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JASON R. HILDEBRAND



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- ARTICLES -

**NEGOTIATING THE INSIDE GAME:
ALIGNING LAW, STRATEGY, AND ETHICS
IN CORPORATE CRISIS SIMULATIONS**

EVAN PETERSON*

Business law education faces a persistent challenge: the realities of modern business practice no longer fit neatly within doctrinal boundaries. Business leaders must navigate legal obligations, strategic imperatives, and ethical responsibilities simultaneously, not in segmented silos. Although scholars, including Robert Bird, David Orozco, Constance Bagley, Justin Evans, and others, have underscored this convergence for years,¹ the challenge for business law faculty is finding ways to help students experience that integration in a meaningful and practical way. Crisis management provides a compelling lens for this task. Organizational crises, ranging from financial

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¹ Robert C. Bird & David Orozco, *Finding the Right Corporate Legal Strategy*, 56 MIT SLOAN MGMT. REV. 81 (2014); Constance E. Bagley, *Winning Legally: The Value of Legal Astuteness*, 33 ACAD. MGMT. REV. 378 (2008); Robert C. Bird & Justin W. Evans, *What Is the Impact of Legal Strategy?* 61 AM. BUS. L.J. 113 (2024).

collapse to product recalls and ESG controversies, rarely present purely legal questions. Such crises require coordinated responses from in-house counsel, executives, consultants, and managers, all of whom are making decisions under conditions of uncertainty and incomplete information.² While lectures and case studies may help students understand the foundations of these complex situations, such methods struggle to convey the simultaneity and interdependence of legal, ethical, and strategic considerations as they unfold in real time. Simulation-based learning provides a way to bridge this divide.

The central goal of this paper is to demonstrate how artificial intelligence (AI) can meaningfully expand the possibilities in simulation-based business law pedagogy. The Apex Innovations Crisis Simulation (Apex Simulation or Simulation) is built around a fictional company and was developed with the assistance of ChatGPT.³ The Simulation illustrates how AI can serve as a design partner in building dynamic, interdisciplinary decision environments that reflect the pressures of real business crises. AI enables scaling complexity, adapting scenarios to student choices, and

² Robert Waterman & Bruce E. Yannett, *Crisis Management, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL* (2021).

³ Generative artificial intelligence (ChatGPT) was used to develop all materials for the Apex Innovations Crisis Simulation. The AI-generated content underwent an extensive review by the author to ensure coherence and consistency. AI tools were also used to assist with language refinement and readability of this paper.

embedding simultaneous legal, strategic, and ethical dimensions at every decision point throughout the simulation. Traditional simulations cannot practically generate or sustain these capabilities at scale. The result is a pedagogical approach that mirrors the real-world pressures of business crises. It is important to emphasize that AI does not replace faculty judgment; it simply supports a level of integrated design that earlier approaches could not feasibly sustain.

The paper proceeds in four parts. Section I outlines the evolution of business law pedagogy and movements toward integrating law, strategy, and ethics in the business law classroom. Section II describes the development and implementation of the Simulation, illustrating how artificial intelligence can support faculty in designing rigorous, interdisciplinary exercises. Section III presents results from the Simulation, including student decision patterns and reflections that reveal how undergraduates navigated simultaneous pressures under crisis conditions. Section IV concludes with implications for teaching, research, and the future of AI-enabled pedagogy in business law.

I. BACKGROUND

A. The Evolution of Business Law Pedagogy

The days of disciplinary silos are gone. As the practice of business law operates in an increasingly interdisciplinary sphere, modern business challenges demand a seamless integration

of legal knowledge and business acumen.⁴ According to Bird and Evans, “Law and strategy (LAS)—the study of the law’s role in competitive advantage—has developed rapidly and with substantial promise for over twenty years.”⁵ Bird and Evans further noted that LAS reflects a “concern for how the law, legal resources, and legal competencies can lead some firms to create or enhance competitive advantages that directly support their broader corporate strategies.”⁶ Chambers and Martin’s 2022 examination of corporate disclosures and governance through a business and human rights risk lens underscores the importance of analyzing legal, ethical, and sustainability from an interconnected perspective.⁷ Park and Bishara explored climate change and “the just transition” by integrating legal frameworks, labor economics, and sustainability science.⁸ Madden and Berger-Walliser showcased how regulatory, market, societal, and other institutional pressures shape ESG disclosures.⁹ Such scholarship reflects a broader shift toward viewing

⁴ ASS’N OF CORPORATE COUNSEL, *2024 Chief Legal Officers Survey* (Jan. 30, 2024),

https://www.acc.com/sites/default/files/2024-01/ACC_2024_Chief_Legal_Officers_Survey_Report.pdf

⁵ Bird & Evans, *supra* note 1.

⁶ *Id.*

⁷ Rachel Chambers & Jena Martin, *Reimagining Corporate Accountability: Moving Beyond Human Rights Due Diligence*, 18 N.Y.U. J.L. & BUS. 773 (2022).

⁸ Stephen Park & Norman D. Bishara, *Climate Change and a Just Transition to the Future of Work*, 60 AM. BUS. L.J. 701 (2023).

⁹ Thomas M. Madden & Gerlinde Berger-Walliser, *Making Sense of ESG with the SEC*, 25 U. PA. J. BUS. L. 927 (2023).

law as fully embedded in strategic and ethical business decision-making, thereby creating a concomitant need for professionals who can think and act across disciplines. Preparing students to confront these challenges calls for interdisciplinary approaches to the study of business law that mirror the convergence of law, ethics, and strategy that now dominates modern business practice.

This shift in scholarship is mirrored by evolving expectations within business education, particularly through accreditation standards that emphasize interdisciplinary and practice-oriented learning. As modern business challenges demand more interdisciplinary approaches, higher education accrediting bodies have responded by calling on business schools to adapt their programs and priorities accordingly. The Association to Advance Collegiate Schools of Business (AACSB) Guiding Principles and Standards for Business Accreditation (Guiding Principles and Standards) make clear that business schools have a responsibility to adapt to the changing needs of the business world by providing relevant skills and knowledge to the communities they serve.¹⁰ Among these expectations, Standard 7 directs institutions to deliver forward-looking, globally oriented, and innovative curricular content.¹¹ To meet AACSB's call for innovation and societal impact, business schools must cultivate

¹⁰ ASS'N TO ADVANCE COLLEGIATE SCHS. OF BUS., 2020 *Guiding Principles and Standards for Business Accreditation*, <https://www.aacsb.edu/-/media/documents/accreditation/2020-aacsb-business-accreditation-standards-jul-1-2022.pdf>

¹¹ *Id.*

faculty and courses that translate interdisciplinary principles from modern business practice into meaningful classroom experiences by continuing to move beyond doctrinal coverage toward approaches that prepare students for interdisciplinary decision-making.

Translating these interdisciplinary expectations into classroom practice presents a distinct pedagogical challenge for business schools. Adapting AACSB's emphasis on experiential learning, innovation, and societal impact to the business law classroom implicitly calls for an interdisciplinary approach that integrates the legal, managerial, and ethical dimensions of complex organizational challenges. The multidimensional expertise of business law faculty positions them to advance such interdisciplinary perspectives.¹² Adopting an interdisciplinary approach to the study of business law increases the need for pedagogical innovations that promote integration across a growing range of disciplines.¹³ Advancing interdisciplinary learning in business law requires more than institutional or faculty aspirations; it necessitates approaches that can bridge the entrenched silos that have traditionally divided business disciplines in teaching and research.¹⁴

¹² Robert C. Bird & Cheryl Kirschner, *Special Report: The Summit on the Academic Profession of Business Law*, 37 J. LEGAL STUD. EDUC. 87, 91 (2020).

¹³ Caryn L. Beck-Dudley, *The Future of Work, Business Education, and the Role of AACSB*, 35 J. LEGAL STUD. EDUC. 165, 170 (2018).

¹⁴ *Id.*

Building on Bird and Evans's observation that integrating interdisciplinary insights into legal strategy requires engagement beyond traditional legal boundaries,¹⁵ this paper turns to crisis management as a pedagogical context. Crisis management offers a powerful contextual lens for bridging disciplinary silos by revealing how legal, strategic, and ethical considerations intersect during organizational crises.

B. Crisis Management as the Convergence of Law, Strategy, and Ethics

Crises are an inescapable reality of organizational life. Organizational crises . . . “may be sparked by all manner of developments—from a New York Times article about bribery allegations that were improperly investigated, to a massive recall of a best-selling product linked to consumer deaths, to reporting by nonprofit researchers to a federal agency regarding deceptive conduct.”¹⁶ The goal of crisis management is to mitigate the threats to organizational integrity posed by organizational crises, including risks to public safety, financial stability, and reputation.¹⁷ Crisis management teams (CMTs) typically bring together executives, managers, outside counsel, consultants, and public

¹⁵ Bird & Evans, *supra* note 1 at 130.

¹⁶ *Id.*

¹⁷ Timothy Coombs, *Crisis Management and Communications*, INST. FOR PUB. REL. (Sept. 23, 2014), <https://instituteforpr.org/crisis-management-communications/>

relations specialists alongside in-house counsel,¹⁸ reflecting the interdisciplinary nature of decision-making during the crisis. Bird and Orozco's legal strategy framework underscores the critical importance of aligning legal strategy with business strategy.¹⁹ In the context of crisis management, such alignment is an indispensable component for integrating legal, strategic, and ethical considerations into organizational responses. Bagley's concept of legal astuteness reinforces this alignment by emphasizing how leveraging the legal dimensions of a problem can support ethical and strategic decision-making.²⁰ George Siedel's framing of law, strategy, and ethics as three interrelated pillars is especially relevant in the crisis context where organizational decision-makers weigh the implications of their choices against potential responses from regulators, investors, employees, and the public.²¹

Organizational crises provide business law faculty with a practical, real-world context for examining how legal duties, managerial incentives, and ethical responsibilities intersect. The urgency, ambiguity, and reputational stakes that define organizational crises make them a powerful lens for exploring the simultaneity of law, strategy, and ethics.²² Although lectures and case studies can

¹⁸ Waterman & Yannett, *supra* note 2.

¹⁹ Bird & Orozco, *supra* note 1.

²⁰ Constance Bagley, *supra* note 1.

²¹ See generally Christine Ladwig & George Siedel, *Strategy, Law, and Ethics for Business Decisions* (2020).

²² See W. Timothy Coombs, *Ongoing Crisis Communication: Planning, Managing, and Responding* 5-7 (5th ed. 2019); Christine M. Pearson & Judith A. Clair, *Reframing Crisis*

provide a critical foundation for theoretical understanding, such methods are limited in their ability to showcase the chaotic, interconnected nature of decision-making in the context of organizational crises. In contrast, simulation-based learning can foster deeper conceptual understanding among students and enhance their ability to synthesize more complex ideas across disciplines.²³ The following section explores how experiential, simulation-based exercises can provide undergraduate business law instructors with innovative tools for demonstrating the interdisciplinarity of law, business, and ethics through the lens of crisis management.

C. Experiential and Simulation-Based Pedagogy in Undergraduate Business Law

Building on crisis management as a lens for studying the interdisciplinarity of law, business, and ethics, simulation-based learning offers a mechanism for bringing these dynamics into the classroom.

Management, 23 ACAD. MGMT. REV. 59, 61-63 (1998); Jonathan Bundy et al., *Crises and Crisis Management: Integration, Interpretation, and Research Development*, 43 J. MGMT. 1661, 1661-63 (2017).

²³ Vivek Ahuja, *Simulations in Business Education: Unlocking Experiential Learning*, in *Practices and Implementation of Gamification in Higher Education 1* (Veronica Membrive ed., IGI Glob. 2024); Mehrdad Farashahi & Masoud Tajeddin, *Effectiveness of Teaching Methods in Business Education: A Comparison Study on the Learning Outcomes of Lectures, Case Studies and Simulations*, 16 INT'L J. MGMT. EDUC. 131, 136 (2018).

Simulation-based learning provides an engaging and practice-oriented environment that helps students develop a broad range of skills. Business simulation games help students develop communication, leadership, teamwork, critical thinking, and problem-solving skills.²⁴ In the business law classroom, simulations provide students with opportunities to connect legal reasoning with strategic and ethical considerations in realistic organizational settings.²⁵ Despite their pedagogical benefits, however, interdisciplinary simulations in business law are not without limitations. Simulations that acknowledge ethics and sustainability may incorporate these themes as subsequent add-on considerations rather than integrating them throughout the decision-making process. Simulations that separate legal, ethical, and strategic dimensions into successive stages risk diluting the simultaneity of pressures that characterize real-world crises. This type of sequencing may lead students to view law, ethics, and strategy as discrete phases rather than as concurrent pressures that must be addressed simultaneously in practice. Moreover, achieving true simultaneity within a large-scale simulation presents a significant challenge. The time and coordination required to create a meaningful set of interconnected decisions that incorporate legal, ethical, and strategic factors into each choice would

²⁴ Anida Mahmood et al., *Utilizing Experiential Learning Methods to Teach Substantive Law Courses to Undergraduate Students*, 11 ASIAN J. LEGAL EDUC. 97 (2024).

²⁵ *Id.*

make such a simulation impossible to sustain at scale. This is where artificial intelligence offers a genuine pedagogical breakthrough. By generating adaptive decision paths, realistic stakeholder reactions, and multidimensional feedback, AI can better capture the interplay among legal, ethical, and strategic choices in ways that static simulations cannot. Thoughtfully integrated, it enables business law students to confront these forces as concurrent pressures, mirroring the realities of decision-making in modern business practice.

D. The Emerging Role of Artificial Intelligence

Extending simulation-based learning as a lens for examining crisis management and the interdisciplinarity of law, business, and ethics, artificial intelligence enables more dynamic and scalable simulation design. AI has emerged as a transformative pedagogical tool in business education. Mollick et al. (2024) described *PitchQuest*, a “venture capital pitching simulator that showcases the capabilities of AI in delivering instruction, facilitating practice, and providing tailored feedback.”²⁶ Prakash (2024) surveyed curricular efforts to integrate AI into law courses, linking theory to practice.²⁷ Other innovations

²⁶ Ethan Mollick et al., *AI Agents and Education: Simulated Practice at Scale*, arXiv:2407.12796 (June 20, 2024), <https://arxiv.org/abs/2407.12796>

²⁷ Aswathy Prakash & Vishnu Nair, *Integrating Generative AI into Legal Education: From Casebooks to Code*,

across business and negotiation education reflect this same momentum toward AI-enabled experiential learning. At MIT Sloan, the *Negotiation Essentials Sprint* and *Negotiation Strategy Sprint* integrate AI counterparts into negotiation training, enabling participants to practice with AI agents and receive real-time feedback.²⁸ Harvard's Division of Continuing Education has introduced *Negotiation Strategies with Artificial Intelligence Simulations*, a course in which students use AI-powered tools to replicate negotiation scenarios and receive individualized feedback.²⁹ Wharton's new *Artificial Intelligence for Business* concentration likewise includes coursework addressing the ethical, legal, and societal implications of AI in business decision-

Opportunities and Challenges. 6 LAW, TECH. & HUM. 60 (2024).

²⁸ MIT Sloan Executive Education, *Negotiation Essentials Sprint: AI-Accelerated Learning* (2025), <https://executive.mit.edu/course/negotiation-essentials-sprint%3A-ai-accelerated-learning/a054v00000r9v41AAA.html>; MIT Sloan Executive Education, *Negotiation Strategy Sprint: AI-Accelerated Learning* (2025), <https://executive.mit.edu/course/negotiation-strategy-sprint%3A-ai-accelerated-learning/a054v00000r9v7AAAQ.html>

²⁹ Harvard Div. of Continuing Educ., *Negotiation Strategies with Artificial Intelligence Simulations* (Course Listing, 2025), <https://coursebrowser.dce.harvard.edu/course/negotiation-strategies-with-artificial-intelligence-simulations/>; Harvard Program on Negotiation, *From Agent to Advisor: How AI Is Transforming Negotiation* (2024), <https://www.pon.harvard.edu/daily/negotiation-skills-daily/from-agent-to-advisor-how-ai-is-transforming-negotiation/>

making.³⁰ Collectively, these developments underscore how institutions are leveraging AI to enhance the scalability and accessibility of experiential learning. Business law faculty are now positioned to leverage these same advances to create interdisciplinary learning experiences that capture the complexity of real organizational decision-making.

These advances mark a shift from viewing AI as a challenge to recognizing it as a catalyst for innovation in business law pedagogy, opening new possibilities for experiential and interdisciplinary instruction. As the next section demonstrates, AI-assisted simulations have the potential to address these simultaneity and scalability challenges by operationalizing the integration of law, strategy, and ethics in real time. The Apex Simulation was developed to demonstrate how business law faculty can use artificial intelligence to more fully integrate legal analysis, ethical reasoning, and strategic decision-making into their courses through an experiential crisis management simulation.

II. OVERVIEW OF THE APEX INNOVATIONS CRISIS SIMULATION

³⁰ The Wharton Sch. of the Univ. of Pa., *The Wharton School Introduces New Undergraduate Concentration and MBA Major in Artificial Intelligence for Business* (Apr. 2025), <https://news.wharton.upenn.edu/press-releases/2025/04/the-wharton-school-introduces-new-undergraduate-concentration-and-mba-major-in-artificial-intelligence-for-business/>

A. Introducing the Apex Simulation

Crisis management provides a natural pedagogical setting within business law courses for examining how law, strategy, and ethics intersect in business decision-making. Using ChatGPT, I began with a simple question: how might this tool help innovate the delivery of undergraduate business law? I directed ChatGPT to generate a crisis simulation embedding law, strategy, and ethics within a single integrated simulation exercise. The intent was to use ChatGPT as a generative partner in developing the scenario narrative, supporting materials, and decision paths. The process proved cumbersome at times as several recurring challenges required ongoing attention and adjustment. Maintaining simultaneity proved challenging throughout the development process. The initial set of ChatGPT-generated questions often contained decision choices that were too simplistic, undercutting realism and immersion. Despite specific instructions to integrate legal, ethical, and strategic considerations into every decision, ChatGPT often addressed these dimensions in a sequential fashion. Some decision choices were more developed or persuasive than others, requiring revision to avoid undue influence on students' decision-making. Even after the scoring framework was established, subsequent AI outputs on other aspects of the simulation led to unrequested changes to the scoring framework. As a result, it was necessary to shift to a question-by-question development process to maintain consistency and accuracy. Ensuring consistency across multiple

decision pathways also required continuous oversight. Identifying and working through these issues became a central part of developing the simulation.

The final version that emerged from this iterative process of continuous experimentation and revision represents one approach for immersing students in this intersection. Students are assigned distinct professional perspectives and challenged to balance legal duties, strategic objectives, and ethical considerations within a simulated corporate crisis. The simulation is grounded in five learning goals, each representing a core competency in crisis management and corresponding to a distinct decision domain within the exercise: (1) balancing legal, financial, and reputational risks (Product Safety & Consumer Protection); (2) managing unexpected developments under pressure (Legal & Regulatory Strategy); (3) advocating a position while collaborating with others (Crisis Communication & Media Strategy); (4) understanding how legal teams navigate business crises (Corporate Accountability & Leadership); and (5) managing public perception and financial fallout (Financial & Investor Relations). The following subsections describe the simulation's structure, beginning with the scenario overview and then detailing the role archetypes, decision domains, branching design, and scoring system used to track student choices.

1. Scenario Overview

The simulation begins with the scenario narrative provided in an overview packet, which introduces students to their assigned roles within the Apex Innovations (Apex) in-house legal team as the company faces reports of overheating and battery fires in its flagship smartphone. Consumers have begun filing complaints, regulators are pressing for testing data, and expanding media attention is fueling public concern. As the company's stock price declines, investor confidence wavers, and senior executives face mounting pressure to stabilize both the firm's reputation and its financial outlook. The scenario clearly demonstrates to students that the situation has evolved into an organization-wide crisis encompassing regulatory oversight, potential litigation, leadership credibility, investor confidence, and the company's overall reputation in the marketplace. The Overview Packet signals that the exercise will unfold dynamically: confidential emails and executive memos provide the initial context, while breaking news updates appear over time to introduce additional pressures. Students are told that the exercise frames negotiation as a collaborative process that requires building consensus among members of the in-house legal team, each approaching the crisis from a different professional perspective.

The overview packet also provides a preview of the five decision-making domain areas. The first domain encompasses product safety and consumer protection. Teams choose how to respond to overheating and battery fires: a full voluntary recall, a limited recall, or delaying action until compelled

by regulators. Each option balances consumer safety, liability exposure, and financial solvency. For the second domain, legal and regulatory strategy, teams decide how to engage with regulators, such as the Consumer Product Safety Commission. Student choices in this area affect credibility, penalties, and reputation. The third domain centers on crisis communication and media relations. Teams must determine whether to posture the company's public message as a minimal defensive statement, a balanced acknowledgment with a remedial plan, or an aggressive campaign reframing the narrative. Early choices shape later credibility and flexibility. In the fourth domain, teams consider how to demonstrate corporate accountability and leadership: either by removing executives, instituting compliance reforms, or maintaining leadership continuity. These choices influence legitimacy, stakeholder confidence, and perceptions of culture. For the final domain on financial and investor relations, teams must allocate resources under crisis conditions: fund recalls and remediation, pursue cost-containment, or invest in future innovation. These decisions reverberate across all domains, shaping both credibility and capacity for reform. The framing emphasizes that decisions must be made in real time, with incomplete information, to replicate the conditions of corporate crisis management. A complete version of the scenario facts is provided in Appendix A.

2. Role Archetypes and Team Formation

Students assume one of three roles within Apex Innovations' in-house legal team: cop, counsel, or entrepreneur.³¹ The cop orientation emphasizes compliance and accountability, even when doing so may entail significant business cost. The counsel orientation emphasizes maintaining organizational stability while ensuring that each action remains legally defensible. The entrepreneur orientation focuses on keeping investors confident and the company's reputation strong, even if that means taking on greater legal risk to preserve growth and stability. Each packet includes a mission statement, prioritized objectives, and guiding strategies tailored to that student's assigned role. After reviewing their role materials, students are reorganized into negotiation groups of three, with each group containing one representative of each archetype. As such, each group must reconcile competing priorities of compliance, balance, and entrepreneurial risk-taking. Depending on enrollment numbers within a course, one role may be duplicated within a group so that two students share the same perspective. Each decision option in the simulation is mapped across all three archetypal orientations, with some choices aligning more strongly with one perspective than the others. These mappings remain hidden from students

³¹ Roles were adapted from Robert Nelson and Laura Nielsen's research on in-house counsel in large corporations, which identified recurring orientations that corporate lawyers adopt in practice. Robert L. Nelson & Laura B. Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 L. & SOC. REV. 457, 468 (2000).

during deliberation. The mappings are revealed only after all decisions are complete, allowing students to reflect on how their cumulative choices align with the underlying archetypes. Abbreviated descriptions of the cop, counsel, and entrepreneur role packets are provided in Appendix B.

3. Decision Areas and Branching Design

After students have reviewed the materials for their assigned role, they begin the structured negotiation phase of the simulation. The Apex Simulation Packet organizes the exercise into the five decision-making domains noted above, each with three sequential decision points, for a total of 15 structured choices. These interconnected decision paths generate numerous possible crisis pathways, adding realism, depth, and opportunities for repeat engagement. Decision options require groups to weigh competing considerations, with every choice simultaneously implicating legal obligations, ethical expectations, and strategic pressures. Each decision affects subsequent decisions. The packet implements this design through a “choose-your-own-path” format, in which each decision directs students along distinct pathways within the simulation. This structure allows the crisis to evolve dynamically over time, creating an experience that feels organic and interconnected for students. Representative decision sheets illustrating the structure of these domains and their options are provided in Appendix C.

4. Breaking News Updates

In addition to the structured branching decisions, the simulation includes four Breaking News Updates designed to simulate evolving crisis conditions. These updates prompt students to reassess their earlier decisions, reflecting the way real crises evolve unpredictably as new pressures emerge across different areas of decision-making. Because all teams receive the same updates, these moments become shared turning points that allow the instructor to compare how different groups react to the same unfolding events. The instructor can time each update to increase pressure, sustain engagement, or adapt to the classroom's pacing. The updates can serve as touchpoints to help students compare how their decisions differ when faced with the same external pressures. A complete set of Breaking News Updates is provided in Appendix D.

5. Student Decision Tracking and Scoring

As groups progress through the simulation, they record their choices on decision tracking sheets. Each sheet corresponds to one of the five decision-making domains. Students mark their selected option, explain their reasoning, and indicate whether a breaking news update influenced their thinking. Groups receive a scoring guide after completing all five areas. As noted above, each decision aligns more strongly with one archetypal perspective (cop, counsel, or entrepreneur) than with the others; in scoring, that archetype receives 10 points, while the other two receive 0 points. After all 15 decisions are

scored, groups calculate their results across the three archetypes and report them to the instructor. The instructor can then compile the aggregate results across all groups. Appendix E provides a full scoring breakdown for all questions and answers. It is important to emphasize that assessment within the simulation is designed to support reflection rather than ranking. Instructors are encouraged to use the scoring system to illustrate and compare patterns in decision-making, examining how different groups responded to the same legal, ethical, and strategic pressures.

III. PILOTING THE APEX SIMULATION

The Apex Simulation was piloted for the first time in the winter 2025 semester as part of the author's undergraduate business law course. The exercise was spread over multiple 50-minute class periods. Before passing out the materials, the author gave a brief introduction to the exercise (including the learning goals) to situate the exercise within the course learning goals and connect it to course concepts. The introduction emphasized the importance of integrating theory and hands-on practice in the business law classroom. Students were then assigned their roles (see Appendix B) and given a portion of the class period to review the introductory packet materials. Before beginning the exercise, the author went over the simulation instructions with the class and opened the floor to student questions.

Observations during the simulation revealed a wide range of individual behaviors and group

dynamics. Many groups were initially overwhelmed by the amount of information in front of them. Some groups anxiously skimmed the materials, others read in detail, and others seemed to glance around the room in bewilderment. Taking care to minimize disruptions to the entire class, the author reminded these students that the process was more important than the outcome and that the exercise is designed to simulate anxiety that can accompany complex decision-making. Once these groups overcame their initial anxiety and began making their initial decisions, the atmosphere in the room changed. The level of conversation within most groups increased as students became more comfortable with the process, revealing a range of group dynamics. As expected, in some groups one or two students dominated the discussion, while in others every student participated equally. A noteworthy experience centered on one group, in which all three students were constantly in disagreement. The author reminded this group that, although their perspectives differed (based on their roles), they were all part of the same organization working toward the same goal. It was interesting to observe how students who had been relatively quiet during the first part of the semester became engaged in the exercise, and how some were quieter than expected. A small number of students disengaged at various points throughout the simulation, either checking their phones or pretending to read materials. Periodic reminders were used to encourage full participation. The Breaking News Updates proved helpful in refocusing attention on the task at hand.

Many students expressed discomfort with choosing a single course of action, as each option seemed to create new risks elsewhere. Several groups spent considerable time debating trade-offs, while one group seemed to easily reach consensus on each decision.

The scoring results indicate that most students aligned with either the cop or counsel perspective, while relatively few aligned with the entrepreneur perspective. Of the nine groups, five leaned toward the cop perspective, while four leaned toward the counsel perspective.³² Although no group finished with an entrepreneur-dominant profile, several groups displayed entrepreneurial leanings in parts of their decision-making. The counsel-leaning groups (1, 2, 6, and 8) reflected efforts to balance legal risk, financial costs, and reputational concerns without overcommitting to one extreme. These results suggest that these groups viewed stability and flexibility as strategic assets. In contrast, the cop-leaning groups (3, 4, 5, 7, and 9) placed greater weight on compliance and risk avoidance. While group 4 scored heavily toward the cop orientation, groups 5 and 7 showed more mixed responses. Although groups 5 and 7 aligned most closely with the cop perspective, both groups showed higher

³² While these results provide insight into implementing an interdisciplinary crisis management simulation in an undergraduate business law course, the small sample size limits the generalizability of the findings. The results should be interpreted as exploratory, with future iterations across additional sections and institutions needed to more fully assess pedagogical impact.

entrepreneurial scores than the other teams. No group reflected a predominantly entrepreneurial perspective, potentially suggesting that students were reluctant to prioritize brand preservation or investor confidence over regulatory compliance and reputational accountability. Future offerings of the simulation will vary the ordering of response options at each decision point to assess whether the relatively low frequency of entrepreneur-dominant choices reflects ordering effects or other underlying factors. The overall results from the piloted implementation of the Apex Simulation suggest that students prioritized compliance and stability, with minimal willingness to take risks or pursue innovative strategies.

Students' responses to the post-simulation reflections revealed additional insights into how they perceived and processed the experience. From a broad perspective, students' reflections suggest they internalized and applied the simulation's central goal: recognizing how legal, ethical, and strategic considerations interact in real time during a corporate crisis. Many students commented that there were no obvious "right" answers to the Apex Simulation questions, since each answer choice carried its own trade-offs and consequences. Other students emphasized the importance of long-term thinking, with one noting, "With crisis management, you can't make decisions for short-term goals; you have to focus on the long-term outlook." Several students indicated that their groups leaned too heavily toward one orientation, noting that the imbalance could have negatively affected their overall strategy.

