 235.

separate opinion dissenting from the majority.[128] In his dissent, Judge Silberman disagreed with the majority's holding that the plaintiff was a public official and that the actual malice standard applied.[129] That, also, is relatively unremarkable. He also criticized the majority's application of the actual malice standard.[130] He argued that the majority had improperly shifted the burden of proof to the plaintiff to show actual malice, rather than requiring the defendant to prove the truth of its statements or that it had acted with reasonable care in verifying their accuracy.[131] None of these debates require separate comment.

However, the next phase of Judge Silberman's dissent does. It contains very significant critiques of the status quo. Silberman went on to also criticize the majority's reliance on the Supreme Court's decision in *New York Times v. Sullivan*, arguing that the actual malice standard had been misapplied and that it has created a "nearly insurmountable" burden for plaintiffs in defamation cases.[132] He asserted in his dissent that the actual malice standard should be reserved for cases involving matters of public concern, and that private individuals (as the plaintiffs in this case were) should be held to a lower standard of proof.[133] He called for a reconsideration of the actual malice standard and he also advocated for a greater focus on tasking media defendants to prove the truth of their statements, or to act with reasonable care in verifying those statements' accuracy.[134] He did not mince words:

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[128] *Id.* at 243.
[129] *Id.* at 243-251.
[130] *Id.*
[131] *Id.* at 250-251.
[132] *Id.* at 251-256.
[133] *Id.*
[134] *Id.*

> As [the *New York Times v. Sullivan*] case has subsequently been interpreted, it allows the press to cast false aspersions on public figures with near impunity. It would be one thing if this were a two-sided phenomenon. *Cf. New York Times*, 376 U.S. at 305, 84 S.Ct. 710 (Goldberg, J., concurring) (reasoning that the press will publish the responses of public officials to reports or accusations). *But see* Suzanne Garment, *The Culture of Mistrust in American Politics* 74–75, 81–82 (1992) (noting that the press more often manufactures scandals involving political conservatives). The increased power of the press is so dangerous today because we are very close to one-party control of these institutions. Our court was once concerned about the institutional consolidation of the press leading to a "bland and homogenous" marketplace of ideas. *See Hale v. FCC*, 425 F.2d 556, 562 (D.C. Cir. 1970) (Tamm, J., concurring). It turns out that *ideological* consolidation of the press (helped along by economic consolidation) is the far greater threat.[135]

This case is included to illustrate for the students some of the more salient contemporary critiques of the current federal standard for defamation as discussed herein. This criticism is an invaluable discussion prompt because it originated with an influential jurist on an influential federal court.

C. Berisha v. Lawson

Precedent suggests that the Supreme Court has

[135] *Id*. at 254 (footnotes in the original omitted).

been reticent to revisit the current standard. Recently the Court denied certiorari in *Berisha v. Lawson.*[136] Two of the justices, Thomas and Gorsuch, filed separate dissents[137] to the denial in which they elucidated their opinions regarding why a review of the *New York Times v. Sullivan*[138] standard is appropriate.[139] The case stemmed from a 2015 book published by the defendant that narrated a reputably true story of how three Miami men became international arms dealers.[140] In the book the men are depicted as tangling with the "Albanian mafia."[141]

The plaintiff, Shkelzen Berisha, was identified in the book as a key member of that mafia group.[142] The book became the basis for the film "War Dogs."[143] The plaintiff filed suit for defamation under Florida law.[144] "According to Berisha, he is not associated with the Albanian mafia—or any dangerous group—and Lawson recklessly relied on flimsy sources to contend that he was."[145] Per Justice Thomas:

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[136] Berisha v. Lawson, 141 S.Ct. 2424 (Mem) (2021)

[137] While Justice Thomas and Justice Gorsuch's dissents are not legally binding, we cannot ignore their predictive value. They are explored as part of the project because we have a clear record two Supreme Court Justices explaining why they support, and indeed voted in favor of, reevaluating the current actual malice standard for public figures in the United States.

[138] 376 U.S. 254.

[139] 141 S.Ct. 2424-2430.

[140] 141 S.Ct. 2424 (citing to 973 F.3d 1304, 1306 (CA11 2020)).

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

> The District Court granted summary judgment in favor of Lawson. Setting aside questions of truth or falsity, the court simply asked whether Berisha is a "public figure." Why? Because under *this Court's First Amendment jurisprudence*, public figures cannot establish libel without proving by clear and convincing evidence that the defendant acted with "'actual malice' "—that is with knowledge that the published material "was false or with reckless disregard of whether it was false."[146]

Berisha's request to the Supreme Court centered on the actual malice standard imposed by the court in 1963.[147] In a deliberate acknowledgement of Silberman's dissent in *Tah*,[148] Thomas' position is that "[t]his Court's pronouncement that the First Amendment requires public figures to establish actual malice bears "no relation to the text, history, or structure of the Constitution."[149] He goes on to state the prior standard: "[i]n fact, the opposite rule historically prevailed: "[T]he common law deemed libels against public figures to be ... *more* serious and injurious than ordinary libels."[150] Thomas cites the history of defamation law prior to the current standard's actual malice requirements, and his perception of the real world impact of that standard as a reason to grant certiorari and to reconsider *New York Times v. Sullivan*.[151]

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[146] *Id. (emphasis added, citations omitted).*
[147] *Id.* at 2425.
[148] 991 F.3d 231 (2021).
[149] *Id*. at 2425 (citing Tah v. Global Witness Publishing, Inc*.,* 991 F.3d 231, 251 (CADC 2021) (Silberman, J., dissenting) (emphasis deleted)).
[150] Id. at 2425 (citing McKee, 586 U. S., at _____, 139 S.Ct. at 679 (opinion of THOMAS, J.)).
[151] *Id.* at 2425.

Justice Gorsuch bases much of his dissent (and support for a granting of certiorari) on the shifted media landscape since 1964.[152]

> It's hard not to wonder what these changes mean for the law. In 1964, the Court may have seen the actual malice standard as necessary "to ensure that dissenting or critical voices are not crowded out of public debate." … But if that justification had force in a world with comparatively few platforms for speech, it's less obvious what force it has in a world in which everyone carries a soapbox in their hands. Surely, too, the Court in 1964 may have thought the actual malice standard justified in part because other safeguards existed to deter the dissemination of defamatory falsehoods and misinformation. … In that era, many major media outlets employed fact-checkers and editors … and one could argue that most strived to report true stories because, as "the public gain[ed] greater confidence that what they read [wa]s true," they would be willing to "pay more for the information so provided" … . Less clear is what sway these justifications hold in a new era where the old economic model that supported reporters, fact-checking, and editorial oversight is disappearing.[153]

Gorsuch notes that the actual malice standard now means virtual immunity from liability for publishers because of the high bar presented, and the fact that "[p]ublication without investigation, fact-checking, or editing has become the optimal legal strategy."[154] The Justice opines that the combination of current legal and business

[152] *Id.* at 2427.
[153] *Id.* at 2427 -2428 (citations omitted).
[154] *Id.* at 2428.

incentives favors "[t]hose who can disseminate the most sensational information as efficiently as possible without any particular concern for truth."[155]

D. Coral Ridge v. SPLC

In *Coral Ridge Ministries Media, Inc. v. Southern Poverty Law Center*,[156] the Supreme Court once again denied a petition for certiorari concerning a case that centered on defamation claims and a request by the appellant to reconsider the actual malice standard.[157] The plaintiff/appellants basic contention was that The Southern Poverty Law Center had labeled Coral Ridge as an "'Anti-LGBT hate group' because of its biblical views concerning human sexuality and marriage."[158] Coral Ridge sued based on the "hate group" designation.[159] Coral Ridge lost its claim at the district court level[160], and then at the appeals court level[161] based on the application of the actual malice standard. Justice Thomas opined that:

> SPLC's "hate group" designation lumped Coral Ridge's Christian ministry with groups like the Ku Klux Klan and Neo-Nazis. It placed Coral Ridge on an interactive, online "Hate Map" . . . Nonetheless, unable to satisfy the "almost impossible" actual-malice standard this Court has imposed, Coral Ridge could not hold SPLC to

[155] *Id.*
[156] 142 S.Ct. 2453 (Mem) (2022).
[157] *Id.* at 2454.
[158] *Id.*
[159] *Id.*
[160] Coral Ridge Ministries Media, Inc. v. Southern Poverty Law Center, 406 F.Supp.3d, at 1278–1280 (M.D. Ala. 2019).
[161] Coral Ridge Ministries Media, Inc. v. Southern Poverty Law Center, 6 F.4th 1247, 1251–1253 (C.A.11 2021).

> account for what it maintains is a blatant falsehood. Because the Court should not "insulate those who perpetrate lies from traditional remedies like libel suits" unless "the First Amendment requires" us to do so, I respectfully dissent from the denial of certiorari.[162]

Thomas' dissent here, like his dissent in *Berhisha*,[163] is included as a prompt to provide valuable insight into his reasoning why he believes that the actual malice standard needs to be revisited and revised.

IV. SAMPLE ASSIGNMENT COMPONENTS

With this topical and timely legal history in mind, students are well positioned to begin work on the assignment. As an integral part of that project, they are required to utilize the cases mentioned previously in this paper and to complete outside research. The basic assignment requires student researchers to analyze the arguments both for and against changes to the federal defamation standard, especially for public figures. In addition, the researchers are directed either defend the status quo or to make and support cogent proposals for a new defamation standard. The relevant portions of the project assignment are reproduced below. Portions of the project that are specific to deadlines, format, page length, etc. are redacted:

> Your basic assignment is to provide me an objective analysis of current defamation law, and a recommendation regarding whether the *New York Times v. Sullivan* standard should be

[162] 142 S.Ct. at 2455 (internal citations omitted).
[163] 141 S.Ct. 2424 (Mem) (2021).

replaced with a more up-to-date standard as advocated by the supplied dissents in *Tah v. Global, Berisha v. Lawson,* and *Coral Ridge v. SPLC.* The relevant parts of all these cases are provided for you. I also am requesting a recommendation regarding what that standard should be if you do recommend changes. Your recommendation should be written in the third person. Do not refer to me, or to you.

A common concern presented by critics is that the current standard for defamation in the United States for public figures is very restrictive. Under the 1964 case of *New York Times v. Sullivan,* to sustain a claim of defamation or libel, the First Amendment requires that the plaintiff show that the defendant knew that a statement was false or was reckless in deciding to publish the information without investigating whether it was accurate. This is called "actual malice." This standard is a very high standard of proof, and it makes it virtually impossible for public figures to sue successfully even when the published information is false. The case is provided to you.

I have also provided relevant portions of *Tah v. Global, Berisha v. Lawson,* and *Coral Ridge v. SPLC.* These cases are very significant because the dissenting judges in each case make a strong critical analysis of the issues with the real-world ramifications of the *New York Times v. Sullivan* decision from 60 years ago. The majority judges in each of these cases applied the *New York Times v. Sullivan* standard to the cases in front of them. Nevertheless, the dissenting judges (who lost the vote in each case) urge the Supreme Court to

change the old standard to reflect real-world conditions. Remember that when you discuss these cases the facts of the case don't matter much. The legal analysis that comes out of the case matters. Therefore, you should not spend precious page space on long discussions of the facts in these cases. Rather, you should focus on the legal discussions in the majority (to a degree) and the dissents (where the criticism lies). At some point a new defamation case likely will be heard by the Supreme Court and the Court will need to decide if the old standard is still appropriate. When they do, they will look at all these arguments.

You should include outside research. Do not cite the textbook. Remember that the following are not reliable objective sources of information: advocacy websites (like political party and candidate websites); political commentary; "clickbait" websites; and especially "fact check" websites – which Facebook just admitted in a recent defamation lawsuit are just hired 3rd party opinions and are not fact checks at all. These sites are likely to advocate for a particular outcome. Use *original* legal sources when possible, and it is advisable to review journal articles and in-depth analysis of the subject, instead of relying on the top results in your search engine. "News" articles are almost always not objective, and consistently push narratives that may or may not be based in fact. Do not use Wikipedia. Ever.

Remember that you should be providing candid advice, and not a "best case" presentation of the

> facts as a political candidate may do, or an attorney may do when arguing a case in public, before a jury. You are NOT on a team cheering a specific result. Your analysis should be substantive. "Substantive" means that your legal analysis must be analytically engaged with the topic, and not merely opinion or outrage. You may decide in whatever manner that you choose, but the result must be reasoned and based in law. Assume *nothing* about my personal or legal opinion from this fact pattern, and *do not try to write your material to please me*. You may decide and give advice as you choose if you are candid and ground your decision in law and fact. My agreement (or not) with you will not impact your grade in any way, shape, or form.

V. STUDENT PROPOSED SOLUTIONS

A variation on this project has been presented to roughly 1,000 students to date. The students are usually divided into groups of three or four. Occasionally it is assigned as an individual project. The Family Educational Rights and Privacy Act of 1974 (FERPA)[164] prevents a presentation of the actual solutions provided by these groups. That is mildly regrettable because the analysis provided by the groups are cogent, well-reasoned, well-presented, and, in many cases, persuasive.

At present, roughly 40% of submitted papers advocate for no changes to the current standard. The remainder suggest changes to the current standard, including the removal of the actual malice standard. A future paper will include a statistical analysis and breakdown of the results. However, the actual suggested changes are, in many ways, irrelevant. The process, and

[164] 20 U.S.C. § 1232g (1994).

the concepts that must be mastered in the completion of the assignment, are invaluable.

VI. Conclusions

In short, this project provides an avenue for professors to assess their students skill in risk analysis, critical thinking, and issue spotting, and expose students to the workings of current federal caselaw that controls defamation law and the criticisms that are beginning to appear within the judiciary. In addition, the project functions well as an introduction to constitutional law, judicial interpretation, federal supremacy, legal research, legal analysis, the meaning of majority, the impact of concurring and dissenting opinions, and binding and persuasive precedent. In the future, if the law of defamation changes (as we suspect it will be based on the current upswell of criticisms from within the judiciary) the authors will revise the project and report regarding same. And (a little humor here) we'll do it without actual malice. There's no need to get ourselves sued.

BAD DEBT OR BAD LUCK: A PRIMER ON THE CASE-DRIVEN ANALYSIS OF BUSINESS VS. NON-BUSINESS BAD DEBTS

JONATHAN W. BRIGNALL, JD, CPA[*]
LARA KESSLER, JD, CPA[**]

ABSTRACT

The Internal Revenue Code (IRC) allows taxpayers to deduct losses from bad debts in calculating taxable income. Bad debts can be classified as business or non-business, and this classification has important consequences. Business bad debts can be deducted in full against ordinary income, and deductions for partial worthlessness are allowed. Non-business bad debts must be totally worthless, and are deductible only as a short-term capital loss, subject to an annual limit of $3,000 against ordinary income. Whether a bad debt is business or non-business is a facts and circumstances

[*] Assistant Professor of Accounting, Grand Valley State University, JD from Western Michigan University-Thomas M. Cooley Law School, Master of Accountancy from University of South Florida, Master of Science in Taxation from Grand Valley State University, Master of Business Administration from Grand Valley State University, brignajo@gvsu.edu, 616-331-7504, 3150 L. William Seidman Center, 50 Front Ave. SW, Grand Rapids, MI 49504-6424.
[**] Professor of Accounting, Grand Valley State University, JD from Vanderbilt University, Master of Science in Accounting from Grand Valley State University.

determination driven largely by caselaw.

This article provides an up-to-date summary of the current state of the case law related to the business or non-business classification. Several general principles are discussed, followed by an analysis of six commonly encountered issues. For these issues, we provide a detailed discussion of the factors used to resolve the classification issue. The six issues discussed are (1) when a shareholder lends money to a corporation; (2) when the taxpayer claims to be in the business of lending money; (3) when the taxpayer claims to be a promoter of a corporation; (4) when the taxpayer claims that the loan was to protect employment; (5) when the taxpayer claims the loan was to protect a source of income or business relationship; and (6) when the taxpayer claims the loan was made to protect a business reputation.

The IRS is frequently successful in cases where taxpayers are attempting to treat a bad debt as a business bad debt. This paper will help taxpayers plan to structure their loans so that business bad debt treatment is supported wherever possible. Although no one makes a loan with the expectation that it will result in a bad debt deduction, it is important from a planning perspective to consider this issue at the time the loan is made.

I. Introduction

Perhaps the most important feature of a loan is the expectation that it will one day be repaid. Unfortunately, for various reasons, this does not always happen. However, it is unlikely that anyone ever makes a true loan—as opposed to a gift or some other arrangement—without this expectation. But as this article explores, effective tax planning requires that a lender consider the possibility that a loan will not be repaid *at the time the loan is made*.

Internal Revenue Code (IRC) § 166 provides for a deduction when a loan becomes worthless. However, due to the significant potential for abuse inherent in claiming a deduction, this provision imposes several requirements for deductibility. First, the loan in question must be an actual, bona-fide, loan, as opposed to a gift or some other type of investment or arrangement. Second, the loan must be "worthless," at least in part.[165] IRC § 166 only apples to loans; it does not apply to securities such as bonds. Therefore, if the loan is securitized, the taxpayer must look to other provisions for any potential deduction.[166]

For non-corporate taxpayers, IRC § 166 distinguishes between business and nonbusiness bad debts.[167] The consequences of this distinction are important. If the bad debt is determined to be a business bad debt, the taxpayer is entitled to an ordinary deduction for the amount of the debt that is worthless. Deductions for debts that are partially worthless are allowed.[168] Because a business bad debt is deductible from ordinary income, it becomes part of the calculation of the taxpayer's net operating loss. Depending on the rules in effect in the year the net operation loss is created, the taxpayer may be able to carry the loss (including the

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[165] I.R.C. § 166(a).

[166] *See* I.R.C. § 165(g) for the requirements applicable to worthless securities.

[167] I.R.C. § 166(d)—which defines nonbusiness debt—begins with the phrase "In the case of a taxpayer other than a corporation." Corporate taxpayers do not need to consider this issue. For a corporation, all bad debt deductions are effectively treated as business bad debts. However, it is conceivable that in a case where the use of the corporate form was deemed abusive, the IRS could argue—after "piercing the corporate veil" and disregarding the corporate entity—that a bad debt deduction was in fact a nonbusiness debt.

[168] I.R.C. § 166(a)(2).

business bad debt) back or forward.[169]

An additional advantage of business bad debt classification is that a longer statute of limitations for a refund claim applies. The general statute of limitations for refund claims requires that a claim be filed before the later of three years after the return was filed, or two years after the tax was paid.[170] In the case of a refund claim that arose from a business bad debt deduction, the three-year period is extended to seven years.[171]

However, if the debt is determined to be a nonbusiness bad debt, then the results are less favorable to the taxpayer. The amount of the bad debt is treated as a short-term capital loss[172] for tax purposes. The taxpayer can use the bad debt deduction to offset any capital gains for the year, but beyond that, the taxpayer is subject to the $3,000 annual limitation for capital losses.[173] Any remaining amount can generally be carried back three years, and carried forward ten years.[174] Furthermore, deductions for partial worthlessness of nonbusiness bad debts are not allowed.[175] As a result, taxpayers are generally better off from a tax perspective if they can successfully characterize the bad debt as a business bad debt.

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[169] I.R.C. § 172.
[170] I.R.C. § 6511(a).
[171] I.R.C. § 6511(d)(1). This treatment does not extend to nonbusiness bad debts. *See* Taha v. United States, 137 Fed. Cl. 462, 466 (2018), *rev'd on other grounds*, Taha v. United States, 757 Fed. Appx. 947 (2018).
[172] I.R.C. § 166(d)(1)(B).
[173] I.R.C. § 1211(b).
[174] I.R.C. § 1212.
[175] I.R.C. § 166(d)(1)(B). Because subsection (a)—which includes language allowing partial worthlessness—does not apply; and this subsection specifically includes the term "worthless," the language of the code section does not allow for a deduction for partial worthlessness of nonbusiness debt.

The code distinguishes between business and nonbusiness by defining what is meant by a nonbusiness bad debt. IRC § 166(d)(2) provides:

> (2) Nonbusiness debt defined.
>
> For purposes of paragraph (1), the term "nonbusiness debt" means a debt other than—
>
> > (A) a debt created or acquired (as the case may be) in connection with a trade or business of the taxpayer; or
> >
> > (B) a debt the loss from the worthlessness of which is incurred in the taxpayer's trade or business.[176]

The key phrase in § 166(d)(2) is "trade or business." What constitutes a trade or business in this context is not defined by the code, nor is it defined in the regulations. This has led to the creation of a body of case law defining the meaning of "trade or business" as it concerns the deductibility of bad debts. The obvious tension in these cases is that taxpayers may wish to argue that the facts support a conclusion that the bad debt was business, and the IRS argues the opposite. Ultimately, the determination of whether a debt is business or nonbusiness is a question of fact.[177] The taxpayer generally has the burden of proof if their classification is challenged.[178]

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[176] I.R.C. § 166(d)(2).
[177] Treas. Reg. § 1.166-5(b) (as amended in 1980).
[178] *See* Deely v. Comm'r, 73 T.C. 1081, 1092 (1980).

The two categories of business debt created by IRC § 166(d)(2)(A)&(B) are similar, but are not exactly the same. An example of a loan falling into the first category is a loan made by a shareholder to a corporation to provide working capital. Examples of the second category would include ordinary trade receivables and loans made by a taxpayer who is in the lending business as a part of that business. These two subcategories provide different routes to business bad debt treatment.

The purpose of this paper is to explore the case law which distinguishes business from nonbusiness bad debts, especially as it relates to tax planning. It will be assumed that a business bad debt deduction will be more advantageous to the taxpayer than a non-business bad debt deduction. Many of the cases in this area involve taxpayers who are attempting to stretch the facts of their situations to support an argument for business bad debt treatment. Most of these taxpayers have not been successful in making that argument. This article will provide guidance to taxpayers in order to structure their loans so that business bad debt treatment is supported wherever possible.