Another key theme that emerged from the collective comments centered on the crisis setting's unpredictability, with multiple students noting how earlier choices shaped subsequent decisions. As one student noted, "This exercise showed how complex decision-making is and how one thing leads to a snowball of other things." Numerous students described a tension between ethics and profitability, with one student noting, "It was hard to choose between what's ethically right and what helps the company more." Several reflection comments noted that the entrepreneur-oriented perspective was at a disadvantage in team deliberations, with one student expressing surprise that their group chose only one option in favor of the entrepreneur perspective. Several students remarked that their group decisions leaned mainly toward the counsel perspective.

In addition to team-level orientations, students also highlighted the difficulty of managing external perceptions alongside internal priorities. Some stressed the importance of transparency with employees and regulators, while others described the challenge of reconciling investor demands with consumer protection. One summarized: "Our team balanced keeping the company's employees around, the investors engaged, and the morale high within. The common ground we found is that we wanted to always keep a good reputation with the company." Taken together, such insights demonstrate that the Simulation immersed students in the interdisciplinary reality of business law. Instead of treating legal issues, ethical considerations, and business strategy as separate and sequential, the

exercise required students to engage all three dimensions simultaneously.

IV. ADAPTING THE APEX SIMULATION ACROSS COURSE CONTEXTS

The Apex Simulation is not presented in full in this article. Instead, the paper outlines the structure and provides representative excerpts to illustrate how the simulation operates within the business law classroom. As the complete simulation materials exceed the practical limits of an academic appendix, they are available from the author upon request. The broad nature of the simulation provides faculty with substantial flexibility in implementing the simulation. With respect to simulation content, faculty can adjust the factual scenario, decisions, and roles to more closely align with a specific industry (health care, tech, or finance) or a specific regulatory framework. For example, instructors can tie an employment scenario to EEOC standards, framing a product safety issue around CPSC oversight, or grounding financial reporting or governance problems within SEC requirements. As crisis management situations require in-house counsel to collaborate with executives, consultants, and managers from diverse organizational departments,³³ instructors may incorporate roles for individuals working outside the legal department. For example, instructors may expand the roles to include a human resource (HR) representative who focuses more

³³ Waterman & Yannet, *supra* note 2.

closely on the potential effects of decisions on workplace culture. Other instructors may opt to include a marketing role more geared toward brand protection, even in the face of increased risk and rising costs. Instructors wishing to further enhance realism may also include quantitative trade-offs among decision options, such as projected litigation costs vs. recall or settlement costs.

In terms of simulation delivery, faculty may adjust the simulation to accommodate different class lengths by varying the number of decision domains addressed and the exercise's overall pacing. In shorter class sessions, faculty may choose to focus on a single domain (such as product safety & consumer protection) and introduce one or two Breaking News Updates. In longer class periods, faculty may have students tackle all five domains in a single class session. If employed over several class sessions, faculty can ask students to reflect on their perceived progress as the exercise progresses. The simulation may also include a presentation component in which students share their reflections on what they learned with the class. The simulation can be adjusted to suit different course levels (undergraduate, graduate, professional) by expanding expectations for students' reasoning. For example, in lower-level undergraduate courses, instructors may have students focus on how the trade-offs associated with different responses could affect various stakeholders. In upper-level undergraduate or graduate courses, instructors can ask students to connect their decisions to specific regulatory standards or fiduciary obligations.

Instructors seeking to emphasize the strategy or interdisciplinary implications of the exercise may ask students to focus on potential reputational consequences or on organizational decision-making under conditions of uncertainty. Differences in enrollment and group composition can be accommodated with minimal modification. Multiple groups can conduct the simulation simultaneously, with the instructor moving between groups to answer questions, observe, and offer suggestions as needed. For classes with uneven enrollment, instructors may assign students to duplicate roles within a group as needed. In such instances, analyzing the results of groups with duplicated roles could provide an interesting point of comparison during debriefing discussions.

V. CONCLUSION

The Apex Simulation offers a practical model for bringing an interdisciplinary approach into the business law classroom. The core of the Simulation illustrates one method of immersing students in decision environments where legal requirements, ethical considerations, and strategic pressures intersect simultaneously rather than in compartmentalized stages. By asking students to make decisions with incomplete information under changing conditions, and where early decisions can shape later outcomes, the simulation challenges students to work through some of the competing considerations that business leaders face in times of organizational crisis. Although the Simulation was

rooted in a specific product-safety crisis, the Simulation's foundational structure is easily transferable to other business law topics. The broader design process can support simulations involving employment discrimination, torts, contracts, intellectual property, or other areas. An essential lesson from developing the Simulation centers on AI's role as a transformative pedagogical tool in business education. Although AI tools helped develop preliminary simulation materials, the provided output required continuous refinement and scrutiny. For business law faculty contemplating how to incorporate AI into their course preparation, the benefits of such tools serve as a starting point rather than a destination: faculty oversight is necessary at every stage. The Apex Simulation project demonstrates that AI-supported design, when paired with faculty oversight, can develop teaching materials that integrate law, strategy, and ethics in meaningful, practical ways. It offers a workable model for experiential learning that helps students develop the integrated legal, ethical, and strategic judgment required by modern business practice.

Using AI to develop interdisciplinary simulations for business law courses offers several directions for future research in business law pedagogy. Building on LAS scholarship, future work could examine how AI can further facilitate the integration of law with economics, organizational behavior, strategic management, and other law-adjacent disciplines. Research could explore whether AI-enabled simulations improve students' ability to draw on perspectives from such disciplines in a

coordinated way, further facilitating the proactive use of legal knowledge within diverse strategic and organizational contexts. For example, simulations can incorporate economic reasoning related to incentives and decision trade-offs, organizational behavior concepts such as group dynamics and decision biases, or more advanced strategic frameworks on market positioning. Extending this approach to other doctrinal areas, such as contracts, corporate governance, or employment law, would further test the capabilities of using AI as a supportive tool in scaling interdisciplinary reasoning throughout the business law curriculum.

APPENDIX A – SCENARIO FACTS

Your company, Apex Innovations, manufactures and sells consumer electronics. Recently, a popular smartphone model produced by Apex has been reported to overheat and, in some cases, catch fire. Several customers have filed complaints, and the Consumer Product Safety Commission (CPSC) is investigating the issue. Apex's reputation and financial stability are at risk. Additionally, major investors are expressing concerns about the company's ability to manage the crisis, and key stakeholders, including suppliers and distributors, are seeking assurances about Apex's future direction. Meanwhile, the company's financial team warns that a recall or significant legal settlement could strain cash reserves and impact funding for upcoming product launches.

Further complicating the situation, an investigative journalist is preparing a report alleging that Apex ignored early warning signs of battery defects during quality testing, citing anonymous sources within the company. Social media platforms are flooded with customer testimonials and videos showing damaged devices, amplifying public outrage. The marketing team reports a sharp decline in online sales, and several retail partners are considering halting the distribution of Apex's products until the issue is resolved. Meanwhile, the R&D department is concerned about the potential delay of a highly anticipated product release, which is central to

Apex's long-term strategy for competing with industry leaders.

Adding another layer of complexity, the company's primary manufacturing facility is located in a region recently impacted by geopolitical tensions, resulting in disrupted supply chains and increased operational costs. Concurrently, a class-action lawsuit led by a consumer advocacy group is being filed, seeking substantial damages. Internally, employee morale has begun to decline due to uncertainty about job security and frustration over the company's crisis management. The Human Resources department is concerned about a potential rise in turnover rates among key talent, which could disrupt operations further. Apex's ability to innovate and maintain its competitive edge now hinges on the decisions made during this critical period.

As the company's legal counsel, you must navigate this crisis by making decisions that will affect the company's legal, financial, and strategic outcomes while balancing the interests of consumers, investors, employees, and other stakeholders. Apex's leadership team is looking to you—its top legal advisors—to craft a response strategy.

APPENDIX B – SCENARIO ROLES

ROLE 1: COP (REGULATORY COMPLIANCE & RISK MITIGATION)

Mission: Ensure Apex Innovations strictly follows legal, regulatory, and ethical requirements to minimize liability. Your role is to prevent legal disasters, protect consumers, and maintain regulatory trust—even if it means significant short-term financial losses.

Key Objectives: (1) Ensure full legal compliance to prevent lawsuits, regulatory penalties, or criminal charges; (2) Prioritize consumer safety through recalls and accountability measures; (3) Minimize future risks by pushing for internal reforms and oversight.

Critical Questions for Approach: (1) Should Apex immediately recall all affected products to prevent consumer harm? (2) Should Apex self-report safety failures and accept external regulatory oversight? (3) Should Apex fire executives responsible for ignored safety warnings to restore trust? (4) Should Apex settle lawsuits early, even if it's expensive, to avoid prolonged legal battles? (5) Should Apex increase compliance spending, even if it slows product innovation?

ROLE 2: COUNSEL (BALANCED LEGAL & BUSINESS STRATEGY)

Mission: Find a middle ground between legal, financial, and strategic concerns to protect Apex

Innovations from excessive legal risk while maintaining business viability.

Key Objectives: (1) Mitigate legal risk while ensuring business stability; (2) Balance compliance, public relations, and investor confidence; (3) Prevent long-term brand damage while avoiding panic-driven decisions.

Critical Questions for Approach: (1) Should Apex limit the recall to affected models instead of recalling everything? (2) Should Apex settle lawsuits quietly or try to negotiate broader consumer protections? (3) Should Apex discipline executives but keep them for continuity? (4) Should Apex shift messaging to safety improvements while avoiding panic? (5) Should Apex use internal oversight reforms instead of allowing full external intervention?

ROLE 3: ENTREPRENEUR (GROWTH & REPUTATION-FOCUSED)

Mission: Protect Apex's long-term financial success, reputation, and market position by ensuring that legal responses do not cripple the business.

Key Objectives: (1) Minimize financial losses and maintain investor confidence; (2) Protect Apex's brand and ensure continued market dominance; (3) Avoid unnecessary regulation, lawsuits, and reputational damage.

Critical Questions for Your Approach: (1) Should Apex wait for more internal data before making a recall decision? (2) Should Apex fight lawsuits aggressively, arguing that overheating issues are

rare? (3) Should Apex retain executives rather than making public accountability moves? (4) Should Apex launch new product innovations to shift focus away from the crisis? (5) Should Apex resist regulatory intervention to maintain business flexibility?


APPENDIX C – DECISION SHEETS³⁴

**DECISION AREA 1: PRODUCT SAFETY &
CONSUMER PROTECTION**

Read the following decision options, then turn to the page indicated by your choice.

Decision 1: How to Respond to Product Defects

Option A: Full Recall – Immediately halt sales, pull all units from stores, and refund all customers.

 *Turn to Page 110*

◆ **Pros:** Protects consumer safety, rebuilds trust, reduces legal liability.

◆ **Cons:** \$500M+ loss in recall expenses, stock drop, investor lawsuits for mismanagement.

³⁴ The decision sheets in Appendix C reflect a student decision path of option A for each of the three decisions in Area 1.

Option B: Partial Recall – Recall only high-risk batches and offer replacements for affected customers.

➔ *Turn to Page 120*

- ◆ **Pros:** Saves \$300M compared to a full recall, mitigates risk for most affected consumers.
- ◆ **Cons:** If new cases emerge, Apex may still face full liability later.

Option C: No Recall, Defend the Product – Claim the fires are due to consumer misuse, dismiss defect concerns.

➔ *Turn to Page 130*

- ◆ **Pros:** Avoids immediate financial loss, reassures investors.
- ◆ **Cons:** High legal risk, regulators may mandate a forced recall.

PAGE 100

Full Recall Implemented: Consequences & Next Steps

This is the page teams turn to if they chose A. Full Recall in Decision 1: How to Respond to Product Defects.

📌 **Apex Innovations has announced a full recall of its flagship smartphone.** All units have been pulled from shelves, and consumers are being

offered full refunds. Regulators and consumer advocates praise the decision as a **responsible move** to protect public safety. However, this choice comes with significant financial and operational consequences.

Immediate Outcomes of Full Recall

- ◆ **Public Trust Increases** – Consumers appreciate Apex’s transparency and commitment to safety.

- ◆ **Financial Losses Rise** – The recall costs exceed \$500M, and stock prices drop **12% overnight**.

- ◆ **Retailers Demand Compensation** – Major retail partners are frustrated about **lost sales revenue** and are negotiating penalties.

- ◆ **Investor Backlash** – Hedge funds criticize Apex’s decision, fearing an inability to recover profits.

- ◆ **Regulatory Scrutiny Lessens** – The **Consumer Product Safety Commission (CPSC)** reduces its investigation pressure, viewing Apex’s recall as a proactive measure.

Proceed to Decision 2: Internal Safety & Quality Control Strategy

Now that Apex has recalled its product, **leadership must decide how to prevent future safety failures**. Regulators will still require proof that the company has **addressed internal safety and testing issues** before allowing Apex to return to full

production. How will Apex reform its quality control process? Can the company balance improved safety with maintaining its production schedule?

📌 **Choose one of the following options and turn to the appropriate page:**

◆ **Option A: Overhaul the Product Testing Process - Go to Page 140**

Pros: Apex introduces **industry-leading safety standards**, reassuring regulators.

Cons: Product development is **delayed by 9 months**, risking loss of market share.

◆ **Option B: Strengthen Compliance Without Disrupting Production - Go to Page 150**

Pros: Increased **inspections and compliance measures** limit future risk.

Cons: Regulators **remain skeptical**, requiring frequent progress updates.

◆ **Option C: Keep Existing Processes - Go to Page 160**

Pros: Maintains **supply chain stability and avoids added costs**.


Cons: Engineers warn that **another failure is inevitable**, potentially causing a **future crisis**.

PAGE 110

Apex Implements Major Safety Overhaul

*This is the page teams turn to if they chose A.
**Overhaul the Product Testing Process in Decision
2: Internal Safety & Quality Control Strategy.***

Apex Implements Major Safety Overhaul

 **Apex Innovations announces a complete overhaul of its product testing and safety protocols.** The company commits to industry-leading **quality control measures**, including advanced stress testing, an independent safety review board, and stricter supplier oversight.

Immediate Outcomes of Overhaul Decision

◆ **Regulators Praise the Move** – The **Consumer Product Safety Commission (CPSC)** views this as a proactive measure and delays further enforcement actions.

◆ **Production Delays Increase** – Implementing new safety measures **delays the launch of Apex’s next flagship product by 9 months.**

◆ **Investors Express Concern** – Stock value dips 7%, as Apex prioritizes safety over short-term revenue.

◆ **Retailers Renew Confidence** – Major retailers **continue carrying Apex products**, citing the company’s commitment to quality.

◆ **Competitors Take Advantage** – Rivals market their **own devices as "safer alternatives"** while Apex scrambles to implement changes.

✦ **Proceed to Decision 3: Communicating with Customers**

Now that Apex has **committed to stronger safety protocols**, the company must decide **how to communicate this decision to customers**. Some consumers appreciate the proactive move, but others are demanding compensation for purchasing a potentially defective product.

📌 **Choose one of the following options and turn to the appropriate page:**

◆ **Option A: Offer Full Refunds and Apologies**

- *Go to Page 170*

Pros: Restores public trust and avoids future lawsuits.

Cons: Costs Apex **\$400M+ in revenue**, and investors may file class-action lawsuits.

◆ **Option B: Provide Store Credit or Replacement Devices** - *Go to Page 180*

Pros: Reduces refund costs, keeping more cash in the company.

Cons: Retailers refuse to cover replacement costs, increasing Apex's financial strain.

◆ **Option C: Minimize Public Statements** - *Go to Page 190*

Pros: Avoids fueling panic, keeping the focus on upcoming product improvements.

Cons: Journalists **uncover leaked safety reports**, making Apex look deceptive.

PAGE 140

Apex Announces Full Refunds and Public Apology

This is the page teams turn to if they chose A. Offer Full Refunds and Apologies in Decision 3: Communicating with Customers.

✚ **Apex Innovations issues a public apology and offers full refunds to all affected customers.** The company holds a press conference where the CEO acknowledges past mistakes and pledges to **restore consumer trust through transparency and better safety practices.**

✚ **Immediate Outcomes of Offering Full Refunds & Apologies**

- ◆ **Public Trust is Restored** – Consumers **respond positively**, with many acknowledging Apex’s commitment to responsibility.
- ◆ **Legal Risk is Reduced** – The **Consumer Product Safety Commission (CPSC)** sees this move as a **strong corrective action**, lowering the chances of further penalties.
- ◆ **Investors Panic** – The **stock price drops 15%**, as hedge funds react negatively to the **\$400M+ financial loss** from refunds.
- ◆ **Retailers Express Relief** – Major retailers

resume full product sales, seeing Apex as a **responsible brand**.

◆ **Competitors Gain an Edge** – Rival smartphone manufacturers **use Apex’s recall as a marketing advantage**, luring away previously loyal customers.

📌 **End of Area 1: Product Safety & Consumer Protection** - Your decisions have shaped Apex’s **product safety strategy**, public reputation, and financial stability. The company is now shifting its focus to **legal, regulatory, and corporate strategy challenges**.

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APPENDIX D – BREAKING NEWS UPDATES

📌 **BREAKING NEWS UPDATE #1 –
EXPLOSION INCIDENT**

A passenger’s Apex Model X smartphone overheated and caught fire mid-flight on a commercial airline. The FAA (Federal Aviation Administration) is considering banning Apex phones from all flights. A video of the explosion has gone viral, with over 50 million views on social media. Regulators may impose a forced recall if Apex does not take immediate action.

Instructions for Teams: Consider how this affects future decisions involving product strategy, crisis communication, recall strategy, and regulatory

response. No need to revisit past decisions—focus on pivoting your current strategy.

▪ | BREAKING NEWS UPDATE #2 – CEO UNDER INVESTIGATION

A whistleblower has leaked internal emails showing that Apex’s CEO was warned about overheating issues six months ago but still pushed production forward. The SEC (Securities and Exchange Commission) has launched an investigation into whether Apex misled investors. Employees are staging a walkout, demanding leadership resignations. Investors are selling off stock, causing a major price drop.

Instructions for Teams: Reevaluate any prior decisions related to leadership, liability, or public statements. Decide whether to revise past decisions (e.g., support of leadership, PR stance) or stick to them—and justify your reasoning. Adjust future legal, ethical, and leadership strategies accordingly.

▪ | BREAKING NEWS UPDATE #3 – COMPETITOR OPPORTUNISM

Apple and Samsung have launched a joint marketing campaign positioning their smartphones as safer and more reliable. Major retailers are considering dropping Apex products entirely. Tech reviewers are recommending that consumers switch brands, citing safety concerns. A consumer boycott movement is trending, with calls to #DitchApex.

Instructions for Teams: Consider how this affects your next steps in PR, retail strategy, competitive positioning, and brand recovery. No need to revisit earlier decisions unless you want to voluntarily reassess brand messaging.

▪ | BREAKING NEWS UPDATE #4 – SECRET DOCUMENT LEAK

A former Apex engineer has released confidential internal safety reports showing that executives were warned a year ago but dismissed concerns due to cost issues. Consumer lawsuits are doubling, with new legal actions being filed every hour. Regulators are expanding investigations to consider criminal negligence charges. Shareholders are suing Apex for misleading investors.

Instructions for Teams: Teams should review prior choices—especially those tied to legal defense, ethics, leadership accountability, or financial disclosures. Decide whether to revise those decisions, double down, or spin a new narrative. Integrate new legal and PR tactics into future actions to contain fallout.

APPENDIX E – SCORING GUIDE

Use this scoring guide to **determine whether your group leaned toward the Cop, Counsel, or Entrepreneur approach.**

Area 1: Product Safety & Consumer Protection

Scoring Instructions: For each decision your group made, award 10 points only to the archetype (Cop, Counsel, or Entrepreneur) that aligns with your selected option. Leave the other two blank.

Decision Topic	Your Group's Choice	Cop	Counsel	Entrepreneur
Product Safety Response	A = Full Recall	10		
	B = Partial Recall		10	
	C = No Recall			10
Safety & Quality Control	A = Overhaul Testing	10		
	B = Strengthen Compliance		10	

Decision Topic	Your Group's Choice	Cop	Counsel	Entrepreneur
	C = Keep Existing Process			10
Customer Communication	A = Full Refunds	10		
	B = Store Credit		10	
	C = Minimize Response			10

Total Points from Area 1

Cop _____

Counsel _____

Entrepreneur _____

Area 2: Legal & Regulatory Strategy

Scoring Instructions: For each decision your group made, award 10 points only to the archetype aligned with your selected option. Leave the other two blank.

Decision Topic	Your Group's Choice	Cop	Counsel	Entrepreneur
CPSC Investigation	A = Full Cooperation	10		
	B = Negotiate Privately		10	
	C = Resist & Defend			10
Class-Action Lawsuit Strategy	A = Settle Quickly	10		
	B = Fight in Court		10	

Decision Topic	Your Group's Choice	Cop	Counsel	Entrepreneur
	C = Offer Consumer Vouchers			10
Internal Policy Changes	A = New Compliance Standards	10		
	B = Hire Crisis Legal Team		10	
	C = Delay Changes			10

Total Points from Area 2

Cop _____

Counsel _____

Entrepreneur _____

Area 3: Crisis Communication & Media Strategy

Scoring Instructions: For each decision your group made, award 10 points only to the archetype aligned with your selected option. Leave the other two blank.

Decision Topic	Your Group's Choice	Cop	Counsel	Entrepreneur
Public Messaging Strategy	A = Hold Press Conference	10		
	B = Release Controlled Statement		10	
	C = Minimize Public Response			10

Decision Topic	Your Group's Choice	Cop	Counsel	Entrepreneur
Social Media Crisis Mgmt	A = Apologize & Engage	10		
	B = Limit Engagement		10	
	C = Shift Narrative			10
Whistleblower & Internal Leaks	A = Conduct Investigation	10		
	B = Offer NDAs		10	
	C = Ignore Whistleblowers			10

Total Points from Area 3

Cop _____

Counsel _____

Entrepreneur _____

Area 4: Corporate Accountability & Leadership

Scoring Instructions: For each decision your group made, award 10 points only to the archetype aligned with your selected option. Leave the other two blank.

Decision Topic	Your Group's Choice	Cop	Counsel	Entrepreneur
Executive Accountability	A = Fire CEO & Executives	10		
	B = Issue Reprimands		10	
	C = Shift Blame			10

Decision Topic	Your Group's Choice	Cop	Counsel	Entrepreneur
Corporate Culture & Ethics Reform	A = Overhaul Ethics Programs	10		
	B = Create Leadership Task Force		10	
	C = Maintain Current Structure			10
Employee Morale & Retention	A = Bonuses & Reassurance	10		
	B = Improve Transparency		10	
	C = Ignore Concerns			10

Total Points from Area 4

Cop _____

Counsel _____

Entrepreneur _____

Area 5: Financial & Investor Relations

Scoring Instructions: For each decision your group made, award 10 points only to the archetype aligned with your selected option. Leave the other two blank.

Decision Topic	Your Group's Choice	Cop	Counsel	Entrepreneur
Crisis Financial Priorities	A = Maximum Safety Spending	10		
	B = Balance Crisis & R&D		10	

Decision Topic	Your Group's Choice	Cop	Counsel	Entrepreneur
	C = Limit Crisis Spending			10
Investor Communication	A = Shareholder Q&A	10		
	B = Financial Statement		10	
	C = Delay Communication			10
Long-Term Growth Strategy	A = Delay New Product Launches	10		
	B = Continue Expansion		10	
	C = Aggressive			10

Decision Topic	Your Group's Choice	Cop	Counsel	Entrepreneur
	Cost-Cutting			

Total Points from Area 5

Cop _____

Counsel _____

Entrepreneur _____

Add up your group's total points for each category:

Counsel Type	Total Points (Combined total from all 5 areas)
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Cop (Risk-Averse, Compliance-Heavy)	_____ pts
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Counsel (Balanced, Strategic Approach)	_____ pts
--	-----------

Entrepreneur (Risk-Tolerant, Profit-Driven)	_____ pts
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The highest total score determines your group's dominant crisis management approach. If your team has a relatively even split across two categories, you likely balanced both approaches rather than strongly favoring one.

Mostly Cop (Risk-Averse, Compliance-Heavy)

- Your team prioritized legal compliance, consumer safety, and strict accountability at the expense of financial flexibility.
- Apex likely restored public trust but faced financial losses and slower recovery due to high spending on safety and legal measures.
- This approach is ideal for avoiding long-term regulatory consequences but may frustrate investors.

Mostly Counsel (Balanced, Strategic Approach)

- Your team tried to balance legal risk, financial concerns, and reputation management.
- Apex likely stabilized the crisis without excessive spending or extreme leadership changes.
- This approach is moderate, preserving both trust and financial flexibility, though it risks not fully satisfying any single stakeholder group.

Mostly Entrepreneur (Risk-Tolerant, Profit-Driven)

- Your team prioritized investor confidence, cost control, and aggressive recovery strategies at the expense of regulatory compliance and long-term public trust.
- Apex may have avoided major financial losses in the short term but risks facing long-term damage if legal and reputational issues escalate.
- This approach is ideal for maintaining stock value but could lead to lawsuits, regulatory penalties, and talent losses.

**INCLUDING CRIMINAL LAW IN A
BUSINESS LAW CLASS – A TOPIC
IMPORTANT ON ITS OWN AND IN
SUPPORT OF OTHER BUSINESS LAW
LEARNING**

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I. INTRODUCTION

As instructors of business law know all too well, the typical law class for undergraduate business majors is expected to cover numerous topics, many of which are themselves a separate course in a law school setting. The prospect of adding even more content is daunting; instructors rightfully resist diminishing or diluting coverage of important existing topics in favor of adding even more material. For that reason, business law instructors often do not view criminal law as a topic of primary importance,¹ although many undergraduate textbooks do include a chapter on this subject.² However, not prioritizing

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¹ John C. Kuzenski, *Contemporary Business Law Courses: An Exploratory Study of Undergraduate Textbook Content and Pedagogical Planning*, J. OF LEGAL STUD. EDUC., 119, 138 (2023).

² See MANN AND ROBERTS, SMITH & ROBERSON'S BUSINESS LAW, (Cengage 18th ed. 2023); MELVIN AND GUERRA-PUJOL,

the inclusion of criminal law may be a disservice. The topic itself is important: the number of federal criminal statutes has grown dramatically since the 1990s.³ The government estimates that white collar crime, which includes embezzlement, securities fraud, computer and internet fraud, and economic espionage and trade secret theft, costs the United States more than \$300 billion annually.⁴ Beyond that, exposure to criminal law concepts often helps students in their understanding of topics typically found in business law courses, including litigation and business ethics. For that reason, instructors should consider adding at least a basic discussion of this important topic to their classes.

This Article discusses how to add criminal law content to a business law course. It examines some of the concepts that should be included and makes suggestions about how this material can be covered in a time-efficient manner. Particular focus will be paid to learning what can take place outside the classroom, including by use of videos and

THE LEGAL ENVIRONMENT OF BUSINESS, A MANAGERIAL APPROACH: THEORY TO PRACTICE (McGraw-Hill 2024).

³ Patrick McLaughlin and Liya Palagashvili, *Counting the Code: How Many Criminal Laws Has Congress Created*, MERCATUS CTR. GEORGE MASON U. (Jan. 17, 2023), <https://www.mercatus.org/research/policy-briefs/counting-the-code-congress-criminal-laws>. At present the Justice Manual, published by the Department of Justice, states that the prosecution of corporate crime is a high priority although it is unclear if this will change. U.S. DEP'T OF JUST., Just Manual § 9-28.010 (2023).

⁴ *White-Collar Crime*, LEGAL INFO. INST. WEX, https://www.law.cornell.edu/wex/white-collar_crime (last visited May 26, 2025).

homework assignments. While instructors must be careful not to overburden students, judicious planning can allow for meaningful exposure to criminal law concepts that will sharpen students' overall understanding of the legal environment, help them recognize and avoid potential business crimes, and provide guidance should they nonetheless find themselves in a situation where criminal exposure is a possibility.

The Article begins with an analysis of basic concepts to cover, including the difference between civil and criminal law, the different level of offenses, and the proof required for a criminal conviction. From there it moves to a detailed discussion of the Federal Sentencing Guidelines, which are important for understanding the interaction between criminal law and business ethics. Lastly, the Article examines some crimes that may arise in the business context, including embezzlement, mail and wire fraud, and various tax crimes. While not an exhaustive list, the discussion is intended to sensitize future business professionals to crimes they may encounter over the course of their careers.

II. INTRODUCTORY CONTENT TO COVER

In light of the time constraints applicable to business law courses, most instructors will decide that any discussion of criminal law must necessarily be limited to essential topics. A good place to start is an explanation of the difference between criminal

law and civil law.⁵ This discussion will reinforce the focus of the course, which for business law classes will center on civil law. It will also help students to understand the role government plays in criminal investigations and prosecutions and, by comparison, the resources and effort required of plaintiffs in bringing a civil suit.⁶ As a part of this discussion it is useful to provide some information about criminal restitution, since students may be under the impression that a criminal conviction means victims will automatically be reimbursed by the defendant for their losses. In the federal system, restitution may be ordered for certain expenses including damage to property, lost income, and medical costs or other financial expenditures incurred directly in relation to

⁵ For a helpful discussion of this issue, students should be encouraged to visit *The Differences Between Criminal Court and Civil Court*, LEGAL AID SOCIETY OF NE. N.Y., (Aug. 4, 2022), <https://www.lawhelp.org/resource/the-differences-between-criminal-court-and-ci>.

⁶ See generally COUNTYOFFICE.ORG, *How Much to File a Civil Lawsuit?*, YOUTUBE (Aug. 27, 2024), (https://www.youtube.com/watch?v=qSlk0qD1Z_U). For a discussion of court costs visit *Court Costs*, LEGAL INFO. INST. WEX, https://www.law.cornell.edu/wex/court_costs (last visited May 26, 2025). Some commercial websites provide estimates of average attorney costs but it is important to stress to students that any reference to these sites does not constitute an endorsement. For examples, see *How Much does It Cost to Sue Someone?*, HIGH RISE FIN., <https://www.highriselegalfunding.com/faqs/how-much-does-it-cost-to-sue-someone/> (last visited May 27, 2025) (over \$10,000 for a simple suit); *How Much Does It Cost to Sue Someone in Civil Court?* PUSCH & NGUYEN, <https://puschnghuyen.com/how-much-does-it-cost-to-sue-someone-in-civil-court/> (last visited May 27, 2025).

a crime.⁷ Other outlays, like legal fees incurred for services obtained in connection with a crime, are not eligible.⁸ Efforts by the federal government to collect restitution can continue for up to twenty years, but future managers and business professionals need to know that the odds of receiving a full recovery are very low.⁹

Since business law classes typically include a discussion of the civil court system and dispute resolution, explaining the difference between the amount of evidence required for a criminal conviction, “beyond a reasonable doubt,” and the “mere preponderance” standard applicable in most civil cases will also be useful. “Beyond a reasonable doubt” requires virtual certainty on the part of the jury, meaning no other reasonable explanation exists for what was proven in court.¹⁰ By comparison, a “mere preponderance” can be thought of just enough to tip the scales of justice, a greater than 50% chance the plaintiff’s allegations are true.¹¹ Managers

⁷ *Restitution Process*, U.S. DEP’T OF JUST., (Oct. 10, 2023) <https://www.justice.gov/criminal/criminal-vns/restitution-process>. Losses for pain and suffering do not qualify. *Id.*

⁸ *Id.*

⁹ *Id.* Victim compensation programs may also exist under state law. See, e.g., *Victim Compensation*, OFF. VICTIM SERVS., <https://ovs.ny.gov/victim-compensation> (last visited May 27, 2025).

¹⁰ *Beyond a Reasonable Doubt*, LEGAL INFO. INST. WEX, https://www.law.cornell.edu/wex/beyond_a_reasonable_doubt (last visited May 26, 2025).

¹¹ Mere preponderance can also be defined as meaning the plaintiff’s allegations are more probable than not. *Preponderance of the Evidence*, LEGAL INFO. INST. WEX, https://www.law.cornell.edu/wex/preponderance_of_the_evide

should understand that a judgment of guilt in a criminal case may constitute important evidence in a later civil proceeding,¹² a possibility which should inform any decision made about filing a criminal complaint.

A discussion of the different levels of criminal offenses should also be considered. This can be helpful to the extent a business law class includes analysis of torts like assault and battery¹³ that may also be crimes and may therefore have consequences beyond liability for damages. Setting that aside though, the difference in the penalties applicable in the case of a criminal conviction is important in its own right and should be understood by business managers. The most serious offense would be a felony, which is a crime punishable by more than one year in prison.¹⁴ Federal felonies include tax

nce (last visited May 26, 2025). “Clear and convincing evidence” applies in some cases, like fraud.

¹² See 50 C.J.S. Judgments § 1192 (May 2025 update); W.E. Shipley, Annotation, *Conviction or Acquittal as Evidence of the Facts on Which It Was Based in Civil Actions*, 18 A.L.R. 2d 1287 (1951).

¹³ *Tort*, LEGAL INFO. INST. WEX, <https://www.law.cornell.edu/wex/tort> (last visited May 27, 2025).

¹⁴ *Felony*, FINDLAW.COM, <https://dictionary.findlaw.com/definition/felony.html> (last visited May 27, 2025). Felonies also include crimes punishable by death. *Id.* Many states classify felonies according to the seriousness of the crime. *Felony*, LEGAL INFO. INST. WEX, <https://www.law.cornell.edu/wex/felony> (last visited May 27, 2025).

evasion,¹⁵ securities fraud,¹⁶ and healthcare fraud.¹⁷ Misdemeanors are less serious and are punishable by up to a year in jail.¹⁸ A person who willfully fails to file a tax return has committed a misdemeanor, and may face fines and prison time (or both) along with the costs of prosecution.¹⁹

Any discussion of criminal law should include analysis of what must be shown for a conviction. This starts with an explanation of the requirement of proof of *actus reus*, meaning a voluntary action or failure to act that causes a prohibited result.²⁰ *Mens rea*, the requisite mental state that must accompany the action or omission,²¹ can be made vivid for students by use of *Regina v.*

¹⁵ 26 USC § 7201.

¹⁶ 18 USC § 1348.

¹⁷ 18 USC § 1347.

¹⁸ *Misdemeanor*, FINDLAW.COM, <https://dictionary.findlaw.com/definition/misdemeanor.html> (last visited May 27, 2025). Under federal law, misdemeanors are divided into classes, with class A being the most serious. *See generally* Olivia Wathne, *Misdemeanor Charges 101: Flexible Treatment, Federal Treatment and Consequences*, FINDLAW.COM (April 4, 2025), <https://www.findlaw.com/criminal/criminal-law-basics/misdemeanors.html>.

¹⁹ 26 USC § 7203. Different sanctions apply for willful violations of 26 USC § 6050I (Returns relating to cash received in trade or business, etc.).

²⁰ *Actus Reus*, LEGAL INFO. INST., WEX, https://www.law.cornell.edu/wex/actus_reus (last visited May 27, 2025).

²¹ *Mens Rea*, LEGAL INFO. INST., WEX, https://www.law.cornell.edu/wex/mens_rea (last visited May 27, 2025).

Dudley and Stephens,²² a decision which has bedeviled law students and almost certainly many of the readers of this manuscript. In the interest of conserving classroom time, instructors should consider using outside resources to cover this compelling case, which involved shipwrecked sailors who killed a weakened boy and as a result survived their ordeal and were rescued, only to be convicted of murder. There are useful articles and videos which can be assigned to students to help them understand the legal and ethical dilemmas the facts raised. The case lends itself to assignments or exam questions asking students to analyze the ethics of the sailors' actions, of the subsequent conviction, and of the commutation of the death sentences the men ultimately faced.²³

A discussion of criminal procedure is also useful background. Many textbooks have a basic explanation of what a businessperson who has been victimized by crime or accused of criminal action can expect.²⁴ Criminal procedure necessarily includes reference to Constitutional protections, like the Fourth Amendment prohibition against unreasonable searches and seizures, and the Fifth Amendment protection against self-incrimination. For that

²² 14 Q.B.D. 273 (Queen's Bench Division 1884).

²³ See, e.g., A.K. Legal, *The Ethical Dilemma of R. v. Dudley and Stephens (1884) – Case Explained*, YOUTUBE (May 24, 2024) <https://www.youtube.com/watch?v=AfurrI0t8jU>; *Regina v. Dudley and Stephens*, U. MINN., <https://lawlibrarycollections.umn.edu/classic-cases-criminal-regina-v-dudley-stephens> (last viewed May 27, 2025).

²⁴ See, e.g., CLARKSON AND MILLER, *BUSINESS LAW TEXT AND CASES 201* (Cengage, 16th ed. 2025).

reason, instructors who wish to add criminal law content to a business law class should consider placing it in the syllabus in close proximity to any Constitutional law discussion. Also to be considered, again in light of time constraints, is shifting coverage of this topic to learning outside the classroom. There are excellent resources on criminal procedure that are informative and well worth assigning to students.²⁵

III. CRIMINAL LAW AND ETHICS

Many business law classes incorporate a discussion of ethics, a topic that grew in importance after scandals like Enron and WorldCom in the early 2000s led to the passage of the Sarbanes Oxley Act and the adoption of various governance measures.²⁶ Criminal law and business ethics are closely intertwined, a relationship well exemplified by the

²⁵ A particularly useful video on criminal procedure is United States Courts, *Knowledge Seminar Criminal Trials: Journey to Justice*, YOUTUBE (May 9, 2019) <https://www.youtube.com/watch?v=SYSTnUvqTaE>; *see also* *Criminal Procedure*, LEGAL INFO. INST. WEX, https://www.law.cornell.edu/wex/criminal_procedure (last visited May 27, 2025).

²⁶ Later ethics scandals like those involving Lehman Brothers and the Bernie Madoff Ponzi scheme have kept this pot boiling. For a discussion of the importance of business law in business ethics, *see* Robert C. Bird, *On the Future of Business Law*, 35 J. OF LEGAL STUD. EDUC., 301, 302 (2018). Many business law textbooks include ethics chapters. *See*, MANN AND ROBERTS, *supra* note 2; CLARKSON AND MILLER, *supra* note 24; MELVIN AND GUERRA-PUJOL, *supra* note 2.

Federal Sentencing Guidelines.²⁷ The Guidelines are a valuable addition to any discussion of business law and ethics and an understanding of criminal law will be useful background for students studying them.²⁸ Again, instructors should consider some of the many helpful online resources that will give students an overview of this topic without expending classroom time.²⁹

The United States Sentencing Commission publishes the Sentencing Guidelines. The Commission was formed in 1984, in response to perceived disparities in sentences handed down by federal courts when defendants were convicted of the same offense.³⁰ The Guidelines, which are

²⁷ U.S. SENT'G GUIDELINES MANUAL (U.S. SENT'G COMM'N 2024).

²⁸ A copy of the Sentencing Guidelines can be found at <https://www.ussc.gov/guidelines/2024-guidelines-manual-annotated>.

²⁹ Helpful information for instructors can be found at U.S. SENT'G COMM'N, *Introduction to the Federal Sentencing Guidelines Part 2*, YOUTUBE (2012) <https://www.youtube.com/watch?v=4uYTipOGldw> and U.S. SENT'G COMM'N, *Introduction to the Federal Sentencing Guidelines Part 3*, YOUTUBE (2012) <https://www.youtube.com/watch?v=7NMCmK6yzBY>. See also *Criminal Procedure*, LEGAL INFO. INST. WEX, https://www.law.cornell.edu/wex/federal_sentencing_guidelines (last visited May 27, 2025) and Varghese and Summersett, PLLC., *Federal Sentencing: Everything You Need to Know*, YOUTUBE (Mar. 2, 2021) <https://www.youtube.com/watch?v=oLQGmiCxt2U>.

³⁰ *An Overview of the United States Sentencing Commission*, U.S. SENT'G COMM'N, https://www.ussc.gov/sites/default/files/pdf/about/overview/USSC_Overview.pdf (last visited May 28, 2025).

advisory,³¹ set a base offense level for various federal crimes, which level may be increased or decreased based on specific offense characteristics. For example, the base offense level for insider trading is eight,³² but the level may be increased depending on the amount of gain which resulted and also whether the offense involved an organized scheme to engage in insider trading.³³ Once the base offense level is determined, adjustments must be considered. Adjustments can result in increases or decreases to the offense level. For example, a defendant who willfully obstructed the investigation, prosecution, or sentencing of the offense of conviction may be subject to a two-level increase in the offense level.³⁴ A defendant who clearly accepted responsibility for his or her actions may qualify for a decrease in offense level.³⁵

The US Probation Office prepares a Presentence Report which contains information relating to the base offense level and also any adjustments that may be applicable.³⁶ To apply the

³¹ U.S. v Booker, 543 US 220 (2005).

³² U.S. SENT'G GUIDELINES MANUAL § 2B1.4(a) (U.S. SENT'G COMM'N 2024).

³³ U.S. SENT'G GUIDELINES MANUAL § 2B1.4(b) (U.S. SENT'G COMM'N 2024).

³⁴ U.S. SENT'G GUIDELINES MANUAL § 3C1.1 (U.S. SENT'G COMM'N 2024). This enhancement also applies if the obstruction related to an offense closely related to the offense of conviction. *Id.*

³⁵ U.S. SENT'G GUIDELINES MANUAL § 3E1.1 (U.S. SENT'G COMM'N 2024).

³⁶ *The Presentence Report*, U.S. PROBATION OFFICE, WDTX, <https://www.txwp.uscourts.gov/presentence-report/index.html> (last visited May 28, 2025).

Sentencing Guidelines, a defendant’s criminal history must also be determined and the Probation Office plays a role here too. There are six criminal history categories, reflecting a defendant’s past conduct, with Category I being the least serious and Category VI the most.³⁷ The criminal history category is based on the number of points assigned for prior sentences, but special rules may apply.³⁸ Once both the offense level and criminal history category are known, a table is used to determine the actual advisory sentence, with the number of months constituting the sentence to be determined by the intersection of the horizontal and vertical lines on the grid. An excerpt from the sentencing table appears below.³⁹

SENTENCING TABLE
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24

³⁷ U.S. SENT’G COMM’N, *An Overview of the United States Sentencing Commission*, *supra* note 30.

³⁸ U.S. SENT’G GUIDELINES MANUAL Ch. 4 (U.S. SENT’G COMM’N 2024).

³⁹ U.S. SENT’G GUIDELINES MANUAL Ch.5 Pt. A (U.S. SENT’G COMM’N 2024). The Sentencing Table is divided into zones as shown by the stepped lines which indicate the various sentencing options. For example, someone with an offense level of three and a criminal history category of IV would be in Zone A, for which imprisonment would not be required unless expressly mandated by the guideline specifically applicable to the offense of conviction. *Id.* at § 5C1.1.

Chapter eight, the Guideline chapter which covers sentencing of organizations, is particularly important, both for business law classes that do discuss criminal law and because of Chapter eight's business ethics content. Sentencing of organizations, which includes corporations, partnerships, and associations among other entities,⁴⁰ is similar to the process described above for individuals. Possible sanctions applicable include fines, probation, orders of restitution and subjecting the defendant to forfeiture statutes.⁴¹ Special rules apply to organizations that operate primarily for a criminal purpose or by criminal means, but these are not likely to be relevant to most future business professionals.⁴² For organizations that do not fall within that category, some of the offenses likely to be relevant to business, like tax evasion or fraud, are specifically listed by the Guidelines and are crimes for which the dollar loss or harm can be quantified.⁴³ In these

⁴⁰ U.S. SENT'G GUIDELINES MANUAL § 8A1.1 App. Note 1 (U.S. SENT'G COMM'N 2024).

⁴¹ Paula Desio, *An Overview of the Organizational Guidelines*, U.S. SENT'G COMM'N

<https://www.uscc.gov/sites/default/files/pdf/training/organizational-guidelines/ORGOVERVIEW.pdf> (last visited May 28, 2025). Organizations may also be required to issue a public notice of conviction. *Id.*

⁴² U.S. SENT'G GUIDELINES MANUAL § 8C1.1 (U.S. SENT'G COMM'N 2024).

⁴³ U.S. SENT'G GUIDELINES MANUAL § 8C2.1 (U.S. SENT'G COMM'N 2024); *Primer - Fines for Organizations*, OFF. OF THE GEN. COUNS., (2024)

https://www.uscc.gov/sites/default/files/pdf/training/primers/2024_Primer_Organizational_Fines.pdf. In cases where the

cases, the fine calculation starts by determining the base offense level and any appropriate adjustments, as described above for individuals.⁴⁴ The base fine is then calculated by reference to the “Offense Level Fine Table,”⁴⁵ *or* by the amount of gain the offense generated *or* by the amount of loss the scheme caused, depending on which figure is greatest.⁴⁶ After determining the base fine, the court must calculate an organization’s “culpability score.” This starts at five points but is adjusted up if various factors are present, including the involvement of high-level personnel or pervasive tolerance of the offense by substantial authority figures.⁴⁷ Important to the present discussion, the existence of an effective compliance and ethics program may reduce the culpability score.⁴⁸

offense is not listed in § 8C2.1, the fine is calculated under § 8C2.10. U.S. SENT’G GUIDELINES MANUAL § 8C2.10 (U.S. SENT’G COMM’N 2024).

⁴⁴ U.S. SENT’G GUIDELINES MANUAL § 8C2.3 (U.S. SENT’G COMM’N 2024). *See also Primer - Fines for Organizations*, OFF. OF THE GEN. COUNS., *supra* note 43.

⁴⁵ U.S. SENT’G GUIDELINES MANUAL § 8C2.4 (U.S. SENT’G COMM’N 2024).

⁴⁶ *Id.* Fines are based on the loss caused only when the loss was caused intentionally, knowingly, or recklessly. *Id.*

⁴⁷ U.S. SENT’G GUIDELINES MANUAL § 8C2.5 (U.S. SENT’G COMM’N 2024). The calculation of the adjustment is affected by the number of employees an organization has. *Id.* Other aggravating factors include a prior criminal history and an organization’s violation of a court order or obstruction of justice. *Id.*

⁴⁸ U.S. SENT’G. GUIDELINES MANUAL § 8C2.5(f) (U.S. SENT’G COMM’N 2024). No reduction will be granted in certain cases, including where an organization unreasonably delayed in reporting the offense to government authorities. *Id.* Self-

Once the culpability score is determined, a sentencing court uses a table, which appears below, to identify maximum and minimum multipliers.⁴⁹ For example, a culpability score of four equates to a minimum multiplier of 0.8 and a maximum of 1.6. The multipliers are applied to the base fine, calculated as described above, to determine the guideline fine range. This means if the base fine is \$60,000, the guideline fine range runs from \$48,000 to \$96,000. Various factors are to be considered in deciding on a fine within the guideline range, including the absence of an effective compliance and ethics program when the offense was committed.⁵⁰

CULPABILITY SCORE	MINIMUM MULTIPLIER	MAXIMUM MULTIPLIER
10 or more	2.00	4.00
9	1.80	3.60
8	1.60	3.20
7	1.40	2.80
6	1.20	2.40
5	1.00	2.00
4	0.80	1.60
3	0.60	1.20
2	0.40	0.80
1	0.20	0.40
0 or less	0.05	0.20.

reporting, cooperation, and acceptance of responsibility are also grounds to reduce an organization’s culpability score. U.S. SENT’G GUIDELINES MANUAL § 8C2.5(g) (U.S. SENT’G COMM’N 2024).

⁴⁹ U.S. SENT’G GUIDELINES MANUAL § 8C2.6 (U.S. SENT’G COMM’N 2024).

⁵⁰ U.S. SENT’G GUIDELINES MANUAL § 8C2.8(a)(11) (U.S. SENT’G COMM’N 2024).

As this analysis indicates, the existence of an effective ethics and compliance program can have a significant impact on a corporation's sentence and therefore is an important part of any discussion of criminal law. However, even where a business law course does not cover criminal law concepts, an analysis of what constitutes an effective ethics and compliance programs should be part of any future business professional's training,⁵¹ because the failure to implement such a program may constitute a breach of corporate management's duties.⁵² In *In Re Caremark International*, a Delaware Chancery Court case involving a proposed settlement of a derivative action, the court wrote the following in considering a claim based on failing to monitor:

⁵¹ "In fact, the most useful benefit from using the Guidelines to design and implement a compliance and ethics program is that it can help companies avoid investigations and convictions in the first place." Steven Gordon, *Implementation of Effective Compliance and Ethics Programs and the Federal Sentencing Guidelines*, 2-2 CORP. COMPLIANCE ANSWER BOOK (PLI) https://legacy.pli.edu/product_files/Titles/2470/%23205998_02_Corporate_Compliance_Answer_Book_2018_P3_20170915151415.pdf (last visited May 28, 2025). The lack of an effective compliance and ethics program may be a contributing factor when considering organizational prosecutions. A 2022 report indicated that 89.6% of organizational offenders did not have any compliance or ethics program. *The Organizational Sentencing Guidelines: Thirty Years of Innovation and Influence*, U.S. SENT'G COMM'N, https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220829_Organizational-Guidelines.pdf (last visited May 28, 2025).

⁵² Gordon, *supra* note 51, at 2-4.

... it would, in my opinion, be a mistake to conclude that corporate boards may satisfy their obligation to be reasonably informed concerning the corporation, without assuring themselves that information and reporting systems exist in the organization that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance.⁵³

On the subject of the Sentencing Guidelines, the court observed:

... I note the potential impact of the federal organizational sentencing guidelines on any business organization. Any rational person attempting in good faith to meet an organizational governance responsibility would be bound to take into account this development and the enhanced penalties and the

⁵³ In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970 (De.Ch. 1996).

opportunities for reduced sanctions that it offers.⁵⁴

As this discussion strongly suggests, analysis of what the Sentencing Guidelines consider to be necessary for an effective compliance and ethics program is an important addition to a discussion of business law and ethics, beyond having obvious value for any criminal law class.⁵⁵ There are two overarching principles which must be considered: an organization must exercise due diligence in preventing and detecting crime and it must promote a culture that encourages ethical conduct and a commitment to comply with the law.⁵⁶ Beyond that, the Guidelines list seven specific steps that should be taken to implement these principles.

⁵⁴ *Id.*

⁵⁵ Before beginning a discussion of Chapter 8, instructors should be prepared to answer a question that students are almost certain to raise: if a business organization has an effective compliance program, how could a crime even occur? On this point, the guidelines are clear: the failure to prevent or detect the crime for which an organization is being sentenced does not necessarily mean a program is ineffective. U.S. SENT'G GUIDELINES MANUAL §8B2.1(a) (U.S. SENT'G COMM'N 2024).

⁵⁶ U.S. SENT'G GUIDELINES MANUAL § 8B2.1 (U.S. SENT'G COMM'N 2024). In addition to relying on the Sentencing Guidelines, the New York Stock Exchange Listed Company Manual contains guidance on what to include in a corporate code of ethics. § 303A.10 *Code of Business Conduct and Ethics, NYSE Listed Company Manual (Section 3)*, N.Y. STOCK EXCH. (last amended Nov. 25, 2009), <https://nyseguide.srorules.com/listed-company-manual/09013e2c85c0074e>.

1. Standards and procedures must be established to prevent and detect criminal conduct.⁵⁷ These can be found in an organization’s mission statement, code of ethics, or in employee handbooks but they must be well-communicated and readily available.⁵⁸

2. The organization’s governing authority must be knowledgeable about the compliance and ethics program and must exercise reasonable oversight as to its implementation and effectiveness. Specific individuals considered to be “high-level personnel,” such as directors, executive officers, and substantial owners, are to have overall responsibility for the program and specified individuals within the organization should have day-to-day operational responsibility for compliance. Individuals with operational responsibility must be given sufficient resources, appropriate authority and direct access to the organization’s governing authority or any appropriate subgroup of that authority.⁵⁹

⁵⁷ U.S. SENT’G GUIDELINES MANUAL § 8B2.1(b)(1) (U.S. SENT’G COMM’N 2024).

⁵⁸ *US Sentencing Guidelines: Benchmark for an Effective Ethics and Compliance Program*, LEXIS, (Jan. 14, 2025), <https://advance.lexis.com/open/document/openwebdocview/U-S-Sentencing-Guidelines-Benchmark-for-an-Effective-Compliance-and-Ethics-Program/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5HK9-1911-JYYX-616F-0000-00&pdcomponentid=102981#>.

⁵⁹ U.S. SENT’G GUIDELINES MANUAL § 8B2.1(b)(2) (U.S. SENT’G COMM’N 2024). *See id.* at § 8A1.2, commentary, for a definition of “High-level personnel.”

3. Reasonable efforts must be taken to exclude individuals the organization knew, or should have known, engaged in illegal activities or other conduct inconsistent with an effective ethics program.⁶⁰ This restriction applies to “substantial authority personnel,” which includes “high-level personnel” discussed earlier, like directors and executive officers, but also others such as plant managers, sales managers, or other individuals who exercise substantial discretion within the scope of their work.⁶¹

4. The organization must take reasonable steps to periodically communicate its standards, procedures, and other aspects of the compliance and ethics program. This entails training and a wide distribution of information to persons within the organization ranging from members of the governing authority to employees and, if appropriate, agents.⁶² The training provided may differ, depending on an individual’s responsibilities.⁶³

⁶⁰ U.S. SENT’G GUIDELINES MANUAL § 8B2.1(b)(3) (U.S. SENT’G COMM’N 2024).

⁶¹ *Id.* This section refers to definitions found in the application instructions to § 8A1.2. Employers should be certain to check any list of “excluded persons” that applies to their specific industry. Gordon, *supra* note 51, at 2-23. Due diligence is required, which may involve screening and background checks. *US Sentencing Guidelines: Benchmark for an Effective Ethics and Compliance Program*, *supra* note 58.

⁶² U.S. SENT’G GUIDELINES MANUAL § 8B2.1(b)(4) (U.S. SENT’G COMM’N 2024).

⁶³ *Id.* See also Gordon, *supra* note 51, at 2-24.

5. Reasonable steps to insure compliance with the organization's program must be taken, including monitoring and auditing to detect criminal conduct.⁶⁴ Audits can be conducted by an internal compliance officer or externally, ideally by outside legal counsel.⁶⁵ The effectiveness of the compliance and ethics program must be evaluated periodically and the organization must have a system that allows employees or agents to seek guidance or report criminal conduct without fear of retaliation.⁶⁶ A method by which individuals can check back in anonymously, to determine if the organization has followed up on their reports, should be considered as it instills confidence that ethics concerns are taken seriously.⁶⁷

6. The compliance and ethics program must be promoted and enforced consistently through appropriate incentives and disciplinary measures.⁶⁸ An organization can reward individuals who help to address ethics complaints or who make useful suggestions to improve the ethics system.⁶⁹ What

⁶⁴ U.S. SENT'G GUIDELINES MANUAL § 8B2.1(b)(5) (U.S. SENT'G COMM'N 2024).

⁶⁵ This is so the results of the audit are covered by attorney-client privilege. Gordon, *supra* note 51, at 2-18.

⁶⁶ U.S. SENT'G GUIDELINES MANUAL § 8B2.1(b)(5) (U.S. SENT'G COMM'N 2024).

⁶⁷ Gordon, *supra* note 51, at 2-28.

⁶⁸ U.S. SENT'G GUIDELINES MANUAL § 8B2.1(b)(6) (U.S. SENT'G COMM'N 2024).

⁶⁹ LEXIS, *US Sentencing Guidelines: Benchmark for an Effective Ethics and Compliance Program*, *supra* note 58.

discipline is appropriate depends on the situation but organizations should be careful to detail these consequences in a document such as a personnel manual that is distributed to all employees. Additionally, the procedures that are specified must be closely followed.

7. If criminal conduct is discovered, an organization must respond appropriately and act to prevent future misconduct, including modifying the compliance and ethics program as necessary.⁷⁰ This step should include prompt discipline but the organization also should consider whether efforts should be made to address the harm caused by the conduct, such as restitution. In some cases, self-reporting to regulators or law enforcement may be advisable or even required.⁷¹ Course material should stress the importance of seeking legal advice before taking these steps in order not to inadvertently compromise the organization's negotiating posture in any future litigation or enforcement actions tied to the violation.

IV. CRIMES TO DISCUSS

Like individuals, a business organization can commit or be the victim of many different kinds of crimes. However, given the time constraints that most instructors face, a business law class that covers criminal law should focus on crimes that are more

⁷⁰ U.S. SENT'G GUIDELINES MANUAL § 8B2.1(b)(7) (U.S. SENT'G COMM'N 2024).

⁷¹ Gordon, *supra* note 51, at 2-30.

typically associated with business operations. Some of these are listed below.

A. Embezzlement

Embezzlement is when someone to whom personal property has been entrusted fraudulently takes that property.⁷² A business organization would be a victim of embezzlement, for example, when a bookkeeper commits fraud by adding a fictitious employee to the payroll and collects the resulting compensation payments.⁷³ Embezzlement may be a federal crime, as where a federally insured bank employee siphons funds, but often it is prosecuted under state law.⁷⁴ In determining punishment, the Model Penal Code classifies embezzlement according to the nature and value of the property stolen.⁷⁵ This means that the greater the amount taken the greater the punishment a defendant faces.

B. Mail and Wire Fraud

⁷² *Embezzlement*, LEGAL INFO. INST. WEX, <https://www.law.cornell.edu/wex/embezzlement> (last visited May 27, 2025). California defines embezzlement as “the fraudulent appropriation of property by a person to whom it has been intrusted.” CAL. PENAL CODE § 503 (West 2025).

⁷³ In *U.S. v. Milligan*, a payroll specialist was convicted of wire fraud and other crimes for embezzling money from her former employer. 77 F.4th 1008 (D.C. Cir. 2023).