II. GENERAL PRINCIPLES

A critical distinction between a business and nonbusiness bad debt is the difference between a trade or business and an investment activity. In *Whipple v. Commissioner*,[179] the U.S. Supreme Court provided that a finding that a taxpayer is engaged in a trade or business—as opposed to an investment activity—requires that the taxpayer is seeking compensation beyond a normal investor's return. Merely devoting time and energy to the affairs of a corporation is not in itself a trade or

[179] Whipple v. Comm'r, 373 U.S. 193, 202-203 (1963).

business.[180] The distinction is not simply quantitative. That is, an investor who has extensive investment activities, without more, is still not considered to be in a trade or business.[181] However, an activity which does qualify as a business—but includes an investment component—does not lose its trade or business status because it includes that component.[182]

The *Whipple* Court pointed out that Congress's use of the phrase "trade or business" was deliberate. The use of this phrase in other sections of the code had given it an established meaning; a narrower concept than activities engaged in for profit. In the Court's reasoning, the provision of the IRS code "was designed to make full deductibility of a bad debt turn upon its proximate connection with activities which the tax laws recognized as a trade or business, a concept which falls far short of reaching every income or profit making activity."[183]

The second major case in this area is *United States v. Generes*.[184] In *Generes*, the U.S. Supreme Court established that the connection with a taxpayer's trade or business must be the "dominant motivation" for the taxpayer's decision to make a loan.[185] The taxpayer in *Generes* had argued that a "significant" motivation was sufficient, drawing an analogy to the concept of proximate cause used in tort law.[186] However, the Court determined that a significant motivation—short of the dominant

[180] *Id*.
[181] King v Comm'r, 89 T.C. 445, 459 (1987)(citing Higgins v Comm'r, 312 U.S. 212, 216, 218 (1941)). *See also* Dagres v Comm'r, 136 T.C. 263, 281 (2011).
[182] *Dagres*, 136 T.C. at 281.
[183] *Whipple*, 477 U.S. at 201.
[184] U.S. v Generes, 405 U.S. 93 (1972).
[185] *Id*. at 103.
[186] *Id*. at 105.

motivation—is insufficient.[187] The Court's reasoning in this case provides important insights that inform this area of case law. Seven reasons were given to explain why "dominant" as opposed to "significant" motivation is the appropriate standard:

1. The IRC carefully distinguishes between business and nonbusiness items; the significant motivation standard blurs the distinction.
2. Application of the significant-motivation standard would undermine the holding in *Whipple* that a shareholder's mere activity in a corporation's affairs is not a trade or business.
3. Dominant motivation is a workable standard; it provides a guideline of certainty for the courts. This prevents the mere presence of a business motive, however small or insignificant, from controlling the tax result at the taxpayer's convenience. The Court found this particularly important given the dependence on the voluntary compliance system.
4. The dominant motivation test strengthens the IRC § 262 requirement that "no deduction shall be allowed for personal, living, or family expenses except as otherwise provided."
5. The dominant motivation test makes requirements under § 166(d) consistent with the loss provisions of § 165(c).
6. The court found no inconsistency in using dominant motivation for this classification and using significant motivation in provisions dealing with tax-avoidance activity (e.g. accumulated earnings tax, transfers made in contemplation of death).

[187] *Id*.

7. The use of the word "proximate" in the Treasury Regulations is not analogous to its use in tort law.[188]

Determining a taxpayer's dominant motivation can be challenging at times, and such a determination is often clouded by self-serving arguments. For this reason, the courts have held that "[i]n determining the dominant motivation of a taxpayer for purposes of section 166, objective facts, rather than subjective intent, control."[189]

Another important case in determining the meaning of trade or business is *Commissioner v. Groetzinger*.[190] Although not a case involving a bad debt, the Court analyzed a taxpayer's gambling activity to determine whether such activities constituted a trade or business. In doing so, the Court emphasized that a trade or business activity requires that "the taxpayer must be involved in the activity with continuity and regularity and that the taxpayer's primary purpose for engaging in the activity must be for income or profit."[191] This principle is cited repeatedly throughout the bad debt cases. Another principle coming from *Groetzinger* is that a taxpayer may be engaged in more than one trade or business during a taxable year.[192]

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[188] *Generes*, 405 U.S. at 103-105. *See also* United States v. Flucas, 22 F. 4th 1149 (2022) (Criminal sexual assault case where the court emphasized that the dominant motivation standard expressed in *Generes* does not apply outside of the context of taxation).

[189] Viani v. Comm'r, TC Memo 1994-471, 13 (1994).

[190] Comm'r v. Groetzinger, 480 U.S. 23, 35 (1987) (Not a bad debt case; this case involved determining whether a taxpayer's gambling activity constituted a trade or business. However, this case is frequently cited, and often quoted as done here, in the bad debt cases.).

[191] *Id*.

[192] *Id*.

With these general principles laying the groundwork for an analysis of whether the loan in question was made in connection with, or arose from, a taxpayer's trade or business, the remaining body of case law applies the analysis to a variety of facts and circumstances. The majority of the cases have dealt with six general categories of situations, in which the taxpayer:

1. Lends money to a corporation in which he or she is a shareholder;
2. Claims to be in the business of lending money;
3. Claims to be in the business of promoting corporations or other business ventures;
4. Lends money for the purpose of protecting his or her employment;
5. Lends money for the purpose of protecting a source of income or business relationship; or
6. Lends money for the purpose of protecting his or her business reputation.[193]

These categories are not mutually exclusive. In fact, many of the cases involve more than one of these circumstances.[194] The general principles discussed above underlie all of these issues.

III. SHAREHOLDERS AND THEIR CORPORATIONS

It is common for shareholders of a corporation to lend money to the corporation for a variety of reasons.

[193] Michael A. Yuhas, Thomas G. Hartman, and Tim Airgood, The Maze of Cases on Business Bad Debts: A Guided Tour, THE PRACTICAL ACCOUNTANT, Apr. 1992.

[194] Also, many of the cases involve other bad debt requirements, such as whether the deduction arises from a bona-fide debt. *See, e.g.*, Starer v. Comm'r, T.C. Memo 2022-124 (2022).

These reasons may include protecting the shareholder's salary, providing working capital, providing capital for long-term investments, and protection of the shareholder's equity interest in the corporation. If multiple interests are involved, the key is to determine which interest represents the dominant motivation.[195] This issue becomes a fairly straight-forward application of the general principles contained in *Whipple*, *Generes* and *Groetzinger*. As mentioned above—but of special importance in this context—objective facts, and not subjective intent are controlling.[196]

A threshold issue that is common in the shareholder loan context is whether a transfer from a shareholder is a loan or an equity investment. If the transfer is determined to be an equity investment, it will not be eligible for any deduction under I.R.C. § 166.[197]

A case illustrating the application of the dominant motivation principle is *Haury v. Commissioner*.[198] In *Haury*, the taxpayer made four secured working capital loans to two corporations in which he was a shareholder totaling over $422,000. Haury testified that the loans were made to protect his employment and provide working capital. The loans became totally worthless when a government contract the corporations were pursuing did not come through. Notwithstanding Haury's arguments that he made the loans to protect his substantial salary, that he had no other significant sources of income, and that he had a minimal investment in the corporations, the Court found that he actually had a considerable investment in the corporations and his dominant motivation was to protect—and enhance the return

[195] *Generes*, 405 U.S. at 103.
[196] *Viani*, TC Memo 1994-471 at 13.
[197] Rutter v. Comm'r, T.C.M. 2017-174, 11 (2017).
[198] Haury v. Comm'r, 751 F.3d 867 (8th Cir. 2014).

from—that investment.[199]

A more recent case, *Yaryan v. Commissioner*,[200] also reinforces the point that loans made to an entity in which the taxpayer is an investor are nonbusiness loans. The taxpayer in *Yaryan* entered into a joint venture to develop real estate. Yaryan made advances to the joint venture which were memorialized in the form of promissory notes. The real estate developments did not perform as expected, resulting in losses and defaults on the promissory notes. Yaryan claimed business bad debt deductions for these losses.[201]

Yaryan and the IRS agreed that Yaryan was not in the lending business. However, Yaryan claimed to be in the real estate business by virtue of his involvement in the joint ventures.[202] The court analyzed the following factors to determine whether the real property was held by the taxpayer in a trade or business:

> (1) [T]he purpose for which the property was acquired, (2) the activities of the taxpayer and those acting on his or her behalf, (3) the continuity of sales and their frequency, and (4) any other facts relevant to the determination of whether a sale was a transaction of a trade or business.[203]

The court found that Yaryan's involvement was an investment interest. He had no responsibility to develop the real estate. Although he owned at least one lot directly, he did not develop, market, or sell it. The

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[199] *Id*. at 871-872.
[200] Yaryan v. Comm'r, T.C.M. 2018-129 (2018).
[201] *Id*.
[202] *Id*. at 8-10.
[203] *Id*. at 10 (citing Brown v. Comm'r, 448 F.2d 514, 516-517 (10th Cir. 1971), *aff'g* 54 T.C. 1475 (1970)).

court concluded that Yaryan was not in the real estate business with respect to the property, and therefore the bad debts were nonbusiness.[204]

Three key points were emphasized by the *Yaryan* court in its analysis. First, "[t]he management of one's investments, no matter how extensive, is not considered a trade or business."[205] Second, it is the objective facts that are controlling, not the taxpayer's subjective intent.[206] Finally, the court noted that a common distinction that separates a trade or business from an investment is the "receipt by the taxpayer of compensation other than the normal investor's return."[207]

Two recent cases disallowed business bad debt deductions in narrow, somewhat abusive situations, and bear mentioning in this context. First, In *Kelly v. Commissioner*, the tax court disallowed a bad debt deduction for intercompany debt.[208] In *Kelly*, the taxpayer created an intercompany debt, cancelled it, and claimed a business bad debt deduction. The court reached this conclusion even though the cancellation of indebtedness income was reported.[209] The court concluded that a taxpayer "cannot create a deduction by recording intercompany debt and then cancelling it. There must be a debt owed to [the taxpayer] that is uncollectible to create a business bad debt."[210]

In *Scheurer v. Commissioner*, [211] the tax court stated that a bad debt deduction cannot follow from

[204] *Id*. at 11.
[205] *Id*. at 9.
[206] *Id*.
[207] *Id*.
[208] Kelly v. Comm'r, T.C.M. 2021-76 (2021)(This case is currently pending appeal).
[209] *Id*. at 21.
[210] Id. at 22.
[211] Scheurer v. Comm'r, T.C.M. 2017-36 (2017).

advances to an already insolvent debtor. The court rejected the taxpayer's contention that the loans involved were bona-fide loans, stating, "[a]dvances made to an insolvent debtor generally do not create debts for tax purposes but are characterized as capital contributions or gifts."[212]

Loans made to provide working capital can be either business or nonbusiness, depending on the circumstances. Providing short-term working capital is more likely to give rise to a business debt than providing long-term capital, although the courts have not provided a bright-line test in this regard.[213] Another common argument made by shareholders—that the loan is being made for protection of employment—is discussed in greater depth below.

IV. TAXPAYERS IN THE BUSINESS OF LENDING MONEY

A common position taken by taxpayers is that the loan is a business bad debt because the taxpayer is "in the business of lending money." However, the history of cases in this area demonstrates that taxpayers usually lose with this argument. Nevertheless, the cases in this area do establish a pattern that can be helpful in determining if the taxpayer is actually in the business of lending money. Although this is a determination of the unique "facts and circumstances" of each case, the court cases provide some consistency that can be useful to taxpayers.

First, the taxpayer must be able to establish that they were in the business of lending money when the loan

[212] *Id*. at 11.
[213] Mann v. Comm'r, T.C.M. 1975-74 (1975). *See also* Gillespie v. Comm'r, 54 T.C. 1025 (1970).

was made.[214] The loan must be proximately related to the taxpayer's lending business, and the business purpose must be the dominant motivation for making the loan.[215] The taxpayer must be engaged in the lending business with continuity and regularity.[216] Applying these principles, in *Imel v Commissioner*[217] the tax court stated, "[t]he right to deduct bad debts as business losses is applicable only to the exceptional situations in which the taxpayer's activities in making loans have been regarded as so extensive and continuous as to elevate the activities to the status of a separate business."[218] This standard is cited repeatedly in the relevant cases.[219]

A major consideration in determining whether the taxpayer is in the lending business is the number of loans made during a specified time period. Almost all cases in this area comment on this question. Although courts have not established a bright-line standard, a comparison of the cases provides some guidance. Exhibit A shows how the tax court has ruled in cases with varying results where the involved taxpayer had varying numbers of loans. In addition to the volume of lending activity, other factors considered by the court include:

- The time period over which the loans were made.

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[214] Ruppel v. Comm'r, T.C.M. 1987-248, 249 (1987), *citing Generes*, 405 U.S. at 103.
[215] *Id*.
[216] *Groetzinger*, 480 U.S. at 35.
[217] Imel v. Comm'r, 61 T.C. 318 (1973).
[218] *Id*. at 325.
[219] *See, e.g.*, *Ruppel*, T.C.M. 1987-248 at 249; Serot v. Comm'r, T.C.M. 1994-532 (1994); Baker v. Comm'r, T.C. M. 1995-385 (1995); Scallen v. Comm'r, T.C.M. 2002-294 (2002).

- The adequacy and nature of the taxpayer's records
- Whether the loan activities were kept separate and apart from the taxpayer's other activities.
- Whether the taxpayer sought out the lending business.
- The amount of time and effort expended in the lending activity.
- The relationship between the taxpayer and his debtors.
- Whether the taxpayer used normal money-lending methods and practices.
- Whether the taxpayer advertised or otherwise solicited for potential borrowers.
- Whether the taxpayer had a business office used in connection with the lending business.
- Whether the taxpayer had a business organization devoted to the lending business.
- Whether the taxpayer used loan forms.
- Whether the taxpayer maintained business books.[220]

The contrast between two recent cases illustrates the difference between a winning position and a losing position for a taxpayer. In *Cooper v. Commissioner*,[221] the taxpayer was a full-time employee of a health industry company and had a variety of other business interests. He had sporadic lending activity involving short-term, high-interest, "hard money" loans.[222] He made 12 loans to 11 borrowers from 2005 to 2010. For, five of these loans,

[220] Cooper v. Comm'r, T.C.M. 2015-191 (2015); Owens v. Comm'r, T.C.M. 2017-157 (2017).
[221] Cooper v. Comm'r, T.C.M. 2015-191 (2015).
[222] *Id*. ("hard money" referring to loans that are difficult to make, usually for creditworthiness issues).

the borrower provided Cooper with a signed promissory note. Cooper did not perform credit checks, verify collateral, take loan applications, or perform any other normal due diligence procedures in connection with his loans. Further, evidence he provided regarding the time spent on servicing the loans was deemed not credible by the tax court. He made a series of loans to a construction company that ultimately went bankrupt. The court found that he made 12 loans over a six-year period and spent less than four hours per week on lending activities. He also had substantial other activities, in addition to his lending activities. The loans were made to friends and acquaintances. He did not observe formalities normally associated with a lending business, but rather made decisions based on gut feelings and the comfort of friendship. He did not hold himself out in any way as being in the lending business. Finally, the court noted that he did not keep adequate records.[223] The Court held that Cooper was "not in the business of lending money," and therefore was not entitled to a business bad debt deduction.[224]

The result in *Owens v. Commissioner*[225] stands in direct contrast to *Cooper*. The taxpayer in *Owen*s was a loan officer for an investment fund. Certain lending opportunities arose that involved risks making them inappropriate for the fund. Owens investigated these opportunities, and if he deemed them worthy, made the loans out of his personal funds. Although he did not maintain a separate office for these personal loans, he did use the investment fund's office and staff for servicing. As Owens controlled the investment fund, the only real difference between the fund loans and the personal loans

[223] *Id*.
[224] *Id*.
[225] Owens v. Comm'r, T.C.M. 2017-157 (2017).

was the "bucket" that the money came from.[226] The tax court found that Owens was in the business of lending money, and thus entitled to a business bad debt deduction. The tax court commented that making 66 loans to numerous borrowers over a 14-year period was more than sufficient to show that he was engaged in the lending business continuously and regularly with the purpose of making a profit.[227] Although he did not maintain records himself, his staff did so, and the records were adequate. As he did not need to bill hours spent, the court was not concerned that he did not have time records tracking the time spent on the personal loans versus that spent on the investment fund loans. He also acted reasonably to protect his interests at the time the loans became distressed.[228] In this case the IRS argued that although the taxpayer was clearly in the lending business with respect to the investment fund loans, the personal loans were not proximately related to that business. Addressing this issue, the tax court stated: "We are convinced that, over the years, he had fallen into the understandable and prudent habit of lending money raised from the public through [the investment fund] to more secured and better risks; the riskier-but-still-promising loans he took on for himself."[229]

Although not specifically stated as a deciding factor, it seems to help if the taxpayer is a bank executive. In ten cases reviewed for this article, the taxpayer was

[226] *Id*.
[227] *Id*.
[228] *Id*. (contrast with Ruppel v. Comm'r, T.C.M. 1987-248 (1987), where the Tax Court, in denying business bad debt treatment, noted that the taxpayer failed to pursue appropriate collection actions once the loan went into default).
[229] *Id*.

successful in three of them.[230] Two of these cases involved personal lending activities of bank executives; the third involved the lending activities of an individual known by bankers to specialize in making difficult loans.[231] Unless the taxpayer's involvement in the lending business rises to this level, they are unlikely to sustain business bad-debt treatment by claiming they are in the business of lending money. Taxpayers planning to justify their treatment of a bad debt as business on the basis of its connection with a lending business should be prepared to show—based on an analysis of the above factors—that they were in the business of lending money at the time the loans were made.

A recent case, *Bercy v. Commissioner*,[232] deals with a question regarding the boundaries of a lending business. The taxpayer in *Bercy* was a real estate broker who had substantial sums of money to lend. Bercy made over $750 million in loans through his real estate business, along with $25 million in personal loans. Although most of the loans were secured by real estate, some of the loans were secured by personal property. The bad debt deduction that was central to the case involved a line of credit that was extended to a furniture business which collapsed in the aftermath of the 2008 financial crisis.[233]

The facts in *Bercy* established that the loans were made in a business-like manner. There were promissory notes executed, due diligence procedures that were performed, interest rates appropriately reflected the risk involved in the loans, and personal guarantees of

[230] *See* Owens, T.C.M. 2017 at 157; Ruppel v. Comm'r, T.C.M. 1987-248 (1987); and Serot v. Comm'r, T.C.M. 1994-532 (1994).
[231] *Id*.
[232] Bercy v. Comm'r, T.C.M. 2019-118 (2019).
[233] *Id*.

borrowers were required. Although the court note that Bercy failed to perfect his interest by recording the loan, the weight of the evidence supported his contention that he was in the lending business.[234]

The IRS disallowed Bercy's business bad debt deduction. The IRS conceded that Bercy was "engaged in the business of real estate lending[,]" but argued that the furniture company loans were outside the scope of that business, and therefore were nonbusiness loans. The IRS described Bercy's non-real-estate lending as "insufficiently robust" to comprise a lending business.[235] The tax court disagreed, stating:

> We are not persuaded to construe the term "trade or business" so narrowly in this context. When previously considering the status of loans as "business debts" under section 166, we have not segmented the taxpayer's lending business according to the nature of the loan or type of customer. Rather, we have simply asked whether the taxpayer was in the business of lending money, separate and distinct from any other gainful employment he or she may have had.[236]

The tax court contrasted the facts in *Bercy* from *Rutter v. Commissioner*. In that case, which was cited by the IRS in their *Bercy* argument, advances to a corporation by a taxpayer were deemed to be equity investments. In *Rutter*, no credible evidence was presented to support the taxpayer's "assertion that he was

[234] *Id*. at 4-5.
[235] *Id*.
[236] *Id*.

in the business of lending money."[237] The tax court had no difficulty concluding that Bercy was in the business of lending money.[238]

V. TAXPAYERS CLAIMING TO BE PROMOTERS OF CORPORATIONS

If a finding that a taxpayer is in the trade or business of lending money essentially requires that the taxpayer be a banker (or in some similar position), then a useful inquiry to understand if the taxpayer is in the business of promoting corporations, is to ask if the taxpayer is a dealer, or a venture capital fund manager. This is essentially what the law requires. The key case in this area is *Whipple*. An excerpt from that case has been used repeatedly in cases where this issue is involved:

> Devoting one's time and energies to the affairs of a corporation is not of itself, and without more, a trade or business of the person so engaged. Though such activities may produce income, profit or gain in the form of dividends or enhancement in the value of an investment, this return is distinctive to the process of investing and is generated by the successful operation of the corporation's business as distinguished from the trade or business of the taxpayer himself. When the only return is that of an investor, the taxpayer has not satisfied his burden of demonstrating that he is engaged in a trade or business since

[237] *Rutter*, T.C.M. 2017-174 at 30.
[238] *Bercy*, T.C.M. 2019-118 at 5.

investing is not a trade or business and the return to the taxpayer, though substantially the product of his services, legally arises not from his own trade or business but from that of the corporation. Even if the taxpayer demonstrates an independent trade or business of his own, care must be taken to distinguish bad debt losses arising form his own business and those actually arising from activities peculiar to an investor concerned with, and participating in, the conduct of the corporate business.