⁷⁴ In New York, embezzlements are prosecuted as larceny. N.Y. PENAL LAW § 155.05 (West 2025).

⁷⁵ MODEL PENAL CODE § 223.1(2).

Mail fraud is charged when a defendant used the U.S. Mail or caused the use of the U.S. Mail in a scheme to defraud. The scheme must have involved material misstatements or omissions and resulted, or would have resulted, in the loss of money, property, or services.⁷⁶ Where a scheme to defraud is perpetrated using electronic communications, including the internet, wire fraud has been committed.⁷⁷ According to the mail and wire fraud laws, the statutory penalty for both these crimes is a fine, imprisonment up to twenty years, or both, although greater sanctions may apply in some cases.⁷⁸ Jim Bakker, the famous television evangelist who generated millions by fraudulently selling “lifetime partnerships” at his ministry’s resort, was convicted of wire and mail fraud and conspiracy.⁷⁹

C. Insider Trading

Besides civil sanctions, insider trading can lead to criminal prosecution. Trading on non- public information can be charged as securities fraud under

⁷⁶ Frauds and Swindles, 18 U.S.C. § 1341.

⁷⁷ Fraud by Wire, Radio or Television, 18 U.S.C. § 1343.

⁷⁸ For mail fraud, see 18 U.S.C. § 1841; for wire fraud see 18 U.S.C. § 1843. The applicable sentencing guideline is § 2B1.1. See, e.g., U.S. v Brown, 771 F.3d 1149 (9th Cir. 2014).

⁷⁹ Lee May, *Bakker Gets 45 Years in Prison: Fraud: The Defrocked Television Evangelist is Also Fined \$500,000 in Connection with Selling ‘Lifetime Partnerships’ in the PTL Ministry*, L. A. TIMES (Oct. 25, 1989), <https://www.latimes.com/archives/la-xpm-1989-10-25-mn-486-story.html>.

18 U.S.C. 1348. The maximum penalty under this statute is a fine, up to twenty-five years in prison, or both. It is also possible to be prosecuted under the securities laws. For example, in *Salman v. U.S.*,⁸⁰ the defendant was charged under Section 32 of the 1934 Securities Exchange Act for insider trading in violation of the Section 10(b) prohibition against manipulative or deceptive devices in connection with sales or purchases of securities.⁸¹ Possible sanctions under Section 32 include a fine of up to \$5 million, imprisonment for no more than twenty years, or both.⁸² *Salman* was a tippee of information received from an extended family member,⁸³ but the misappropriation theory can also be used as grounds for conviction.⁸⁴ Persons found guilty of insider trading include Chris Collins, a Congressional representative from New York,⁸⁵ Raj Rajaratnam,

⁸⁰ 580 U.S. 39 (2016) “*Salman* was indicted on one count of conspiracy to commit securities fraud, see 18 U.S.C. §371, and four counts of securities fraud, see 15 U.S.C. §§ 78j(b), 78ff; 18 U.S.C. § 2; 17 C.F.R. § 240.10b-5.” *Id.* at 43.

⁸¹ § 10(b) is found in 15 U.S.C. § 78j(b).

⁸² 15 U.S.C. § 78ff(a). In the case of a corporation, the maximum fine is \$25 million.

⁸³ 580 U.S. at 42. A tippee is someone who trades on inside information received from an insider, knowing the disclosure was improper. *Id.* at 41.

⁸⁴ 69A AM JUR *Securities Regulation* § 1536 (2025). In general terms, the misappropriation theory applies where an individual trades on non-public information in breach of a fiduciary duty owed to the source of the information. *Id.* See *U.S. v. O’Hagan*, 521 U.S. 642 (1997).

⁸⁵ *Former Congressman Christopher Collins Sentenced for Insider Trading Scheme and Lying to Federal Agents*, U.S. ATT’Y’S OFF., S. D. N.Y. (Jan. 17, 2020),

founder of a hedge fund who was sentenced to eleven years in prison,⁸⁶ and Jeffrey Skilling, who served as Enron's CEO as the company imploded.⁸⁷

D. Money Laundering

In general, money laundering involves masking financial assets so they can be used without alerting authorities to the illegal activities that generated them.⁸⁸ Typically this is a three-step process that begins when the dirty money is placed in the launderer's hands. Next, the launderer conceals the source of the money, often by passing it through a complex web of transactions or by the use of bookkeeping tricks. Finally, the money is returned through an indirect route and now appears to have been obtained from lawful sources. Shell companies

<https://www.justice.gov/usao-sdny/pr/former-congressman-christopher-collins-sentenced-insider-trading-scheme-and-lying>.

⁸⁶ *Hedge Fund Billionaire Raj Rajaratnam Found Guilty in Manhattan Federal Court of Insider Trading Charges*, U.S. ATT'Y'S OFF., S. D. N.Y. (Jan. 17, 2020),

<https://archives.fbi.gov/archives/newyork/press-releases/2011/hedge-fund-billionaire-raj-rajaratnam-found-guilty-in-manhattan-federal-court-of-insider-trading-charges>.

⁸⁷ Brian Dolan, *Enron Executives: What Happened and Where are They Now?*, INVESTOPEdia (Sept. 19, 2024),

<https://www.investopedia.com/enron-executives-6831970>.

Insider trading is found in the Sentencing Guidelines at § 2B1.4(a). U.S. SENT'G GUIDELINES MANUAL § 2B1.4(a) (U.S. SENT'G COMM'N 2024).

⁸⁸ *What is Money Laundering?*, FIN. CRIMES ENFT NETWORK, <https://www.fincen.gov/what-money-laundering> (last visited May 29, 2025).

are often used for laundering purposes. For example, a money launderer might create a corporation to operate what appears to be a service business to receive money to be cleaned. The business generates fake invoices and records receipts to account for the money paid to the launderer by the criminal. In the hands of the shell service company, the money appears to be legitimately sourced and can later be withdrawn by the launderer for return to the criminal, less fees.⁸⁹

There are various federal statutes that target money laundering but for business law instructors attempting to explain this crime, it is probably best to focus on two laws passed as part of the Money Laundering Control Act of 1986. Under 18 USC 1956, certain financial transactions that involve the proceeds of specified predicate offenses (like mail and wire fraud) and that are “committed or attempted (1) with the intent to promote further predicate offenses; (2) with the intent to evade taxation; (3) knowing the transaction is designed to conceal laundering of the proceeds; or (4) knowing the transaction is designed to avoid antilaundry reporting requirements” are illegal.⁹⁰ Under 18 USC

⁸⁹ *Money Laundering*, LEGAL INFO. INST. WEX, https://www.law.cornell.edu/wex/money_laundering (last visited May 29, 2025).

⁹⁰ Charles Doyle, *Money Laundering: An Abridged Overview of 18 U.S.C. § 1956 and Related Federal Criminal Law*, CONG. RSCH. SERV. (Nov. 30, 2017) file:///C:/Users/ah33/Downloads/RS22401.11.pdf. 18 USC § 1956(a)(2) involves money laundering in the context of international transactions and 18 USC § 1956(a)(3) focuses on laundering where there is a government investigation. *Id.*

1957, essentially the deposit or withdrawal of criminally derived property valued at more than \$10,000 is also criminal. Both of these statutes provide for punishment by fines, imprisonment, or both.⁹¹ Bernie Madoff, famous for running the largest Ponzi scheme in history, was convicted of money laundering among other charges.⁹²

E. Tax Crimes

Improper or fraudulent reporting of taxes due or failure to provide required information can lead to painful civil consequences but can also result in criminal sanctions. A discussion of some of the more significant tax provisions is important content for a business law course⁹³ because of the tax obligations business operations typically generate. Note that businesses are often subject to both federal and state mandates. Instructors should remind students of state compliance responsibilities, but time constraints likely preclude in-depth analysis of state law obligations. Federal tax crimes that merit discussion include evasion and willful failure to collect or pay over a tax.

⁹¹ 18 USC §1956(a) and 18 USC § 1957(b). See 18 USC § 1956(b) for a discussion of penalties.

⁹² Adam Hayes, *Bernie Madoff: Who He Was and How His Ponzi Scheme Worked*, INVESTOPEDIA (June 23, 2024), <https://www.investopedia.com/terms/b/bernard-madoff.asp>.

⁹³ Instructors can expect that accounting students will study taxation as part of their curriculum. However, tax textbooks available from some of the major publishers do not include criminal tax content.

F. Tax Evasion

Attempting to minimize tax owed to the federal government is perfectly legal, but evading tax by underreporting income or claiming false deductions is not. The crime of tax evasion, found at 26 USC 7201, can also be charged when taxpayers claim credits to which they are not entitled, maintain a double set of books for their business, or file a false return.⁹⁴ Tax evasion is a felony and while the actual punishment is determined using the Sentencing Guidelines,⁹⁵ the statute provides for a maximum fine of \$100,000 (\$500,000 for a corporation), imprisonment of up to five years, or both, plus the costs of prosecution.

To prove tax evasion, the government must show an unpaid tax liability exists and that the defendant committed an affirmative act to avoid or attempt to avoid the tax. Mere failure to pay tax, without more, does not constitute evasion.⁹⁶ The defendant's actions must be willful, meaning there

⁹⁴ See, e.g., Julia Kagan, *Tax Evasion: Definition and Penalties*, INVESTOPEDIA (April 25, 2025),

<https://www.investopedia.com/terms/t/taxevasion.asp>.

⁹⁵ U.S. SENT'G GUIDELINES MANUAL § 2T1.1(U.S. SENT'G COMM'N 2024).

⁹⁶ *Tax Evasion*, LEGAL INFO. INST. WEX, https://www.law.cornell.edu/wex/tax_evasion (last visited May 29, 2025). See also *Criminal Tax Manual* § 8.00 U.S. DEPT OF JUST. TAX DIV., (updated May 19, 2025) <https://www.justice.gov/tax/foia-library/criminal-tax-manual-title-page-0>.

was a specific intent to evade a known legal duty.⁹⁷ Willfulness can be inferred from a defendant's conduct, as where the taxpayer gave inconsistent statements to government agents,⁹⁸ where the taxpayer concealed assets,⁹⁹ or where the taxpayer knowingly or recklessly withheld information from their accountants.¹⁰⁰ State income tax evasion statutes may also apply.¹⁰¹ Famous people convicted of tax evasion include Al Capone, Martha Stewart, Lauryn Hill, and Pete Rose.¹⁰²

G. Willful Failure to Collect or Pay Over Tax

⁹⁷ *Tax Evasion*, LEGAL INFO. INST. WEX, https://www.law.cornell.edu/wex/tax_evasion (last visited May 29, 2025). In *Cheek v. U.S.*, willfulness was defined as a “voluntary, intentional violation of a known legal duty.” 498 U.S. 192, 200-01 (1991) (quoting *U.S. v. Bishop*, 412 U.S. 346 (1973)).

⁹⁸ *U.S. v. Bishop*, 264 F.3d. 535, 550 (5th Cir. 2001).

⁹⁹ *Id.*

¹⁰⁰ *U.S. v. Chesson*, 933 F.2d 298, 305 (5th Cir. 1991).

¹⁰¹ See for example, 30 DEL. CODE ANN. tit. 30 § 571 (West Aug. 15, 2024); IND. CODE ANN. §6-3-6-11 (West 2025); MINN. STAT. ANN. § 297E.13 (West 2025).

¹⁰² Jennifer Taylor, *23 Celebrities Convicted of Tax Evasion*, GOBANKINGRATES (Feb. 15, 2023, at 9:00 ET), <https://www.nasdaq.com/articles/23-celebrities-convicted-of-tax-evasion>. Also convicted was hotel tycoon Leona Helmsley, who was famously quoted as saying: “We don’t pay taxes. Only the little people pay taxes.” *Top 10 Tax Dodgers*, TIME, https://content.time.com/time/specials/packages/article/0,2880,4,1891335_1891333_1891317,00.html (last visited May 29, 2025).

Under 26 USC 7202, persons who are required to collect, truthfully account for, and pay tax and who willfully fail to do so are guilty of a felony and face a fine, imprisonment up to five years, or both, along with the costs of prosecution. The primary focus of this statute is taxes withheld from employees.¹⁰³ Importantly, persons prosecuted for failing to pay over withholding taxes also face *personal liability* under the 100% trust fund penalty found at Tax Code § 6672.¹⁰⁴ Both § 7202 and 6672 target “responsible persons,” which has been defined broadly as anyone with “the authority required to exercise *significant* control over the [employer’s] financial affairs.”¹⁰⁵ Criteria considered by the government in determining if a businessperson is “responsible” include the ability of an individual to sign checks; the identity of officers, directors, and

¹⁰³ U.S. DEP’T OF JUST. TAX DIV., *supra* note 96, at § 9.03.

¹⁰⁴ For a discussion of responsible persons under the 100% penalty of § 6672, see *Employment Taxes and the Trust Fund Recovery Penalty (TFRP)*, IRS, (May 7, 2025), <https://www.irs.gov/businesses/small-businesses-self-employed/employment-taxes-and-the-trust-fund-recovery-penalty-tfrp>. For criminal prosecutions, see U.S. DEP’T OF JUST. TAX DIV., *supra* note 96, at §9.04; *see also* Martha Salzman, Arlene Hibscheiler, Michael Tedesco, *Employment Tax Penalties: Let’s Keep It Civil*, THE TAX ADVISER, Feb. 1 2018, <https://www.thetaxadviser.com/issues/2018/feb/employment-tax-penalties/>.

¹⁰⁵ U.S. DEP’T OF JUST. TAX DIV., *supra* note 96, at § 9.04, discussing U.S. v Jones, 33 F.3d 1137, 1139 (9th Cir. 1994), a case brought under 26 USC § 6672. (Emphasis in original).

shareholders; and the identity of the individual(s) in charge of financial affairs.¹⁰⁶

Under § 7202, the government must prove the defendant acted “willfully.” An evil purpose or motive is not required.¹⁰⁷ On this point, future business professionals should know the thinking of the Department of Justice:

A defendant may argue that she was using the withheld tax to pay current expenses so she could keep the company operating and eventually pay the delinquent tax. Although such facts may affect jury appeal and perhaps how the judge views sentencing, if the government proves the defendant voluntarily and intentionally used unencumbered funds to pay creditors other than the United States, the jury may properly convict even if the intentional nonpayment of the known trust fund tax liability was motivated by a desire to keep the business afloat.¹⁰⁸

What this means is that a businessperson who pays other creditors in order to keep the doors open may be subject to a Section 7202 prosecution. In *United States v. Gilbert*, for example, the Ninth Circuit dismissed a defendant’s arguments that the

¹⁰⁶ U.S. DEP’T OF JUST. TAX DIV., *supra* note 96, at § 9.04.

¹⁰⁷ U.S. v Pomponio, 429 U.S. 10, 12 (1976).

¹⁰⁸ U.S. DEP’T OF JUST. TAX DIV., *supra* note 96, at § 9.04[2].

government had failed to prove willfulness. The court noted that "... Gilbert's act of paying wages to his employees, instead of remitting withholding taxes to the IRS, shows that he voluntarily and intentionally violated § 7202."¹⁰⁹

Criminal prosecutions for willful failure to pay over withheld taxes tend to be limited to egregious cases.¹¹⁰ For instance, in *U.S. v Quinn*, an attorney had a nearly ten-year history of noncompliance, filed bankruptcy to delay collection, and used her sister to conceal assets.¹¹¹ Although this means that most businesspeople are likely to never face prosecution under this section, exposing students to the 100% civil penalty that typically also arises in these cases would serve future business leaders well even in courses that do not include criminal law.¹¹²

H. Fraud and False Statements

¹⁰⁹ *U.S. v. Gilbert*, 266 F.3d 1180, 1185 (9th Cir. 2001).

¹¹⁰ See Salzman, Hibschiweiler & Tedesco, *supra* note 104.

¹¹¹ *U.S. v. Quinn*, 566 Fed. Appx. 659 (10th Cir. 2014).

¹¹² Students often wrongly assume that formation of an LLC or corporation precludes personal liability for officers, directors or owners under any circumstances. Instructors therefore should consider presenting some of the theories that can generate loss of personal assets. Besides the trust fund penalty rules of 26 USC § 6672, other theories include piercing the corporate veil, personal guarantees, watered stock and illegal dividends. Note also that trust fund tax liability may arise in other contexts, such as where a business collects but fails to pay over state sales tax. See, e.g., NY TAX LAW § 1133 (McKinney 2024).

Tax Code section 7206 punishes a variety of offenses, including willfully making and signing false returns, statements, or other documents under penalty of perjury.¹¹³ This offense is a felony, punishable by a fine, up to three years in prison, or both, together with the costs of prosecution. Section 7206(1) is not limited to tax returns and has been used where false information was submitted to the IRS for settlement purposes and where false information was provided in an application to extend a filing deadline.¹¹⁴ A taxpayer who signed and filed a return that was prepared by a qualified return preparer will not be convicted of this offense if it can be proven that the preparer received full information and the defendant believed the return was correct.¹¹⁵ The government must show that the information was materially false. Courts have held that the existence of a tax deficiency is not required for a conviction but the lack of a deficiency may be relevant to determining materiality.¹¹⁶ Willfulness also must be

¹¹³ 26 USC § 7206(1). A false statement or document not made under penalty of perjury is a misdemeanor and can be prosecuted under 26 USC § 7207. Fraudulent Returns, Statements or Other Documents, IRM 9.1.3.3.8 (Jan. 30, 2023).

¹¹⁴ U.S. DEP'T OF JUST. TAX DIV., *supra* note 96, at § 12.06.

¹¹⁵ U.S. v. Wilson, 887 F.2d 69, 73 (5th Cir. 1989).

¹¹⁶ U.S. v. Floyd, 740 F.3d. 22,32 (1st Cir. 2014) (“A conviction for violation of section 7212(a) does not require proof of ... a tax deficiency”); U.S. v. Clifton, 127 F.3d 969, 971 (10th Cir. 1997) (“... taxpayer's failure to report all taxable income will not affect the computation of tax, which in turn might very well affect the jury's deliberations on the element of materiality.”).

proven. As noted above, willfulness is defined as voluntary, intentional, and knowing.¹¹⁷

Under 26 USC 7206(2), assisting in the preparation or presentation of a false return, claim, or other document is also criminal, and subject to the sanctions noted above. This can be thought of as punishing “aiding and abetting.”¹¹⁸ Important for instructors who are teaching accounting students, this section applies to return preparers but also can be used against corporate officers, tax shelter promoters, and others.¹¹⁹ The violation must have been committed willfully and must be false as to a material matter. Examples of schemes prosecuted under this provision include the use of inflated values by the general partners in a limited partnership, resulting in excessive depreciation deductions and investment credits,¹²⁰ political contributions disguised as business expenses,¹²¹ and sham financing transactions that generated false interest

¹¹⁷ U.S. DEP’T OF JUST. TAX DIV., *supra* note 96, at § 12.11[1]. While ignorance of the facts is a defense, “willful blindness,” which is where a defendant intentionally avoided learning something, is not. *Id.* at §12.11[6].

¹¹⁸ U.S. DEP’T OF JUST. TAX DIV., *supra* note 96, at §13.03.

¹¹⁹ *Fraudulent Returns, Statements or Other Documents*, IRM 9.1.3.3.7.2 (Jan. 30. 2023). In *U.S. v. Thomas*, a CPA was convicted under this provision. Even though he did not prepare the actual returns in question, he structured transactions that falsely presented personal expenses as deductible. 1994 WL 645725 at 6 (6th Cir. 1994).

¹²⁰ *U.S. v. Barshov*, 733 F.2d 842, 845 (11th Cir. 1984).

¹²¹ *U.S. v. McCrane*, 527 F.2d 906 (3d Cir. 1975), *vacated on other grounds*, 427 U.S. 909, *reaff’d in relevant part*, 547 F.2d 204 (3d Cir. 1976).

deductions.¹²² Note that in addition to criminal prosecution, the government may attempt to shut down fraudulent return preparers by obtaining a permanent injunction.¹²³

I. False Statements

Future business professionals should understand that trying to avoid a criminal prosecution by lying is never a good legal strategy. Instead, the instruction should be to contact an attorney and, for individuals, to claim the Fifth Amendment protection against self incrimination. This is because under 18 U.S.C.1001, it is a crime to make false statements in matters involving the federal courts, Congress, or federal agencies.¹²⁴ This law has been used in cases involving false statements made to the SEC¹²⁵ and the IRS.¹²⁶ In *Neely*, for example, the defendant was convicted after making false statements to an IRS agent and providing

¹²² U.S. v. Clardy, 612 F.2d 1139 (9th Cir. 1980).

¹²³ U.S. DEP'T OF JUST. TAX DIV., *supra* note 96, at § 13.11.

¹²⁴ 18 USC § 1001. See CHARLES DOYLE, *False Statements and Perjury: An Overview of Federal Criminal Law* (2025) CONG. RSCH. SERV., <https://www.congress.gov/crs-product/98-808>.

¹²⁵ Bilzerian v. U.S., 127 F.3d 237 (2d Cir. 1997).

¹²⁶ U.S. v. Fern, 696 F.2d 1269 (11th Cir. 1983). In *U.S. v Bazantes*, the defendants were subcontractors who were convicted under 18 USC § 1001 for submitting false payroll forms on a project to construct a building for a federal agency. 978 F.3d 1227 (11th Cir. 2020).

altered documentation.¹²⁷ A statement need not be made under oath to be prosecuted for this crime.¹²⁸

Section 1001 applies to false statements, false writings, and concealing information. The act or statement must be material, meaning it had a tendency to influence or was capable of influencing the entity to which it was addressed. The government must also show that the defendant acted knowingly and willfully. This burden is met by proof the defendant knew or chose not to know that what he or she presented was false and that it was presented with intent to deceive.¹²⁹ A violation of this statute is a felony, punishable by fines and imprisonment.¹³⁰ Famous people convicted for making false statements include Martha Stewart¹³¹ and former Illinois governor Rod Blagojevich.¹³²

J. Cybercrime

There are a variety of federal statutes used to prosecute white collar cybercrime, including wire fraud,¹³³ identity theft,¹³⁴ credit card fraud,¹³⁵ and the Computer Fraud and Abuse Act.¹³⁶ The typical

¹²⁷ Neely v. U.S., 300 F.2d 67 (9th Cir. 1962).

¹²⁸ *Id.*

¹²⁹ U.S. v. Ricard, 922 F.3d 639, 655 (5th Cir. 2019).

¹³⁰ 18 USC § 1001 provides for fines and imprisonment up to five years but longer sentences are possible in certain cases.

¹³¹ U.S. v. Stewart, 433 F.3d 273 (2d Cir. 2006).

¹³² U.S. v. Blagojevich, 794 F.3d 729 (7th Cir. 2015).

¹³³ See text accompanying notes 76 – 79.

¹³⁴ 18 USC § 1028; 18 USC § 1028A.

¹³⁵ 15 USC § 1644.

¹³⁶ 18 USC § 1030.

business law class will not have the time, and the instructor may not have the expertise, to provide any real insight into how best to protect computer systems and online data. However, instructors can add value to a course by including information about basic protective measures and steps to take should a business fall victim to cybercrime activity. Helpful resources include an online page maintained by the FBI with cybersafety tips and directions about how to report cybercrime and fraud.¹³⁷ Many states have similar resources¹³⁸ and there are also organizations with useful information.¹³⁹ Companies can purchase cyberinsurance, but it is important to be sure any policy being considered offers real protection. Future business leaders should be encouraged to find

¹³⁷ *The Cyber Threat*, FBI, <https://www.fbi.gov/investigate/cyber#Respond-and%20Report> (last visited June 1, 2025).

¹³⁸ See *Cybercrimes*, NAT'L ASS'N OF ATT'YS GEN., <https://www.naag.org/issues/cyber-and-technology/cybercrimes/> (last visited June 1, 2025); Taylor Fox, *How to Report a Cybercrime, Cyberattack, Data Breach or Hack to the U.S. Authorities*, CYBERCRIME MAGAZINE, (May 2, 2025), <https://cybersecurityventures.com/directory-of-u-s-state-and-local-cybercrime-law-enforcement/>.

¹³⁹ See, e.g., *Get Help*, FIGHTINGCYBERCRIME.ORG., <https://fightcybercrime.org/support/> (last visited June 1, 2025). This website lends itself to a homework assignment where students are given a fact pattern in which they have fallen victim to cybercrime. They must identify the crime/scam and then describe the steps they should take to report and recover. For example, students could be told that their laptop has slowed and they are experiencing battery drain. Exploring the website should lead them to "My Device has Been Hacked." Once there the students can identify the appropriate steps they should take to respond.

a knowledgeable insurance agent but also to educate themselves with reliable online information about the various products available.¹⁴⁰

V. CONCLUSION

Though perhaps not thought of as usual content, incorporating basic criminal law principles into a business law course can be extremely helpful for future business and accounting professionals. Many online resources exist that will permit meaningful exposure outside of traditional classroom instruction, and in many ways an understanding of criminal law supports and enhances student understanding of business law concepts, including business ethics. Instructors considering inclusion of criminal law should be guided by two goals: helping future businesspeople, especially accountants,¹⁴¹ recognize and avoid potential criminal situations; and helping them understand the criminal justice system, should they find themselves facing jeopardy

¹⁴⁰ The FTC offers tips for evaluating coverage. *Cyber Insurance*, FED. TRADE COMM'N, <https://www.ftc.gov/business-guidance/small-businesses/cybersecurity/cyber-insurance> (last visited June 1, 2025).

¹⁴¹ Beyond criminal consequences, accountants who commit crimes may be subjected to professional discipline. For example, Joshua J. Levine faced suspension, a period of probation, and a fine after being convicted of aiding in the preparation of a false tax return. *See* <https://www.op.nysed.gov/enforcement/enforcement-actions> (January 14, 2025).

or find themselves victimized by crime. Both of these objectives are worthy and support the proposition that business law courses should include at least some criminal law content, even if the subject cannot be covered in-depth.

**ENSURING BENEFICIAL BUSINESS
BEHAVIOR AFTER DISASTERS**

KENT MILLER*

I. BACKGROUND

A. The Problem

It is an unfortunate reality that large-scale disasters have become more commonplace in the twenty-first century. Severe weather, a global pandemic, and various conflicts have all made headlines in the late 2010s and early 2020s. The response worldwide to the COVID-19 pandemic showcased just how distinct responses to emergencies and disasters can be, with the results equally as manifold. Evaluating the options and incentives available in crisis situations is necessary to realize the broader picture of how society responds when facing challenges and can be helpful when creating the tools needed to manage natural disasters. The lessons from the pandemic lead to a call for public-private relationships that make disaster recovery far more effective.

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Post-disaster planning by city, state, and federal leaders is a complex enterprise in the United States, in part because of its sheer size and varied geography. Consider, for example, the effects of Hurricane Helene in late 2024. Western North Carolina normally avoids the intense effects of hurricanes, yet Helene caused nearly \$60 billion in damage and affected about 40% of North Carolina residents.¹ Numerous components of North Carolina's economy and welfare were harmed: housing, utilities, education, health care, and agriculture, among others.² In those circumstances, a concerted effort between the federal government, North Carolina's state government, and local officials was essential. Yet there are other challenges present due to where the resources and powers to manage emergencies are located. The American system of government is one of shared federalism, and states in that system have historically held the police powers – the ability to create policy on issues that affect an individual's health, safety, and education, among others.³ While the Federal

¹ N.C. OFF. OF STATE BUDGET AND MGMT., HURRICANE HELENE RECOVERY REVISED DAMAGE AND NEEDS ASSESSMENT 5 (Dec. 13, 2024), *available at* <https://www.osbm.nc.gov/hurricane-helene-dna/>.

² *Id.*

³ Cornell University Legal Information Institute, *Police Powers*, https://www.law.cornell.edu/wex/police_powers (last visited Sept. 2, 2024). This discussion was particularly visible after Hurricane Katrina and the criticisms regarding the federal response – including calls to strengthen federal power to respond after disasters. See Christina E. Wells, *Katrina and the Rhetoric of Federalism*, 26 MISS. C. L. REV. 127 (2007).

Emergency Management Agency (FEMA) can coordinate disaster relief, the federal executive branch can declare states of emergency, and Congress can appropriate funds, recovery from a disaster remains a mostly local endeavor.⁴

The private sector, especially corporations, holds a substantial percentage of American financial resources through business equity. In other words, the private sector retains a high amount of the total concentration of resources available in America. The share of wealth in the hands of corporations has increased dramatically in recent years.⁵ Private equity firms alone now manage over \$3 trillion in assets.⁶ It is no secret that financial resources are inequitably distributed in American society: as of

⁴ This is especially vital if there is no Federal Disaster Declaration. *See, e.g.*, S.C. Emergency Management Division, *Help for Individuals*, <https://www.scemd.org/recover/get-help/help-for-individuals/> (last visited August 7, 2024). Though funding and coverage is often highest at the federal level, it is still state and local leaders that must make the early decisions on how to rebuild. *See* Deserai A. Crow & Elizabeth A. Albright, *Intergovernmental Relationships After Disaster: State and Local Government Learning During Flood Recovery in Colorado*, 21 J. OF ENV'T POL'Y & PLANNING 257 (2019).

⁵ Sandy Brian Hager & Joseph Baines, *The Tax Advantage of Big Business: How the Structure of Corporate Taxation Fuels Concentration and Inequality*, 48 POL. & SOC'Y 275, 276 (2020).

⁶ Robert I. Field, Barry Furrow, David R. Hoffman, Kevin Lownds & Hilary Pearsall, *Private Equity in Health Care: Barbarians at the Gate?*, 15 DREXEL L. REV. 821 (2023), citing MEDICARE PAYMENT ADVISORY COMM'N, REPORT TO THE CONGRESS: MEDICARE AND THE HEALTH CARE DELIVERY SYSTEM 76 (2021).

2013, over half of all investment assets were owned by the top 1% of household incomes, a number which expands to 88.5% for the top 10%.⁷ Taxation is likewise uneven, as business entities with pass-through benefits like partnerships and S-corporations now account for over half of business income, yet these entities pay far fewer taxes than traditional C-corporations.⁸ Legislative efforts like the Inflation Reduction Act of 2022 sought to remedy some of this inequity through tools like the Corporate Alternative Minimum Tax (CAMT)⁹ by closing many of the loopholes available to large corporations escaping tax liability, but its long-term effects – and differing priorities as the national political environment changes – are unknown. The resulting amount of wealth held onto by these firms, and not for public infrastructure through taxes, is substantial. Some

⁷ G. William Domhoff, *Power in America: Wealth, Income, and Power*, U.C. SANTA CRUZ (2017), <https://whorulesamerica.ucsc.edu/power/wealth.html>.

⁸ Michael Cooper et al., *Business in the United States: Who Owns It and How Much Tax Do They Pay?*, TAX POL'Y AND THE ECON. (2016), Brown Univ., <https://www.nber.org/papers/w21651>. It is worth noting that the Tax Cuts & Jobs Act did change the multinational tax landscape substantially, with a flat rate of 21% the current post-TCJA policy. Mindy Herzfeld, *Designing International Tax Reform: Lessons from TCJA*, 28 INT'L TAX & PUB. FIN. 1163, 1172 (2021). While this led to lower tax incentives for companies investing internationally to take advantage of lower taxes rates abroad, it remains a major component of the complex tax inequality problems domestically.

⁹ INTERNAL REV. SERV., *Corporate Alternative Minimum Tax*, IRS.GOV (Oct. 24, 2024), <https://www.irs.gov/inflation-reduction-act-of-2022/corporate-alternative-minimum-tax>.

estimates place the lost tax revenue from the dramatically increased use of pass-through taxation at around \$100 billion.¹⁰ When combined with the higher concentration of pass-through taxes on high earners (meaning more tax revenue has disappeared since that higher number is being taxed at a far lower level) and the lower federal tax rate for entities like LLCs, partnerships, and S-corporations, the tax base that could exist to support infrastructure post-disaster relief has severely eroded.¹¹ This is relevant to disaster relief because it means that a lot of resources are at the disposal of corporate bodies and can be deployed with the proper incentives and foundation, but those resources can also remain unused or even worsen existing societal problems if used in ways that do not aid recovery. Firms can be vital in taking on the role left behind due to the lower capacity of the public sector. In reality, they are in an optimal position to understand what is taking place and effectively deliver a response.¹² Returning to the aftermath of Hurricanes Milton and Helene, Walmart and its associated organizations donated \$16 million to Helene relief efforts in eastern Tennessee, while Target and Publix gave \$3 million and \$1 million, respectively.¹³ While an excellent start, this only

¹⁰ *Id.*

¹¹ *Id.*

¹² See Luis Ballesteros, Michael Useem & Tyler Wry, *Masters of Disasters? An Empirical Analysis of How Societies Benefit from Corporate Disaster Aid*, 60 ACAD. OF MGMT. J. 1682 (2017) (finding that corporations are highly influential in successful disaster responses).

¹³ Colleen Olphert, *Companies Respond to Hurricanes Milton and Helene*, BOSTON COLL. CTR. FOR CORP. CITIZENSHIP (Oct.

suggests at what could be possible should more alignment with public incentives occur.

B. The Evolving Corporation

Modern corporations are not static creatures demanding profits at all costs, but rather complex organisms in need of encouragement. The question then becomes not whether corporations are donating to disaster relief, but how they are donating in line with their assets in society. The role of the corporation in society has also changed with time. The longstanding objective of creating wealth for shareholders beginning with *Dodge v. Ford Motor Co.*¹⁴ has been modified through numerous theories and approaches to take into account the needs of others through donations, charity, and inclusion of additional stakeholders.¹⁵ Even the very definition

8, 2024), <https://ccc.bc.edu/content/ccc/blog-home/2024/10/companies-respond-hurricanes-milton-helene.html>.

¹⁴ 204 Mich. 459, 170 NW 669 (1919).

¹⁵ One of the foundational articles about this topic is *Herald Co. v. Seawell: A New Corporate Social Responsibility?*, 121 U. PA. L. REV. 1157 (1973). Extensive progress has been made in further measuring the parameters of ESG in the past decade. See Ting-Ting Li, Kai Wang, Toshiyuki Sueyoshi & Derek D. Wang, *ESG: Research Progress and Future Prospects*, 13 SUSTAINABILITY 11663 (2021). This also includes how specific business disciplines, like finance, use ESG information practically. See Amir Amel-Zadeh & George Serafeim, *Why and How Investors Use ESG Information: Evidence from a Global Survey*, 74 FIN. ANALYSTS J. 87 (2018). However, there has been a countervailing push against ESG (environmental, social, and

of a corporation, from an abstract perspective, has been questioned.¹⁶ The development of stakeholder theory further challenged the all-in mentality of shareholder returns by asserting that the needs of a nexus of interconnected stakeholders are important to consider in addition to the traditional shareholders.¹⁷ Yet finding balance between the needs of shareholders and other stakeholders in this area is not easy, given that many criticize stakeholder theory for moving far away from the original intentions of its authors.¹⁸

It also has an acknowledged and clear libertarian underpinning. At first glance, this would seem to clash with an argument for increasing regulation. Government intervention could become unwelcome if the act of maximizing shareholder wealth is accomplished by the firm – or by various other free market mechanisms like competition and stakeholder collaboration - in considering its various stakeholders.¹⁹ Put another way, a libertarian perspective could state that the idea of shareholder

governance) laws taking place in many states, seeking to restore fiduciary duties in favor of shareholders and investors. See Charles Donefer, *State ESG Laws in 2023: The Landscape Fractures*, THOMSONREUTERS.COM (May 31, 2023), <https://www.thomsonreuters.com/en-us/posts/esg/state-laws/>.

¹⁶ David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201 (1990).

¹⁷ See R. EDWARD FREEMAN, *STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH* (2010).

¹⁸ See, e.g., James A. Stieb, *Assessing Freeman's Stakeholder Theory*, 87 J. OF BUS. ETHICS 401 (2009).

¹⁹ R. Edward Freeman & Robert A. Phillips, *Stakeholder Theory: A Libertarian Defense*, 12 BUS. ETHICS Q. 331 (2002).

value maximization does not necessarily collide with stakeholder theory if the method used to maximize shareholder wealth comes from taking into account all of the stakeholder effects. Still, stakeholder theory accomplishes what many theories do not: providing a framework for understanding the connections that exist outside of the boardroom itself.²⁰ This can prove crucial when it comes to public-private approaches needed for disaster recovery and does not reduce the role a public partner can play. Corporations and their interactions with charity and disaster relief have also changed significantly. In 1990, only about one out of every five of the largest 500 corporations in the United States donated to disaster relief, but by 2019, that number reached 95%.²¹

The evolving rights landscape of the corporation and its intersection with the First Amendment in areas like free speech has a serious impact on what corporations should be required to do when disaster strikes. *Citizens United v. FEC*²² is frequently the first case that comes to mind in terms of this debate. That decision signaled a new direction in how rights are evaluated for corporations. In *Citizens United*, the Supreme Court refused to make a distinction between a natural person and an organization when it comes to the particular form of

²⁰ See Bidhan L. Parmar, R. Edward Freeman and Jeffrey S. Harrison, *Stakeholder Theory: The State of the Art*, 4 ACAD. OF MGMT. ANNALS 403 (2010).

²¹ *Giving After Disasters*, HARV. BUS. REV., Jan.-Feb. 2019, available at <https://hbr.org/2019/01/giving-after-disasters>.

²² 558 U.S. 310 (2010).

political speech.²³ It left many essential questions unanswered, though, regarding that boundary. Courts have tried to clarify the boundaries for corporations as time has progressed.²⁴ Many issues, like how businesses operate when using new technology like artificial intelligence, remain unresolved.²⁵ A good number of scholars and attorneys remain uncomfortable with the balance that *Citizens United* crafted for corporations and personhood.²⁶ This uneasy balance remains central to the conversation surrounding disaster recovery. In terms of what they can do with their considerable financial resources, should corporations be allowed to do whatever they choose as part of their free speech, or do they have a higher obligation to assist society? Any regulations that are implemented must keep in mind this standard – if corporations have First Amendment rights, they have power, but

²³ *Id.* at 883.

²⁴ See, e.g., Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220 (2021); see also Adam Kuckuk, *13 Years of Impact: The Long Reach of Citizens United*, NAT'L CONF. OF STATE LEGISLATURES, Feb. 28, 2023, available at <https://www.ncsl.org/state-legislatures-news/details/13-years-of-impact-the-long-reach-of-citizens-united>.

²⁵ For example, with how artificial intelligence plays a role in political speech. See Michael R. Siebecker, *The Incompatibility of Artificial Intelligence and Citizens United*, 83 OHIO ST. L. J. 1211 (2022) (arguing that the rapid evolution of corporations with artificial intelligence merits reconsideration of the standards established in *Citizens United*).

²⁶ See, e.g., Clara Torres-Spelliscy, *Does We the People Include Corporations?*, 43 HUM. RTS. MAG. 2 (2024).

government action compelling speech is regularly considered a problem.²⁷

C. Do For-Profit Firms Have a Conscience?

The question then remains: if corporations are more akin to people in terms of their First Amendment rights, do they have a conscience — or at least something that functions like one? Human speech is tempered to some extent by an understanding of right and wrong. For instance, from a utilitarian perspective, one could reason that having access to high-quality healthcare is the right thing to do, even if people may disagree on how to reach that outcome.²⁸ Some argue that, in the compartmentalized nature of businesses, the public relations team serves this function. They take signals and input from various other organs of the business and translate that into the external speech that the firm generates.²⁹ This is centered on systems theory, which finds that public relations is in an ideal position to interpret between corporations and stakeholders not driven by profit given its boundary

²⁷ See Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355 (2018). The Supreme Court also revisited this concept for freedom of religion within the First Amendment in 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).

²⁸ For an argument in how this plays out in a crisis (such as the COVID-19 Pandemic), see Julian Savulescu, Ingmar Persson and Dominic Wilkinson, *Utilitarianism and the Pandemic*, 34 BIOETHICS 620 (2020).

²⁹ See Shannon A. Bowen, *A State of Neglect: Public Relations as “Corporate Conscience” or Ethics Counsel*, 20 J. PUB. REL. RSCH. 271 (2008).

location – albeit preferably with some assistance from ethics experts.³⁰ A corporate equivalent to a conscience can perceive and understand the human cost of disasters and seek to address the damage done.³¹ From incorporating both utilitarianism and systems theory, one finds that for-profit firms do indeed have a conscience – but one that has been confined to perceived benefit when compared to its potential.

The traditional notion of profit often omits considerations of how complicated a conscience can be. Although there are times when the most socially beneficial course of action meshes with the directors' goals of increased profits, the emphasis remains on providing shareholders with better financial returns regardless of whether that is what actually takes place. The libertarian argument for stakeholder theory discussed earlier³² relies on this alignment of priorities, and although that certainly can occur, there still are plenty of situations where it does not.

Naturally, philanthropy is one important way in which corporations take actions that benefit the

³⁰ *Id.* at 273.

³¹ Some virtues that disaster management needs, and where a conscience would be helpful, include stewardship, resilience, and communication. See Sara Kathleen Geale, *The Ethics of Disaster Management*, 21 *DISASTER PREVENTION & MGMT.* 445 (2012). The unpredictable nature of disasters makes ethics all the more important (and complicated). See Tore Bakken, *Risk, Responsibility and Conscience: How Does One Communicate about Morality in the Risk Society?*, in *ETHICAL DILEMMAS IN MANAGEMENT* (Christina Garsten & Tor Hernes eds. 2008), at 11-27.

³² Freeman & Phillips, *supra* note 19.

community. Corporations and other for-profit entities have regularly engaged in giving back to their communities; the extent to which this is permissible is a discussion that reaches back to the beginnings of modern legal research.³³ This is not to suggest that corporate giving only takes place when profitable, as seen in the Hurricane Helene example earlier³⁴, but rather that philanthropy can be restrained based on anticipated potential gains. Sometimes it is fairly apparent when for-profit organizations can both help charities while also improving their bottom line. Modern businesses have, for instance, frequently offered to donate a percentage of their sales to charity, which can lead to higher profits if the consumer places a value premium on that donation to charity and the increased sales volume exceeds that of the donation.³⁵

To determine how a conscience, defined earlier as the public relations of a firm conveying the firm's value to the public through systems³⁶, is meaningful to corporate giving post-disaster, one can start by examining their present-day incentives and position. It has not all been up to public agencies to

³³ See, e.g., Theodore W. Cousins, *How Far Corporations May Contribute to Charity*, 35 VA. L. REV. 401 (1949) (explaining the limits of corporate powers under its articles of incorporation, but leaving the idea open that incidental or auxiliary acts are permissible).

³⁴ N.C. OSBM, *supra* note 1.

³⁵ Paul Pecorino, *A Portion of Profits to Charity: Corporate Social Responsibility and Firm Profitability*, 83 S. ECON. J. 380 (2016).

³⁶ See Bowen, *supra* note 29.

provide aid. For-profit organizations have historically held a consistent presence in disaster response, demonstrating their capacity in this area, as seen with the Hurricane Helene relief discussed previously. Corporations often have access to gauge infrastructure needs and crisis stages in ways that public organizations typically do not. One well-known example of this is the Waffle House Index.³⁷ Waffle House is a chain of 24-hour casual restaurants specializing in breakfast foods; it was founded in the Atlanta metropolitan area and is primarily found in the Southeast, Mid-Atlantic, and Lower Midwest.³⁸ FEMA has used the Waffle House Index to figure out the level of damage after a natural disaster, as the restaurant has an impressively robust supply chain and infrastructure.³⁹ In other words, if Waffle House

³⁷ For a summary of how this index functions, see Hannah Schoenbaum, *How Waffle House Helps Southerners – and FEMA – Judge a Storm’s Severity*, ASSOCIATED PRESS (Oct. 9, 2024), available at <https://apnews.com/article/waffle-house-index-hurricane-milton-e0547ca1fb11ddcadab50035a0da7819>.

³⁸ Waffle House, *Our Story*, <https://www.wafflehouse.com/our-story/> (last visited August 12, 2024).

³⁹ Sarah Dobie, Jennifer Schneider & Avery Szafranski, *Going Beyond the Waffle House Index: Using Food Systems as an Indicator of Community Health and Sustainability*, IEEE INT’L SYMP., 2019, available at <https://ieeexplore.ieee.org/abstract/document/9032922>; see also Natalie T. J. Tindall, Jan Uhrick & Jennifer Varden-Winter, *Public Relations Ethics, Corporate Social Responsibility, and the Private Sector: The Case for Corporate Community Resilience Support for Disaster Preparedness*, in *THE MORAL COMPASS OF PUBLIC RELATIONS* 149, 149 (Brigitta R. Brunner ed., 2016).

is capable of serving its full menu, the fundamental components of power, roads, water, and other basic needs are likely intact. Waffle House's ability to survive and even flourish in a crisis can be helpful in determining how other firms can respond effectively (even if the area does not have a Waffle House, given what FEMA has learned from its operations), and also how the public sector can use private assets to measure the severity of a disaster that is abrupt in nature (like a hurricane) as opposed to those that develop over time (like pollution).

Private firms, however, may use the damage caused by disasters to expand into areas that are traditionally public in nature. While the incentives that drive private companies can spur helpful change and make some services more effective, they can also cause suffering. Consider, for example, the crises discussed herein: rural healthcare, e-waste, and price gouging. Crises and disasters, of course, come in many forms: not just storms or disease, but also social injustice that leads to negative economic conditions. A considerable percentage of America's infrastructure is in disrepair, and private firms may – rightly or wrongly – have some potential solutions. One such example of this opportunism is the water system in Jackson, Mississippi. The city of Jackson had been experiencing urban decay and a failing economy for many decades; the foundation for essential services like water had become antiquated, resulting in shortages and poor quality.⁴⁰ German

⁴⁰ Sarah Fowler, *Big Companies Cashed In on Mississippi's Water. Small Towns Paid the Price*, N.Y. TIMES, Feb. 5, 2024,

corporation Siemens stepped in with promises to solve the crisis, and even turn a profit, in 2010 via the installation of modern water meters.⁴¹ Siemens' products were defective, and the city mishandled the process of repairing them.⁴² Missed obligations and extremely inflated customer prices led to financial devastation for the city and an eventual federal takeover of the water system.⁴³ Jackson settled with Siemens for about \$90 million in 2020, but their negligence has had a lasting impact on Jackson's water supply.⁴⁴ While nothing seems to suggest improper motives on Siemens' part, their negligence caused damage to a traditionally public service.

Donations are another way in which for-profit firms can help the community. Charitable giving after a disaster, though, is not a completely unmotivated endeavor. Numerous approaches historically have tried to explain the various reasons why for-profit firms give to charity other than for the

available at <https://www.nytimes.com/2024/02/05/us/jackson-mississippi-water-crisis.html>.

⁴¹ *Id.*

⁴² Brendan Pierson, *Jackson, Mississippi Water Crisis Prompts Lawsuit for City, Siemens*, REUTERS (Sept. 19, 2022), available at <https://www.reuters.com/legal/litigation/jackson-mississippi-water-crisis-prompts-lawsuit-city-siemens-2022-09-19/>.

⁴³ Fowler, *supra* note 40.

⁴⁴ Jae-Young Ko, *An Explanation of the 2021 Jackson Water Crisis and Policy Suggestions for Sustainable Water Infrastructure in Jackson, Mississippi – A Research Commentary*, JACKSON ST. UNIV. ONLINE J. OF RURAL & URBAN RSCH (2022), at 65, available at https://www.jsums.edu/murc/files/2022/02/2022.OJRUR_JacksonWaterCrisis_Special.Issue_Final_-1.pdf.

benefit of their community. Corporate theory, for example, notes that charity can further social goals of the company and is not a selfless action; the tax policy approach measures charity against the financial benefits of tax deductions.⁴⁵ More recent theories have, however, better closely aligned charitable giving with the concept of social responsibility.⁴⁶ Yet it would be myopic to view post-disaster giving as purely a manifestation of corporate social responsibility; there remain other ways that charity directly connects to corporate goals. Charitable giving could be tied to political influence: a recent estimate found that as much as 6.3% of charity given by large U.S. corporations may have political goals similar in structure of political action committee (PAC) spending.⁴⁷ This is not to offer a normative policy regarding corporate political donations, but rather is a statement of the destination of these funds and the realization that donations are not purely motivated by rebuilding efforts. There remain significant motives as to how corporate charity is distributed, but not its total amount; this suggests that the decision to donate is not necessarily

⁴⁵ Nancy J. Knauer, *The Paradox of Corporate Giving: Tax Expenditures, the Nature of the Corporation, and the Social Construction of Charity*, 44 DEPAUL L. REV. 1, 4-6 (1994).

⁴⁶ For instance, Freeman's stakeholder concept. See Freeman, *supra* note 17.

⁴⁷ See Marianne Bertrand, Matilde Bombardini, Raymond Fisman & Francesco Trebbi, *Tax-Exempt Lobbying: Corporate Philanthropy as a Tool for Political Influence*, 110 AM. ECON. REV. 2065 (2020).

impacted by these motivations, but rather how the money is spent.⁴⁸

It is also unwise to categorize all for-profit entities as operating similarly in the realm of charitable giving. Small- and medium-sized businesses, commonly known as SMEs, are especially vulnerable to the shocks generated by disasters due to a variety of factors like representation in personal services, lower cash reserves, and a restricted supply chain.⁴⁹ Most obvious are the financial and logistical concerns, but there are also human capital issues. People do not move as freely as before due to the above circumstances (if one's client base is almost entirely in a disaster-affected region as a personal services SME, moving may be more challenging) and now must focus on the disaster's effects on life outside of work.⁵⁰ The COVID-19 pandemic offered insight into unique impacts on a wide range of businesses – from sole proprietorships to massive corporations – which stands in contrast to the usual focus on a local area and intense severity; the duration and extent of

⁴⁸ See Dane K. Peterson, Cathryn Van Landuyt & Courtney Pham, *Motives for Corporate Philanthropy and Charitable Causes Supported*, 14 J. STRATEGY & MGMT. 397 (2021).

⁴⁹ See Michael Odei Erdiaw-Kwasie, Matthew Abunyewah, Salifu Yusif & Patrick Arhin, *Small and Medium Enterprises (SMEs) in a Pandemic: A Systematic Review of Pandemic Risk Impacts, Coping Strategies, and Resilience*, 9 HELIYON 1, 5-7 (2023).

⁵⁰ *Id.*

the pandemic was, in other words, different from one's typical disaster.⁵¹

Establishing whether SMEs are better aligned with community needs, and whether SMEs engage regularly in corporate social responsibility (CSR) post-disaster, is helpful in deciding how to structure policies that give businesses suitable incentives to assist. Small and medium-sized businesses are often positioned as the recipient of aid after a disaster rather than being able to donate. The good news for SMEs is that numerous options are available for aid. First, they can receive an insurance payout for damages that fall within that policy; then, FEMA can allocate funds if said business falls within a disaster area.⁵² If the business – regardless of size – is still encountering operational challenges, it can apply for a Small Business Administration (SBA) Disaster Loan if, again, it is within a declared disaster area.⁵³

Small and medium businesses serve another crucial purpose after a disaster, though: they are part of the social well-being of the communities in which they exist. This is not to suggest that larger companies are absent or distant from the people they serve. Many in the employ of large companies are of course local, but the nerve center of that company is likely far away from the disaster-stricken area. There

⁵¹ See Timothy Manuel & Terri L Herron, *An Ethical Perspective of Business CSR and the COVID-19 Pandemic*, 15 SOC'Y & BUS. REV. 235 (2020).

⁵² U.S. SMALL BUS. ADMIN., *Disaster Assistance*, <https://www.sba.gov/funding-programs/disaster-assistance> (last visited August 29, 2024).

⁵³ *Id.*

are just more steps involved in claiming that a multistate or multinational operation is closely linked to that town or city as is the case with many (but not all) SMEs. These businesses can serve as a useful gauge on the often-unseen damage of some disasters or harm that would not be properly addressed by larger initiatives. Making sure that SMEs resume functioning after a disaster strikes may have more implications than just profit and loss — it can serve as an indicator of whether the community itself has recovered.⁵⁴ In a 2020 study, researchers found that, out of 63 identified barriers to recovery from a disaster, a lack of small businesses was highly cited as a barrier, second only to low employment.⁵⁵ The implication from this research is that SMEs mean more than just a form of business to places in these dire circumstances. Those in charge of small and medium businesses may make post-disaster decisions that are reflective of getting the community back on its feet rather than its own viability because the community relies on it as part of its identity.⁵⁶ SMEs, then, are likely not in need of an incentive adjustment to aid others in extreme situations. This contrasts with the notion that all for-profit businesses have unaligned goals, so the approach here should be

⁵⁴ Yu Xiao, Kai Wu, & Donovan Finn & Divya Chandrasekhar, *Community Businesses as Social Units in Post-Disaster Recovery*, 42 J. PLAN. EDUC. & RSCH. 76, 77 (2022).

⁵⁵ Behzad Rouhanizadeh, Sharareh Kermanshachi & Thahomina Jahan Nipa, *Exploratory Analysis of Barriers to Effective Post-Disaster Recovery*, 50 INT’L J. DISASTER RISK REDUCTION 1, 5 (2020).

⁵⁶ Xiao et al., *supra* note 54.

to determine the tools that will enable and motivate more businesses to contribute meaningfully to disaster relief. Businesses are not monolithic in nature, and figuring out incentives and motivation will require more fine-tuning than a top-down policy.

Entrepreneurs are also affected by the post-disaster business landscape. While limited in resources and financial ability to assist the community, they do have some capabilities to innovate. When the community is rebuilding, it will need new ways to become resilient so that the next disaster does not cause as much damage (or does not occur at all, if the disaster happening is influenced by poor decision-making). Adopting an entrepreneurial mindset can improve social cohesion and ties in the community, since traditional businesses may lack the capital. Targeted aid from the government is often unhelpful and may even make circumstances slightly worse.⁵⁷ Entrepreneurs are likewise an important part of the recovery process and also need guidance on how best to accomplish doing so.

II. DISASTERS

Not all disasters are the same, though, and proposals to incentivize for-profit companies to give back must be flexible to handle both natural and manmade disasters. Industries vary widely on how they are affected by disasters, which means that any suitable analysis of the tools available must look at

⁵⁷ Sussie Morrish & Rosalind Jones, *Post-Disaster Business Recovery: An Entrepreneurial Marketing Perspective*, 113 J. BUS. RSCH. 83, 84 (2020).

several different types of disaster scenarios as is done in this article.⁵⁸ The COVID-19 pandemic represents a truly unique form of disaster. While there were some commonalities with other disasters, like supply chains being disrupted and small businesses being especially hurt by its effects, there were also major differences: regulatory impacts on consumer demand given the extent of the government's response to combat the widespread nature of the pandemic, the disruption of high-income commerce, and the ineffectiveness of traditional financial assistance tools.⁵⁹ The three examples below will illustrate how for-profit incentives are being managed (or not being managed) in rural health care, in e-waste, and in price gouging. The COVID-19 pandemic has made already existing concerns about these areas worse as will be discussed, but the lessons taken from them should be applicable across many circumstances. Evaluating the results thus far from these three distinct types of disasters from different parts of the economy illustrates the common threads that tie corporations and other for-profit firms to the disaster recovery process, leading to more observations about how better to align objectives.

⁵⁸ See Ihtisham A. Malik, Robert W. Faff & Kam F. Chan, *Market Response of US Equities to Domestic Natural Disasters: Industry-Based Evidence*, 60 ACCT. & FIN. 3875 (2019) (finding that industries vary not only in their responses to the same disaster, but also with different types of disasters).

⁵⁹ Stephanie Chang et al., *Business Recovery from Disasters: Lessons from Natural Hazards and the COVID-19 Pandemic*, 80 INT'L J. DISASTER RISK REDUCTION 1 (2022).

A. Example: Post-Disaster Health Care in Rural America

The American health care system has undergone a dramatic transformation over the past few decades from the increased impact of for-profit entities in the sector. One such change is the increasingly prominent role of private equity firms in the ownership of health care facilities: private equity now owns about 9% of all private hospitals.⁶⁰ Private equity has also been especially active in emergency room services, urgent care centers, and debt collection in the medical industry, but the result has been similar among these areas as well as in hospitals: consolidation and a dramatic increase in debt.⁶¹ Patient outcomes have also been poor: a recent study has found that patient care declined in quality for many outcomes after private equity acquisition of hospitals, resulting in a 25% increase in hospital-acquired conditions.⁶² There are major

⁶⁰ Alan Condon, *386 Hospitals Now Owned by Private Equity Firms: 6 Things to Know*, BECKER'S HOSP. REV., Dec. 19, 2023, <https://www.beckershospitalreview.com/finance/386-hospitals-now-owned-by-private-equity-firms-6-things-to-know.html> (last visited Sept. 3, 2024).

⁶¹ See generally Eileen Appelbaum & Rosemary Batt, *Private Equity Buyouts in Healthcare: Who Wins, Who Loses?*, CTR. FOR ECON. & POL'Y RSCH. WORKING PAPER 118 (Mar. 15, 2020), https://www.cepr.net/wp-content/uploads/2020/03/WP_118-Appelbaum-and-Batt.pdf (providing an overview of private equity's interest in health care as well as an introduction to some of the early results from their involvement).

⁶² Sneha Kannan, Joseph Dov Bruch & Zirui Song, *Changes in Hospital Adverse Events and Patient Outcomes Associated*

negative motivations for private equity in the medical industry that can cause serious damage to public services and other economic outcomes: the classic formula of rapid revenue generation often at the price of worse outcomes for many stakeholders involved (for example, doctors, staff, and community members) does not connect well with the goal of producing high-quality health care.⁶³ Private equity acquisitions alter many of the variables in determining viability of services by focusing on doing what will show immediate gains, and many patients in rural and underserved areas do not offer much of a quick return due to a lower ability to pay or need for costly services. Field et al. in particular explain the appeal of healthcare to those in private equity: it is always in need, it is growing in demand as the population ages, and insurance payments provide protection from insolvent users of services.⁶⁴ These characteristics – necessity, age-driven demand, and insurance red tape – run against the inherent conflict of maximizing short-term profits in an area that has a moral obligation to provide healing and comfort. The above statistic of 9% private equity

with *Private Equity Acquisition*, 330 J. AM. MED. ASS'N 2365, 2366 (2023).