If full-time service to one corporation does not alone amount to a trade or business, which it does not, it is difficult to understand how the same service to many corporations would suffice. To be sure, the presence of more than one corporation might lend support to a finding that the taxpayer was engaged in a regular course of promoting corporations for a fee or commission . . . but in such cases there is compensation other than the normal investor's return, income received directly for his own services rather than indirectly through the corporate enterprise. . . [S]ince the Tax Court found, and the petitioner does not dispute, that there was no intention here of developing the corporations as going businesses for sale to customers in the ordinary course, the case before us inexorably rests upon the claim that one who actively engages in serving his own corporations for the purpose of creating

> future income through those enterprises is in a trade or business. That argument is untenable . . . and we reject it. Absent substantial additional evidence, furnishing management and other services to corporations for a reward not different from that flowing to an investor in those corporations is not a trade or business . . . .[239]

In order for the promotion, organization, financing of, or dealing in, corporations to be considered a separate business, they "must be conducted for a fee or commission or with the immediate purpose of selling the corporations at a profit in the ordinary course of that business."[240] In other words, something other than an investor's return is required. This could take the form of fees for services, commissions, dealer profits on sale, or similar forms of compensation, but would exclude investor compensation such as dividends or long-term capital gains.[241] Further, the taxpayer must show that their involvement with the entities was directed toward a quick and profitable sale, rather than long-term investment gain.[242] The longer the interest is held, the greater likelihood that the court will consider the profits to be investment gains. For example, in *Deely v. Commissioner*,[243] the tax court considered that a taxpayer who typically held entities for between 17 and 39 years

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[239] *Whipple*, 373 U.S. at 202-203 (citations omitted). *See e.g.*, Bell v Comm'r, 200 F.3d 545, 547-548 (8th Cir. 2000); Gubbini v Comm'r, T.C.M. 1996-221(1996).
[240] Deely v Comm'r, 73 T.C. 1081, 1093 (1980).
[241] *Whipple*, 373 U.S. at 202-203; *Deely*, 73 T.C. at 1093.
[242] *Deely*, 73 T.C. at 1093 (citing Giblin v Comm'r, 227 F.2d 692, 696 (5th Cir. 1955)).
[243] *Deely*, 73 T.C. at 1094.

was not in the trade or business of promoting corporations.[244]

Consistent with general trade or business analysis principles, whether the taxpayer is in the trade or business of promoting corporations is a question of fact.[245] Only in exceptional situations are activities extensive enough to be considered a trade or business.[246] In keeping with *Groetzinger*,[247] the taxpayer's promotion activities must be continuous and extensive, not few and infrequent.[248] The taxpayer must have been in the business of promoting corporations at the time the loan was made, and the loan must have been made in connection with that business.[249]

In addition to looking at the compensation of the taxpayer and the speed of disposition of the corporate entities, the courts look to other factors as indications that the taxpayer is or is not engaged in the trade or business of promoting corporations. The courts will look to see whether the taxpayer is actively seeking opportunities to promote corporations, whether the taxpayer is advertising, and whether the taxpayer maintains a separate office, books and records, or profit and loss statements specific to the promotion activity.[250]

A contrast of two recent cases is helpful in determining the factors that separate success from failure when arguing that a taxpayer is a promoter. In *Dagres v. Commissioner*,[251] the taxpayer was a venture capital fund manager. The taxpayer was engaged in this occupation

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[244] *Id*.
[245] *Giblin*, 227 F.2d at 697.
[246] Berwind v Comm'r, 20 T.C. 808, 815 (1953).
[247] *Groetzinger*, 480 U.S. at 35.
[248] *Groetzinger*, 480 U.S. at 35; *Giblin*, 227 F.2d at 696.
[249] *Generes*, 405 U.S. at 103.
[250] Dagres v. Comm'r, 136 T.C. 263, 280-285 (2011); Gubbini v. Comm'r, T.C.M. 1996-221, 5-6 (1996).
[251] *Dagres*, 136 T.C. at 280-285.

full-time. Bad debts arising from loans made in connection with his venture capital activities were held to be made in connection with his trade or business, resulting in business bad debt deductions.[252]

The taxpayer in *Gubbini v. Commissioner*[253] also claimed that he was in the business of being a venture capitalist. However, Gubbini was also an anesthesiologist, and was involved in various other activities. Gubbini claimed a business bad debt deduction arising from a loan made in connection with a corporation called Color Trick. The tax court determined that he was merely an investor in this corporation and that his claim to be a venture capitalist or business promoter was not supported by the underlying facts. Nothing in his tax return indicated that he earned income from rendering services as a promoter. Evidence did not support his claim that he had a reputation in the community as a promoter. The Court found that the loans made to Color Trick were made to protect his equity stake in the corporation, an investment motive.[254] The Tax Court denied Gubbini's business bad debt deduction.

In *Bell v. Commissioner*, [255] a taxpayer claimed a deduction for partially worthless business debts for loans he made to two corporations in which he had an interest. He argued that the loans were related to his business of "buying, rehabilitating and reselling corporations."[256] The Eighth Circuit of the U.S. Court of Appeals, in affirming the Tax Court's decision against the taxpayer, found several problems with the taxpayer's argument which are illustrative of many of these cases. First, the taxpayer did not provide personal services to the

[252] *Id*.
[253] *Gubbini*, T.C.M. 1996-221 at 5-6.
[254] *Id*.
[255] *Bell*, 200 F.3d at 548.
[256] *Id*.

distressed corporations for which he might expect compensation in addition to an investor's return. Second, the taxpayer did not distinguish between his return and that of the corporations. Third, the court noted that although he claimed to be in the business of rehabilitating and selling troubled companies, he had never successfully done so. Finally, employees of the taxpayer's company testified that the company's "objective was to purchase companies and turn them around for resale OR for retention as successful ongoing concerns."[257] This implied a longer holding period and a strategy of keeping winners and dumping losers, which is an investment objective.[258] The losses were investment losses treated as nonbusiness bad debts, a particularly painful result because no deduction for partial worthlessness is allowed.

In a footnote included in the opinion, the *Bell* court suggested that unless a taxpayer who claimed to be in the business of promoting corporations treated gains from the sale as ordinary income, they were unlikely to be engaged in a trade or business. The court also cast doubt on several decisions where taxpayers prevailed on this issue, suggesting that they were incorrectly decided and of no precedential value.[259]

In summary, facts that indicate that a taxpayer is in the trade or business of promoting corporations include:

- Taxpayer received compensation beyond a normal return.

[257] *Id*. at 548-549 (emphasis in original).
[258] *Id*.
[259] *Id*. at 548, footnote 2 (citing Boris I. Bittker & Lawrence Lokken, Federal Taxation of Income, Estates and Gifts ¶33.6, at 33-23 (2d ed. 1990)).

- Taxpayer disposed of the interest in the corporation within a short time after incorporation.
- Taxpayer engaged in many transactions of this type.
- Taxpayer has an established reputation, through advertising or other means, of being a dealer in corporations.
- Taxpayer is involved in venture capital investments or similar activities.
- Taxpayer treats gains from profitable dispositions as ordinary income.[260]

Facts that indicate that a taxpayer is not in the business of promoting corporations include:

- Taxpayer's only compensation is a normal investment return.
- Investments in corporations held for a longer period of time.
- Pattern of "keeping winners, dumping losers."
- Return is coming from the business of the owned corporation, rather than from the taxpayer's own activities.
- Taxpayer is not being compensated for providing services (or taxpayer is not providing services).
- Taxpayer treats gains from profitable dispositions as capital.[261]

[260] *Dagres*, 136 T.C. at 280-285; *Gubbini*, T.C.M. 1996-221 at 5-6; *Bell*, 200 F.3d at 548-549.
[261] *Id*.

VI. PROTECTING EMPLOYMENT

Another potential bad debt occurs when an employee makes a loan to an employer. As discussed above, the taxpayer benefits more if the bad debt is a business bad debt as opposed to a nonbusiness bad debt. In support of the taxpayers, the courts have held that under IRC § 166 being an employee may be a trade or business.[262] It depends on the employee's dominant motivation. In *Generes*, the court found that an employee-shareholder often acts with two motivations when making a loan to a company: (1) an employee-shareholder's desire to protect his investment; and (2) the desire to protect his status as an employee.[263] If the dominant motivation of the loan is to maintain the employee's employment, then the debt is a business bad debt. Essentially, the employee made the loan in his trade or business of being an employee.[264] However, if the dominant motivation is investment related, the taxpayer may not deduct the loss as a business bad debt.[265]

The cases regarding this topic focus mostly on whether the loan was motivated by the status as employee or as the status as an investor. In *Kelson v. United States*,[266] the Court held that "objective facts surrounding loans, rather than the [taxpayer's] subjective intent, control."[267] Since this case, the courts have relied on three objective factors: (1) the size of the investment; (2) the size of the after-tax salary; and (3) other source of gross

[262] Trent v Commissioner, 291 F.2d 669 (2nd Cir. 1961); *rev'g* 34 T.C. 910 (1960).
[263] *Generes*, 405 U.S. at 104.
[264] Graves v. Commissioner, T.C.M. 2004-140 (2004).
[265] *Generes*, 405 U.S. at 104.
[266] Kelson v. U.S., 503 F.2d 1291 (10th Cir. 1974).
[267] *Id*.

income.[268] A court will more likely find that the motivation was investment related if the investment was relatively large, the salary is relatively small, and the other sources of income are relatively large.[269]

In *Litwin v. Unites States*, [270] the court applied the objective factors stated above.[271] Litwin had successfully been involved in several energy-related start-up companies. Litwin was principal shareholder, principal investor, chairman of the board, and CEO of AFS. AFS experienced cash flow problems so Litwin lent the corporation money and personally guaranteed bank loans. AFS later filed for bankruptcy. Litwin argued to the court that the debts were business bad debts. The court held that Litwin formed the company mainly to be employed, be useful in society, and earn a salary.[272] Litwin spent a large amount of time working for the company and did not obtain significant capital returns on his investment in the company. In addition, Litwin's risk on the loans to the company far exceeded his investment; thus, he probably was not making the loans to protect his investment. Thus, the court concluded that his dominant motivation in making the loans was to protect his employment which qualifies under IRC § 166 as a business bad debt.

Unlike *Litwin*, the petitioner in *Lease v. Commissioner* [273] was unsuccessful in his argument for business bad debt treatment.[274] In this case, the court addressed whether an advance by a shareholder who desires to be a future employee to a corporation is a loan

[268] Litwin v. U.S., 983 F.2d 997 (1993).
[269] Smith v. Comm'r, 60 T.C. 316, 319-320 (1973).
[270] *Litwin*, 983 F.2d at 997.
[271] *Id*.
[272] *Id*. at 998-999.
[273] Lease v. Comm'r, T.C.M. 1993-493 (1993).
[274] *Id*.

or a contribution of capital. The court relied on two models: a shareholder takes the residual risk and desires to profit from the success of the business, while a creditor is paid current compensation for the use of funds in the form of interest and repayment of the principal in the future regardless of the success of the company.[275]

The court further stated that the main question was whether a shareholder could reasonably expect the company to repay the loan in accordance with the terms.[276] Under the facts of *Lease,* the court concluded that the advances were capital contributions and not debt. At the time of the advances, the company had no assets or capital and had not begun operations. The court reasoned that under these circumstances, no creditor would have lent money to the company. These advances were not short-term advances that were likely to be repaid. Furthermore, no promissory notes were created as evidence that the advances were debt instead of capital contributions. The court went even further by stating that even if these advances were bad debt, they were nonbusiness bad debts. There was not a proximate relationship between the advances and the petitioner's business activities as an employee.[277] If the creditor is an investor and an employee, the bad debt must have a proximate relationship to the employment, which would be the trade or business, rather than to his investment in order to receive business bad debt treatment.[278] In this case the petitioner argued that the purpose of the advances was to secure future employment with the company. The court was not persuaded that the petitioner's dominant motive was employment because there was no evidence

[275] *Id*.
[276] *Id*.
[277] *Id*.
[278] *Id*.

he ever received a salary or would ever receive a salary.[279] In addition, the court held that large advances in comparison to a small salary indicate that the dominate motivation was making and protecting an investment rather than promoting or protecting a salary.[280]

In contrast to *Lease*, in *Graves v. Commissioner*,[281] the petitioner was successful in arguing that the dominant motivation was as an employee and not an investor.[282] The petitioner is this case was the sole shareholder of KPS Trucking Co. and a salaried employee, managing its daily operations. KPS began experiencing financial difficulties, and the petitioner lent capital to KPS in an attempt to continue business operations and to pay salaries. KPS filed for bankruptcy in July 1996. Petitioner's loans remained unpaid and were worthless. The petitioner successfully argued to the court that his loan to his employer constituted a business bad debt. As such, he believed that he should be able to deduct the bad debt expense from gross income to arrive at adjusted gross income, as is typical for trade or business expenses. However, the court held that the debt should be an itemized deduction.[283] The court relied on § 62 which provides in part:

> For purposes of this subtitle, the term "adjusted gross income" means, in the case of an individual, gross income minus the following deductions:
> (1) Trade and business deductions.--The deductions allowed by this chapter (other than by part VII of this subchapter) which

[279] *Id*.
[280] *Id*.
[281] Graves, 2004 T.C.M. at 140.
[282] *Id*.
[283] *Id*.

> are attributable to a trade or business carried on by the taxpayer, *if such trade or business does not consist of the performance of services by the taxpayer as an employee*.[284]

The court concluded that because the petitioner's trade or business consisted of the performances of services as an employee, the bad debt expense may not be deducted from gross income to arrive at adjusted gross income but must be instead treated as a miscellaneous itemized deduction subject to the 2% floor.[285]

The Court of Appeals in *Haury v. Commissioner*[286] emphasized that individual taxpayers may not deduct a nonbusiness bad debt from ordinary income.[287] Citing *Generes*, the court stated that the taxpayer's "status as a shareholder was a nonbusiness interest," whereas his "status as employee was a business interest".[288] Further relying on *Generes*, the court held the status determination depends on what was the dominant motivation in making or guaranteeing the loan.[289] In the *Haury* case, Haury argued that he made several loans to NPS Systems as an employee to help the company state afloat and continue operating. Haury was the president, secretary and a member of the board of directors; however, his responsibilities as an employee were not clear. He did earn a substantial salary from NPS Systems. Nonetheless, the court held that Haury was not involved in the day-to-day operations and that he appeared more like an owner-investor than an employee; thus, he did not

[284] I.R.C. § 62(a)(emphasis added).
[285] *Id*.
[286] *Haury*, 751 F.3d at 867.
[287] *Id*.
[288] *Generes*, 405 U.S. at 100-101.
[289] *Id*. at 103-104.

prove that his dominant motivation was to protect the business interest as an employee. As such, the debt was determined to be a nonbusiness bad debt.[290]

VII. PROTECTING A SOURCE OF INCOME OR BUSINESS RELATIONSHIP

As mentioned above, business bad debts are deductible as ordinary deductions against ordinary income; whereas a nonbusiness bad debt is deductible only as a short-term capital loss and only if totally worthless.[291] Thus, a taxpayer prefers the bad debt to be business and the IRS usually argues that the debt is nonbusiness bad debt. Another way to claim that a debt is a business bad debt is to assert the loan was made to protect a source of income or a business relationship. In *Dagres v. Commissioner*,[292] the taxpayer, who managed venture capital funds, maintained that he made the loan to a business acquaintance, who was an important source of leads, in return for the opportunity to be the first to hear about investment opportunities in new companies.[293] The IRS argued that this debt was a nonbusiness bad debt as it was personal in nature and not created in connection with his business arguing that investing one's money does not amount to a trade or business.[294] The court disagreed and held that the taxpayer made the loan as part of the trade or business of managing venture capital funds, which was more than a mere investment; and thus, his bad debt loss was a business bad debt.[295] The court found that the taxpayer made the loans to gain preferential access to new

[290] *Id*.
[291] I.R.C. § 166.
[292] *Dagres*, 136 T.C. at 264.
[293] *Id*.
[294] *Id*.
[295] *Id*.

companies and use that in his venture capital activities. Citing *Deely v. Commissioner*,[296] the court held these loans were not personal in nature as the activity of "promoting, organizing, financing, and/or dealing in corporations . . . for a fee or commission or with the immediate purpose of selling the corporations at a profit in the ordinary course of that business is a business."[297] One of the factors for distinguishing between an investment and a trade or business is if the taxpayer receives compensation attributable to his services and not just a return of his investment. The taxpayer is this case was compensated for identifying and pursuing investment opportunities for other investors. His compensation exceeded his share of the return on investment and any salary he received for his employment. The court further held that the just because the subject matter is investing does not mean the activity is a mere investment.[298] Ultimately, the court found that the dominant motivation was to provide venture capital and was not employment or investment related.[299]

In *Helwig v. Commissioner*,[300] the Tax Court also held that the dominant motivation for lending money to a company was developing business opportunities and not the potential profit from the appreciation of a company's share holdings.[301] In this case the taxpayer made advances to a company with the expectation of developing business opportunities in the manufacturing of vending machines. Based on the facts, the court found that there was business potential and reasonable expectation of profit from its relationship with the

[296] *Deely*, 73 T.C. at 1093 (1980).
[297] *Id*.
[298] *Dagres*, 136 T.C. at 267.
[299] *Id*.
[300] Helwig v. Comm'r, T.C.M. 1999-386 (1999).
[301] *Id*.

company to whom it advanced money. Accordingly, they held that the advances were business debt but, in the end, found that they were not worthless.[302]

In contrast, in *Weber v. Commissioner* the dominant motivation was investing and not as part of a trade or business.[303] In this case the petitioner/taxpayer was approached by a friend, Makeever, to invest in a solar system business, SAV Solar Systems. The taxpayer loaned Makeever, money which was evidenced by a letter of indebtedness. The taxpayer later loaned additional money to the company to become part owner. He further guaranteed a small business loan for the business. After a while, the taxpayer temporarily terminated his job as a doctor and became involved in the day-to-day operations of the business; however, he did not receive a salary from the company. The company eventually went bankrupt and the taxpayer was liable on the loan he guaranteed. There was no possibility of recovery from the company and its obligation to the taxpayer was worthless.[304] The taxpayer claimed he was entitled to a business bad debt deduction because his dominant motivation in guaranteeing the loan was "protecting his reasonable expectation of receiving a large salary"[305] from the company. The respondent argued that the guaranty was not made in connection with the petitioner's trade or business and therefore, is only entitled to a nonbusiness bad debt. In agreeing with the respondent, the court stated that one measures the taxpayer's dominant motivation at the time of the guaranty, not the payment to discharge the guaranty.[306] The court found that that the taxpayer failed to establish a connection to his trade or business. At the

[302] *Id*.
[303] Weber v. Comm'r, T.C.M. 1994-341 (1994).
[304] *Id*. at 359.
[305] *Id*. at 351.
[306] *Id*. at 352.

time of the guaranty, he was a full-time doctor, which was his trade or business, and this loan did not relate to the medical field. He was also a primary investor in the solar company and failed to establish that the dominant motivation for the loan was not his investment in the company.[307] The court rejected the taxpayer's contention that at the time of the guaranty he planned to leave his medical practice and signed the guaranty to protect a potential large salary. Protecting potential salary may be a legitimate business purpose;[308] however, this petitioner provided no evidence of a future salary and in fact, the guaranty precluded him from receiving one. [309]

VIII. PROTECTING BUSINESS REPUTATION

Finally, a taxpayer may claim a bad debt as a business bad debt by proving that the dominant motivation for a loan was to protect a business's reputation. Again, courts will look at the dominant motivation for the advances or loans. In *Smartt v. Commissioner*,[310] the taxpayer was involved in the real estate development business.[311] He formed Smartt Construction Co., which paid him salaries and bonuses during the years at issue. His company relied on significant financing from his good credit history. In 1978, the petitioner/taxpayer and Anderson formed a partnership to help Anderson obtain financing to purchase Baptist Road truck stop. The petitioner was a general partner, owning 40%. The partnership borrowed $675,000 from Columbia Savings and Loan of Colorado as a mortgage. The partnership entered into a lease

[307] *Id*. at 354.
[308] Putoma Corp. v. Comm'r, 66 T.C. 652,674 (1976).
[309] *Weber*, T.C.M. 1994-341 at 356.
[310] Smartt v. Comm'r, 1993 T.C.M. 65 (1993).
[311] *Id*.

agreement with Anderosa which was formed by Anderson to lease and operate the Baptist Road truck stop.[312]

Anderson later created a corporation, SH&A Enterprises, with a large contribution from the petitioner. The petitioner was a creditor of SH&A and not a shareholder. SH&A Enterprises then leased the Fountain truck stock and purchased the Barstow truck stop from Silico. Due to unprofitability, SH&A disposed of its interests in Fountain and Barstow in 1983. The Fountain lease was terminated in 1984. Petitioner then advanced funds in 1984 and 1985 to meet Barstow's expenses, including rent and mortgage payments. These advances were to be repaid on any subsequent sale of Barstow. Baptist Road also had financial difficulties in 1984 and Anderson fell behind on rent payments. The petitioner loaned money to Anderson to pay a portion of the rent and expenses in 1984-1985. In 1985, Anderson's checks began to bounce because United Bank had emptied the accounts to make a principal reduction on SH&A's line of credit. United Bank threatened to enforce a lien on Baptist Road unless SH&A paid its line of credit or petitioner guaranteed the line of credit. The petitioner then executed a note in order to keep Baptist Road operating and thereby prevented the partnership from defaulting on the mortgage with Columbia Savings. The petitioner believed that if the partnership defaulted on its obligations to Columbia Savings, his good credit standing would be affected, and it would impair his ability to finance his real estate developments. The petitioner was not repaid any amounts advanced when the partnership had to assume the operations at Baptist Road due to a default on the mortgage.[313]

In *Smartt*, the petitioner argued that the losses

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[312] *Id*.
[313] *Id*.

from the advances were business bad debts.[314] If the guarantee was made in the course of the taxpayer's trade or business, the losses are deductible against ordinary income.[315] The respondent argued that a requirement to pay guarantees and make loans to protect one's good credit is not a business bad debt. As discussed previously, courts will look at the dominant motivation of the taxpayer. In this case, the court had to determine if the bad debt was related to the taxpayer's trade or business or if it was related to an investment.[316]

The court found that the petitioner's dominant motivation for his obligations to United Bank and the advances on behalf of Baptist Road to Anderson was the preservation of his real estate development business by maintaining his good credit standing and reputation. If Baptist Road went out of business, the partnership would not have been able to meet mortgage obligations and therefore, it is believed that the default would have triggered a demand for all outstanding debt owed by the petitioner's real estate business. Since Baptist Road paid rent to the partnership which petitioner was a general partner of, the protection of his distributive share of a stream of rental income was at stake. Thus, the court ultimately held that these losses were properly deductible as business bad debts, and any other debts were nonbusiness.[317]

Although similar, the outcome was different in *Osterbauer v. Commissioner*.[318] In *Osterbauer*, the petitioner's deceased husband was in the real estate business and was involved in a gold mining venture,

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314 *Id.*
315 *Id.*
316 *Id.* at 86.
317 *Id.*
318 Osterbauer v. Comm'r, T.C.M. 1995-490 (1995).

International Mining Research and Development, Inc..[319] The decedent contributed real estate to International Mining for a 20% stake in the company. Because of his good reputation in the community, the decedent was asked to serve as president of International Mining but had no daily involvement in the business. When International Mining needed additional capital, they could not obtain a loan. Thus, the decedent (along with another investor) took out a loan and he put up his plane as collateral. The proceeds of the loan were contributed to International Mining. Eventually, International Mining ceased operations and the proceeds from the sale of the decedent's airplane were used to pay off loans.

Under Treasury Regulation § 1.166-9(b), a payment to discharge an obligation as a guarantor is treated as a business bad debt if proximately related to the taxpayer's trade or business. However, if the guaranty was a for-profit transaction, the regulation holds that the discharging payment is a nonbusiness bad debt.[320] In *Osterbauer*, the petitioner, the decedent's spouse, argues that the decedent agreed to the guaranty because failure to do so, would negatively affect the decedent's business in the community. Further, the decedent's dominant motivation was to protect his real estate business and protect the "good name" in the community. The court found that the petitioner offered no evidence that the business reputation was affected as the loan was fully paid off by sale of the plane. In addition, the court looked at the possible outcome if the loan had not gone bad. The court determined that the petitioner and the decedent would have benefited from an increase in the value of International Mining stock and this is the type of capital increase that suggests an investment, nonbusiness

[319] *Id*.
[320] Treas. Reg. § 1.166-9(b) (as amended in 1983).

motive.[321]

IX. CONCLUSION

In this article, we have surveyed the case law in a variety of settings distinguishing between business and nonbusiness bad debts. All of the areas discussed follow a pattern based on the principles of *Whipple* and especially *Generes*; the loan must arise in a trade or business, and the trade or business purpose must be the dominant motivation behind the loan.

In closing, a major point of emphasis bears repeating—the time to consider whether the facts support business bad debt treatment is the time that the loan is made. To the extent that the taxpayer can control the facts, the loan can be structured so that business bad debt treatment can be supported. Of course, it may not be possible to do this in all situations, but at a minimum advance planning will make the taxpayer aware of the consequences before making the loan.[322]

[321] *Id*.
[322] *Id*.

Exhibit A - Summary of Case Results
Taxpayer caliming a business bad debt deduction under IRC Section 166(a),
arguing that they are in the buisnes of lending money.

Year	Case Name	Citation	Decision For	Number of Loans/Years	Additional Factors
1973	Imel	61 T.C. 318	Government	8-9 loans in 4 years	Decision based on the quantity - not enough activity to constitute a separate business.
1987	Ruppel	T.C.M. 1987-248	Taxpayer	27 loans in 4 years	Bank executive made loans for profit. Maintained books and records of lending activity.
1994	Serot	T.C.M. 1994-532	Taxpayer	55 loans in 10 years	Poor recordkeeping not fatal to determination. Taxpayer did not advertise, but was known in community for making loans.
1995	Baker	T.C.M. 1994-385	Government	Small number of loans	No records, no advertising/soliciting, no separate office. All loans in connection with single venture. Did not take action to recover loans.
2000	Miller	T.C.M. 2000-240	Government	Loans made in connection with 6 real estate transactions.	Record did not support taxpayer's contention that he was in the business of lending money.
2002	Scallen	T.C.M. 2002-294	Government	"sufficient number"	Court determined loans not entered into with profit motive as dominant motivation.
2014	Langert	T.C.M. 2014-210	Government	6 loans in 30 years	Taxpayer did not provide sufficient evidence that the loans were made in connection with a trade or business.
2015	Cooper	T.C.M. 2015-191	Government	12 loans in 5 years	Not a significant amount of time spent. Loans to friends and acquaintances. No loan formalities or records. Did not hold himself out as a lender.
2017	Scheurer	T.C.M. 2018-36	Government	isolated loan	Petitioner was a financial advisor; no evidence of other loans. Dominant motivation was personal.
2017	Owens	T.C.M. 2017-157	Taxpayer	66 loans in 14 years	Exec. for lending company. Had adequate records maintained. Reputation in community as a lender.

HOW LEGAL KNOWLEDGE CAN RUIN A TV SHOW: AN ISSUE-SPOTTING EXERCISE FOR THE LEGAL ENVIRONMENT OF BUSINESS COURSE

JENNIFER CORDON THOR[*]
MICHAEL GREINER[**]

ABSTRACT

Attorneys spend three years in law school honing their legal issue spotting skills. This ability to identify legal issues in our surroundings often makes watching a television show difficult to get through as we see a character do something stupid and we think "they would be sued" or "that is illegal" or "it doesn't work that way." Attorneys teaching a Legal Environment of Business course know that having the ability to recognize an issue before it becomes a problem is a valuable skill. The authors have created an exercise called "Ruin a TV Show" that tests your students' ability to spot legal/ethical issues. Students watch an episode of *The Office* and are required to identify legal and ethical issues as they arise. A twenty-two minute episode has over twenty-five legal/ethical

[*] Associate Professor of Management, Legal and Ethical Studies, Oakland University, JD from University of Detroit Mercy School of Law, thor@oakland.edu.
[**] Assistant Professor of Management, Legal and Ethical Studies, Oakland University, JD from Wayne State University Law School, Ph.D in Management Strategy from Wayne State University.

issues to discover. This exercise can be used at the beginning of the semester, at the end of the semester or somewhere in between. Interrupting the show over 25 times to thoroughly discuss the legal issues identified does not make for pleasurable viewing, and in fact, ruins the show, but it does make for an enjoyable learning exercise.

I. Introduction

Attorneys[323] teaching a Legal Environment of Business (LEB) course have had three years of intensive issue spotting exercises and exams which have given law school graduates the ability, be it a curse or gift, to spot legal issues, inconsistencies, and falsehoods in many situations. Oftentimes this ability will come out when you least expect it. How many of us, while watching a television show, have yelled at the TV or just thought it to ourselves– "Judges do not hold motion hearings while walking down the hallway!,"[324] or we might have told a family member at certain points during a show or movie – "that is not how it really works," or we might have pointed out to friends when a character in a show commits an act of negligence, or while watching the news, we

[323] Generally, instructors of the Legal Environment of Business and Business Law courses have attended law school. The Association to Advance Collegiate Schools of Business (AACSB) recognizes that the terminal degree required to teach such courses and modules on business law is the JD and the LLM. *See* AACSB Int'l., *2020 Guiding Principles and Standards for Business Accreditation*, (April 6, 2020).

[324] *See, e.g. Law & Order,* NBC television broadcast beginning in 1990. In multiple episodes, the attorneys are shown walking down the hallway with a judge. During those walks they argue a motion and then the judge makes a ruling on the motion during this walk down the hallway. https://www.imdb.com/title/tt0098844/

might explain that the reporters use of the term "robbery" is not appropriate because what was described is a larceny. Although you may be using this time enjoying a show to hone your issue spotting skills, you oftentimes end up ruining the show for those who are watching with you. If you do this often enough, you soon learn to tone it down or at least keep your comments to yourself.

The vast majority of undergraduate or graduate business students who take an LEB course in business school have no desire to obtain a law degree and are taking this course because it is a requirement for their major.[325] Most business school curriculums have incorporated an LEB or business law course. Business schools have come to realize that "[e]mployers that hire business graduates without knowledge of or respect for the law can cost an organization dearly in fines and penalties."[326] Furthermore, participants at the first *Summit on the Academic Profession of Business Law* determined that "[l]aw is too important to be left to the lawyers and law professors. Businesspeople should not have to hire employees who are legally unaware."[327] Students in an LEB course should be viewed as future "'first responders' in their business environment and their task will be to recognize an actual or potential legal challenge or

[325] *See* Carol J. Miller and Susan J. Crain, *Law-Based Degree Programs in Business and Their Departments: What's in a Name? (A Comprehensive Study of Undergraduate Law-Based Degrees in AACSB-Accredited Universities)*, 24 J. LEGAL STUD. ED. 235 (2007) (business majors have a core required law course) and Michael Simkovic and Frank McIntyre, *The Economic Value of a Law Degree*, 43 J. LEGAL STUD. 249 (2014) (law students are less likely to have undergraduate business degrees).

[326] Robert C. Bird & Cheryl Kirschner, *Special Report: The Summit on the Academic Profession of Business Law,*37 J. LEGAL STUD. ED. 87, 109 (2020).

[327] *Id.*

opportunity as early as possible."[328] Therefore the goal of such courses "should be to develop a student's ability to identify legal risks, issues or opportunities."[329]

An LEB instructor has one semester, sometimes two, to train these students to spot legal issues that arise in a business setting, which is not a lot of time. Issue spotting exercises are a great way to help students get this training. This article offers an activity that helps hone the skill of issue spotting. This activity could be used on the first day of class, the last day of class, or anywhere in between. Different uses for this activity will be discussed below.

Any episode from *The Office*[330] television series is great to use for this assignment. The setting of the series is a place of business and the characters experience multiple situations involving the law and ethics in each episode. There are instances of racial discrimination, sexual harassment, intentional torts, negligence, criminal violations and ethical lapses involving the company's code of conduct. The characters engage in contract negotiations to sell their product and often have to deal with the results of a breach of that contract. All of these topics are often concepts covered in an LEB course.[331] Although what occurs on *The Office* is often exaggerated, students will see where these issues can arise in their own work environments.

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[328] Shelley McGill, *The Social Network and the Legal Environment of Business: An Opportunity for Student-Centered Learning*, 30 J. LEGAL STUD. EDUC. 45, 56 (2013).
[329] *Id.*
[330] *See e.g.*, NBC television broadcast from 2005 – 2013, https://www.nbc.com/the-office/about, last visited November 28, 2023.
[331] *See infra* Part III, the specific legal/ethical issues involved in the episode used by the authors will be discussed in that section.

This paper will begin with a discussion of the literature around using Extra Legal Sources[332] in the classroom and how requiring interaction with digital media can result in experiential learning. There are a multitude of case studies for use in an LEB course using movies and television shows to either highlight one area of business law or to structure an entire LEB course.[333] Next the paper will discuss the use of *The Office* for this particular exercise and in particular the episode called "The Christmas Party." Finally, the paper will discuss the exercise and its many variations for use in an LEB course. Finally, the authors will demonstrate that this activity can be used with other television shows besides the *The Office*.

II. LITERATURE REVIEW

Using non-legal materials to teach law has a relatively long history in the legal classroom.[334] Materials from the humanities and social sciences are often referred to as Extra-Legal Sources (ELS)[335] Professors Miller and DiMatteo argue that the use of ELS in an LEB course will

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[332] Extra Legal Sources are defined as material from the humanities and social sciences when used in a legal classroom. *See infra* note 12.

[333] *See e.g.* McGill, *supra* note 6; Michael R. Fricke, *HBO for ADR: Using Television's Silicon Valley to Teach Arbitration*, 36 J. LEGAL STUD. EDUC. 359 (2019); Margaret B. Sherman, *When the Shark Bites: Using the TV Show "Shark Tank" to Teach Business Entities*, 23 ATLANTIC L. J. 198 (2021) and Michael J. Conklin*, Is Michael Scott's Promise a Contract? in* RECIPES FOR TEACHING BUSINESS LAW (Academy of Legal Studies in Business ed., 2021) (ebook).

[334] Sandra K. Miller & Larry A. DiMatteo, *Law in Context: Teaching Legal Studies Through the Lens of Extra-Legal Sources*, 29 J. LEGAL STUD. EDUC. 155 (2012).

[335] *Id.* at 156.

help sharpen a student's analytical skills.[336] Miller and DiMatteo have used the novel *Lord of the Flies* by William Golding. That novel "provides an excellent spring-board for discussing the role of law in society and the need for an effective economy in human society."[337] The *Lord of the Flies* "can be used to remind business students of the fundamental policy goals of the law – to prevent chaos, foster cooperation, and to ensure the safety and basic rights of the individual."[338]

Professors in law schools have used ELS to enhance their classroom teaching as well. Films and television shows provide many depictions of lawyers from which law students can learn to emulate and/or avoid missteps that those film lawyers make.[339] Professor Elkins used his love for the movies to create a lawyer film course wherein the students would watch a lawyer film one week and discuss it the next.[340] "With lawyer films, we turn our attention to the implicit law school curriculum and engage in a pedagogy of self-learning, looking to see if we can find mirrored in the film what we most want and most fear in being a lawyer."[341] The following films were discussed in this course over the years: *A Few Good Men, Anatomy of a Murder, ...And Justice for All, Class Action, Music Box, Paris Trout, Suspect, The Last Wave, the Verdict, To Kill a Mockingbird, The Devil's Advocate, The Sweet*

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[336] *Id.* at 160.
[337] *Id.* at 172.
[338] *Id.* at 173.
[339] Fictional portrayals of lawyers in film and television are often negative. *See* David M. Spitz, *Heroes or Villains? Moral Struggles v. Ethical Dilemmas: An Examination of Dramatic Portrayals of Lawyers and the Legal Profession in Popular Culture*, 24 NOVA L. REV. 725 (2000).
[340] James R. Elkins, *Reading/Teaching Lawyer Films*, 28 VT. L. REV. 813 (2004).
[341] *Id.* at 831.

Hereafter, *Liar, Liar*, *the Rainmaker*, *The Winslow Boy*, *Snow Falling on Cedars*, *The Castle* and *Adam's Rib.*[342] A difficulty encountered by Professor Elkins in teaching lawyer films to law students was, what the authors has referred to as, the "curse" or "gift" of having been trained as a lawyer. "As legal insiders, law students and lawyers often focus on the legal accuracy of a film, while ignoring the film's larger meaning,"[343] thus, ruining the movie, instead of appreciating the film, for its dramatic and storytelling qualities.

Professor Corcos turned to the world of television to help law students learn about ethics, professional responsibility, criminal and constitutional issues.[344] *Columbo* was a television show that ran from 1968 to 1978 and then from 1989 through 2003.[345] It featured a police detective, who, during each episode solved a criminal mystery. Professor Corcos used this television show because it allowed "law students [to] exercise their powers of observation and deduction along with Columbo."[346] Students would watch each episode in its entirety and then they would discuss all of the legal issues found therein.[347] Professor Corcos recommended using this show as an end of semester review or for exam purposes.[348] As will be discussed in Section III, using a

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[342] *See Id.* at 813.
[343] *Id.* at 833.
[344] Christine Corcos, *Columbo goes to Law School*: *Or, Some Thoughts on the Uses of Television in the Teaching of Law*, 13 LOY. L.A. ENT. L. REV. 499 (1993).
[345] *Id.* at 504. Shaun Curran, *Why the World Still Loves 1970s Detective Show Columbo*, CULTURE, BBC (Sept. 9, 2021) https://www.bbc.com/culture/article/20210909-why-the-world-still-loves-1970s-detective-show-columbo.
[346] Corcos, *supra* note 22, at 506.
[347] *Id.* at 509.
[348] *Id.* at 510.

show that is over 20 years old, like *Columbo* is not ideal for today's student, and that is why the authors used a relatively more recent show, *The Office*, for this activity.

Law professors have found that when teaching law students to be business lawyers, it is important to use "[i]nteractive activities that promote student understanding of theoretical business concepts may engage students, making them more accountable for their own learning."[349] In addition, "[i]ssue spotting, rule explanation, and legal analysis serve as the core of an enhanced teaching methodology to instill in students the need for precision and conciseness in practicing business law."[350]

The typical college student today is in what has been coined "Generation Z" or Gen Z for short. Gen Z "is generally considered to be those born in the mid 1990s to the mid – 2000s."[351] "A critical aspect of engaging Generation Z students is underscoring the relevance of what they are learning."[352] Members of Gen Z have never known a non- digital world. They learn best by doing and creating.[353] Visual learners in Gen Z do well in courses that incorporate clips from movies and television. In fact, Professors Cameron and Pagnattaro have found that "a quick and easy assignment that facilitates many learners is asking them to find a movie or television clip that either correctly or incorrectly illustrates legal principles."[354]

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[349] Kamille Wolff Dean, *Teaching Business Law in the New Economy: Strategies for Success*, 8 J. BUS. & TECH. L. 223, 240 (2013).
[350] *Id.* at 247.
[351] Elizabeth A. Cameron & Marisa Anne Pagnattaro, *Beyond Millennials: Engaging Generation Z in Business Law Class*, 34 J. LEGAL STUD. ED. 317 (2017).
[352] *Id.* at 319.
[353] *Id.*
[354] *Id.* at 321.

Therefore, assignments involving television shows are excellent learning tools for today's college student.

"It can be a challenge to make a business school law course relevant and engaging for the young undergraduate student who is not pursuing legal studies."[355] In order to make an LEB course interesting to Gen Z students,"[b]usiness school law professors search for relevant business cases and examples from their student's frame of reference and often supplement textbook material with media clips, Internet videos, current news stories, as well as television and movie examples."[356] Today's business students' "future career paths will not demand a detailed or exhaustive understanding of legal theory. Instead, they will be 'first responders' in their business environment, and their task will be to recognize an actual or potential legal challenge or opportunity as early as possible."[357] Students in an LEB course will learn "how to spot legal issues, solve problems within the context of the framework the law provides, and navigate the legal system."[358]

The following exercise draws upon the pedagogical tool of ELS to help LEB students identify legal and ethical issues that can arise in an office setting. They will be better prepared to act as "first responders" after engaging in activities such as this.

III. *THE OFFICE*

The Office, is a television show that originally

[355] McGill, *supra*, note 6.
[356] *Id.* at 47
[357] *Id.* at 56.
[358] Hillary Silvia, *Learning Law Through Pleadings of the Rich and Infamous*, 38 J. LEGAL STUD. EDUC. 5 (2021).

aired in the United States between 2005 and 2013.[359] It was a mockumentary sitcom based in a sales office of a fictional paper company, Dunder-Mifflin, in Scranton, Pennsylvania.[360] "[T]he show offered white-collar catharsis by making funny, meaningful storylines out of everyday office-worker woes."[361] Even though the show ended a decade ago, it is still popular today due to its run on Netflix and now on Peacock.[362] An analysis of Nielsen data "found that almost [three] percent of total user minutes [on Netflix in 2018] were spent watching episodes of *The Office*. There are hundreds of shows on Netflix, and the streaming service has 139 million subscribers globally. Three percent of total minutes spent watching TV on Netflix is *52 billion minutes."*[363] The biggest fans of the show over the last few years have been from Generation Z.[364] So even though this show is no

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[359] Kevin Craft, *The Thing That Made The Office Great Is the Same Thing That Killed It*, THE ATLANTIC (May 16, 2013), https://www.theatlantic.com/entertainment/archive/2013/05/the-thing-that-made-i-the-office-i-great-is-the-same-thing-that-killed-it/275883/.

[360] *Id.*

[361] *Id.*

[362] Stephanie Sengwe, *The One Show That Unites Millennials and GenZ (When They're Not Arguing About Side Parts)*, Pure Wow (Aug. 3, 2021). https://www.purewow.com/entertainment/one-show-millennials-and-genz-agree-on.

[363] Sonia Saraiya, *Why is Gen Z Obsessed with The Office?*, VANITY FAIR (April 26, 2019), http://www.vanityfair.com/hollywood/2019/04/billie-eilish-the-office-gen-z-netflix.html.

[364] Evita Duffy, *What 'The Office' Can Teach Gen Z About the Dignity of Work Amid Our Labor Crisis*, THE FEDERALIST (Nov. 7, 2021) http://thefederalist.com/2021/11/02what-the-office-can-teach-gen-z-about-the-dignity-of-work-amid-our-labor-crisis.html.

longer in production, legal environment of business professors will find that the majority of their students have seen many episodes of the show, if not all of them. That is why it is a good resource to use. It brings something familiar to the students, but is used in a different way to shed light on the subject matter.

A. The Episode – "Christmas Party"

The episode of *The Office* that the authors have used is called "The Christmas Party."[365] This episode is filled with legal issues and/or situations that could potentially turn into a legal issue. There is negligence, intentional torts, issues involving *respondeat superior*, racial discrimination, sex discrimination and religious

[365] Season 2, Episode 10 (2005). A note on copyright and fair use. The authors showed this episode from a DVD that had been borrowed from the library. The authors believe that the use of this entire episode, as used in this activity, falls under the Fair Use Exception under the Copyright Act, 17 U.S.C. §107 (2022). First, the purpose is for teaching and it is transformative. Watching the episode to spot legal and ethical issues is a new way of viewing this material. Second, the nature of this work was not originally created for teaching and spotting legal issues. Third, although the entire episode is used, as Appendix A clearly shows, the entire episode is full of legal/ethical issues for the students to identify. Finally, the use of this work is limited to either in-class viewing of the professor's/university's copy of the episode or the student is required to obtain a legal copy of the material to view at home. As such, use of this episode may actually increase the market for the work. Students cannot record the material during class. Instructors should not stream this episode from their own personal Netflix, Amazon Prime and/or PeacockTV account as the license you consented to when you created your account generally limits your ability to show in a classroom (public) setting. *See* Netflix Terms of Use (May 11, 2018), Section 4. 2 – on file with the Authors.

discrimination, among others.[366] The authors created this assignment at the end of the Fall semester, just prior to the Christmas holiday, and therefore, it seemed like a perfect fit. This episode is not the only episode of *The Office* that would work with this activity – practically every episode has some legal/ethical issue arise that the characters cause and/or deal with.[367]

B. The Exercise

The authors have used this exercise in three different formats. Once during a class period to generate a class discussion. One format was as an extra credit paper assignment. And the third format was as a group oral final exam. Choosing whether to incorporate this activity in an LEB course will depend on the course's learning goals. The authors have provided a discussion at the end of this section demonstrating how this activity engages with Bloom's Taxonomy as well as how each element of that learning process is implicated.