⁶³ See Erin C. Fuse Brown & Mark A. Hall, *Private Equity and the Corporatization of Health Care*, 76 STAN. L. REV. 527 (2024); see also Alexander Borsa, Geronimo Bejarano, Moriah Ellen & Joseph Dov Bruch, *Evaluating Trends in Private Equity Ownership and Impacts on Health Outcomes, Costs, and Quality: Systematic Review*, BRIT. MED. J. 382 (2023) (finding increased costs to patients and some harm to quality of care associated with private equity ownership).

⁶⁴ Field et al., *supra* note 6, at 825-26.

ownership of private hospitals worsens when one realizes that 34% of those private equity hospitals serve rural populations.⁶⁵

Americans living in rural parts of the United States face even more challenges to receiving appropriate health care treatment, worsened by the increasing presence of private equity ownership. This awful reality is based on several factors: a lack of financial resources, poor infrastructure, and an inability to retain medical personnel key among them.⁶⁶ Private equity-owned hospitals are typically found in more rural and lower income areas.⁶⁷ Legal scholars have weighed in on the impact of private equity ownership in other aspects of health care, including nursing homes.⁶⁸ Researchers have noticed negative outcomes due in part to private equity-owned hospitals having fewer employees per patient and lower positive experience scores as reported by the patients; there may be other variables that contribute to the distinctions between these types of hospitals as well, but these two factors are more directly connected to ownership decisions made at the private equity-managed facilities.⁶⁹ Certain subsets of patients may be particularly vulnerable; elder care patients often have very complex and

⁶⁵ Condon, *supra* note 60.

⁶⁶ Nathan Douthit, Sakal Kiv, Tzvi Dwolatzky, & Sudipta Biswas, *Exposing Some Important Barriers to Health Care Access in the Rural USA*, 129 PUB. HEALTH 611 (2015).

⁶⁷ Joseph Bruch, Dan Zeltzer, & Zirui Song, *Characteristics of Private Equity-Owned Hospitals in 2018*, 174 ANNALS OF INTERNAL MED. 277, 279 (2021).

⁶⁸ Field et al., *supra* note 6.

⁶⁹ *Id.*

expensive illnesses that a profit-minded health care facility may not want to treat.⁷⁰ Mortality rates are higher due in considerable part to the nurse staffing and compliance elements that are sacrificed to increase short-term gains.⁷¹ In the big picture, patients – not all, but many – still suffer from this change.

Another aspect of rural health care that is quickly turning into a disaster is mental healthcare. Several reasons exist for the emerging rural mental health crisis. Even though severe mental health issues occur in about equal numbers between urban and rural populations in the United States⁷², rural mental health care is held back by the lack of an appropriate research framework from which to gather data and a shortage of innovation, in addition to all of the other concerns (staffing, specialists, culture) that exist within rural health care generally.⁷³ Finding appropriate resources to treat mental health concerns was challenging before the

⁷⁰ See Atul Gupta, Sabrina T. Howell, Constantine Yannelis & Abhinav Gupta, *Owner Incentives & Performance in Healthcare: Private Equity Investment in Nursing Homes*, NAT'L BUR. OF ECON. RSCH. WORKING PAPER 28474 (2023), https://www.nber.org/system/files/working_papers/w28474/w28474.pdf.

⁷¹ *Id.*

⁷² Dawn Morales, Crystal L. Barksdale & Andrea Beckel-Mitchener, *A Call to Action to Address Rural Mental Health Disparities*, 4 J. CLINICAL & TRANSLATIONAL SCI. 463 (2020).

⁷³ *Id.* See also Emily Jensen, Elizabeth Wieling, & Tai Mendenhall, *A Phenomenological Study of Clinicians' Perspectives on Barriers to Rural Mental Health Care*, 44 J. RURAL MENTAL HEALTH 51 (2020).

COVID-19 pandemic.⁷⁴ During and after it, however, the problem worsened, as rural Americans were at a substantially greater risk of serious harm from COVID.⁷⁵ Regulatory efforts to provide telehealth via the Coronavirus Aid, Relief, and Economic Security (CARES) Act⁷⁶ were helpful to some, but not all, of rural residents depending on their access to reliable broadband Internet service.⁷⁷

Finding qualified professionals to practice rural medicine is an ongoing issue, especially in mental health care.⁷⁸ There are, at least, some valuable enticements for individuals to pursue careers in rural mental health despite the obstacles, including access to natural surroundings and opportunity to practice broadly. Policymaking that continues to provide incentives to new health care providers will play an important role in ensuring that the career still retains some level of attractiveness post-COVID.⁷⁹

⁷⁴ Sarah Hastings & Tracy Cohn, *Challenges and Opportunities Associated with Rural Mental Health Practice*, 37 J. RURAL MENTAL HEALTH 37 (2013).

⁷⁵ Nicole Summers-Gabr, *Rural-Urban Mental Health Disparities in the United States During COVID-19*, 12 PSYCH. TRAUMA: THEORY, PRAC., AND POL'Y 222 (2020).

⁷⁶ For a summary of how the CARES Act has impacted telehealth, see Julia Shaver, *The State of Telehealth Before and After the COVID-19 Pandemic*, 49 PRIMARY CARE 517 (2022).

⁷⁷ Summers-Gabr, *supra* note 75.

⁷⁸ Megan Oetinger, Kelly Flanagan & Isaac Weaver, *The Decision and Rewards of Working as a Mental Health Professional in a Rural Area*, 38 J. RURAL MENTAL HEALTH 50 (2014).

⁷⁹ *Id.*

This article does not assert that the full-scale removal of private sector influence from health care is prudent. There are many positive aspects to introducing private-sector reforms to hospital success. It is important to note that health care does not have a full dichotomy between the public and private sector. The realities of what qualifies as competition are far more complicated due to the many interconnected components of providing health care.⁸⁰ Many rural hospitals plagued by a lack of resources and subpar care have sought out mergers and acquisitions as a good way to remedy those outcomes.⁸¹ One recent study found that 17% of unprofitable hospitals in rural areas merged from 2010-18.⁸² There is a balance to doing so; the merged firm now has improved access to capital, specialist providers, and cutting-edge technology.⁸³ Merged rural hospitals have better outcomes in many cases in that they have adopted more of the best parts of private-sector knowledge than many providers. The improvement can happen quickly for common illnesses that do not require a steep training and learning curve like heart failure and stroke, while

⁸⁰ Maria Goddard, *Competition in Healthcare: Good, Bad or Ugly?*, 4 INT'L J. HEALTH POL'Y MGMT. 567 (2015).

⁸¹ H. Joanna Jiang, Kathryn R. Fingar, Lan Liang, Rachel M. Henke & Teresa P. Gibson, *Quality of Care Before and After Mergers and Acquisitions of Rural Hospitals*, 4 J. AM. MED. ASS'N NETWORK OPEN 1 (2021).

⁸² Caitlin Carroll, Rhiannon Euhus, Nancy Beaulieu & Michael E. Chernew, *Hospital Survival in Rural Markets: Closures, Mergers, and Profitability*, 42 HEALTH AFF. 498 (2023).

⁸³ *Id.*

long-term benefits can occur years later after the necessary reorientation of the organization has taken place.⁸⁴ Additionally, health care facilities can benefit from restructuring and rebranding efforts.⁸⁵ There are some advantages to private equity ownership specifically in terms of income and process quality.⁸⁶ In other words, the hospital becomes more profitable and efficient through lean measures designed to increase short-term gains. These individual private sector mechanisms result, then, in a positive for rural health care. Yet, it is necessary to do something about the negative consequences from other for-profit components like private equity when the end goal is improving patient health.

The fact remains, though, that the negatives of private equity investment far outweigh these positives. Given the at best mixed private equity ownership outcomes and the already significant disadvantages present with rural health care, policymakers must consider what options are available that both realigns private equity incentives and improves rural health. The reality is that rural areas are underserved by many parts of the economy because it usually is not profitable to do so;

⁸⁴ *Id.* at 7-8.

⁸⁵ Aline Bos & Charlene Harrington, *What Happens to a Nursing Home Chai When Private Equity Takes Over? A Longitudinal Case Study*, 54 INQUIRY: THE J. OF HEALTH CARE ORG., PROVISION, & FIN. 1 (2017).

⁸⁶ Joseph Bruch, Suhas Gondi & Zirui Song, *Changes in Hospital Income, Use, & Quality Associated with Private Equity Acquisition*, 180 J. AM. MED. ASS'N INTERNAL MED. 1428 (2020).

government policy also frequently fails with the lack of a growing tax base or political will to make the needed investments.

Legal experts have proposed several solutions for responding to private equity acquisitions across health care as a general field. Federal tools already exist in the area of antitrust: the Hart-Scott-Rodino Antitrust Improvements Act of 1976 can be applied to roll-ups — attempts to buy many health care companies at once.⁸⁷ That law, though, does not necessarily apply to many single purchases within a short span of time that fails to result in a roll-up scenario, which could limit its applicability to single private equity purchases.⁸⁸ Bipartisan congressional investigations have increased after recent complications have surfaced in private equity-managed hospitals.⁸⁹ Individual states have not typically had laws governing private equity acquisitions in medicine, but that appears to have changed in the past few years — and more are

⁸⁷ 15 U.S.C. § 18(a) (1976).

⁸⁸ Hoag Levins, *The Effect of Private Equity Investment in Health Care: A Penn LDI Virtual Seminar Brings Together Top Financial and Health Care Experts*, U OF PA. LEONARD DAVIS INST. OF HEALTH ECON. (2023), <https://ldi.upenn.edu/our-work/research-updates/the-effect-of-private-equity-investment-in-health-care/>.

⁸⁹ Lauren Coleman-Lochner, *Private Equity Is Under a Congressional Probe Over Hospital Failures*, BLOOMBERG.COM, Dec. 8, 2023, *available at* <https://www.bloomberg.com/news/articles/2023-12-08/private-equity-under-congressional-probe-over-hospital-failures>.

potentially underway.⁹⁰ State law may be an untapped resource for those seeking to more closely monitor these developments, given how close in proximity they are to these crises

Many people may perceive rural health care as a different type of disaster when compared to a hurricane, but it is no less damaging. The responses in the legal and policymaking community to this crisis can be instructive in determining how to address the larger issue of aligning for-profit goals when disaster strikes. The COVID-19 pandemic served to test just how strong the underlying foundation of rural health care is, and although some improvements for efficiency exist when private equity manages facilities in non-urban areas, the reality is that for-profit incentives were not properly placed for rural health care to be even adequate during the pandemic.

⁹⁰ See, e.g., Amelia Templeton, *Oregon Lawmakers Could Limit Corporate Ownership of Medical Practices*, OPB.ORG, Feb. 22, 2024, <https://www.opb.org/article/2024/02/22/oregon-lawmakers-could-limit-corporate-ownership-of-medical-practices/>; see also Brian Boyle, Darren Patz, Steven R. Phillips, Joshua Kaye & David P. Cleary, *US Government Targets Healthcare Private Equity: Top Points for Risk Management*, DLAPIPER.COM, <https://www.dlapiper.com/en-us/insights/publications/2024/01/us-government-targets-healthcare-private-equity-top-points-for-risk-management> (last visited Sept. 4, 2024) (noting the challenges that risk management faces, from a private sector perspective, with many of the possible changes that may result from increased government scrutiny).

B. Example: E-Waste

Corporations will have more of a cause-and-effect relationship on some disasters rather than other ones. One area where this is notable is in ecological disruptions. While this traditionally may mean climate change, it can include other corporate impacts on the environment. E-waste is a prime illustration of this situation, and one that has gone largely unregulated. Alves defines e-waste as “discarded electronic devices with a battery or plug that are no longer wanted, not functional, or obsolete.”⁹¹ This includes consumer products as varied as televisions, microwaves, refrigerators, and fluorescent lamps.⁹² In 2019, the world created an estimated 53.6 million tons of e-waste; of that, less than 20% was properly collected and recycled.⁹³ E-waste presents a complicated proposition for corporations. It has many valuable components like silver, copper, and plastic, but many dangerous components like lead, mercury and cadmium.⁹⁴ The concept of extended producer responsibility (EPR)

⁹¹ Bruna Alves, *Global E-Waste – Statistics & Facts*, STATISTA, Dec. 18, 2023, available at <https://www.statista.com/topics/3409/electronic-waste-worldwide/#topicOverview>.

⁹² Linh Thi Truc Doan, Yousef Amer, Sang-Heon Lee & Phan Nguyen Ky Phuc, *Strategies for E-Waste Management: A Literature Review*, 13 INT’L J. ENERGY & ENV’T ENG. 157 (2019).

⁹³ *Electronic Waste (E-Waste)*, WORLD HEALTH ORG., ct. 18, 2023, available at [https://www.who.int/news-room/fact-sheets/detail/electronic-waste-\(e-waste\)](https://www.who.int/news-room/fact-sheets/detail/electronic-waste-(e-waste)).

⁹⁴ Doan et al., *supra* note 92.

has been effective in ensuring that corporations making electronic products feel some ownership over their end-of-life disposal.⁹⁵ EPR is a good start, but something more comprehensive must be established to reel in e-waste.

It would seem clearer to use regulation as a tool here given that corporations produce the very things that are causing e-waste. In addition to EPR as a strategy, many countries have adopted import/export restrictions and recycling regulations as methods to combat problems in disposal.⁹⁶ The United Nations' Sustainable Development Goals (SDGs) provide an overarching framework for achieving progress in many different areas of the environment, including e-waste.⁹⁷ Of particular relevance are SDGS 11 and 12: Sustainable Cities and Communities, and Responsible Consumption and Production, respectively.⁹⁸ The challenges and mechanisms by which to address this issue are more international in scope than with rural health care, given that the latter poses some uniquely American concerns – and the converse is also the case, as rural health care has certain components that are part of each nation's laws and demographics that would not have an analogous form in the United States. E-

⁹⁵ See Yamini Gupt & Samraj Sahay, *Review of Extended Producer Responsibility: A Case Study Approach*, 33 WASTE MGMT. & RSCH. 595 (2015).

⁹⁶ See Rashmi Patil & Seeram Ramakrishna, *A Comprehensive Analysis of E-Waste Legislation Worldwide*, 27 ENV'T SCI. & POLLUTION RSCH. 14412 (2020).

⁹⁷ *The 17 Goals*, U. N. DEP'T OF ECON. & SOC. AFF., <https://sdgs.un.org/goals> (last visited Aug. 27, 2024).

⁹⁸ *Id.*

waste looks like e-waste around the world, but rural health is clearly different in the U.S. than in, for example, Bolivia or Kazakhstan.

Reducing e-waste effectively is necessary, but difficult, for the companies that produce electronic items. E-waste's presence is not uniform, but rather exists in many different types that need to be handled in distinct ways.⁹⁹ It has high up-front costs, and the technology this process demands is often hard to find.¹⁰⁰ There are incentives that companies could use to make e-waste disposal more efficient, including investing in research and development for improving e-waste recycling and disposal technology, reorganizing the production infrastructure itself to be more eco-friendly, and building both external and internal partnerships to ease the process.¹⁰¹

The solution here, as discussed below, is a partnership. The government can make appropriate laws and regulations to encourage the reduction of e-waste, and the private sector needs to make important

⁹⁹ Rafaela Anuardo et al, *Transforming E-Waste into Opportunities: Driving Organizational Actions to Achieve Sustainable Development Goals*, 15 SUSTAINABILITY 1 (2023), citing Olanrewaju Shittu, Ian Williams & Peter Shaw, *Global E-Waste Management: Can WEEE Make a Difference? A Review of E-Waste Trends, Legislation, Contemporary Issues and Future Challenges*, 120 WASTE MGMT. 549 (2021), and Linh Thi Truc Doan, Yousef Amer, Sang-Heon Lee, Phan Nguyen Ky Phuc & Luu Quoc Dat, *E-Waste Reverse Supply Chain: A Review and Future Perspectives*, 9 APPLIED SCI. 1 (2019).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 13-15.

changes to how it views e-waste. Governments can enforce laws, but the private sector can become more efficient operationally to ease the burden of e-waste on the environment. This is not an overnight disaster, but one that has been building up over time; when that occurs, publicization of the issue is often a critical first step.

E-waste is not your traditional disaster, nor are rural health care and price gouging. Yet the response structure in place remains critical, as does the overall drive of this paper. Corporations and other for-profit entities have the ability to address a major problem in society, but they have not been given the proper direction to unleash those resources. They can accomplish much (and have) but can offer society something even greater. Just because the problem is measured over a lengthier time span does not make it any less potent.

C. Post-Pandemic Prices and Fees

Regulation, of course, is not a panacea. It has not been in the two manmade examples discussed so far: rural health care has a very specific culture in which it exists, and regulations that seek to fix problems without addressing why rural health is so challenging are unlikely to be successful. Similarly, regulations that take away the ability of a for-profit company to research and innovate solutions can result in stagnation. Regulation requires constant fine-tuning and adjustments to ensure a suitable balance. Even well-meaning regulatory acts – especially at the state level – can have unforeseen

negative consequences. Corporations have frequently been criticized for unfairly raising prices after the COVID-19 pandemic.¹⁰² The consumer response to raising prices is multifold and often centered on context, leading to a discussion about the role of economic policy with prices. A reactive approach, painting corporations as monolithically greedy, may misinterpret important reasons for price increases unknown to the consumer.¹⁰³ Elected representatives making laws at the state level may often be attorneys, but they must focus on the perceived needs of their constituents (and scoring points for re-election) at the expense of writing the best-fitting laws. The purpose of doing so is not to say that price gouging, for instance, is mythical – it most certainly exists – but rather that attempts at regulation need nuance to be relevant.

In 2023, California passed Senate Bill 478, which prohibits businesses from using unadvertised service fees – junk fees – to help ensure that consumers have a full account of what they are actually paying for via deliveries, hotels, and concert tickets.¹⁰⁴ The bill itself explains the ethical problems that it seeks to fix: false advertising, drip

¹⁰² See, e.g., Talmon Joseph Smith & Joe Rennison, *Companies Push Prices Higher, Protecting Profits but Adding to Inflation*, N.Y. TIMES, May 31, 2023, available at <https://www.nytimes.com/2023/05/30/business/economy/inflation-companies-profits-higher-prices.html>.

¹⁰³ See Christopher Buccafusco, Daniel Hemel & Eric Talley, *The Price of Fairness*, 84 OHIO ST. L.J. 389 (2023).

¹⁰⁴ CAL. SB-478, CONSUMERS LEGAL REMEDIES ACT (2023), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB478.

pricing, and unfair competition. Section 2 of the bill provides a list of twenty-eight items that it hopes the law will reduce or eliminate.¹⁰⁵ The implications of this law are straightforward. Restaurants, the businesses at the center of this debate for example, have already indicated that they will just raise menu prices or explain the purpose of a surcharge that is still allowed under this law on the final bill the consumer receives: for example, paying for employee benefits.¹⁰⁶ Does this solve the actual problem that the law seeks to address? Partially. Consumers gain transparency in pricing, but the actual impact on their wallets remains intact.

State laws often serve as motivators for federal action, and California is frequently one of the states that initiates regulatory experiments.¹⁰⁷ As of February 2024, the Biden administration took an interest in empowering the Federal Trade Commission to remedy junk fees at the national level. This follows naturally from earlier FTC efforts regarding airline fees.¹⁰⁸ In December 2024, this

¹⁰⁵ *Id.* at § 2.

¹⁰⁶ Stephanie Breijo, *What Does a Service Fee Ban Mean for Diners? Expect Higher Menu Prices – A Lot Higher*, L.A. TIMES, Feb. 15, 2024, available at <https://www.latimes.com/food/story/2024-02-15/new-california-hidden-fees-law-service-fee-ban>.

¹⁰⁷ See, e.g., Steve Milne et al., *New California Laws that Might Affect Your 2024*, CAPRADIO.ORG, Dec. 26, 2023, available at <https://www.capradio.org/articles/2023/12/26/new-california-laws-that-might-affect-your-2024/>.

¹⁰⁸ Tony Romm, *From Airlines to Ticket Sellers, Companies Fight U.S. to Keep Junk Fees*, WASH. POST, Nov. 19, 2023, available at

became a reality with a nationwide ban on junk fees for live event tickets and hotel rooms.¹⁰⁹ The FTC took this initial step in November 2023 with the proposed Trade Regulation Rule on Unfair or Deceptive Fees.¹¹⁰ The response from industry lobbyists has naturally been icy: many industries have sought exclusion from these rules, while others have asked for clarification on definitions.¹¹¹ Leaders in the concert ticket industry have noted additional challenges including the rather non-centralized nature of selling concert tickets (being unable to actively manage which fees venues list or do not list) and the disadvantage companies face from upfront prices that make them seem, at first glance, a far more expensive provider of tickets compared to others that are not paying as close of attention to including all costs in the final price.¹¹²

This connects to disaster response in a few key main ways. First, it showcases how the federal government's regulatory framework functions and can be influenced. For slow-moving crises and disasters, planning for lobbying efforts and other responses is necessary. Second, it shows how something starting as a statewide initiative can

<https://www.washingtonpost.com/business/2023/11/19/companies-lobbyists-fight-junk-fees/>.

¹⁰⁹ FED. TRADE COMM'N, *Federal Trade Commission Announces Bipartisan Rule Banning Junk Ticket and Hotel Fees* (Dec. 17, 2024), available at <https://www.ftc.gov/news-events/news/press-releases/2024/12/federal-trade-commission-announces-bipartisan-rule-banning-junk-ticket-hotel-fees>.

¹¹⁰ 88 FR 77420 (Nov. 9, 2023).

¹¹¹ Romm, *supra* note 108.

¹¹² *Id.*

become federal law. Third, it illustrates the shaky foundation of administrative law, considering that these efforts may change significantly with a new presidential administration.¹¹³ If the main goal is encouraging for-profits to more readily respond to disasters, an ineffective regulation that fails to consider any one of these factors could lead to an environment of bare compliance.

This heated debate has been instructive for understanding post-disaster consumer prices for several reasons. The first point may seem obvious but bears repeating: not all industries are the same. A regulation that tries to protect consumers from bad corporate behavior post-disaster cannot be too broad as a result. The second is to be conscious of the costs of implementing these new laws: not every firm is going to have the infrastructure to make the needed changes, and it could lead to exits of some companies unable to handle the increased costs of the regulation. Third, lawmakers should understand the effects of potential policy from a variety of perspectives, not just government. Laws like California's Senate Bill 478 have been especially criticized by economists, who worry that the law will not achieve its aim of

¹¹³ This is clear from the start of the second Trump administration, which has rolled back and attempted to eliminate many regulations. *See, e.g.,* Julia Jacobo, *Trump's Policies Could Impact the Environment Long After He Leaves Office, Some Experts Say*, ABCNEWS.COM (May 19, 2025), available at <https://abcnews.go.com/US/trumps-policies-impact-environment-long-after-leaves-office/story?id=121749744>.

eliminating junk fees and will mainly result in higher up-front costs.¹¹⁴

Laws that are appropriate in scope have the potential to avoid many of these issues. One excellent example is the recent federal executive efforts to reduce or eliminate overdraft fees through the Consumer Financial Protection Bureau.¹¹⁵ Financial institutions may vary considerably, but they are far more similar than clearly distinct sectors of the economy like food, travel, and entertainment. This provides valuable evidence of regulatory effects on business entities, as financial institutions are heavily regulated.¹¹⁶ As they are similar, one can better anticipate sector-wide reactions to regulation. Banks are already accustomed to the costs associated with regulations; the regulatory framework at both the state and federal levels is well known. This proposed law would not completely do away with overdraft fees, but merely remove their for-profit nature – banks could only demand as much as would

¹¹⁴ See, e.g., LaShawn Hudson, *Economists Explain Why Proposed Legislation Might Not Stop Junk Fees*, WABE.ORG, May 31, 2023, available at <https://www.wabe.org/economists-explain-why-proposed-legislation-might-not-stop-junk-fees/>.

¹¹⁵ Ken Sweet & Cora Lewis, *New Regulation Proposed by Biden Administration Would Limit Overdraft Fees to as Low as \$3*, PBS.ORG, Jan. 17, 2024, available at <https://www.pbs.org/newshour/economy/new-regulation-proposed-by-biden-administration-would-limit-overdraft-fees-at-big-banks-to-as-low-as-3>.

¹¹⁶ DEP'T OF TREAS., OFF. OF THE COMPTROLLER OF THE CURRENCY, *Laws & Regulations*, <https://www.occ.treas.gov/topics/laws-and-regulations/index-laws-and-regulations.html> (last visited Dec. 22, 2024).

be necessary to break even.¹¹⁷ Targeting a single industry also allows the firms within that sector to come up with standardization and self-enforce ethical standards; in this example, some policymakers have suggested that banks could set a benchmark overdraft fee that would apply broadly.¹¹⁸ If the goal is to get for-profit entities to offer more of their resources in post-disaster scenarios, it is possible that an industry standard in which higher levels of contributions are expected could serve the same purpose. One very long-term approach could be establishing regulation early on and then having that regulation turn into custom. Based on the discussions in this paper, it is unlikely that all for-profit entities will first come to this conclusion on their own.

Evidence from the recent pandemic showcases some similarities, and considerable differences, in how individual states strengthened their consumer protection laws for price-gouging. More than one in three states changed their anti-gouging laws from 2020 to 2022, but not uniformly.¹¹⁹ They vary, for example, in terms of civil versus criminal penalties, private citizen enforcement, coverage of goods, a declaration of a specific condition like a state of emergency or severe weather.¹²⁰ Given the absence of a federal anti-

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Kaitlin Ainsworth Caruso, *Price Gouging, the Pandemic, and What Comes Next*, 64 BOSTON COLL. L. REV. 1797, 1798 (2023).

¹²⁰ *Id.* at 1805-06.

gouging law, how states combat price gouging is even more important.¹²¹

There is also a sociological component to just how severe the negative consequences of post-disaster corporate decision making can be. People living in poorer areas of the United States are likely to be far more impacted than people in wealthier areas.¹²² Basic necessities like food, which in even optimistic times is not evenly distributed since about 10% of Americans have food insecurity, can become inaccessible post-disaster.¹²³ Food pantries are often located in close proximity to urban centers; they are less likely to be found in rural areas. Regardless, the travel distance to reach those pantries may make life challenging for many low-income people even in major cities, as seen in a recent study conducted in Houston, Texas, after severe flooding.¹²⁴ Attempts to address food deserts in non-disaster times have produced conflicting information; regulations that would seek to remedy this concern may not fully, as

¹²¹ *Id.* at 1802.

¹²² One clear example is low-income legal services: after Hurricane Katrina, the infrastructure in New Orleans to support low-income legal services was unable to handle almost 90% of demand from residents. See Davida Finger, *50 Years After the War on Poverty: Evaluating the Justice Gap in the Post-Disaster Context*, 34 B.C. J. L. & SOC. JUST. 267 (2014). This has a direct impact on the businesses that are on the other side of these disputes, which can range from housing, to insurance, to contractor fraud. *Id.*

¹²³ John P. Casellas Connors, Mastura Safayet, Nathanael Rosenheim & Maria Watson, *Assessing Changes in Food Pantry Access After Extreme Events*, 40 AG. & HUM. VALUES 619, 620 (2023).

¹²⁴ *Id.*

of yet, understand why interventions have been unsuccessful.¹²⁵ One such intervention is the Healthy Food Financing Initiative, which was created to ensure access to high-quality foods in areas where unhealthier options – or no options at all – tend to dominate.¹²⁶ Its operation functions as a public-private partnership that provides grants, loans, and technical help to those seeking to provide healthy food services to areas with limited options.¹²⁷ The law’s support of new supermarkets in low-income areas of Pittsburgh produced only middling results, largely because of a low adoption rate among residents, who decided to continue shopping at a grocery store outside of the area.¹²⁸ An idealistic approach may opt for a regulatory mechanism that increases food availability, only to watch it fail because the underlying causes were not fully explored.

This illustration demonstrates one of the drawbacks of regulatory engineering: good intentions do not always lead to effective policies. Common problems like food insecurity are

¹²⁵ See Rachel Engler-Stringer, Daniel Fuller, Hasanthi Abeykoon, Caitlin Olauson & Nazeem Muhajarine, *An Examination of Failed Grocery Store Interventions in Former Food Deserts*, 46 HEALTH ED. & BEHAV. 749 (2019).

¹²⁶ See Madhumita Ghosh-Dastidar et al., *Does Opening a Supermarket in a Food Desert Change the Food Environment?*, 46 HEALTH & PLACE 249 (2017).

¹²⁷ U.S. DEP’T OF AG., RURAL DEVT., *Healthy Food Financing Initiative*, <https://www.rd.usda.gov/about-rd/initiatives/healthy-food-financing-initiative> (last visited Dec. 22, 2024).