1. Class Discussion Format

During the last class session and just before the final examination, the LEB class watched "The Christmas Party" episode of *The Office*. Prior to watching the show,

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[366] *See supra* note 43 regarding copyright/fair use.

[367] For example, the following episodes are available on PeacockTV.com: "Sexual Harassment," Season 2, Episode 2; "Office Olympics," Season 2, Episode 3; "The Fire," Season 2, Episode 4; "Performance Review," Season 2, Episode 8; "Drug Testing," Season 2, Episode 20; "Gay Witch Hunt," Season 3, Episode 1; and "Produce Recall," Season 3, Episode 21. Another episode that contains a lot of legal issues, Season 6, Episode 12: "Scott's Tots." In that episode, Michael Scott offers free college tuition to some local students and then tries to back out of it. Conklin, *supra*, note 11. *See supra* note 43 regarding copyright/fair use.

the instructor told the students that they should use this activity as a review. That they will see/hear actions/words that could raise a legal issue either for the company, Dunder-Mifflin, or for the individuals involved. The instructor told the students that when they see a legal/ethical issue that was discussed in class, that they should yell out "stop the show." The instructor would then pause the show and the student would explain what they saw and why it was a legal/ethical issue. The students were given an example – "if you see a character push someone down from behind, then you would say 'stop the show' and explain that what you saw was a battery." After this brief introduction, the instructor began the show.

The LEB class taught by the authors was an hour and fifteen minutes in length. That class length proved to be adequate to discuss one entire episode of *The Office.* At first, the class was hesitant to participate, not really knowing what the instructor was looking for. It was necessary for the instructor to start things off. After the show started and some legal issues had arisen, the instructor yelled "stop the show" and then paused the program. The instructor then explained why the show was stopped and explained the legal/ethical issues that they saw on the screen.[368] A detailed discussion about the legal/ethical issues was generated with some of the following prompts: Do you agree with what I saw? What area of law is involved here? What can the business/individual do to prevent this from happening in the future? Did we discuss any cases involving this issue? If so, which ones? How would you have handled this situation? Was anyone harmed by this incident? Who

[368] The instructor, before revealing why the show was stopped and in effort to encourage issue spotting, could have told the students that they missed something and then ask them to figure out why the instructor stopped the show.

would be liable if this was brought to court? Can/should the employer fire a person for this action? Once the instructor exhausted the discussion on that one moment from the show, the show was restarted. The students, having realized what was expected of them, began yelling "stop the show" in earnest. With this episode, you will find that the show will be stopped practically every minute to discuss a legal issue. That is why it takes more than an hour (the show is really only 22 minutes long) to watch a half hour show. This stopping of the show every minute is also why this activity is called "Ruin A TV Show." It is hard to enjoy a television show when you are constantly stopping it to discuss legal issues. Although the show is ruined, this class activity is a lot of fun.

2. Written Assignment

The following is the extra credit written assignment version. With the move to online asynchronous teaching during the COVID 19 pandemic, it was more appropriate to do this in a written assignment, as there was no synchronous participation for a discussion to occur. Again, this assignment was given at the end of the semester and acted like a review of some of the course material.

> Ruin a TV Show:
>
> Now that you have had a little bit of legal training, it is likely that you will see legal issues arise in some of the weirdest places. For me, it is TV shows and movies. I cannot watch a TV show or a movie without pointing out the legal errors or the legal issues that have arisen in the show/movie - even if the

show/movie was not about the law. I now pass on this gift/curse to you.

In this Assignment you will be required to watch an episode of The Office called "Christmas Party" (Season 2, Episode 10). It is available for free at many local public libraries. It is available on Peacock with a Peacock subscription and you can use the free subscription to get access to this episode. It can also be found on Youtube, iTunes, and Amazon Prime for around $2.00 per episode. As you watch the episode, look for legal issues that we have learned about in class and that arise and make a note of when they occur during the episode. You will describe what is happening on the screen and note the minute and seconds it occurs during the episode. You will submit your list of legal issues in a word document. Hint: there are over 15 different legal issues in this episode. I do not expect you to find them all, but I do expect a good effort.

The following is an example of what your list should look like. Note that these aren't real events from the episode:

1. Michael pushes Dwight down from behind @ 2:55. This is an example of the tort called battery. This was an unwanted touch. It was not an assault, because Dwight did not see it coming and was not put in fear of being pushed.

> 2. Dwight tells Angela that she has nice legs and she looks uncomfortable when he says this to her @10:10. This is an example of employment discrimination and specifically sexual harassment/hostile work environment.
>
> 3. Jim falsely tells Ryan that Michael is stealing from the company @15:32. This is the tort of defamation - which is telling a lie about someone that hurts the person's reputation.

The students were given two weeks to work on this assignment and were allowed to turn it in during the final exam week. Typically, this assignment was given as an extra credit activity worth 10 points and graded according to the following rubric:

Points	Criteria
10	Correctly identified 10 or more legal issues.
9	Correctly identified 8-9 legal issues.
7	Correctly identified 6-7 legal issues.
5	Correctly identified 5 legal issues.
3	Correctly identified 4 legal issues.
1	Correctly identified 1-3 legal issues

Appendix A has a listing of all of the legal issues in this episode as found by the authors and students.

3. Group Oral/Written Final Exam

This activity can be used to assess whether students have learned the concepts taught in the LEB course. The authors created a Group Oral/Written Final

Exam. Prior to the Oral/Written Exam they were told that it was a comprehensive exam, but that they should concentrate their studying efforts on torts, employment law, agency, employment discrimination, contract law, ethics constitutional law and criminal law. The students were told that they would be watching a video during the exam and that they would be required to identify legal/ethical issues as they arise on screen. The students were also informed that they should be able to identify the area of law for each legal issue. The students knew that it was a group activity and they had chosen their group members prior to the exam. The night before the exam, the instructor emailed the students to let them know that at least one member of their group should bring a laptop to the exam.

The final exam period at the authors' institution is a three-hour session. At the beginning of the exam period, the instructor emailed each group a Google Document. That document was only accessible to the members of the group and the instructor. An example of that document is provided in Appendix B. This document contained the instructions for the oral/written exam, the grading rubric and it was also where the student would record their observations. Using a Google Document[369] allowed the instructor to see what the students were writing as they were writing it. The instructions contained the following information:

> Today, we are watching an episode of *The Office* called "Christmas Party" (Season 2,

[369] To preserve the academic integrity of this activity, in the event the instructor chooses to use it again, the instructor immediately turned off the sharing capabilities with this Google Document when the exam session ended. The students no longer had access to it once they left the classroom.

> Episode 10). As we watch the show, you will be looking for legal/ethical issues that we have learned about in class. When you identify a legal/ethical issue, someone in your group should yell "Stop the Show." The episode will then be paused.
>
> After someone has yelled "Stop the show!" you will have a few minutes to type a description of what was happening on the screen and the legal/ethical issue that has arisen in this Google Doc. Then you will identify the area of law that covers this legal/ethical issue. When time is up, the professor will review each group's submission and identify who got it right. Each group will earn 1 point if they correctly identify the issue and 1 point for correctly identifying the area of law. The Group that yelled "Stop the show" first and correctly identified the issue and area of law will get an additional point. Once points have been awarded, the show will be re-started and we will start the process all over again.

Since this group of students had been fully prepared after having studied for a comprehensive final exam, they began in earnest as soon as the show started. Immediately someone yelled "stop the show." They were given three minutes to consult with their group members and write their response. Here is an example of one of the group's responses to the first time someone yelled "stop the show:"

1. Show stopped at: 0:01
    1. Description of legal/ethical issue: The Dunder Mifflin office is promoting the Christian religion by having a Christmas

party and pushing these beliefs on its employees

2. Area of Law: Constitutional law

This group received one point for that response. They were given credit for identifying the legal issue of religious discrimination in the workplace. They were mistaken in their identification of the area of law. This is not a constitutional law issue as Dunder Mifflin is a private company. They did not get the extra point for stopping the show, because they were mistaken about the area of law.

The instructor reviewed each groups' submission for the stopped show and awarded points based upon the grading criteria. Then the instructor announced the points earned by each group and explained the correct answers. The show was started again and the process repeated itself at least fifteen more times. Requiring written responses and grading them on the spot does slow things down a bit. The benefit of grading the exam in real time was that the students knew their grades immediately. It took over two hours to get through the twenty-two-minute show thus, completely ruining the show with this activity.

4. More Options for This Activity

There are more options for adapting this activity to meet the needs of an instructor of an LEB course. This activity can be made into a longer paper assignment that goes beyond just issue spotting. For example, an instructor may want the students to identify a case discussed in class that involves a similar legal issue found in the show. Instructors can require students to identify which, if any, of the parties would be liable for that legal issue and have students suggest solutions to resolve and/or prevent this legal issue from happening again.

The authors have always used this activity towards the end of class; however, using it earlier in the semester or even on the first day of class can be beneficial to the instructor and student. Using the class discussion variation of this activity on the first day can accomplish many beneficial goals for the instructor. You can connect with students on a personal level.[370] As discussed above, members of Generation Z enjoy watching *The Office* and bringing something that they enjoy and are familiar with to that first day of class can help build that student-instructor rapport. The instructor can set the tone of the course by encouraging respectful class discussion throughout the course at the outset.[371] Finally, this activity introduces course content right off the bat and since an LEB course has a lot of material to cover, "every minute of class time is precious."[372] The discussion will be more limited using it at the beginning of the course, as you have not discussed cases and/or elements of legal claims; however, you will get a good sense of what the students already know about some legal issues and what may need further explanation to cover later on in the course.

Using this activity very often as a graded assignment or exam, could lead to some issues of academic integrity. Students from prior semesters could share details about the discussion with newer students. To avoid that, the authors recommend switching out the episodes and/or using a completely different show altogether. Legal television series like *Law & Order*[373] or

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[370] Michael R. Koval, *Step Away from the Syllabus: Engaging Students on the First Day of Legal Environment*, 30 J. LEGAL STUD. ED. 179, 180 (2013). Professor Koval's *Bistro 24* activity was inspired by the television show *24*.

[371] *Id.*

[372] *Id.* at 181.

[373] NBC television broadcast, https://www.nbc.com/law-and-order.

Better Call Saul[374] have story lines that specifically involve legal issues so they may have some good topics to discuss in class. However, using legal television series for an issue spotting exercise, may not be that helpful as the legal issues could be pretty obvious. Television series that are not related to the law will make legal issue spotting more challenging. For example, in the television series *Ghosts*[375] a young couple are starting a business by turning their older home into a bed and breakfast. The home is inhabited by ghosts and one of the characters can see and talk to them. In the episode called *Spies*[376] many legal and ethical issues arise regarding privacy and the authenticity of customer reviews when the ghosts volunteer to spy on the bed and breakfast guests.

5. Bloom's Taxonomy

When determining whether to incorporate this activity into your LEB course and whether it meets your course's learning goals, consider Bloom's Taxonomy. This activity in the class discussion format engages Bloom's Taxonomy (as revised) of cognitive process.[377] The revised Taxonomy defines the learning process as:

- "Remember: Retrieve relevant knowledge from long-term memory."

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[374] AMC Network Entertainment, LLC, https://www.amc.com/shows.
[375] Paramount, https://www.cbs.com/shows/ghosts/.
[376] *Id.* Season 2, Episode 1, September 28, 2022.
[377] *See* Eric D. Yordy & Amy Criddle, *Climbing Bloom's Ladder with the Confidential Settlement*, 35 J. LEGAL STUD. EDUC. 231 (2018); Julie Furr Youngman, *From Remembering to Analyzing: Using Mini Mock Arguments to Deepen Understanding and Increase Engagement*, 37 J. LEGAL STUD. EDUC. 53 (2020).

- "Understand: Construct meaning from instructional messages, including oral, written, and graphic communication."
- "Apply: Carry out or use a procedure in a given situation."
- "Analyze – Break material into constituent parts and determine how parts relate to one another and to an overall structure or purpose."
- "Evaluate – Make judgments based on criteria and standards."
- "Create – Put elements together to form a coherent or functional whole; reorganize into a new pattern or structure."[378]

The class discussion format described above challenges the students along Bloom's Taxonomy. This exercise requires students to "Remember" what had been taught throughout the semester, thus engaging their long-term memory. Students demonstrate that they "Understand" the information on the television screen when they alert the instructor to "stop the show" and explain what they saw as a legal/ethical issue. The students "Analyze" what is on screen and determine whether what is shown is a legal, ethical or no issue at all. If a legal issue, they will determine what area of law is implicated. The discussion questions asking them to identify who would be liable in this situation requires that they engage the cognitive process of "Evaluate." Finally, when asked how they would handle the situation to prevent this legal issue from arising again or in the first place, the answer requires that they "Create" a solution

[378] Youngman, *supra* note 55, at 56 (quoting LORIN W. ANDERSON ET AL., A TAXONOMY FOR LEARNING, TEACHING, AND ASSESSING: A REVISION OF BLOOMS TAXONOMY OF EDUCATIONAL OBJECTIVES, 31 (2001).

from what is presented on the television screen. Therefore, depending on your course's leaning goals, this activity in its various formats is likely to satisfy those that follow Bloom's Taxonomy.

IV. CONCLUSION

The "Ruin a TV Show" activity is a great end of the semester activity. It allows students to demonstrate what they have learned and challenges them to apply what they have learned in a "mock" business setting. Students will realize how much they have learned in just one semester and they will see how what they learned in LEB is applicable in the real world. Having the ability to spot legal and ethical issues as they arise in the day-to-day office setting and honing this issue spotting ability will make them valuable employees and business owners.

Appendix A:
Legal Issues Raised in the "Christmas Party" episode of *The Office.*

Number	Time	Legal Issue
1	0:00	The fact that this business is hosting a party called a "Christmas Party" on company property could raise some issues regarding religious discrimination. Individuals who work at this business and who do not follow a Christian religion could feel like they are being forced to celebrate a religious holiday that they do not believe in. It appears that they cannot remove themselves from this activity because it is taking place during the work day and in the workplace. Some students may claim this violates the First Amendment – freedom of religion. However, this is a private employer and the US Constitution limits the government's ability to act in a discriminatory fashion. Has this show been *Parks and Rec*, which takes place in a government setting, than a constitutional violation would be implicated. Area of Law: Employment Discrimination
2	0:29	Dwight and Michael are caring a Christmas tree through the front door of the office and Dwight

		exclaims that he just got a splinter. When a worker suffers an injury on the job, it could be a worker's compensation claim. Negligence is implicated here as it appears neither worker has the proper safety equipment (gloves) to do the job in a safe manner. Area of Law: Employment Law/Worker's Compensation
3	0:45	As Dwight and Michael lift the tree into place, they dislodge and damage a ceiling tile. The tree is too tall to fit into the office space. Through their negligence, Dwight and Michael cause damage to the property. Area of Law: Tort/Negligence
4	1:34	After Kevin trims the tree top using a paper cutter/trimmer, he asks Michael why did he get it so big and Michael looks into the camera and says "that's what she said." This is a sexual innuendo and could be considered sexual harassment. Michael is the supervisor of the office and in that role he exposes the company to liability using that sort of language in the workplace. Use of this language could rise to the level of a hostile work environment. Area of Law: Employment Discrimination/Sexual Harassment
5	1:51	Kevin asks Michael what will they do with the chopped off top of the

		tree. Michael tells him that that is a "perfectly good mini tree" and that they will sell it to charity. Assuming that Michael used company funds to purchase the tree, taking a part of it and selling and then keeping the proceeds would be considered the intentional tort of conversion or the crime of larceny. Area of Law: Tort/Conversion and Criminal/Larceny
6	2:00	Jim explains that for the office "secret" gift exchange that he had chosen his coworker Pam's name. He then describes a very personal gift – teapot, photo, mixtape, hot sauce – each item having a story behind it, which involved him observing her behavior and remember incidents years later. He then states that he wrote a card to Pam because at Christmas you tell people how you feel about them. If Pam is not receptive to his feelings and this personal gift, it could be viewed as a form of sexual harassment. It could feel like he was stalking her and using their office friendship as a way to get to get close to her. The employer should have a mechanism in place for Pam to report this behavior in the event that it is unwanted. Area of Law: Employment

		Discrimination/Sexual Harassment.
7	3:14	Michael walks into a side office where his employees are planning the party. He is wearing a Santa hat and white beard. As he walks in he says "Merry Christmas" and then pointing at the three women in room he says "Ho ho ho" and then pointing at the one man in the room and says "Pimp." Michael is insinuating that the women are prostitutes. This is sexual harassment – hostile work environment. Area of Law: Employment Discrimination/Sexual Harassment
8	3:49	Michael grabs the back of the necks of two female employees and as he says "I want people making out," he pushes the women's head closer together. This is the intentional tort of battery – an unwanted offensive touch. It is not an assault as the women could not see that he was about to grab them from behind. Area of Law: Tort/Intentional Tort
9	4:26	Two employees are shown trying to move a very heavy desk. Dwight suggests that they should use a hand truck. One asks if they had one and Dwight says no. This is possible of violation of company policy and/or an OSHA rule regarding lifting.

		Area of Law: Employment Law/Worker Safety
10	4:38	Michael is in his office talking to two employees. Darryl, an African American, asks to borrow his Santa hat. Michael asks the employee if he has seen Santa, when the employee responds that he has, Michael says I'm sorry, it just doesn't work. Dwight then asks if he could be an elf and Michael says that makes sense because he has "elfish features," he is Caucasian. Area of Law: Employment Discrimination/Racial Discrimination
11	5:41	Various employees discuss what they got as gifts for their secret santas. Oscar states that the knows nothing about Creed other than that he works there. He says that Creed looks Irish so he got him a shamrock key chain. This could lead to an awkward situation in the even that Creed is not Irish. This could develop into a hostile work environment based upon stereotypes of national origin. Area of Law: Employment Discrimination/National Origin
12	8:11	During the opening of Secret Santa gifts, Ryan opens his up and discovers an expensive iPod. Michael tells everyone it is from him. Ryan looks uncomfortable.

		We learned earlier that Michael has spent more on the iPod than the agreed upon $20 limit. This is a breach of the agreement the parties entered into to participate in this activity. [Is it a breach of contract? Are all of the elements of a contract present?] This is also unethical behavior on the part of Michael. He is the supervisor, he makes more money than the other employees. We also learned that he received a $3,000 Christmas bonus because he fired someone. This makes it look like he favors one employee over all others. Area of Law: Contract Law Ethical Issues
13	8:48	Michael opens up his gift to discover the Phyllis has hand-knitted him an oven mitt. It is clear that Michael does not like this gift and he storms off. Phyllis is clearly shaken by his reaction. Michael is clearly not following the agreed upon rules of this activity and making his employees stressed. Area of Law: Contract Law? Ethical Issues
14	9:21	Michael returns to the gift exchange and announces that they are changing it from Secret Santa to Yankee Swap. Before someone opens a gift they can choose one of the already opened gifts. Then

		the person whose gift was taken, gets to choose another unopened gift under the tree. This announcement is clearly upsetting to everyone, including Phyllis. Angela actually cries because of this change. This could be viewed as intentional harassment or intentional infliction of emotional distress. Area of Law: Tort [Does this rise to the level of egregious behavior required for intentional infliction of emotional distress?]
15	12:03	The gift exchange is still going on. After Michael is talking about how great the oven mitt is, Meredith says that she will take it. Michael then yells "sucker!" Thus, further humiliating Phyllis. Area of Law: Tort/Intentional – [Does this rise to the level of egregious behavior required for intentional infliction of emotional distress?]
16	12:52	After Michael opens a gift from Dwight, he again is disappointed in it. He rips the elf ears off of Dwight's head and then throws them at him. The removing of the ears from Dwight's head is a battery. It is also an assault because Dwight watched Michael's hands come towards and therefore was able to put in fear of an imminent battery.

		Michael throwing the ears at Dwight are also an assault and battery. Dwight saw the ears being thrown at him (assault) and then felt the impact of the ears hitting him (battery). Area of Law: Tort/Intentional
17	14:32	Michael reveals that he got a $3,000 bonus. This is likely a violation of company policy. Many companies discourage and/or ban the discussion of salary among employees. Area of Law: Contract Law/Company policy
18	16:10	Michael walks into the office with 15 bottles of vodka. We had learned earlier that company policy prohibited alcohol in the workplace. This could raise some issues of liability for the employer. If an employee gets intoxicated at this work event on work property and then injures someone, the employer could be liable. Especially, since Michael is a supervisor and supplying his employees with alcohol at work. However, the employer may have a good defense in that Michael is violating workplace policy and the supplying of alcohol is not in his scope of employment. Area of Law: Agency/Respondeat Superior and Contract Law/Company Policy

19	19:01	A guest (Packer) at the party comes up behind Michael and puts him into a headlock. This is a battery – an offensive touch. It is not an assault since Michael did not see him coming. Area of Law: Tort/Intentional
20	19:13	Packer points out that he has mistletoe attached to his pants over his crotch. This is sexual harassment and contributes to a hostile work environment. Area of Law: Employment Discrimination/Sexual harassment
21	19:27	Packer comes up behind Meredith as she is dancing and grabs her waist and butt. This is a battery and sexual harassment. Area of Law: Tort/Intentional and Employent Discrimination/Sexual Harassment.
22	19:44	Kevin is posting photo copies of his naked butt on the wall. This is sexual harassment. Creates a hostile work environment. Area of Law: Employment Discrimination/Sexual Harassment
23	19:53	Packer is passed out. Various employees have decorated him with Christmas decorations as he slept and one is spraying him with silly string. These are all unwanted touches or batteries. Area of Law: Tort/Intentional
24	20:07	Kelly goes into the kitchen area where Dwight is looking in the

		refrigerator. She then surprises him by grabbing him and kissing him. This is an assault and battery along with sexual harassment. Area of Law: Tort Law/Intentional and Employment Discrimination/Sexual harassment.
25	20:22	Angela is seen outside throwing Christmas ornaments on the ground and breaking them. Assuming the ornaments are not hers, this is the tort of conversion. She is taking the ornaments with the intent to deprive the owner of possession of them. This could also be larceny of office property. Area of Law: Tort Law/Intentional and Criminal Law/Larceny
26	21:12	Meredith goes into Michael's office and takes off her top. This is sexual harassment. Area of Law: Employment Discrimination/Sexual Harassment.
27	21:17	Michael takes a picture of Meredith without her top on. Earlier Michael said that the best and craziest thing that happens will be photographed and put in the office newsletter. Meredith is drunk, she cannot consent to this photo. If Michael puts into the newsletter, he will have committed the tort of appropriation. Area of Law: Tort Law/Intentional

Appendix B

Ruin a TV Show - Final Oral/Written Exam - Group 1

Use this Google Doc to record your answers during our activity. This document is shared with all of the members of your group and with the instructor.

Directions:

Now that you have had a little bit of legal training, it is likely that you will see legal issues arise in some of the weirdest places. For me, it is TV shows and movies. I cannot watch a TV show or a movie without pointing out the legal errors or the legal issues that have arisen in the show/movie - even if the show/movie was not about the law. I now pass on this gift/curse to you.

Today, we are watching an episode of *The Office* called "Christmas Party" (Season 2, Episode 10). As we watch the show, you will be looking for legal/ethical issues that we have learned about in class. When you identify a legal/ethical issue, someone in your group should yell "Stop the Show." The instructor will then pause the episode.

After someone has yelled "Stop the show!" you will have a few minutes to type a description of what was happening on the screen and the legal/ethical issue that has arisen in this Google Doc. Then you will identify the area of law that covers this legal/ethical issue. When time is up, the instructor will review each group's submission and identify who got it right. Each group will earn 1 point if they correctly identify the issue and 1 point for correctly identifying the area of law. The Group that yelled "Stop the show" first and correctly

identified the issue and area of law will get an additional point.

Once points have been awarded, the show will be re-started and we will start the process all over again.

> Example: Michael pushes Pam from behind. Michael has committed a battery. This was an unwanted touch. It is not an assault because Pam did not see Michael behind her and she was not put in fear of an imminent battery.
> Area of Law: Tort law

Hint: there are over 20 different legal/ethical issues in this episode.

Grading:

Points earned	Letter Grade
35	A
33	A-
31	B+
30	B
27	B-
26	C+
24.5	C
23.5	C-
22	D+
21	D
0	F

THRESHOLD CONCEPTS AND BARRIERS TO LEARNING IN UNDERGRADUATE BUSINESS LAW

DEBRA BURKE[*]
JOAN PARKER-WEBSTER[**]

I. INTRODUCTION

Do you know before the semester even starts what concepts your students will find difficult to comprehend? Can you forecast what test questions they will miss because they will answer the question seemingly from a gut feeling instead of based on the course materials and lectures? When you write multiple choice distractors, do you have an uncanny idea about what they will be erroneously assuming and include it as a choice? Arguably, there is an explanation for this predictable disconnect between what business law professors teach and what students process. Certain concepts in every discipline can be difficult to digest and internalize because they are counterintuitive and contrary to the outcome expected by students. But there are strategies to counter this repetitive phenomenon of barriers to understanding.

Jan Meyer and Ray Land, distinguished researchers in the United Kingdom on academic practice in teaching and learning, introduced the theory of

[*] MPA, JD Professor, Western Carolina University.
[**] EdD, Professor, University of Alaska-Fairbanks (retired).

threshold concepts to identify learning outcomes that represent a fundamental shift in the understanding of a subject which distinguishes how experts in the discipline think.[379] They described the concept as "akin to passing through a portal, opening up a new and previously inaccessible way of thinking about something."[380] Threshold concepts are not the equivalent of core concepts, or building blocks that progress a student's understanding of the subject, although they are necessary to bring students to a threshold concept.[381] Such an "accumulation of knowledge may lack context, meaning or significance and may simply be encountered as a bizarre mass of seemingly unrelated information" until a student comprehends the relevant threshold concept.[382]

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[379] *See* Jan H.F. Meyer & Ray Land, *Threshold Concepts and Troublesome knowledge: An introduction*, *in* OVERCOMING BARRIERS TO STUDENT UNDERSTANDING: THRESHOLD CONCEPTS AND TROUBLESOME KNOWLEDGE (Jan H.F. Meyer & Ray Land, eds. 2006) (discussing the theory). Since the early 2000s there have been themed pedagogical conferences on threshold concepts in the various disciplines. The ninth biannual conference on threshold concepts was held at the Charles Sturt University, Port Macquarie Campus, NSW, Australia Concepts in the summer of 2023. *Call for Papers 2023*, THRESHOLD CONCEPTS, https://thresholdconcepts.home.blog/ (last visited Sept. 13, 2023). The literature on the theory has grown exponentially since the first papers by Meyer and Land were published.

[380] Meyer & Land, *id.* at 3.

[381] Fiona Donson & Catherine O'Sullivan, *Building block or stumbling block? Teaching actus reus and mens reus in criminal law*, THE TEACHING OF CRIMINAL LAW: THE PEDAGOGICAL IMPERATIVES 21, 26 (Kris Gledhill & Ben Livings eds. 2017).

[382] Aidan Ricketts, *Threshold Concepts in Legal Education*, DIRECTIONS: J. EDUC. STUD. (Dec. 2004), at 2, http://www.directions.usp.ac.fj/collect/direct/index/assoc/D1175070.dir/doc.pdf.

Similarly, some knowledge may be difficult to grasp, but not be threshold.[383] "Threshold concepts are unique to a discipline, cause an irreversible change in a person's cognitive understanding of the discipline, are difficult and challenging (troublesome) to master, and are transformative."[384] Threshold concepts are characterized by these features:

> *Transformative:* Once understood, a threshold concept changes the way in which the student views the discipline.
> *Troublesome:* Threshold concepts are likely to be troublesome for the student.
> *Irreversible:* Given their transformative potential, threshold concepts are also likely to be irreversible, i.e., they are difficult to unlearn.
> *Integrative:* Once learned, threshold concepts, are likely to unite aspects of the subject that previously did not appear to be related.
> *Bounded:* A threshold concept will probably delineate a particular conceptual space, serving a specific and limited purpose.[385]

Threshold concepts are transformative because they not only alter how a particular phenomenon is viewed, but also impact other sets of ideas about the

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[383] Sophie Hill, *The difference between troublesome knowledge and threshold concepts*, 45 STUD. HIGHER EDUC. 665, 667 (2020).
[384] Lucille A. Jewel, *Old-School Rhetoric and New-School Cognitive Science*, 13 LEGAL COMM. & RHETORIC: JALWD 39, 72 (2016).
[385] Meyer & Land, *supra* note 1, at 7-8.

discipline; they are irreversible because once mastered, it becomes difficult to re-set and to envision the topic as previously considered.[386] Examples include hypothesis testing in biology[387] and discourse, genre and context in history.[388] An evolutionary grasping of threshold concepts permits sufficient reflection and achieves the desired learner transformation.[389]

This article explores the literature of threshold concepts and barriers to understanding. It first provides an overview of the theory and then discusses the application of threshold concepts to the study of law as a discipline, including the concepts of malleability, uncertainty, the consideration of moral implications, and the integrative aspects of substantive and procedural law.

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[386] Peter Davies & Ross Guest, *Introduction to Threshold Concepts*, 8 INT'L REV. ECON. EDUC. 6, 10 (2009), https://www.researchgate.net/publication/46553346_Introduction_to_Threshold_Concepts.

[387] Charlotte Taylor, *Threshold Concepts in Biology: Do they fit the definition?*, OVERCOMING BARRIERS TO STUDENT UNDERSTANDING: THRESHOLD CONCEPTS AND TROUBLESOME KNOWLEDGE 87, 95-96 (Jan H.F. Meyer & Ray Land, eds. 2006).

[388] Linda Adler-Kassner, John Majewski & Damian Koshnick, *The Value of Troublesome Knowledge: Transfer and Threshold Concepts in Writing and History*, COMPOSITION FORUM (Fall 2012), http://compositionforum.com/issue/26/troublesome-knowledge-threshold.php. *See also* Natalia Vidal, Renae Smith, & Wellington Spetic, *Designing and Teaching Business & Society Courses from a Threshold Concept Approach*, 39. J. MGMT EDUC. 497 (2015) (asserting that ethics, corporate social responsibility, and sustainability are threshold concepts for business and society courses).

[389] Puvanambihai Natanasabapathy & Sandra Maathuis-Smith, *Philosophy of being and becoming: A transformative learning approach using threshold concepts*, 51 EDUC. PHIL. & THEORY 369, 378 (2019).

It continues by discussing these concepts, particularly barriers to their understanding, as being instructive of the challenges for teaching business law. Finally, it explores some concepts that are troublesome to business law students to discern why they are particularly challenging, and to raise a heightened awareness and to urge vigilance in making sure those portals to troublesome knowledge are opened.

II. THRESHOLD CONCEPTS OVERVIEW

Threshold concepts assist educators in discerning an effective learning environment within disciplines and in illuminating linkages to thinking and practicing within those disciplines.[390] They focus on the parts of a discipline that are key to understanding at a more macro level that unlock a deeper level of comprehension, and not necessarily to mastering a skill or ability, which takes practice.[391] Threshold concepts transform the assimilation of the learner's understanding, are irreversible in their comprehension (not easily forgotten) and are integrative in the sense that they expose previously hidden interrelatedness of concepts.[392] Because they demand an integration of ideas and a

[390] Meyer & Land, *supra* note 1, at 16.

[391] *See* David Heading & Eleanor Loughlin, *Lonergan's insight and threshold concepts: Students in the liminal space*, 23 TEACHING HIGHER EDUC. 657, 658-59 (2017), https://www.researchgate.net/publication/321908364_Lonergan%27s_insight_and_threshold_concepts_students_in_the_liminal_space.

[392] Glynis Cousin, *Threshold concepts, troublesome knowledge and emotional capital: An exploration into learning about others*, OVERCOMING BARRIERS TO STUDENT UNDERSTANDING: THRESHOLD CONCEPTS AND TROUBLESOME KNOWLEDGE 134, 135-37 (Jan H.F. Meyer & Ray Land, eds. 2006).

transformation of the learner's understanding, they can be inherently problematic to grasp.[393]

The threshold concepts framework emphasizes transformational learning experiences evidenced by the comprehension, internalization and integration of critical concepts.[394] Conceptual portals or gateways to such concepts are often the points at which students experience difficulty and may find understanding troublesome because, for example, they require a letting go of familiar views and beliefs previously held.[395] When entering these gateways, students can experience a transformative state, also referred to as liminality,[396] which is a transitioning from one previously held understanding to a new one.[397] Attention to threshold concepts helps students navigate this liminal space of true learning by providing a greater understanding as students progress between old and new understandings.[398] Liminal spaces for learning are not

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[393] Ray Land et al., *Implications of threshold concepts for course design and evaluation*, OVERCOMING BARRIERS TO STUDENT UNDERSTANDING: THRESHOLD CONCEPTS AND TROUBLESOME KNOWLEDGE 195, 196 (Jan H.F. Meyer & Ray Land, eds. 2006).

[394] Jan H.F. Meyer, *Threshold concepts and pedagogic representation*, 58 EDUC. + TRAINING 463, 464-65 (2016).

[395] Jan Meyer & Ray Land, *Threshold concepts and troublesome knowledge: Epistemological considerations and a conceptual framework for teaching and learning*, 49 HIGHER EDUC. 373, 373-374 (2005).

[396] Ray Land, Julie Rattray & Peter Vivian, *Learning in the liminal space: A semiotic approach to threshold concepts*, 67 HIGHER EDUC. 199, 201 (2014).

[397] This notion of a liminal space for learning, is also described as the zone of proximal development (ZPD). Lev Vygotsky, *Internalization of higher psychological functions*, MIND IN SOCIETY: THE DEVELOPMENT OF HIGHER PSYCHOLOGICAL PROCESSES 84-86 (Michael Cole, et al., eds. 1978).

[398] Jan H.F. Meyer & Ray Land, *Threshold concepts and*

defined by linearity necessarily, but are "liquid" spaces, simultaneously transforming and being transformed by learners as they move through it,[399] and are marked by the recursive nature of liminality.

In educational settings, these liminal spaces are not only dynamic,[400] but also particularly troublesome if the learner is unable to achieve a transformed status. As a result, the learner remains stuck in a suspended state in which understanding can approximate to a kind of mimicry or lack of authenticity in comprehension.[401] In other words, students merely regurgitate what they hear from the instructor without any true understanding. Understanding is the process of learning and coming to know. In the liminal space of understanding, arguably, instead of a single discrete moment when a concept is grasped, there is a process that culminates in an insight or a series of insights that can vary based upon the individual

troublesome knowledge: linkages to ways of thinking and practising, IMPROVING STUDENT LEARNING – TEN YEARS ON (C. Rust ed. 2003).

[399] Meyer & Land, *supra* note 17, at 377.

[400] This liminal zone is not static and is constantly in flux, meaning the roles of learner and teacher are never fixed, and the relationships between the cultural resources of the learners and teachers are situated in social interactions constituting the learning event. Joan Parker-Webster & Theresa Arevgaq John, *Preserving a space for cross-cultural collaborations: an account of insider/outsider issues*, 5 ETHNOGRAPHY & EDUC.175, 187 (2010).

[401] Meyer & Land, *supra* note 17, at 377. While mimicry can often be interpreted by instructors as simple reproduction of information by the student to fulfill an assignment, instead it may reflect a point in a process which "involves the learner's attempts at understanding that emerge as limited understanding or troubled misunderstanding." *Id*.

learner.[402] "Not all learners see or reach the light at the end of the tunnel and some may remain in the old understanding, never crossing the threshold and… [o]thers may struggle for a greater or lesser period before passing the threshold and entering into a new and deeper understanding of the subject."[403] In other words, learners may oscillate between a previous, less sophisticated understanding and the more elusive deeper comprehension of the concept.[404]

Troublesome knowledge encountered in these spaces is counter-intuitive, seemingly alien, and intellectually absurd to the untransformed learner.[405] Conceptually difficult knowledge may result from a mix of misimpressions from everyday experience as well as from reasonable, but mistaken, expectations.[406] Difficulty in grasping knowledge conceptually also may arise from the knowledge being foreign, that is, from a perspective that conflicts with the learners, such as in historical studies, viewing past events through present knowledge and values.[407] Moreover, preconceived notions held by

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[402] Heading & Loughlin *supra* note 13, at 660-68 *(*discussing how insights of individual learners complement threshold concepts).

[403] *Id*. at 658.

[404] Land et al., *supra* note 15, at 196.

[405] Meyer & Land, *supra* note 1, at 3.

[406] David Perkins, *The Many Faces of Constructivism*, EDUC. LEADERSHIP, Nov. 1999, at 9, https://people.wou.edu/~girodm/library/Perkins.pdf. *See* Martin Shanahan & Jan H.F. Meyer, *The Troublesome Nature of a Threshold Concept in Economics, in* OVERCOMING BARRIERS TO STUDENT UNDERSTANDING: THRESHOLD CONCEPTS AND TROUBLESOME KNOWLEDGE 100 (Jan H.F. Meyer & Ray Land, eds. 2006) (examining characteristics of troublesome knowledge as applied to the concept of opportunity cost in economics).

[407] Perkins, *id.* at 10.

students that contradict the authorized concepts of the discipline can become a barrier to traversing the threshold of the discipline.[408] That is, pre-existing affective learner positions, in which some learners may be defensive, disaffected or clouded by personal experience, can make it more challenging for students to engage in some disciplines.[409]

Often the learner must understand some discipline-based knowledge before the threshold concept can be grasped in an integrative way. In other words, there can be no real understanding of a threshold concept until the learner has some content mastery; once there is some content knowledge, that knowledge can be interpreted considering the threshold concept.[410] In this manner, core concepts, while not transformative in nature, may be essential for student understanding of the discipline.[411] Language used within a discipline also can be troublesome and contribute to the conceptual

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[408] *See* Ursula Lucas & Rosina Mladenovic, *Developing new "world views": Threshold concepts in Introductory accounting, in* OVERCOMING BARRIERS TO STUDENT UNDERSTANDING: THRESHOLD CONCEPTS AND TROUBLESOME KNOWLEDGE 148, 151-56 (Jan H.F. Meyer & Ray Land, eds. 2006) (discussing how negative preconceptions of the discipline as well as students' everyday understanding of accounting, such as profit/loss and cash flow, can create a barrier to understanding).

[409] Cousin, *supra* note 14, at 139-45.

[410] Peter Davies, *Threshold concepts: How can we recognize them?*, OVERCOMING BARRIERS TO STUDENT UNDERSTANDING: THRESHOLD CONCEPTS AND TROUBLESOME KNOWLEDGE 70, 75-76 (Jan H.F. Meyer & Ray Land, eds. 2006).

[411] Donson & O'Sullivan, *supra* note 3, at 26. The use of case studies in business schools helps students use the salient characteristics of content knowledge to understand threshold concepts in context. Davies, *supra* note 32. at 81.

challenges.[412] Moreover, liminal spaces can be particularly vexing when learners are stuck in a transitioning from one troublesome concept to another due to the sequential nature of concepts being explained and understood in terms of other concepts; and if any of these concepts are not fully understood, or even misunderstood, then the description or representation will be misunderstood. The next section discusses some threshold concepts in specific disciplines that students must traverse as they encounter troublesome knowledge which challenges their assumptions and requires a deeper understanding of the subject.

III. THRESHOLD CONCEPTS IN LAW

A. Malleability, Uncertainty & Reasoning

The study of law through cases and precedent, the bifurcation between procedural and substantive law, and the crucial ingredient of identifying and analyzing legal issues are all hallmarks of studying law, as well as the use of the Socratic method in legal inquiry.[413] But what

[412] Meyer & Land, *supra* note 1, at 14-15. For example, business law students may think that "contributory," as in contributory negligence means everyone contributed to the harm instead of it meaning plaintiff fault. Similarly, students tend to think that negligence per se means the end of the case entirely, plaintiff wins, although negligence per se means the breach of a statutory duty of care, leaving causation and damages to be proven. There are other examples of the potential for confusion with the use of legal terminology and instructor awareness of that likelihood is important to the students' grasp of more advanced conceptualizations.

[413] Vida Allen, *A Critical Reflection on the Methodology of Teaching Law to Non-law Students*, 4 WEB J. CURRENT LEG. ISSUES (2007),

threshold concepts have been identified in the literature? *Malleability* is asserted as a threshold concept in law because it marks the difference between law and other disciplines and transforms one's understanding of how the law works within institutions and society.[414] Malleability, as defined in this context, "is an understanding of the latitude or flexibility a lawyer has in articulating legal principles."[415] The malleability of legal principles, or latitude and flexibility permitted in advocacy, recognizes that the law is not as a static set of rules, but, of course, is constrained by ethical and professional norms.[416]

Legal reasoning has been put forward as threshold concept as well.[417] Arguably, malleability is a critical component of legal reasoning and case synthesis may be a threshold for legal reasoning as well.[418] Analogy also is central to legal reasoning, for example, when a law professor poses a hypothetical based on case law, when an attorney advises a client to settle based on precedent,

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https://letr.org.uk/references/storage/CG6VHZ5Q/allen4.html.

[414] Melissa H. Weresh, *Stargate: Malleability as a threshold Concept in Legal Education*, 63 J. LEG. EDUC. 689 (2014) (recognizing the malleability of legal principles as a threshold concept). *But see* Donson & O'Sullivan, *supra* note 3 (concluding that tolerance for uncertainty is a key threshold concept for law students, particularly in criminal law).

[415] Weresh, *supra* note 36, at 719. For example, malleability is exemplified in an ability to craft statements of law more broadly or narrowly depending upon the objective. *Id.* at 722.

[416] *Id*. at 710.

[417] Alex Steel*, Succeed, question, repeat: threshold concepts and variation theory in understanding how law students build competency*, 53 THE LAW TEACHER 231, 236-27 (2019) (citations omitted).

[418] Weresh, *supra* note 36, at 723, 715.

or when a judge adopts one precedent over another because it is more on point.[419] Analogies are most impactful for making learning connections with students when the context is familiar and relevant instead of ambiguous and overcomplicated.[420]

Some writers assert that the law is more than malleable, but is in fact uncertain, and that uncertainty is a threshold concept in law.[421] This reality can strike terror in students because of their preconceived notions that the law was a set of clearly defined rules that are dutifully followed and applied to cases.[422] Otherwise, how can the law order society or be the rule of right not might, unless it is inflexible? Nevertheless, the law is reviewed by policy makers and repeatedly changes in response to and by judicial decisions, legislative enactments, and

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[419] Dan Hunter, *Teaching and Using Analogy in Law*, 2 J. ASS'N LEGAL WRITING DIRECTORS 151, 151 (2004).