¹²⁸ Engler-Stringer et al., *supra* note 125 at 255.

exacerbated by disasters. Regulations that lack context and fail to learn from previous attempts may end up causing even more harm after a disaster takes place. In other words, it is valuable to understand why policies have not worked in the past. The incentives provided to businesses in a post-disaster scenario through regulation may be helpful on the surface, but the adjustment must be precise, targeted, and supported by evidence. Regulation should ensure that corporations and other firms do what they can to help their fellow people in line with the stakeholder and other ethical theories discussed earlier, but in a way that will actually be effective. One example could be extrapolated from this food insecurity discussion: a potential policy could aim to provide meaningful incentives for supermarkets to provide food to low-income populations after a disaster, but the effect could be low adoption by individuals in those areas and logistical problems in getting the food to people in the stricken areas.

Price fluctuations caused in large part by post-pandemic inflation have led to both regulators and industry increasingly trying different solutions. State governments have tried to address the high cost of housing through calls for rent increase caps as the cost of living continues to rise in many U.S. cities.¹²⁹ Some industries, like restaurants, are looking into dynamic pricing – charging consumers different

¹²⁹ See, e.g., Libby Denkmann, Jeanie Lindsay, Sarah Leibovitz, & Noel Gasca, *Rent Control Bill Claws Its Way Back in Olympia*, KUOW.ORG (NPR), Feb. 20, 2024, available at <https://www.kuow.org/stories/rent-control-bill-claws-its-way-back-in-olympia>.

rates depending on some factor like the time of day or year¹³⁰ - as a method to maximize customer sales during busy periods of time, although there remain serious ethical questions in doing so¹³¹. Both public and private sectors need the ability to experiment (within certain restrictions, of course) to find a way that recognizes the costs of doing business after a disaster while also realizing the potential for people to become disadvantaged by prices that are not actually reflective of an economy based in reality.

III. POTENTIAL SOLUTIONS

If American policymakers are to appropriately mobilize the resources found in for-profit firms - having learned the lessons of making focused, data-driven, and effective policy - they must do so at all levels of governance, and advocate for at least minimal regulation internationally when it is feasible to do so. They can achieve these resource-centered goals through balancing enforcement, corporate strengths, and meaningful regulations. Five solutions described below are representative of this balance.

¹³⁰ For a review of the retail aspects of dynamic pricing, see Praveen K. Kopalle, Koen Pauwels, Laxminarayana Yashaswy Akella & Manish Gangwar, *Dynamic Pricing: Definition, Implications for Managers, and Future Research Directions*, 99 J. RETAILING 580 (2023).

¹³¹ See, e.g., Stacey Leasca, *Wendy's Is Introducing Uber-Style Surge Pricing*, MSN.COM, Feb. 26, 2024, <https://www.msn.com/en-us/foodanddrink/foodnews/wendy-s-is-introducing-uber-style-surge-pricing/ar-BBliVDVu>.

The three disasters considered above – post-disaster health care in rural America, e-waste, and post-pandemic prices and fees - all share some common foundations and thereby also could share attempts aimed at addressing them. They all need some combination of government regulation and private-sector resources to improve outcomes. The question then becomes how policymakers can adjust those incentives for for-profit entities to maximize their contribution to post-disaster situations. While each will need a mix that is best tailored to the context of the disaster, there are some overarching themes.

Corporations and private equity firms should be partners with the government in the drive to recover after disaster. Specific changes to business laws could offer for-profit firms appropriate incentives to fully contribute to the efforts rather than rely on the goodwill of corporations. For-profit entities often provide opportunities for community improvement of their own volition.¹³² Large corporations explain their motives clearly in their CSR reports when incentives align within disaster relief.¹³³ Private companies can also partner with the

¹³² See Peter Navarro, *Why Do Corporations Give to Charity?*, 61 J. BUS. 65, 89-90 (1988), for some of the profit-maximizing rationales behind corporate giving to communities, particularly the advertising it provides for the sponsoring firm.

¹³³ See generally Brian R. Johnson, Eric Connolly & Timothy S. Carter, *Corporate Social Responsibility: The Role of Fortune 100 Companies in Domestic and International Natural Disasters*, 18 CORP. SOC. RESP. & ENV'T MGMT. 352 (2010) (finding via a content analysis study that most

public sector and achieve efficient and desirable goals; in the Jackson, Mississippi, water situation described above, for instance, one productive avenue for revolutionizing water delivery – an industry that does not typically adapt quickly to change – was to use public-private partnerships in the form of energy performance contracts.¹³⁴ The crisis in Jackson took place because of failings on both the public and private side, not because of the nature of public-private partnerships.

Five major changes could yield significant benefits: 1) amending the U.S. Tax Code to both reward private-sector giving while also making sure public funding is available; 2) encouraging the development and growth of alternative forms of businesses that take multiple perspectives and interests into account; 3) making state and federal laws that improve enforcement (by, for example, effectively limiting the post-pandemic effects of skyrocketing prices and fees); 4) creating regulations that are well-grounded in research and are tailored to disaster relief; and 5) optimizing the use of corporate advantages in post-disaster situations.

A. Taxes

In tandem with developing partnerships with the private sector, tax reform will also aid in disaster relief. As noted previously, more and more business resources are being established by entities that

corporations have ethical reasons for participating in disaster relief).

¹³⁴ Fowler, *supra* note 40.

engage in pass-through taxation; while taxes do not need to match those of C-corporations (which would then eliminate a large part of the incentive behind having partnerships and S-corporations in the first place), focusing efforts on closing the gap through changes to tax breaks and improved enforcement would free up more resources to combat disasters.¹³⁵ Tax incentives should also be aligned to encourage giving; economics experts have noted that taxation has a considerable impact on a company's decision to engage in corporate social responsibility.¹³⁶ In situations where disaster relief is somehow not tax-deductible, the tax rate has an inverse relationship to charitable giving; when taxes are increased, the percentage of profits donated decreases as well.¹³⁷

Taxation accomplishes far more than just requiring companies and people to hand over money to the government. From a regulatory perspective, it allows the government to deploy critical resources when disasters happen. Taxation is useful for the private sector in that it provides a window into planning: when those starting a business select a form, they are in effect deciding how to be taxed. Increasing or decreasing tax rates has a real,

¹³⁵ Matthew Smith, Owen Zidar & Eric Zwick, *Top Wealth in America: New Estimates under Heterogeneous Returns*, 138 Q. J. OF ECON. 515 (2023).

¹³⁶ For an overview of the principles of corporate social responsibility, see Mauricio Andres Latapi Agudelo, Lara Johannsdottir and Brynhildur Davidsdottir, *A Literature Review of the History and Evolution of Corporate Social Responsibility*, 4 INTL. J. OF CORP. SOC. RESPONSIBILITY 1 (2019).

¹³⁷ Pecorino, *supra* note 35, at 382.

measurable impact on consumer and business behavior; like many other public strategies, doing so is not without peril. A new tax may not have the desired effect that policymakers expect.¹³⁸ Taxes must also be paid by people and businesses to cause change; a common criticism is that the wealthy pay far fewer taxes than they should, which results naturally in a call for reform in how taxes are paid.¹³⁹ Understanding how to shift the narrative about taxes in America, and how to improve tax collection practices with new technology, can go a long way toward making taxation a more effective tool in rebuilding after a disaster.¹⁴⁰

B. Alternative Forms of Businesses

One area of potential exploration in this area is how having some form of business organization designed to promote social welfare – B Corps, benefit corporations, or L3Cs – influences, if at all, the desire of for-profit businesses to contribute to post-disaster recovery. The B Corp standard is still a relatively new method for corporations to gain some acknowledgement of meeting stringent third-

¹³⁸ See, e.g., Jamie F. Chriqui, Christina N. Sansone & Lisa M. Powell, *The Sweetened Beverage Tax in Cook County, Illinois: Lessons From a Failed Effort*, 110 AM. J. PUB. HEALTH 1009 (2020).

¹³⁹ See, e.g., Katharina Gangl & Benno Torgler, *How to Achieve Tax Compliance by the Wealthy: A Review of the Literature and Agenda for Policy*, 14 SOC. ISSUES & POL'Y REV. 108 (2020).

¹⁴⁰ See James Alm, *Tax Evasion, Technology, and Inequality*, 22 ECON. OF GOV. 321 (2021).

party guidelines for social and environmental performance.¹⁴¹ B Corps not only start out with CSR-based goals, but studies have shown that they persist in achieving those same goals.¹⁴² Benefit corporations, a related but distinct concept, involve U.S. state law instead of certification from B Lab, a nonprofit organization¹⁴³ Most states support the legal framework needed to establish benefit corporations, which allow companies to better integrate stakeholder interests by broadening fiduciary duties.¹⁴⁴ Both are growing concepts: the number of American states permitting the creation of a benefit corporation has increased since its initial founding in 2010 in Maryland¹⁴⁵, while over 3,500

¹⁴¹ Elsa Diez-Busto, Lidia Sanchez-Ruiz & Ana Fernandez-Laviada, *The B Corp Movement: A Systematic Literature Review*, 13 SUSTAINABILITY 1 (2021).

¹⁴² Kathleen Wilburn & Ralph Wilburn, *Evaluating CSR Accomplishments of Founding Certified B Corps*, 6 J. GLOB. RESP. 262 (2015).

¹⁴³ B Lab, <https://www.bcorporation.net/en-us/movement/about-b-lab/> (last visited Dec. 18, 2024).

¹⁴⁴ For an overview of the benefit corporation both in the United States and in other countries, see Federica Bandini, Leonardo Boni, Magali Fia & Laura Toschi, *Mission, Governance, and Accountability of Benefit Corporations: Toward a Commitment Device for Achieving Commercial and Social Goals*, 20 EUR. MGMT. REV. 477 (2023); see also Urban Sustainability Directors Network, *Sustainable Consumption Toolkit: B Corps and Benefit Corporations*, USDN.ORG, 2016, available at <https://sustainableconsumption.usdn.org/initiatives-list/b-corps-and-benefit-corporations>.

¹⁴⁵ Gargi Bohra, *Benefit Corporations: Doing Well and Doing Good*, NYU J. L. & BUS. (Feb. 28, 2022),

companies have become certified B Corps as of 2020, an increase of nearly 35% from 2018.¹⁴⁶ Companies may choose to be a B Corp, a benefit corporation, or both given that one is certified from an external source and the other is an election of the state.¹⁴⁷

Details for becoming a benefit corporation vary from state to state,¹⁴⁸ but share some commonalities. Benefit corporations have motivations that match the concept of giving back to communities after disasters. The additional requirements asked of boards of directors help to ensure that they are keeping the community in mind when setting the trajectory of the firm. While the era of focusing solely on shareholder primacy has passed, this demand does grant an extra layer of

<https://www.nyujlb.org/single-post/benefit-corporations-doing-well-and-doing-good>.

¹⁴⁶ Diez-Busto, *supra* note 141, at 2.

¹⁴⁷ For a comparison of B Corps and benefit corporations from a business perspective, see Yale Center for Business and the Environment, *An Entrepreneur's Guide to Certified B Corporations and Benefit Corporations*, 2019, https://cbey.yale.edu/sites/default/files/2019-10/CBEY_BCORP_Online.pdf.

¹⁴⁸ For example, Utah and Oregon. See Utah Department of Commerce, *Benefit Corporation*, <https://corporations.utah.gov/business-entities/benefit-corporation/> (last visited Sept. 2, 2024); Oregon Secretary of State, *File to Become a Benefit Company*, <https://sos.oregon.gov/business/Pages/benefit-company.aspx> (last visited Sept. 2, 2024).

protection should someone sue a board of directors for allocating funds for assistance.¹⁴⁹

Low-Profit Limited Liability Companies (L3Cs) are another way of accomplishing the goal of promoting social welfare in business. They do so by building on the existing framework of LLCs in balancing the benefits of a partnership and the limited liability of the corporate form of business, but then also adding the crucial benefit of a charitable purpose.¹⁵⁰ The L3C has been criticized, especially at its inception, by many business and legal scholars as being impractical and not achieving its stated aims.¹⁵¹ There exists some evidence, though, that L3Cs are especially beneficial for social entrepreneurs and foundations with a more holistic mission.¹⁵² Recent research has found that L3Cs are

¹⁴⁹ See B Lab, *What Is a Benefit Corporation?*, <https://usca.bcorporation.net/benefit-corporation/> (last visited Sept. 2, 2024).

¹⁵⁰ Cody Vitello, *Introducing the Low-Profit Limited Liability Company (L3C): The New Kid on the Block*, 23 LOY. CONSUMER L. REV. 565, 569 (2011).

¹⁵¹ Including the criticisms that L3Cs are neither at home with nonprofits nor with for-profits, being conflicted by profit and charity as two often contradictory guiding forces, as well as the difficulties of obtaining capital as an L3C compared to other for-profit forms of business. See Carter G. Bishop, *The Low-Profit LLC (L3C): Program Related Investment by Proxy or Perversion?*, 63 ARK. L. REV. 243 (2010); see also J. William Callison & Allan W. Vestal, *The L3C Illusion: Why Low-Profit Limited Liability Companies Will Not Stimulate Socially Optimal Private Foundation Investment in Entrepreneurial Ventures*, 35 VT. L. REV. 273 (2010).

¹⁵² See Sonia J. Toson, *Truth Revealed: Challenging the Mythical Narrative of the Low-Profit Limited Liability Company*, 11 SOC. BUS. 47 (2021).

not especially helpful as a signal to consumers when marketing a product, but were preferable for many seeking additional flexibility over classic 501(c)(3)s.¹⁵³ L3Cs, for example, can still earn a profit while attracting charitable investment, a key feature distinguishing them from traditional nonprofits.¹⁵⁴

The early years of L3Cs and benefit corporations demonstrated a desire among states, LLCs, and C-corporations to have socially conscious forms of business.¹⁵⁵ As of 2022, 37 U.S. states and territories permitted the creation of benefit corporations;¹⁵⁶ only eight U.S. states and territories in the same time window allow L3Cs.¹⁵⁷ This may be due in part to the underpinnings of each form: benefit corporations are constructed on the C-corporation chassis, while L3Cs are structurally similar to LLCs.¹⁵⁸ States in which C-corps are more

¹⁵³ Tanya M. Marcum & Eden S. Blair, *The Value of Values: An Update on the L3C Entity, Its Uses and Possibilities*, 88 UMKC L. REV. 927, 928 (2020).

¹⁵⁴ *Id.*

¹⁵⁵ Kate Cooney, Justin Koushyar, Matthew Lee & Haskell Murray, *Benefit Corporation and L3C Adoption: A Survey*, STAN. SOC. INNOVATION REV. (Dec. 5, 2014), https://ssir.org/articles/entry/benefit_corporation_and_l3c_adoption_a_survey.

¹⁵⁶ Bohra, *supra* note 145.

¹⁵⁷ Cornell University Legal Information Institute, *Low-Profit Limited Liability Company*, [https://www.law.cornell.edu/wex/low-profit_limited_liability_company_\(l3c\)](https://www.law.cornell.edu/wex/low-profit_limited_liability_company_(l3c)) (last visited Sept. 2, 2024).

¹⁵⁸ Cooney et al., *supra* note 155.

popular as a form of business are more likely to prefer benefit corporations.¹⁵⁹

A conflict, discussed earlier,¹⁶⁰ exists here: having more B Corps and L3Cs would seem to be appropriate for realigning the incentives society provides to for-profit firms, but doing so comes at a potential cost. The more socially beneficial organizations like B Corps and L3Cs in existence – just like LLCs and partnerships – the fewer taxes are added to the government treasury. B Corps are an external designation, not determined by states for tax purposes, but it is likely that those businesses have elected some form of tax-friendly strategy as permitted by their home states of incorporation. A weaker tax foundation means less support on the public assistance side for when disasters take place. L3Cs are not tax-exempt, however, as they must follow similar rules to LLCs for taxation, so some funds are still being collected.¹⁶¹ L3Cs have stagnated after their early success. Some in the legal community have suggested improvements to the model, such as matching reporting requirements to those mandated for nonprofit organizations, easing transferability and withdrawal options, and asking that only one aspect of the L3C focus on charity rather than the entirety of the business.¹⁶² At this point, there are likely not enough alternative business

¹⁵⁹ *Id.*

¹⁶⁰ See Cooper et al., *supra* note 8.

¹⁶¹ Cornell LII, *supra* note 157.

¹⁶² See, e.g., Cassady V. Brewer, *Seven Ways to Strengthen and Improve the L3C*, 25 REGENT UNIV. L. REV. 329, 331 (2013).

forms to significantly reduce the tax base (more than it already has been), but it is a consideration that could be problematic moving forward.

The end result, however, is evidence showcasing the need - and desire - for alternative forms of business that keep in mind the well-being of society and other stakeholders. Both the need and desire may take place at the same time, but demonstrating new forms of business as relevant may precede the need. B Corps and L3Cs may not be high-profit entities that donate massive amounts of funding after disasters, but their increased presence can lead to a higher cultural expectation of all businesses within a state. Encouraging these forms of business, and perhaps new ones that better refine the balance between profit and charity, are a good strategy for ensuring that businesses are ready to help when disasters arise.

C. Improving Enforcement

The enforcement arm of consumer protection laws is clearly housed within the attorneys general of various states and the federal Attorney General, but their willingness and ability to change complaints into action can be different depending on the state. Research into the reasons why can often be summed up by an individual state's ideology regarding consumer protection and its socioeconomic culture.¹⁶³ Hoarding of scarce products following a

¹⁶³ Colin Provost, *The Politics of Consumer Protection: Explaining State Attorney General Participation in Multi-State Lawsuits*, 59 POL. RSCH. Q. 609 (2006).

pandemic can be especially harmful to impoverished areas; here, the federal government, rather than states, have taken more of a leadership role. During COVID-19, the Trump administration took action via executive orders and the Defense Production Act to ensure availability of some medical equipment.¹⁶⁴ A federal response has the advantage of applying the same rules everywhere instead of relying on states to pass appropriate legislation. Despite the use of federal law during the pandemic, the primary mechanism by which consumers are protected from post-disaster situations like price gouging and junk fees are via state Unfair and Deceptive Acts and Practices (UDAP) laws.¹⁶⁵

Even though the states retain substantial power in ethics enforcement, the federal government does play a major role in coordination with the states via the False Claims Act (FCA).¹⁶⁶ Returning to rural health care, there have been a few examples of the FCA being used to hold private equity companies responsible for the actions of the health care facilities they manage.¹⁶⁷ By piecing together the FCA's use in the *Medrano*, *Martino-Fleming*, and *Anderson* cases, one finds a mechanism by which private

¹⁶⁴ Exec. Order No. 13910, 85 Fed. Reg. 17001 (Mar. 26, 2020); 50 U.S.C. § 4512, as cited in Caruso, *supra* note 114, at n. 20-21.

¹⁶⁵ See Caruso, *supra* note 119, at 1804 for some examples of these state laws and an overview of their beginnings.

¹⁶⁶ For an overview of the purpose of and history behind the False Claims Act, see James B. Helmer Jr., *False Claims Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites and Patriots*, 81 U. CIN. L. REV. 1261 (2013).

¹⁶⁷ Field et al., *supra* note 6 at 147-160.

equity can be made liable: *Medrano* uses the concept of being aware of the risks of actions taken by an owned health care company to meet causation, *Martino-Fleming* establishes liability for failing to correct an already existing violation, and *Anderson* ensures that adding incentives to violate the FCA is adequate for causation.¹⁶⁸

D. Meaningful New Regulations

Achieving a balance by making a meaningful and effective regulation can be difficult to achieve. Even the best-sounding laws may be ineffective if they are not tailored to fit the variables of given circumstances. To improve rural health, for example, government regulations mandated having telehealth options available to rural residents.¹⁶⁹ This worked well for those fortunate enough to have broadband access, but still left a significant percentage of people living in rural areas without reliable Internet outside of the reach of the potential solution.¹⁷⁰

The United States is far from the only country that regularly has disasters (natural or manmade); other countries' experiences with making regulations

¹⁶⁸ Field et al., *supra* note 6 at 147-160, *citing* United States *ex rel.* Medrano v. Diabetic Care RX, LLC, No. 15-CV-62617, 2018 WL 6978633 (S.D. Fla. 2018); Massachusetts *ex rel.* Martino-Fleming v. S. Bay Mental Health Ctr., Inc., 334 F.Supp. 3d 394 (D. Mass. 2018); United States *ex rel.* Anderson and Mathis v. Curo Health Services Holdings, Inc., 2022 WL 842937 (D. Tenn. 2022).

¹⁶⁹ See Summers-Gabr, *supra* note 75.

¹⁷⁰ *Id.*

could be informative for American lawmakers. Japan, for instance, has a strong track record of government regulations for disaster response and recovery. Business continuity plans, or BCPs, are commonplace in Japanese business and industry.¹⁷¹ The Central Disaster Management Council, which coordinates disaster recovery efforts in Japan, and the Cabinet Office established guidelines for business continuity, which it then revised after learning more from a major earthquake and pandemic. These agencies additionally set a goal of having all large companies (as defined in Japan) and half of medium-size companies create BCPs, and they have conducted follow-up surveys to ensure that progress is being made.¹⁷² This deliberate, research-based approach that is flexible enough to amend with new data would work well from a federal perspective in the United States, but coordinating these resources among states may prove more difficult. A model code of sorts may be a useful way to make sure that states are on roughly the same page when planning for disasters.

¹⁷¹ Takahiro Ono & Venkatachalam Anbumozhi, *Effects of Business Continuity Planning on Reducing Economic Loss Due to Natural Disasters*, ECON. RSCH. INST. FOR ASEAN AND EAST ASIA DISCUSSION PAPER SERIES 350 (Nov. 2020), <https://www.eria.org/uploads/media/discussion-papers/Effects-of-Business-Continuity-Planning-due-to-Natural-Disasters-new.pdf>.

¹⁷² *Id.*

*E. Strengthening Regulations: Avoiding
Ossification*

Reinforcing administrative laws so that they better reflect the sought outcomes of public-private interactions in disaster relief is critical to rebuilding. Administrative law (the natural home of regulations) has a reputation for being a laborious and excessively nuanced process in American law. Legal scholars have called this reality *ossification* based on how time-consuming it is to change some regulations; the more positive name for this concept is that regulations are *sticky*: they are hard to change, which can grant some stability.¹⁷³ Disasters provide a complicated challenge: they happen quickly and necessitate, at times, fast responses. The initial instinct might be to create a regulatory regime for disaster management that is flexible and malleable, but doing so might cause unforeseen problems for the business world. As is widely known, for-profit firms dislike risk, and the permanence of regulations can make avoiding risk much easier. Many companies rely heavily on the stability of regulatory frameworks to plan ahead.¹⁷⁴ A fusion of long-term stability with short-term maneuverability, though difficult to establish, may be the best way to write new regulations for promoting disaster recovery. Collecting relevant data regarding the realities of post-disaster recovery is a powerful tool in the hands of policymakers. Many of the governmental

¹⁷³ See Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 88-90 (2018).

¹⁷⁴ *Id.*

approaches discussed earlier in rural health care – congressional investigations, reinforcing use of existing federal laws, or introducing new state ones – can be used in a wide variety of contexts. Regulations have the advantage of both legislative and executive action at the federal level while also designing best practices at the state level; administrative agencies also have the option of incorporating public feedback.

IV. USING CORPORATE STRENGTHS IN DISASTER RELIEF

Corporations and other for-profit businesses have a natural reason to help with disaster relief, at least at the local level: if a community is devastated by a disaster, it will not be long before the corporation's functions suffer too.¹⁷⁵ The general idea that post-disaster recovery rests exclusively with government and nonprofit groups is, as a result, inherently unsatisfactory: addressing the damage done and building up resilience so that (for at least the preventable disasters) it will not happen again are advantageous to companies. One major way that for-profit entities can be helpful in post-disaster climates results from their extensive supply chains, as seen

¹⁷⁵ For an overview of how corporations and communities coordinate with one another to limit future disaster risk, see Rajib Shaw, *Corporate Community Interface: New Approaches in Disaster Risk Reduction*, in COMMUNITY-BASED DISASTER RISK REDUCTION, VOL. 10 67, 67 (Rajib Shaw ed., 2012).

earlier with Waffle House.¹⁷⁶ There are two distinct approaches to disasters: one is firm-centric, in which the corporation is concentrating on firm profitability and outcomes, and one is community-centric, in which stakeholder theory plays a considerable part.¹⁷⁷ The key to properly using corporate resources after a disaster takes place is to emphasize and encourage the community-centric functions of the corporation. Much of the discussion surrounding corporate roles in disaster relief has moved past basic corporate social responsibility to a concept related to global citizenship and several crucial components of corporate identity like culture, brand, and how employees feel about what their employer is doing.¹⁷⁸ Corporations are trending upward in giving, but still fall short of U.S. government funding and short of their potential in speeding up recovery.¹⁷⁹

Other ethical implications may apply to using corporate supply chains in disaster relief. It has

¹⁷⁶ Dobie, *supra* note 39.

¹⁷⁷ See Brent McKnight & Martina K. Linnenluecke, *How Firm Responses to Natural Disasters Strengthen Community Resilience: A Stakeholder-Based Perspective*, 29 *ORG. & ENV'T* 290 (2016).

¹⁷⁸ Stacey White, *Corporate Engagement in Natural Disaster Response: Piecing Together the Value Chain*, *CTR. FOR STRATEGIC & INT'L STUD.* (Jan. 2012), https://csis-website-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/120117_White_Corporate_Engagement_Web.pdf, citing *WORLD ECON. FORUM, ENGINEERING & CONSTRUCTION DISASTER RESOURCE PARTNERSHIP: A NEW PRIVATE-PUBLIC PARTNERSHIP MODEL FOR DISASTER RESPONSE* (2010).

¹⁷⁹ White, *supra* note 178, at 4.

become quite clear that not every corporation is playing by the same set of ethics rules. Some, for example, engage in bribery and have been heavily fined under the Foreign Corrupt Practices Act (FCPA).¹⁸⁰ These fines can exceed billions of dollars; the record fine as of February 2024 is just over a staggering \$3.5 billion.¹⁸¹ Nestle, for instance, has been consistently criticized for various ethical failings over the past fifty years, ranging from problems marketing its baby formula in developing countries, to use of child labor in making cocoa, to cornering the water market in arid areas.¹⁸² Americans may push back against using the infrastructure of a firm that has potentially caused so much suffering.

Importantly, corporations are frequently made up of the very people in need of assistance; for example, domestic natural disasters like Hurricane Katrina left many employees of the for-profit sector in need of essential services. Research in this area suggests that when corporations give to their employees post-disaster, they gain more satisfaction from employees on the firm's role in acting socially responsible and reduce the psychological and

¹⁸⁰ 15 U.S.C. §§ 78dd-1, et seq.

¹⁸¹ Stanford Law School, *Largest U.S. Monetary Sanctions by Entity Group*, STAN. L. SCH., FOREIGN CORRUPT PRACTICES ACT CLEARINGHOUSE, <https://fcpa.stanford.edu/statistics-top-ten.html> (last visited Sept. 2, 2024).

¹⁸² See, e.g., Tehila Sasson, *Milking the Third World? Humanitarianism, Capitalism, and the Moral Economy of the Nestle Boycott*, 121 AM. HIST. REV. 1196 (2016).

physiological impact of the disaster.¹⁸³ This is one place where the corporation can be both firm-centric and community-centric.

It would be unfair to characterize corporations as monolithic in culture and in their desire to provide aid after a disaster. Some scholars have found that there are differences based on where a corporation calls home, both in terms of whether they donate at all, and in terms of the value of the aid provided.¹⁸⁴ It is critical to understand these distinctions in designing policies and regulations that either require or promote corporate participation in post-disaster recovery. Lawmakers are left to wonder whether the voluntary mechanisms for charitable giving are sufficient. If one follows the traditional viewpoint of shareholder maximization, some could argue that any amount contributed is above what is demanded of a corporation. Yet this is clearly not the case given how integrated corporations are now in the global economy and the resources that they hold. Although corporations are now seen as part of the disaster recovery process, there still remains a lack of laws and coordination – domestically, regionally, internationally – that moves that participation from voluntary to

¹⁸³ Marla Baskerville Watkins et al., *Compassion Organizing: Employees' Satisfaction with Corporate Philanthropic Disaster Response and Reduced Job Strain*, 88 J. OCCUPATIONAL & ORG. PSYCH. 436 (2015).

¹⁸⁴ Alan Muller & Gail Whiteman, *Exploring the Geography of Corporate Philanthropic Disaster Response: A Study of Fortune Global 500 Firms*, 84 J. BUS. ETHICS 589 (2009).

required.¹⁸⁵ Some have also argued that, given corporations often worsen disasters through negligence or conscious actions, they have an obligation to provide aid that goes well beyond what they usually contribute.¹⁸⁶ This may be especially true when the disaster's origin comes from the introduction of a toxic substance or inability of a private party to properly maintain certain infrastructure.¹⁸⁷

Private sector funding is not limited to corporations. Venture capital firms and angel investors, sources of some of the highest level of resources in the private sector, have generated some considerable benefits for Americans. Many famous corporations started with the investments provided by these groups: Google, Amazon, and Apple became the incredible successes they remain today because of the funding provided by private sources.¹⁸⁸ Doing so can generate high rates of

¹⁸⁵ STEFANO SILINGARDI, RESPONSES BY PRIVATE CORPORATIONS (CH. 11), IN RESEARCH HANDBOOK ON DISASTERS AND INTERNATIONAL LAW (SUSAN C. BREAU & KATJA L.H. SAMUEL, EDS.), 2016.