[420] Simon Bishop, *Using analogy in science teaching as a bridge to students' understanding of complex issues, in* OVERCOMING BARRIERS TO STUDENT UNDERSTANDING: THRESHOLD CONCEPTS AND TROUBLESOME KNOWLEDGE 187-92 (Jan H.F. Meyer & Ray Land, eds. 2006). "Clarity and simplicity should be the hallmarks of analogical teaching." *Id.* at 192. Tools such as Issue, Rule, Analysis, Conclusion (IRAC) can assist students to grasp legal analysis. *See* Lawrence J. Trautman, et al, *IRAC! IRAC! IRAC!: How to Brief Any Legal Issue*, 29 SO. L.J. (Fall 2019), https://southern-law-journal.s3.us-east-2.amazonaws.com/2019_2/11_SLJ_Fall+2019_Trautman+et+al.pdf (discussing the tool). However, one could argue such constructs may be counter-productive in crossing the threshold because students rely on them rather than struggling to master the underlying logic and complexity of legal reasoning. Steel, *supra* note 39, at 234 (citations omitted).

[421] Donson & O'Sullivan, *supra* note 3, at 24.

[422] *Id.* at 24-25.

regulatory updates.[423] Moreover, the previous interpretation of constitutional provisions, statutes and regulations are constantly challenged by new and distinguishable cases, allowing the law to be refined and nuanced continually. Expectations of the law and the purpose of the law, or what students innately thought was the law, can be shattered when uncertainty is introduced. Nevertheless, the recognition and *tolerance of uncertainty* is a threshold concept that students must internalize to complete their journey.[424]

The Socratic method involves questioning in aid of the discovery of knowledge and can focus attention on the learner's personal belief systems, which may implicate an emotional response in the learner when the subject matter involves philosophical issues.[425] However, its employment may exacerbate the challenge that students face in accepting the threshold concept of uncertainty because "the truth-seeking function of the method encourages rather than discourages a view that there is a true law that may be discovered and applied"[426] which fails to consider the dynamic nature of the law.

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[423] *Id.* Indeed, legal reading of statutes and statutory interpretation may be considered a threshold concept, as well as the ability to understand how they can be applied in different contexts. Steel, *supra* note 39, at 242.

[424] Donson & O'Sullivan, *supra* note 3, at 25.

[425] Jenifer Booth, *On the mastery of philosophical concepts: Socratic Discourse and the unexpected "affect", in* OVERCOMING BARRIERS TO STUDENT UNDERSTANDING: THRESHOLD CONCEPTS AND TROUBLESOME KNOWLEDGE 178-79 (Jan H.F. Meyer & Ray Land, eds. 2006). For a discussion of the method see Matt Hlinak, *The Socratic Method 2.0*., 31 J. LEG. STUD. EDUC. 1, 1-6 (2014).

[426] Laura A. Webb, *Speaking the Truth: Supporting Authentic Advocacy with Professional Identity Formation*, 20 NEV. L.J. 1079, 1102 (2020).

Although it encourages good arguments on both sides of an issue, it may tilt to the notion that one is correct, so some sort of legal truth emerges in the form of the courts' black-letter law, such that the Socratic method leads them to the knowledge of true law,[427] when in fact the law remains uncertain and malleable. Nonetheless, as one scholar posited, the legal learner who has crossed the uncertainty threshold in law not only deals with uncertainty, but relishes ambiguity, seeking precedents to bind or distinguish them and appreciates "the difference, if there is one, between what the law is and what the law should be."[428]

B. Morality & Context

Given that there indeed may be a difference between what the law is and what it should be, another threshold concept in learning law may be that *law and morality do not completely overlap*.[429] The law is often the result of political compromises, and opinions of proper moral choices may vary between persons. That the law may not be ideal, makes the liminal space between old and new understandings a more troublesome one to traverse. For example, students expect the law to enforce

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[427] *Id.* at 1102-03. The method also can be power-centered and professor-centered instead of student centered. Jamie R. Abrams, *Legal Education's Curricular Tipping Point Toward Inclusive Socratic Teaching*, 49 HOFSTRA L. REV. 897, 943 (2021).

[428] Rebecca Huxley-Binns, *Tripping over thresholds: a reflection on legal andragogy*, 50 LAW TEACHER 1, 14 (2016).

[429] "A fundamental principle of business ethics is that to truly be ethical one must be willing to do more than the law requires and less than it allows." Marc Lampe, *A New Paradigm for the Teaching of Business Law and Legal Environment Classes*, 23 J. LEG. STUD. EDUC. 1, 11 (2006).

promises, but the doctrine of consideration tempers that expectation with its requirement of a bargained for exchange of legal value for the enforceability of promises under contract law.[430] That the moral obligation of a promise does not always align with a legal obligation can challenge their presumption that the law will comport with their definition of fairness, as well.[431] Such knowledge is troublesome because it is counterintuitive, removed from the traditional constructs of the role of law in society, and disruptive of perceived understandings about the law.

But it is critical for students to reflect on ethical concerns and social justice because legal truths may be culturally and politically contingent.[432] Such a practice may not only strengthen the analogies made in legal reasoning and reasoning from precedent, but also insert a consideration for a moral evaluation of the law's purpose.[433] In the language of threshold concepts

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[430] Even if a promise was made the lack of consideration is an excuse for nonperformance. 17A AM. JUR. 2d *Contracts* § 10 (2022). In situations in which consideration is lacking, the party did make a promise, and that fact is capable of evidentiary proof. Students can be confused that there is no legal obligation when there seems to be a moral obligation to perform the promise made. For a critique of the doctrine's complexity and a call for its abandonment. *See* Alan M. White, *Stop Teaching Consideration*, 20 NEV. L.J. 503 (2020).

[431] *See infra* notes 88-95 and accompanying text.

[432] Ricketts, *supra* note 4, at 7-8.

[433] For example, the court in *Tunkle v. Regents of University of California* enumerated six criteria generally cited in evaluating the legitimacy of an exculpatory clause. 60 Cal.2d 92, 98-101 (1963). Rather than just reasoning from the specified criteria in evaluating the validity of a clause in a certain context, the public policy argument in support of invalidating such clauses, that is the original justification for questioning the legality of such clauses, must be kept upfront. In other words, going

epistemology, engaged understanding helps students critically evaluate knowledge, ideas, and opinions they already hold and become *unstuck* from such previous assumptions,[434] including such challenges as differentiating ethical versus legal obligations and choices.

Unfortunately, the law is often portrayed as a blunt instrument such that students expect just to learn it.[435] However, uncertainty opens the potential for a deeper understanding that the law is not only coercive but capable of changing behavior, such as that inspired by financial disclosure laws.[436] Students who cross that threshold can appreciate the philosophical foundation of the law and make value judgments about the law, and what it should be. The prospect can be troublesome because it is removed from traditional considerations of legal rules and the role of law in society.[437] This reckoning once again brings to the forefront contemplations about ethics, morality, fairness, and the law.

The combination of procedural, substantive, and jurisdictional context arguably is a threshold concept which must be digested to see the whole picture in the study of law, as well. Malleability, in part, recognizes this fact, in that it integrates concepts within legal analysis, such as jurisdiction, precedential value, rule of law, and

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behind subsequent precedents to get to the reason for the policy decision illuminates the original ethical consideration for the precedent, and ensures that the progeny of the decision do not depart from the policy.

[434] Lydia Morgan, *Understanding Dworkin through art: object-based learning and law*, 52 LAW TEACHER 1, 1 (2018).

[435] Gerard Kelly, *The Role of Serendipity in Legal Education: A Living Curriculum Perspective*, 49 LAW TEACHER 353 (2015).

[436] *Id.*

[437] *Id.*

stare decisis.[438] Important corollaries to the importance of this combined context in the study of case law are that 1) the law is dynamic, so the date of a decision is critical for its precedential value because it could have been overruled or clarified subsequently; and 2) jurisdictional lines impact the value of reliance on a precedent, dependent upon which court announced the decision, and 3) legal decisions are not necessarily rendered on the merits of the case, so precedential value can be limited, all of which contribute to uncertainty and undermine finality. For example, when a summary judgment is not granted all the court is deciding is that there could be a cause of action stated.[439]

Law students, who finally grasp the significance of these complicating realities and embrace the perpetual state of unsettled law, along with the opportunity to distinguish cases, to argue for the preferred state of the law and to interject moral considerations for its evolution, traverse a barrier and master a threshold concept of their discipline. In the language of threshold concepts, this intersection of substantive and procedural law and its importance is illustrative of integration, uniting aspects of the law that previously did not appear to be related. Understanding this integration of timing, process and substance is often the sweet spot that permits the student of law to use circuit splits, the ambiguity generated by

[438] *See* Weresh, *supra* note 36, at 710-11 (discussing the integrative aspect of malleability as a threshold concept).

[439] For example, in a defamation case involving a public figure, if a court refuses to grant the defendant's motion for summary judgement, the ruling simply means that questions of fact remain, for example, on whether actual malice was alleged by clear and convincing evidence. It does not mean that the plaintiff prevails. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (discussing the standard of proof for summary judgment in such cases).

decisions that refuse to dismiss cases at procedural levels, as well as the passage of time since precedents were decided, to make arguments for moving the law, using legal reasoning based on moral considerations.

IV. TROUBLESOME KNOWLEDGE FOR BUSINESS LAW STUDENTS

Typically, undergraduate business law is not a path that leads to a baccalaureate degree or the practice of a specific profession; instead, it is a course, or series of courses, in the subject matter of business law.[440] Threshold concepts are viewed as being discipline bounded, that is, unique to the study of an academic field that leads to professional qualifications, being framed by the practice of that discipline's unique knowledge and particular worldview.[441] Therefore, business law is not necessarily a ready fit because there will be no graduates of business law who will practice business law with an undergraduate degree, in contrast to students of business disciplines such as accounting or financial planning.

Although a critical component of any business curriculum,[442] the rationale for including law in the business curriculum arguably is pragmatic, considered to

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[440] *See* Lampe, *supra* note 51, at 2 ("…most business students are not going to become paralegals or lawyers. They are preparing for a career as business practitioners.").

[441] *See* Sarah Barradell & Tracy Fortune, *Bounded – The neglected threshold concept characteristic*, 57 INNOVATIONS IN EDUC. & TEACHING INT'L 296-304 (2020) (bringing the bounded characteristic of threshold concepts into focus as being integral to the theory).

[442] *See* Robert C. Bird, *On the Future of Business Law*, 35 J. LEG. STUD. EDUC. 201 (2018) (concluding that business law provides an untapped competitive advantage as a source of values-driven management education).

be useful knowledge more than a profession.[443] Nevertheless, the *barriers* to grasping the threshold that must be crossed in learning are like those experienced by students in law school. In other words, that there may be no right answer, that the law is dynamic, that what is presumed to be the law is not necessarily the case, are all barriers to concept mastery in undergraduate business law as well as in the professional degree path of law school. The following sections discusses some areas of troublesome knowledge for business law students.[444]

A. The Law at Odds with Preconceived Notions

1. Fault

Students may be stumped by concepts that do not rely on fault for liability. It is understandable and acceptable to hold a person or entity liable if the harm caused is their fault. However, it is less comprehensible to hold them liable when it is not their fault. A barrier to learning some legal concepts centers on the fact that the law does not just assess blame, but that other factors influence its development, including the economic allocation of risk toward the party more suited to prevent the harm. This function of the law ties the study of law to broader social issues. Aspects of the employment relationship, as well as tort liability not based in negligence or intent, illustrate this perspective.

Regarding the employment relationship, under the doctrine of respondeat superior an employer may be liable vicariously for an employee's tort that is committed

[443] Allen, *supra* note 35.

[444] The focus on these areas emerged in part from the analysis of the most missed multiple choice quiz questions in seven sections (190 students) of a Legal Environment of Business course taught over a two-year period (2021-23).

within the scope of the employment relationship.[445] When an employee commits a negligent act that is work-related, the negligence of the employee is imputed to the employer, even though the employer is not at fault.[446] Fault is not the driver in these results. Instead, the outcome is judicially created to favor a third party seeking to bind a principal for the unauthorized act of an apparent agent,[447] or to protect the injured party injured in tort by providing a more solvent source of compensation. Employers profit from the acts of their employees and must share in their responsibilities to innocent third parties, be it contract or tort, without respect to the absence of fault on their part.

Strict liability and product liability also underscore policy concerns that transcend fault-based limitations. Some activities fall under the umbrella of strict liability, which imposes liability without regard to fault, usually a standard that is reserved for those activities which pose an unreasonable risk of potential harm to bystanders or participants, and which are

[445] 27 AM. JUR. 2d *Employment Relationship* § 356 (2022). The doctrine of respondeat superior may be justified in part because an employer has the right to control the acts of the agent or employee and is thus responsible for injuries arising out of such service.

[446] *Id.* The result holds even if the employer exercised due caring in training and instructing the employee. Similarly, the employer can be liable in contract under the employee-agent's apparent authority, even when the employer has not granted the agent any actual authority to enter a contract, and properly instructed the agent. 3 AM. JUR. 2d *Agency* § 71 (2022).

[447] Boulos v. Morrison, 503 So. 2d 1, 3 (La. 1987).

abnormally dangerous.[448] Although students are comfortable holding people responsible when the incident was their fault, typically they do not want to hold people responsible if the incident causing harm was not their fault and they had exercised care. Nevertheless, social policy requires defendants to compensate for harm that results to others from their intentional behavior that exposes the community to an abnormal risk,[449] even though is seems counter-intuitive to have anything but a negligence standard of care. Being careful is not the remedy in such situations. Being economically prepared by being sufficiently insured, however, can provide protection.

Similarly, strict liability as applied to products also is not a fault theory of recovery.[450] Rather than examine the conduct of the defendant as in the theory of negligence, strict liability as applied to products examines the product. Is the product unreasonably dangerous because a design, for example, which did not compromise utility and was not cost prohibitive, could have made the

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[448] 74 AM. JUR. 2d *Torts* § 14 (2022). Abnormally dangerous activities include blasting operation and keeping wild animals, for example. *Id.* § 15.

[449] *Id.* § 14.

[450] A manufacturer, seller, or lessor of goods will be liable, regardless of intent or the exercise of reasonable care, for personal injury or property damage to consumers, users, and bystanders proximately caused by the goods it manufactures, sells, or leases providing 1) the product was defective when the defendant sold it; 2) the defendant is normally engaged in the business of selling or otherwise distributing the product in question; 3) the product is unreasonably dangerous to the user or consumer because of its defective condition; and 4) the product had not been substantially changed between the time the defendant sold or otherwise distributed it and the time the plaintiff was injured. RESTATEMENT (THIRD) OF TORTS § 2 (AM. LAW INST. 2012).

product safer?[451] Then, if the product is unreasonably dangerous because of its design defect, all sellers are liable, not just the manufacturer.[452] Although the retailer may be blameless, important policy concerns of consumer safety and economic allocation of risk trumps limiting recovery to a showing of fault. In sum, it is hard to direct students out of a singular fault paradigm of liability. Nevertheless, that barrier to understanding can be achieved by underscoring other imperatives of the law and the higher role it plays in society, arguably a threshold concept that is not limited simply to holding blameworthy parties responsible. If students consider the moral evaluation of the law's purpose, these barriers may be more easily traversed.

[451] Aside from the risk utility balancing test, some jurisdictions define a defective product as one that is "dangerous to an extent beyond that anticipated by the ordinary user or consumer." 63 AM. JUR. 2d *Products Liability* § 10 (2012).
[452] *Id.* §§ 88, 91.

2. Agreements

Business law students may entertain the misconception that contracts must be in writing to be enforceable. But once that hurdle is jumped, often they struggle with contract principles that consider something other than what the parties promised in determining enforceability.[453] The concept that a written agreement signed by both parties will not be enforced is foreign and may challenge their preconceived notion of what contracting means. Nevertheless, public policy considerations dictate that some agreements should not be enforced. In other words, what the law should or should not protect transcends the parties' agreement and tempers freedom of contract. Although there are other examples, liquidated damages provisions, exculpatory clauses, restrictive covenants, as well as the concept of unconscionability, provide illustrations of situations that consider the role of law in private contracts.

Contracts often contain provisions requiring breaching parties to pay a sum certain of money if they fail to perform as promised; in other words, parties in their contract may stipulate to the damages payable in the event of a breach.[454] These liquidated damages provisions are enforceable if damages from a party's breach were difficult to estimate at the time the parties formed the contract and the clause represents a reasonable estimate of the value of the promised performance.[455] Courts generally will not enforce a liquidated damages clause

[453] For example, the doctrine of substantial performance may excuse a breach in part, which is an unexpected result occasioned by breach. *See* Ladner v. Pigg, Ladner v. Pigg, 919 So. 2d 100 (Miss. App. 2005) (holding that the failure to submit timely payment did not terminate the contract).
[454] 22 AM. JUR. 2d *Damages* § 506 (2022).
[455] *Id.* § 509.

that requires the breaching party to pay a sum that bears no reasonable relationship to the value of the promised performance even if the parties agreed to the amount.[456]

Employment agreements may contain a restrictive covenant that requires the employee to refrain from working for a competitor, or from starting a new business in competition with the employer, after the employment relationship ends for a reasonable period, and within a reasonably defined geographic area.[457] In evaluating their validity, courts examine if the language is unambiguous and whether the restraint is no greater than reasonably necessary to protect an employer's legitimate business interest.[458] Even though the parties agreed to the provision, courts may decline to enforce it if exceeds what necessary to protect a legitimate business interest or is unduly harsh or oppressive on the employee

[456] *Id.* §§ 507, 510. *See* Bear Stearns v. Dow Corning Corp., 419 F.3d 543 (6th Cir. 2005) (finding the provision to be an unenforceable penalty provision and not a reasonable estimate of damages). Because contract damages compensate the injured party and do not punish the culpable party for breach the parties are not free to contract for a penalty for its breach. 22 AM. JUR. 2d *Damages* § 48 (2022). Punitive damages, while often appropriate in tort actions, are awarded in limited circumstance under contract law because punitive damages vindicate public rights, and do not remedy private wrongs. *Id.* § 590.

[457] Enforceability is usually a matter of state law. For example, Under North Carolina law, a covenant not to compete is valid if it is (1) in writing, (2) made part of the employment contract, (3) based on valuable consideration, (4) reasonable as to time and territory, and (5) designed to protect a legitimate business interest of the employer. A.E.P. Indus., Inc. v. McClure, 302 S.E.2d 754, 760 (N.C. 1983).

[458] Paramount Termite Control Co., Inc. v. Thomas R. Rector, et al., 380 S.E.2d 922, 924-25 (Va. 1989).

because it is not sufficiently limited in scope.[459]

Exculpatory clauses are contractual provisions releasing a party from liability, regardless of fault, thereby negating by agreement what otherwise could have been a valid cause of action for negligence.[460] Because these clauses are at odds with the public policy underlying the right to sue for negligence, they are disfavored. Courts examine the equities in determining enforceability, such as whether the negligent act was simple or gross, whether there was personal injury or property damage, and whether the entity seeking exculpation controlled the outcome.[461] Courts also evaluate if the risks are clearly

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[459] 54A AM. JUR. 2d *Monopolies and Restraints of Trade* § 832 (2022). The test for reasonableness balances "the competing interests of the public as well as the employer and employee to determine whether the covenant constitutes a prohibited restraint on trade." *Id. See* TransUnion Risk and Alternative Data Solutions, Inc. v. Surya Challa, 2017 WL 117128 (11th Cir. 2017) (finding the noncompetition agreement enforceable); Genex Cooperative, Inc. v. Contreras, No. 2:13-cv-03008-SAB (E.D. Wash. Oct. 3, 2014) (finding restrictive covenant unreasonable).

[460] *See, e.g.,* Lin v. Spring Mountain Adventures, Inc., Civ. A. No. 10-333, 2010 WL 5257648 (E.D. Pa. Dec. 23, 2010) (finding the exculpatory clause used in a ski resort contract to be enforceable); Espinoza v. Arkansas Valley Adventures, LLC, 809 F.3d 1150 (10th Cir. 2016) (finding release of rafting company from negligence did not violate state public policy); Hyatt v. Mini Storage on the Green, 763 S.E 2d 166 (N.C. App 2014) (finding exculpatory provision invalid for personal injury claim).

[461] The court in *Tunkle v. Regents of University of California* enumerated the criteria generally cited in evaluating the legitimacy of an exculpatory clause. Courts determine whether or not the agreement: 1) affects a public interest, 2) concerns a business of a type generally suitable for public

and unambiguously disclosed with language that is reasonably understandable to the ordinary person.[462]

Unconscionable agreements typically result from unequal bargaining power and contain terms that unfairly burden one party and unfairly benefit the other.[463] Although the doctrine is not used merely to save a contracting party from a bad bargain, a contract that manifestly takes unfair advantage of a party with unequal bargaining power may not be enforced by a court.[464] Key elements that produce such a result include one party being deprived of any meaningful choice regarding the terms of the contract due to inconspicuous print, unintelligible language, or a lack of opportunity to read the contract before signing, coupled with severely unequal bargaining power, oppressive or manifestly unfair contract terms, and a lack of reasonable

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regulation, 3) touches a service of great importance to the public, 4) involves a service offered to any qualified member of the public who seeks it, 5) confronts the public with a standardized adhesion contract without any provision for paying additional reasonable fees to obtain protection, and 6) requires the person or property to be placed under the control of the party seeking exculpation, subject to a risk of carelessness. 383 P.2d 441, 444-46 (Cal. 1963).

[462] Patricia C. Kussmann, *Validity, Construction, and Effect of Agreement Exempting Operator of Fitness or Health Club or Gym from Liability for Personal Injury or Death of Patron*, 61 A.L.R.6th § 12 (2011). For other contexts see Randy J. Sutton, *Validity, construction, and effect of agreement exempting operator of amusement facility from liability for personal injury or death of patron,* 54 A.L.R.5th 513 (1997); Michele Meyer McCarthy,
Tort Liability Arising from Skydiving, Parachuting, or Parasailing Accident, 92 A.L.R.5th 473 (2001).

[463] 17A AM. JUR. 2d *Contracts* § 274 (2022).

[464] *Id.* § 271.

alternatives.[465]

In each of these preceding examples, the parties' agreement, their contract, may not be enforced even though they agreed to the provisions. This outcome may be difficult for students to digest because it seems to contradict their assumption that contracts should be enforceable according to their agreed upon terms. It especially is counterintuitive to think that courts would refuse to enforce a *signed* contract. However, threshold concepts associated with the study of law require students to reflect on ethical concerns and social justice as they seek legal truths. An appreciation of a societal interest in the enforceability of private contracts in the development of contract law can help business law students traverse the barrier to the preconceived notion that agreements, especially written one, are unchallengeable.

B. The Law is not Necessarily Fair

Students often entertain expectations that the law should reflect their definition of fairness, perhaps by virtue of the machinations of some invisible, blind scale of justice. In the employment context it may come as a surprise that employees can be fired without some sort of legally sufficient justification. The concept of at-will employment permits employers to terminate an employment relationship at any time without just cause.[466]

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[465] *See, e.g.*, Stoll v. Xiong, 241 P.3d 301 (Okla. Civ. App. 2010) (finding unconscionability in a contract with manifestly surprising and harsh terms to disadvantaged plaintiffs); Miller v. House of Boom Kentucky, LLC., 575 S.W.3d 656 (Ky. 2019) (concluding liability waivers between a parent and a for-profit entity involving the actions of a child may be unenforceable).

[466] 82 AM. JUR. 2d *Wrongful Discharge* § 3 (2022). *See* Theisen v. Covenant Medical Center, 636 N.W.2d 74 (Iowa 2001) (holding that termination of at-will employee was lawful

Although the doctrine is tempered in many situations by implied or express agreement, by statutory prohibitions or by public policy arguments, in many situations there need not be *just cause* to terminate.[467] This concept strikes the learner as being unfair because the employee may not have done anything deserving of termination. Moreover, while an exception to the doctrine of at-will employment includes statutes that expressly protect whistleblowers,[468] students are often surprised to learn that not all whistleblowers are protected, notwithstanding that they might be doing the right thing.

Excuses for nonperformance of contractual obligations also can challenge notions of fairness. A party may be excused only when performance becomes either objectively impossible or impracticable through no fault of either party.[469] There are legitimate excuses when performance of contractual obligations become

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because the request for voice identification procedure violated neither law nor public policy).

[467] 82 AM. JUR. 2d *Wrongful Discharge* § 52 (2022). *See* Callantine v. Staff Builders, Inc., 271 F.3d 1124 (8th Cir. 2001) (applying the public policy exception for employees fired for declining to violate a statute); O'Sullivan v. Mallon, 390 A.2d 149 (N.J. Super. 1978) (considering the right of an employer to discharge an employee who refuses to perform an illegal act).

[468] 82 AM. JUR. 2d *Wrongful Discharge* § 112 (2022). *See* Elizabeth C. Tippett, *The Promise of Compelled Whistleblowing: What the Corporate Governance Provisions of Sarbanes Oxley Mean for Employment Law*, 11 EMP. RTS. & EMP. POL'Y J. 1 (2007) (providing an overview of the various forms of whistleblower legislation and scholarship evaluating them).

[469] 17A AM. JUR. 2d *Contracts* § 649 (2022).

objectively impossible[470] or impracticable due to unanticipated changing market conditions.[471] However, conditions which render the performance subjectively impossible do not excuse a breaching party's contract obligations,[472] even though the obstacle seems insurmountable and something for which "fairness" might counsel in favor of an excuse.[473] That the parties are responsible for structuring a contract and for foreseeing contingencies, instead of the court rescuing them if things go south, is not an expected outcome.

C. The Unsettling Unsettled Law

Dealing with uncertainty in the law has been identified as a threshold concept for students of law. However, law students are afforded some years to fully grasp that difficult concept, whereas business law students typically have a semester to try to come to grips with how court interpretations, procedural law, and the levels of review all contribute to making the law

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[470] *See* Pearce-Young-Angel Co. v. Charles R. Allen, Inc., 213 S.C. 578 (S.C. 1948) (excusing contract for No. 1 Dilley blackeye peas that were not procurable in the Dilley section of Texas because the blackeye pea crop of that section of Texas was destroyed by unexpected and torrential rains).

[471] The UCC provides for the discharge of a contract for the sale of goods when a condition parties assumed existed or would continue ceases to exist. U.C.C. § 2-615 (AM. L. INST. & UNIF. L. COMM'N 1977).

[472] 17A AM. JUR. 2d *Contracts* § 649 (2022).

[473] For example, the principal balance plus interest of a loan for millions of dollars for airplanes was still due and payable even though the airlines to which the purchasers had leased the aircraft did not renew their leases because of the events of 911. Bancorp Equipment Finance v. Ameriquest Holdings LLC, Case No. 03-5447 ADM/AJB, 5 (D. Minn. Dec. 7, 2004).

unsettled. Although students appreciate what statutes and constitutions are, they are much less familiar with the role courts play in their evolution. Explaining the common law and its continuing evolution is even more challenging, particularly when students may expect *the law* to be easily discernable.

Variations of law by jurisdiction is particularly confusing, as well as the dynamic nature of its growth.[474] The evolution of the Americans with Disabilities Act provides an example of this dynamic.[475] After the Act was passed in 1990 it became unclear whether someone with a controlled disability, such as high blood pressure, was a person with a disability subject to protection under the law. Federal courts split on the issue.[476] That notion, that a statute, which is the same throughout the country, but has a different effect in some parts of the country, and that this reality remains unchanged until a higher court decides the issue, is unexpected, unsettling, and counterintuitive. Lawyers appreciate this reality, law students learn to appreciate this reality (along with the interaction that occurs between regulatory agencies, the legislature, and courts), and even thrive in that reality of uncertainty, but

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[474] Lampe, *supra* note 51, at 11.

[475] 42 U. S. C. §§ 12101-12103, 12111-12117 (2022).

[476] *Compare* Arnold v. United Parcel Serv., Inc., 136 F.3d 854 (1st Cir. 1998) (refusing to consider the use of mitigating measures in determining whether an individual was disabled) *with* Gilday v. Mecosta Cty., 124 F.3d 760 (6th Cir. 1997) (concluding that the determination should be made considering mitigating measures). The Fifth Circuit adopted a hybrid approach by which "only serious impairments and ailments that are analogous to those mentioned in the EEOC Guidelines and the legislative history--diabetes, epilepsy, and hearing impairments--will be considered in their unmitigated state." Washington v. HCA Health Servs. of Texas, 152 F.3d 464, 470 (5th Cir. 1998).

for business law students the dynamics can be overwhelming. Subsequently, the U.S. Supreme Court resolved the mitigating measures issue in a trilogy of cases, ruling that employees, whose disabilities were controlled, were not protected under the ADA.[477] Finding this interpretation to be at odds with the purpose of the statute, Congress passed the Americans with Disabilities Act Amendments Act in 2008 to ensure such individuals were covered.[478]

Undoubtedly, nuanced applications of the amended statute to specific disabilities will continue to develop just this one area of law. This inherent nature of the law demonstrates the importance of recognizing its continuing evolution. Students can read decisions but may not appreciate that the decision does not represent the state of the law forever. Subsequent considerations may modify, clarify, even change what previously seemed settled law. And not just decisions produce this outcome, but regulatory guidance and legislation as well. It is important for that reality to be appreciated lest they leave our classrooms believing they have learned the law in a static state,[479] even if the depth of understanding is less than the complete digestion of a threshold concept, such as uncertainty or malleability.

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[477] Ultimately, Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999); Sutton v. United Airlines, 527 U.S. 471 (1999); Albertsons, Inc. v. Kirkingburg, 527 U. S. 555 (1999).

[478] ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4 (a) (codified at 42 U.S.C. § 12102(4)). This type of back and forth is also perplexing and unexpected because Congress, on the other hand, would not be permitted to undo an interpretation of the Constitution without an amendment.

[479] Lampe, *supra* note 51, at 11. The law changes in the law over time and businesspeople are unlikely to be aware of most changes. *Id*. Therefore, it is important to accent the inherent dynamic nature of law's development.

V. OVERCOMING BARRIERS

A. General Considerations

To review, for business law students, barriers to understanding the discipline of law may include the reality that the law does not comport with their preconceived notions of the role of law in society, that the law does not necessarily align with their moral compass, and that the law is not a settled volume of rules, but rather is dynamic and dependent on the specifics of each unique case. How may these barriers be overcome? Certainly, it is beneficial to underscore rationales for liability other than fault or doing what is fair, including risk allocation. It is also useful to provide multiple examples in areas involving troublesome knowledge until some of them finally resonate with students and aid in their understanding of counterintuitive concepts. Being affirmatively sensitive about barriers to student understanding in their study of business law will help them to traverse the liminal space of understanding threshold concepts in law, even if they only have a limited time to do so.

B. Specific Considerations

By recognizing and addressing these potential barriers to students becoming unstuck, the threshold concepts of the discipline of law, including malleability, uncertainty, and morality, may be better explored. There are strategies for traversing the barriers to understanding troublesome knowledge. For example, rather than ask for the answer, suggesting that there is one true outcome, instructors can focus instead on what factors are important to the resolution of the dispute and to determining the outcome of the case.

Further, using illustrations that demonstrate the dynamic nature of the law, its uncertainty, as well as its moral implications, can be helpful.[480] Rather than delivering content aimed at learning the law as if it is discernible and static, professors could instead embrace the threshold concepts of the discipline by exploring some complex examples which may not have an answer, or may have multiple answers depending on the question. True, business law students are unlikely to internalize threshold concepts associated with the study of the discipline of law completely in a semester, but they can be exposed to the law's complexity and dynamic nature. The following discussion provides a couple of examples of multiple intersections in the study of law that can help students traverse big picture barriers.

1. Disparagement

Business firms rely on their reputation and the quality of their products and services to attract and keep customers, so the law protects businesses from disparaging statements made by competitors or others. Unfavorable online reviews can have a tremendous adverse impact, so businesses turned to contract law to stop disparaging statements made by consumers by inserting anti-disparagement clauses in consumer contracts. Rather than sue for libel or disparagement in which issues of truth versus falsity, opinion versus fact, and potentially malice, can come into play, the business could just sue for breach of contract, which is why they

[480] Examining moral decision-making an outcome is an important facet of business education. *See* Rene Sarcas & Anita Cava, *A Legal Studies Major: The Miami Model*, 9 J. LEG. STUD. EDUC. 339 (1991) (discussing programs emphasis on ethics); Lamp, *supra* note 51, at 13-20 (exploring the relationship of law to ethics).

were called gag clauses: the contract gagged the consumer. Of course, the business could always sue for libel or disparagement,[481] but these clauses provided an additional cause of action, where the burden of proof arguably was easier, and simply a matter of contract interpretation, i.e., was the review at issue covered by the clause?

For years, consumers were surprised by million-dollar lawsuits filed against them for violating an anti-disparagement clause buried in an agreement, including online agreements.[482] In response to this business practice, in 2016 Congress passed the Consumer Review Fairness Act that outlawed such contractual non-disparagement clauses except in limited circumstances.[483] In essence, the statute made it illegal for companies to include standardized provisions that threaten or penalize

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[481] *See, e.g.,* Susanna Kim, *Couple Fined $3,500 For Negative Review Fights Back With Lawsuit*, ABC NEWS (Dec. 18, 2013), https://abcnews.go.com/Business/couple-fined-3500-negative-review-fights-back-lawsuit/story?id=21249094 (last visited Sept. 13, 2023); *Woman sued after posting a 1-star Yelp review*, https://www.youtube.com/watch?v=F3qP0JQNsuQ (last visited Sept. 13, 2023).

[482] Tom Huddleston Jr., *Can you get sued over a negative Yelp review? Here's what you need to know,* CNBC.COM (Oct. 10, 2019) https://www.cnbc.com/2019/10/10/can-you-get-sued-over-a-negative-yelp-review.html (last visited Sept. 13, 2023). *See also Business sues Dallas couple over negative Yelp review*, https://www.youtube.com/watch?v=DQbsXepkDtg (last visited Sept. 13, 2023).

[483] Pub. L. No. 114–258, 130 Stat. 1355 (2016) (codified at 15 U.S.C. § 45b). Exceptions include reviews that contain confidential information, or are unrelated to the company, or sexually explicit, or false or misleading, for example. *Id*.

people for posting reviews.[484] But the statute only provided a partial remedy to consumers, that is, for situation in which the consumers were party to a contract with an anti-disparagement clause. Other services and products reviewed daily by consumers, such as hotels and restaurants, never used a contract with an anti-disparagement clause. Questions to consider in reviewing application of the common law as well as the legislation in consumer situations include:

- What would a business need to prove to establish libel or disparagement regarding a consumer's review?
- What would be a valid defense for the consumer under libel law?
- What is the problem with unflattering (potentially untrue) online reviews from the perspective of the business?
- Why is litigation problematic for consumers?
- Why does the Consumer Review Fairness Act not protect all consumers from their reviews? In other words, to what types of cases is it limited?
- Before the Act was passed would unconscionability have been a viable defense to enforcement? If so, what is the need for the statute from a litigation cost perspective?
- What other purpose does the statute serve from a uniformity perspective?

[484] *Consumer Review Fairness Act: What Businesses Need to Know,* U.S. FED. TRADE COMM'N, https://www.ftc.gov/business-guidance/resources/consumer-review-fairness-act-what-businesses-need-know (last visited Sept. 13, 2023).

- What might consumers do to mitigate their chances of being sued successfully for an unfavorable review not protected by the statute?[485] How can the wording of the review be important?

This example allows students to examine the equities involved for both businesses, which could be unfairly damaged, and for the consumer, who could be unfairly silenced when other consumers had an interest in the information provided. It fosters a discussion on both torts and contracts, shows how the common law of unconscionability can be complemented by legislative pronouncement, and emphasizes the changing nature of the law in response to societal changes, such as the prevalence of online reviews, all in a context with which students can identify. It also can prompt a discussion about how piecemeal litigation is problematic and outcomes can vary among jurisdictions.

2. Product Liability

A second example relates to the challenging concept of strict liability as applied to products. As noted previously, the outcome of such cases can be hard to digest because they are not based in fault. Product liability law is designed to be proactive because if manufacturers were only held to industry standards, there would be no impetus to make products safer—the

[485] For suggestions see *Negative Yelp review leads to lawsuit*, https://www.youtube.com/watch?v=RIYSM0iqUqE&t=8s (last visited Sept 13, 2023). Also relevant is a discussion of Anti-SLAPP statutes as a complement to the more definitional approach to civil procedure. *See Anti-SLAPP Legal Guide*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/anti-slapp-legal-guide/.

industry could set low norms. Government regulations are important, but often they result after consumers have been harmed. The threat of litigation under strict liability keeps sellers on their toes by shifting the economic risk of dangerous products to the sellers who profit from their sale.

For example, consider a spa tub. People have drowned in them when they have become caught and unable to extricate themselves.[486] An anti-entrapment drain cover would reduce that risk substantially, would not impair the tubs functionality, and is not cost prohibitive. Therefore, a spa tub without that cover arguably is in a defective condition that poses an unreasonable risk of harm to consumers, and the seller should be liable if a foreseeable plaintiff injured as a result. A video can demonstrate how the protection is a cost-effective plastic cover that is easy to install, illustrating that risk utility balancing test.[487]

This example helps to contrast the concept of strict liability as applied to products with negligence. For years drain covers were neither mandated by the

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[486] *See, e.g.,* David Stout, *Hot Tub's Fatal Suction Claims a Teen-Ager Celebrating With Friends After Her Prom*, N.Y. TIMES, May 28, 1996, at B5; Judy Stark, *Meant to soothe, the hot tub can kill*, TAMPA BAY TIMES (Apr. 26, 1997), https://www.tampabay.com/archive/1997/04/26/meant-to-soothe-the-hot-tub-can-kill/; *Teen Held By 12 Tons Of Pressure Broken Grate Blamed After Girl Drowns In Hot Tub During Party*, THE SPOKESMAN-REVIEW (May 29, 1996), https://www.spokesman.com/stories/1996/may/29/teen-held-by-12-tons-of-pressure-broken-grate/.

[487] You can depict the installation of a pool drain cover to demonstrate it is only a plastic lid that is easy to install. *Underwater Install, The Paramount SDX 2 Drain Cover*, https://www.youtube.com/watch?v=uguzFI6xRmQ (last visited Sept. 13, 2023).

government nor a standard in the industry. In other words, the sellers would not necessarily be negligent for such spa tub deaths because it was difficult to establish a breach in the standard of care. However, in 2007 Congress passed the Virginia Graeme Baker Pool and Spa Safety Act[488] after a successful lobbying effort by her mother, the former daughter-in-law of Secretary of State James Baker.[489] Virginia Graeme Baker, aged seven, drowned after she was trapped under water by the powerful suction from a hot tub drain.[490] The federal statute now 1) requires each swimming pool or spa drain cover manufactured and distributed in the United States to conform to specified entrapment protection standards, 2) mandates that existing drains in public pools and hot tubs be covered with larger, rounded covers that do not create suction, and 3) mandates that public pools and hot tubs have a back-up mechanical system installed to prevent suction in those pools with a single main drain.[491]

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[488] 15 U.S.C. §§ 8001-8008 (2022) (as amended 2014).

[489] *See Nancy Baker speaks to support the CPSC's "Pool Safely" campaign,* https://www.youtube.com/watch?v=K9hGCu5H9t8 (last visited Sept 13, 2023) (addressing the importance of pool safety after the tragic death of her daughter).

[490] The two men who eventually freed Graeme from the spa pulled so hard that the drain cover broke from the force. *Virginia Graeme Baker Pool and Spa Safety Act*, (May 1, 2021), https://serviceindustrynews-hi.newsmemory.com/?selDate=20210501&editionStart=Service%20Industry%20News&goTo=19&artid=0 (last visited Sept. 13. 2023).

[491] 15 U.S.C. § 8003 (2022). For an overview of the statute's provisions see *Summary Analysis of the Virginia Graeme Baker Pool and Spa Safety Act*, ASSOC. POOL & SPA PROFESSIONALS, http://www.poolsafely.gov/pool-spa-safety-act/virginia-graeme-baker/ (last visited Sept. 13, 2023).

Although all drain covers manufactured after 2007 must conform to the entrapment protection standard, many private pools and hot tubs still have entrapment hazards. In examining the progression of liability questions to pose include:

- Would a seller have been liable for negligence before the act if they sold a hot tub without a drain cover? Why or why not? Was it unreasonably dangerous?
- Could a seller have been liable before the statute under strict liability as applied to products? Explain.
- Consider the equities involved in holding the seller responsible under strict liability? Is it fair?
- Would a spa tub without the drain be merchantable under the UCC?
- Would capping damages be fair? What are the reasons for and against?
- What about owners, not sellers? What is required by statute? Anything? Should owners take remedial measures? When might that expectation be appropriate? What law applies?
- How does this statute relate to negligence per se?
- Does litigation under strict liability as applied to products have the capacity to encourage safety reform comparable to the statute?
- Why do you think the regulatory statute was passed?

This example in particular focuses on the distinction between the two theories of product liability. It also highlights public policy concerns, and how judicial

law can adjust equities in the absence of legislative pronouncements. It further highlights that the law, both judicial and legislative, is in a constant state of development.

VI. CONCLUSION

The threshold concepts approach to student learning asserts that certain concepts, practices, or forms of learning experiences can act as a portal, or learning threshold, through which the learner enters a new conceptual terrain in which things not previously perceived come into view and new and previously inaccessible ways of thinking and practicing are opened.[492] In traversing the portal students encounter barriers to understanding that are complicated by preconceived notions of the discipline, as well as by the complexities and interrelatedness of the discipline's concepts which make it difficult to see the forest for the trees. In a contextual view of knowledge, it may be that students do not necessarily have to unlearn prior conceptual understandings; rather they need to learn how to recognize that in different contexts (and in different disciplines), understandings may change.[493]

A threshold concepts perspective can assist in conceptualizing course and curriculum design,[494] such as

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[492] Land, Rattray & Vivian, *supra* note 18, at 200.

[493] *Id.* at 215 (2014).

[494] *See* Land et al., *supra* note 15, at 196. *See also, e.g.,* Donson & O'Sullivan, *supra* note 3, at 26-27 (discussing changes to course in criminal law course); Gerlese Åkerlind, Jo McKenzie & Mandy Lupton, *Final Report: A threshold concepts focus to curriculum design: supporting student learning through application of variation theory,* AUSTRALIAN LEARNING & TEACHING COUNCIL (2011), https://eprints.qut.edu.au/215210/1/69603.pdf (formulating

teaching concepts in a logical progression because the understanding of one may be necessary to understand another. Instructors also should remain sensitive to the fact that acquiring a new perspective on an already-held understanding or new conceptual understanding takes time. All learners approach the threshold differently and helping them grasp the new understanding is not a linear process. Because barriers exist to grasping a comprehensive understanding of a discipline, that is, to mastering threshold concepts, available pedagogical tools should be explored to help comprehension.[495] But most importantly, the reinforcement of concepts by instructors, who can identify and appreciate the underlying basis of the struggle with troublesome knowledge, is the best talisman for traversing the threshold.

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a model of curriculum design to assist student learning of foundational disciplinary threshold concepts).

[495] For example, active learning methods, such as flipped classrooms, can be used to help students cross the threshold because time and effort are needed and provide an increase in self-efficacy, which is invaluable to understanding a threshold concept. *See* Nkaepe E. E. Olaniyi, *Threshold concepts: designing a format for the flipped classroom as an active learning technique for crossing the threshold*, RESEARCH & PRACTICE TECH. ENHANCED LEARNING (2020), https://telrp.springeropen.com/articles/10.1186/s41039-020-0122-3 (discussing flipped classroom pedagogy in physics for threshold concept mastery).

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