¹⁸⁶ See Anastasia Telesetsky, *Beyond Voluntary Corporate Social Responsibility: Corporate Human Rights Obligations to Prevent Disasters and to Provide Temporary Emergency Relief*, 48 VAND. J. TRANSNATIONAL L. 1003 (2021).

¹⁸⁷ *Id.*

¹⁸⁸ Darian M. Ibrahim, *The (Not So) Puzzling Behavior of Angel Investors*, 61 VAND. L. REV. 1405, 1407 (2008). For more about Google's experience in raising initial funds, see Ileke Airende, *How Google Moved From a Start-Up to an Established Company*, LINKEDIN.COM (May 26, 2023), <https://www.linkedin.com/pulse/how-google-moved-from-start-up-established-company-ileke-airende/>.

returns due to focusing on intensive debt usage, injection of incentives, and transformations with an intent to sell the acquisition at its peak worth.¹⁸⁹ Angel investors in particular have billions of dollars at their disposal, and they are even more influential than venture capitalists in terms of resources for start-ups.¹⁹⁰ Many well-known individuals like Mark Cuban, Ashish Patel, and Marc Simmons continue that tradition today.¹⁹¹

This is, again, a strength that the for-profit sector can deploy in post-disaster climates. As seen with private equity in health care above, though, these impressive financial resources can also be misapplied in the wrong context.¹⁹² Having manageable and clear regulations that guide this capital in the right direction can make disaster recovery that much easier. It can also help with preventing non-natural disasters in the first place, as the proper incentives could ensure prosocial behavior long before something like the three examples above occurs.

¹⁸⁹ See, e.g., Felix Barber & Michael Goold, *The Strategic Secret of Private Equity*, HARV. BUS. REV. (Sept. 2007), <https://hbr.org/2007/09/the-strategic-secret-of-private-equity>.

¹⁹⁰ See Laurent Belsie, *How Angel Investors Help Start-Up Firms*, NAT. BUR. OF ECON. RSCH., March 2016, <https://www.nber.org/digest/mar16/how-angel-investors-help-startup-firms>.

¹⁹¹ See Indiana University, *IU Angel Network Announces First Portfolio Company*, May 14, 2020, <https://news.iu.edu/live/news/26845-iu-angel-network-announces-first-portfolio-company>.

¹⁹² Field, *supra* note 6 at 825-26.

V. CONCLUSIONS

When a disaster takes place, people and businesses are both harmed. The recovery process is often lengthy and frustrating. For-profit companies have the ability, and the obligation, to help communities in post-disaster circumstances. Through three examples, this article has highlighted how corporate incentives can be moderated so that they ameliorate that process. Three distinct disasters – rural health care, e-waste, and price gouging – all demand a response that coordinates the most productive parts of government action and the most socially helpful elements of private companies. The tools used in rural health care and e-waste, largely manmade creations, are important in designing responses for natural disasters like pandemics, especially for reducing possible negative outcomes of those natural disasters like price gouging. The solution will not arise overnight; effective use of state, federal, and for-profit tools means that American culture must recognize how to maximize the assets that corporations hold.

The five methods discussed above – taxation reform, encouraging alternative forms of business, improving enforcement, making meaningful new regulations, and giving corporations the freedom to deploy their strengths – each contribute something valuable to speeding up disaster recovery, and even in preventing some disasters in the first place. Policymakers must be willing to learn, at a beyond

surface level, about what for-profit firms can and cannot accomplish. They must simultaneously resist resorting to stereotypes about how each stakeholder is or is not likely to act in these situations. A well-researched, informed, and tailored approach is what is needed now. Disasters are likely to increase both in frequency and severity; American society must be ready to answer the challenge.

ESSENTIAL QUESTIONS FOR BUSINESS LAW: A TEACHING STRATEGY

JOSEPH M. LONG*

“Most of the issues of human and social relationships are not of the black and white variety. Right and wrong, sound and unsound, are elusive in the complexities of modern business and finance.”

- Justice William O. Douglas¹

I. INTRODUCTION

Before he became U.S. Supreme Court Justice William O. Douglas, Securities and

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¹ William O. Douglas, *DEMOCRACY AND FINANCE: THE ADDRESSES AND PUBLIC STATEMENTS OF WILLIAM O. DOUGLAS AS MEMBER AND CHAIRMAN OF THE SECURITIES AND EXCHANGE COMMISSION*, 243 (Kennikat Press 1969)(1940).

Exchange Commission chairman William O. Douglas delivered the above quote in a 1940 speech at Yale University.² Chairman Douglas' point, however, is arguably truer today than it was in 1940. A very small percentage of decision-making is "of the black and white variety." Finding and following through with the sound choice is difficult and draining.³ The ever-increasing complexity of both business development and economic growth requires strong critical thinking skills to enhance problem-solving abilities.⁴

In higher education, learning environments should be designed to develop critical thinking. Employers value employee critical thinking employees.⁵ Business school accreditors also require a curriculum designed to develop critical thinking. The Association Council for Business

² *Id.*

³ Sara Berg, *What Doctors Wish Patients Knew About Decision Fatigue*, AMA NEWSWIRE, Mar. 21, 2025, <https://www.ama-assn.org/delivering-care/public-health/what-doctors-wish-patients-knew-about-decision-fatigue>.

⁴ Małgorzata Skrzek-Lubasińska & Radosław Malik, *Is Critical Thinking a Future Skill For Business Success: Science Mapping and Literature Review*, 31 CENT. EUR. MGMT. J. 48, 49 (2023)(stating that "CT [critical thinking] is recognized not only as an important feather of individual abilities but also as the key skill that will support business development and economic growth in the coming years."); Phyllis R. Anderson & Joanne R. Reid, *Critical Thinking Advances the Theory and Practice of Business Management*, 7 J. N. AM. MGMT. SOCIETY 1, 2 (2013).

⁵ Ashley Finley, *How College Contributes to Workforce Success: Employer Views on What Matters Most in AACU Employer Report 2021*, 6, ASS'N. AM. COLL. & UNIV. (2021).

Schools and Programs (ACBSP) requires schools to include undergraduate *Common Professional Components* (CPCs) to “not only provide foundational knowledge but also foster critical thinking, problem-solving skills, and ethical reasoning.”⁶ The Association to Advance Collegiate Schools of Business (AACSB) refers to critical thinking as one of the durable skills that is “more vital than ever,” even with advances in artificial intelligence (AI).⁷ AACSB’s accreditation standard 4.3 requires that a business school’s curriculum “promotes and fosters innovation, experiential learning, and a lifelong learning mindset.”⁸ Lifelong learners are able to “ask questions, find answers, think critically, and collaborate, and they are driven

⁶ ACBSP, ACBSP UNIFIED STANDARDS AND CRITERIA FOR DEMONSTRATING EXCELLENCE IN BUSINESS PROGRAMS, 48 (updated May 2024), https://cdn.ymaws.com/acbsp.org/resource/resmgr/docs/accreditation/2024Unified_Standards_and_Cr.pdf.

⁷ AACSB, 2025 STATE OF BUSINESS EDUCATION REPORT, 41 (2025), <https://www.aacsb.edu/-/media/publications/research-reports/aacsb-2025-state-of-business-education.pdf?rev=035f5c6e9a20440c9a1e67b9117ffac3&hash=ACBD95C1C34E133E26D665357D407771> (stating that while AI automates routine tasks “professionals who can critically assess and apply insights will gain a significant competitive edge.”).

⁸ AACSB, 2020 GUIDING PRINCIPLES AND STANDARDS FOR BUSINESS ACCREDITATION, 40 (updated Feb. 28, 2025), <https://www.aacsb.edu/-/media/documents/accreditation/2020-aacsb-business-accreditation-standards-feb-28-2025.pdf?rev=6fe5f1ff849b4d0dae901d266e17304c&hash=433E81753F5EAC023323086D60803D96>.

by their curiosity to never stop acquiring and developing competencies.”⁹

Including critical thinking in business education overall is an accepted, but often, difficult objective.¹⁰ Instructors in business law have argued for decades that business law and legal environment of business courses (hereinafter “Business Law”) are critical to developing students’ critical thinking and problem-solving skills.¹¹ Because of the focus on critical thinking and dynamic problem-solving,

⁹ Nancy Bagranoff, *Developing Learners vs. Teaching Students*, AACSB.EDU, Jul. 7, 2020, <https://www.aacsb.edu/insights/articles/2020/07/developing-learners-vs-teaching-students>.

¹⁰ David W. Kunsch, et al., *The Use of Argument Mapping to Enhance Critical Thinking in Business Education*, 89 J. EDUC. BUS. 403, 403 (2014).

¹¹ See George J. Siedel, *Six Forces and the Legal Environment of Business: The Relative Value of Business Law Among Business School Core Courses*, 37 AM. BUS. L. J. 717, 741 (2000)(stating that “law is effectively a minor for every future manager because it pervades business decision-making and operations.”); See John Tanner, et al., *A Survey of Business Alumni: Evidence of the Continuing Need for Law Courses in Business Curricula*, 21 J. LEGAL STUDIES EDUC. 203, 216-17 (2004); George Siedel, *Law and the Business School Curriculum*, ASS’N. ADVANCE COLLEGIATE SCHOOLS BUS., AACSB.EDU, Mar. 15, 2017 (stating that government regulation, more frequent litigation, and globalization as some factors that “have made an understanding of the law essential to decision-making.”); Jennifer S. Anderson, et al., *Insights from Snowboard Pedagogy for Legal Studies Instructors*, 16 DEPAUL J. SPORTS L. 225, 227 (2020)(stating that business law courses should “help students understand and resolve law-related problems in organizations, exercise critical thinking, and make meaningful practical applications of legal concepts to their day-to-day work as business practitioners.”).

Business Law courses “stretch the way we think about our world and our place within it.”¹² But, including critical thinking in the Business Law curriculum is challenging. Business Law often covers an expansive amount of content in limited time.¹³ Well-intentioned instructors - myself included - may, therefore, resort to rote memorization that often leaves students overwhelmed.¹⁴

¹² Lawrence J. Trautman, et al., *Teaching Ethics and Values in an Age of Rapid Technological Change*, 17 RUTGERS BUS. L. J. 17, 20 (2021).

¹³ John C. Kunzenski, *Contemporary Business Law Courses: An Exploratory Study of Undergraduate Textbook Content and Pedagogical Planning*, 40 J. LEGAL STUDIES EDUC. 119, 122; Jennifer Cordon Thor & Michael Greiner, *How Legal Knowledge Can Ruin a TV Show: An Issue-spotting Exercise for the Legal Environment of Business Course*, 27 ATLANTIC L. J. 121, 124 (2024)(stating that “an 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.”); Debra Burke & Joan Parker-Webster, *Threshold Concepts and Barriers to Learning in Undergraduate Business Law*, 27 ATLANTIC L. J. 157, 185-86 (2024)(stating that while law students have a few years, “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 unsettled.”).

¹⁴ Anderson, et al., *supra* note 11, at 225 (comparing legal and snowboard instruction and stating that “The learning curve is steep for both business law and snowboard students – concepts are often not intuitive, they can be overwhelming, and it can be a frustrating and painful process.”); *See also*, Burke & Parker-Webster, *supra* note 13, at 171-72 (“Unfortunately, the law is often portrayed as a blunt instrument such that students expect to just learn it.”).

To avoid rote memorization in relation to content and time constraints, instructors share a broad range of teaching strategies, exercises and assessments.¹⁵ I am aware of none that utilize the Essential Questions Teaching Strategy (“EQTS”) to reach critical thinking learning objectives. EQTS is a student-oriented approach to “effectively frame” learning outcomes, either for the entire course or for topics within the course.¹⁶ EQTS engages students by presenting questions about “the big ideas of the subject and to the frontiers of technical knowledge.”¹⁷ These questions may be used in a particular class exercise or discussion and are designed to “have a larger, more pervasive purpose that extends beyond one class period...to the course

¹⁵ A few contemporary examples include Justin Blount & Kristen Wadell, *Smithereen, Incorporated – An Employment Negotiation Exercise*, 40 J. LEGAL STUDIES EDUC. 195 (2023); Raygan Pierce Chain & Michael Conklin, *The Equal Pay Act: Using EEOC v. Verona Area School District in the Classroom*, 41 J. LEGAL STUDIES EDUC. 7 (2024); Debbie Kaminer, *Vaccines in the Time of COVID-19: Using Vaccine Mandates to Teach About the Legal and Ethical Regulation of Business*, 40 J. LEGAL STUDIES EDUC. 53 (2023); Michael Conklin & Justin Blount, *The Pepsi Generation Goes to Court: A Teaching Note Utilizing a Netflix Documentary to Teach Contracts and Ethics*, 33 MIDWEST L. J. 1 (2023); David Orozco, *The Legal Learning Cycle: A Process-Based Approach to Legal Studies Education*, 38 J. LEGAL STUDIES EDUC. 167 (2021).

¹⁶ Jay McTighe & Grant Wiggins, *ESSENTIAL QUESTIONS: OPENING DOORS TO STUDENT UNDERSTANDING*, 4 (2013).

¹⁷ *Id.* at 6.

as a whole.”¹⁸ It requires that the professor “focus on how students think when engaging the material in the course.”¹⁹ The questions provide the structure for course assessments and activities helping an instructor frame individual lessons and the course as a whole.²⁰ The approach, one author writes, is not to develop the student’s mind-set of question-answer, “but instead with the mindset of question-answer-question, an approach that will foster lifelong learning.”²¹ Teachers, one author writes, “need to be facilitating student thinking” and not be the only thinker in the classroom.²² Teachers use EQTS to create thought-provoking questions which appear, at first, to only relate to one course topic, but which students come to realize connect to the larger learning outcomes and purposes of the course.²³

This article argues that EQTS is useful in creating Business Law courses that enhance critical thinking skills. The article focuses upon the undergraduate Business Law course, but I believe EQTS is just as useful in developing other courses in law as well. The article is divided further into two parts. Part II

¹⁸ Michael E. Cafferky, “*Why Do We Have to Learn This Stuff?*”: *Revising or Developing a Course Using Essential Questions*, 1 J. EXCELLENCE IN BUS. EDUC. 1, 5 (2014).

¹⁹ *Id.* at 8.

²⁰ Robb Virgin, *Connecting Learning: How Revisiting Big Idea Questions Can Help History Classrooms*, 105 THE SOCIAL STUDIES 201, 201 (2014).

²¹ *Id.* at 202.

²² Heather Lattimer, *Challenging History: Essential Questions in the Social Studies Classroom*, 72 SOCIAL EDUC. 326, 326 (2008).

²³ Cafferky *supra* note 18, at 5.

explains EQTS generally, its use in other disciplines, and in relation to its usefulness in reaching critical thinking objectives. Part III turns its focus to Business Law, offering ideas on how to develop the Business Law curriculum with EQTS. Part III also provides specific topical examples and course assignments, which are included in the Appendices. Instructors may find these materials useful in their own courses or as models to develop Business Law courses or lessons with EQTS.

II. THE ESSENTIAL QUESTIONS TEACHING STRATEGY

A. An Overview of EQTS

According to research by Ken Bain, teachers with the ability to inspire students to be lifelong learners are considered some of the best teachers.²⁴ Effective teachers reach their students both “intellectually and educationally” and leave their students wanting more from the course experience.²⁵ The best teachers follow the “broad educational tradition that values the liberal arts (including the natural sciences), critical thinking, problem solving, creativity, curiosity, concern with ethical issues, and both a breadth and depth of scientific knowledge and of the various methodologies and standards of evidence used to create that knowledge.”²⁶ Further,

²⁴ KEN BAIN, WHAT THE BEST COLLEGE TEACHERS DO, 7 (2004).

²⁵ *Id.*

²⁶ *Id.* at 8-9.

the best teachers “do not think in terms of teaching only their discipline; they think about teaching *students* to understand, analyze, synthesize, and evaluate evidence and conclusions.”²⁷ In other words, the best college professors create courses with critical thinking as a goal. Business Law instructors argue for the same in their courses. For decades, those teaching Business Law have argued that their courses are much more than the regurgitation of legal principles and that critical thinking skills are a desired learning objective.²⁸

Bain’s description of the best professor and Business Law instructors’ insistence in critical thinking as a learning objective support using EQTS.

²⁷ *Id.* at 115.

²⁸ Debra Burke & Mary Ann Nixon, *Games for Quizzing Recall in Business Law Courses*, 15 J. LEGAL STUD. EDUC. 307, 307 (1991)(“Developing students’ critical thinking skills is a desirable goal for business law educators.”); Debra D. Burke, Ronald A. Johson, & Deborah J. Kemp, *The Twenty-First Century and Legal Studies in Business: Preparing Students to Perform in a Globally Competitive Environment*, 27 J. LEGAL STUD. EDUC. 1, 6 (2010)(stating that “law courses play a key role in providing a fertile multi-issue framework to develop” critical thinking skills.); Matthew A. Edwards, *Is a Burrito a Sandwich? Introducing Business Law Students to the Fundamentals of Legal Reasoning*, 40 J. LEGAL STUD. EDUC. 85, 85 (2023)(advocating for critical thinking and stating “Despite what some students believe, there is far more to business law education than mastering myriad legal rules governing business.”); Justin Blount & Kristen Wadell, *Smithereen Incorporated – An Employment Negotiation Exercise*, 40 J. LEGAL STUD. EDUC. 195, 207-09 (2023)(Emphasizing that through a proposed employment negotiation exercise students could “practice critical thinking and manage these biases in a realistic scenario.”).

A student-centered teaching approach,²⁹ EQTS immerses critical thinking into the course content.³⁰ Using EQTS means that teachers centralize what students should leave the course understanding, both in relation to the subject matter but also in relation to critical thinking skills.³¹ It also allows teachers to address the diverse student backgrounds while exposing students to the same course-related themes and skills.³² Done well, an EQTS-created course or lesson enhances the desire to continue exploring and learning.³³ The best teachers use EQTS to create life-long learners. McTighe & Wiggins argue that EQTS is effective because it: (1) signals the value of inquiry in education, (2) increases the likelihood of a course's intellectual engagement, (3) provides clarity and standard prioritization for the instructor, (4)

²⁹ Virgin *supra* note 20, at 202; Doug Lillydahl, *Questioning Questioning: Essential Questions in English Classrooms*, ENGLISH J. 36, 37 (2015) (“Students need to see classroom connection to their lives and interests, and while some of our students are deeply motivated by skills inquiry, many others feel skills are fatally tainted by practicality and challenge.”).

³⁰ Lauren Bellaera, *Critical thinking in practice: The priorities and practices of instructors teaching in higher education*, 41 THINKING SKILLS & CREATIVITY 100856, 2 (explaining the various approaches to including critical thinking including the immersion approach).

³¹ Virgin *supra* note 20, at 202.

³² *Id.* at 203 (“As learners’ needs are becoming increasingly diverse, the need for a differentiated curriculum is rising. Essential questions offer a viable answer to the difficult challenge of creating a curriculum that is appropriate for all students but that also ensures all students are getting exposed to similar ideas and skills.”)

³³ Lillydahl *supra* note 29, at 38.

provides transparency to teachers, (5) encourages and models metacognition, and (6) supports differentiation for students in relation to ability, interest, and needs – which students find meaningful.³⁴

Further, EQTS is evolutionary – as students gain an understanding of the topic, new questions arise, and inquiry grows.³⁵ Essential questions give students the ability to see that “multiple carefully nuanced responses” are possible and, in decision-making, one solution may not fit every scenario.³⁶ This provides students with a sense of accomplishment in their learning.³⁷ It also develops the skills that Heather Lattimer argues are:

“needed in our democratic citizenry: a willingness to examine multiple perspectives, ask thoughtful questions, seek out additional information, debate ideas with peers, consider the causes and potential consequences of actions, and reconsider our own opinions and understanding in light of new evidence and alternative analyses.”³⁸

The effectiveness of EQTS is evident by the diversity of disciplines using it, including

³⁴ McTighe & Wiggins *supra* note 16, at 17.

³⁵ Lillydahl *supra* note 29, at 38.

³⁶ Lattimer *supra* note 22, at 327.

³⁷ Lillydahl *supra* note 29, at 38.

³⁸ Lattimer *supra* note 22, at 327.

history/social studies,³⁹ mathematics,⁴⁰ English,⁴¹ physics,⁴² music,⁴³ and chemistry.⁴⁴ Instructors in history use essential questions to “address the contested concepts and dilemmas that historians puzzle over in their work” and “require students and teachers to view the content from multiple perspectives.”⁴⁵ A math teacher uses essential questions because those that she uses “are applicable to a wide range of problem-solving tasks and do not prescribe specific mathematical steps for solving a particular type of problem.”⁴⁶ An instructor in music uses essential questions so that students “are encouraged to become questioners and problem solvers as they gain insights that lead to greater understanding of music.”⁴⁷ And, in using EQTS in a specific physics lesson the authors found that “our

³⁹ Kathryn M. Obenchain, et al., *The Past as a Puzzle: How Essential Questions Can Piece Together a Meaningful Investigation of History*, 102 SOCIAL STUDIES 190 (2011); Lattimer *supra* note 22; Virgin *supra* note 20.

⁴⁰ Nancy Emerson Kress, *6 Essential Questions for Problem Solving*, 111 MATHEMATICS TEACHER 191 (2017).

⁴¹ Lillydahl *supra* note 29, at 36.

⁴² Gregory DiLisi, et al., *Thorium and Molten Salt Reactors: Essential Questions for Classroom Discussions*, 56 PHYSICS TEACHER 253 (2018).

⁴³ Sheila Scott, *Repetitions and Contrasts: Using Essential Questions to Frame Unit Plans in General Music*, 27 GENERAL MUSIC TODAY 22 (2014).

⁴⁴ Ming Chi, et al., *Reframing Chemical Thinking Through the Lens of Disciplinary Essential Questions and Perspectives for Teaching and Learning Chemistry*, 33 SCI. & EDUC. 1503 (2023).

⁴⁵ Lattimer *supra* note 22, at 326.

⁴⁶ Kress *supra* note 40, at 192.

⁴⁷ Scott *supra* note 43, at 23.

material was perceived as a real-world example of physics, fit into a standard-based curriculum, and filled a need in the teaching community for providing unbiased references of alternative energy technologies.”⁴⁸ EQTS adoption across disciplines is a positive indication that adaptation to Business Law is worth the effort.

The following section explains the components of EQTS, first focusing upon the essential question, including using examples of essential questions from other disciplines. After an explanation of the essential question, the section covers the use of hype, leading and guiding questions.

B. The Components of EQTS

1. The Central Component: The Essential Question

The central (essential) component of EQTS is the essential question. An essential question provides the learner with the opportunity to grasp sometimes abstract or seemingly disconnected concepts that may seem simple for experts in the field.⁴⁹ Students cover important course content but with essential questions are encouraged to continuously examine their understanding of key ideas and processes.⁵⁰ The essential question may be used to frame an entire course or within a

⁴⁸ DiLisi *supra* note 42, at 253.

⁴⁹ McTighe & Wiggins, *supra* note 16, at 4.

⁵⁰ *Id.* at 14.

particular course topic.⁵¹ A question that frames the entire course reaches for a general understanding that may also be transferable across disciplines.⁵²

Essential questions are designed to be “asked and re-asked throughout” a course to allow students to continuously question even after reaching “a provisional answer that makes sense.”⁵³ McTighe & Wiggins note that essential questions have most, if not all, of the following characteristics: (1) open-ended, (2) thought provoking or intellectually engaging, (3) call for higher-order thinking, (4) point towards ideas that are transferable within the discipline, (5) raise additional questions, (6) require support and justification, and (7) recur over time, i.e. can be revisited again and again.⁵⁴ The questions help instructors avoid what one author calls “isolated strands of knowledge,” weaving context together across course topics.⁵⁵

Essential questions from other disciplines are illustrative. In history, Professor Lattimer suggests the following essential questions to frame the study of the 1920s, personal freedoms, and “the changing role of women and the shifting dynamics of the family”: 1) “Should women be free to vote?” 2) “Should women be free to pursue interests outside of the home?”, and 3) “How does the greater freedom

⁵¹ *Id.* at 9.

⁵² *Id.*

⁵³ *Id.* at 14 & 16.

⁵⁴ *Id.* at 3 (stating further that essential questions “cannot be answered with finality in a single lesson or brief sentence” but “stimulate thought” and “spark more questions.”).

⁵⁵ Lillydahl *supra* note 29, at 37.

of women impact the rest of the family?”⁵⁶ The questions were supported by case studies that “provided students the opportunity to dig into a slice of the past.”⁵⁷ These questions provided students the opportunity to “learn more about a time period in history” while also learning “more about the complexities of the question by examining cases from history.”⁵⁸

Virgin provides other examples of history-focused essential questions.⁵⁹ “What causes conflict?” was an essential question for units on both the Civil War and the Vietnam War.⁶⁰ For units on the Industrial Revolution and the New Deal, the essential question used was “What is progress?”⁶¹ These questions are extremely open-ended, may result in multiple answers, can be revisited, and require higher-order thinking that gives students the freedom to explore and create more questions. These are also exceptional examples of essential questions that work in the legal discipline.

In mathematics, Nancy Emerson Kress presents students with problems and then asks essential questions that “are applicable to a wide range of problem-solving tasks and do not prescribe specific mathematical steps for solving a particular type of problem.”⁶² Some of the questions Kress

⁵⁶ Lattimer *supra* note 22, at 328.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Virgin *supra* note 20, at 204.

⁶⁰ *Id.*

⁶¹ *Id.* at 209.

⁶² Kress *supra* note 40, at 192.

proposes include: (1) "What do you notice?", (2) "What additional information or clarification would be helpful?", (3) "What can you do to figure out the problem?", (4) "Is there another way you could approach this problem?", and (5) "What else can you say about the problem, and what else would you like to know?"⁶³ Kress stated that the questions "shaped and directed students' thinking and supported all students in becoming aware of the use of [essential questions] for solving mathematical problems."⁶⁴ Through the use of essential questions, Kress' students experienced an increase in confidence and "began doing work that was more thorough and complete."⁶⁵

And, as a final example, Professor Sheila Scott uses essential questions to develop a particular unit of music education known as "Repetitions and Contrasts."⁶⁶ The essential questions created are used for the purpose of using the form of music to "organize and understand the world around us" and to "organize and understand music."⁶⁷ These two learning outcomes are open-ended and transferable. Professor Scott does more than simply teach musical notes. She teaches a way for students to see and understand the world, and to work through problems in the world. Something very transferable to teaching any subject in the law.

⁶³ *Id.* at 193-94.

⁶⁴ *Id.* at 195.

⁶⁵ *Id.*

⁶⁶ Scott *supra* note 43, at 23.

⁶⁷ *Id.*

But, essential questions, on their own may not attract students to the topic. To capture student attention for a course's essential question(s), other types of questions are useful. Those questions include hype, leading, and guiding questions. Each type of question is explored below in the next section.

2. Useful Questions to Reach the Essential One: Hype, Leading, and Guiding

McTighe & Wiggins advocate the use of “hype questions” to hook students.⁶⁸ These questions are not intended to spark deep inquiry or critical thinking but, like using a match to start a fire, superficially attract attention to scenarios and circumstances that help lead to deeper inquiry.⁶⁹ Hype questions may be used to generate interest in course discussions and assignments.

This is a brief, but important role in EQTS, where students' interest in a topic may dissipate quickly. Of course, a more thorough exploration must follow using questions that are more in-depth and on topic. These questions are known as leading questions.

Leading questions are characteristically rhetorical and point towards an important fact or facts.⁷⁰ Answering the question provides students with contextual knowledge used to build a foundation upon which the essential question may be

⁶⁸ McTighe & Wiggins *supra* note 16, at 12.

⁶⁹ *Id.*

⁷⁰ *Id.* at 11.

explored. There are limitations though. Used too often, leading questions may lead to rote memorization, something detrimental to critical thinking development. So, leading questions should cover the important terms or concepts that give instructors the ability to guide students towards a deeper understanding. Guiding questions help students go further.

As leading questions do, guiding questions push students towards a specific conclusion or outcome, but unlike leading questions are broader and require more than simple recall.⁷¹ Guiding questions may be unit specific and difficult to transfer across units.⁷² They are not intended to be explored throughout the course, but to help students reach conclusions about the topic before them.⁷³ For example, if the topic being covered is business forms, a guiding question may be, “Why would a sole proprietor want to change her business form?” This question is open-ended but intended to guide students towards understanding both the disadvantages of the sole proprietorship form as well as the advantages of other business forms like a limited liability company.

By utilizing hype, leading and guiding questions an instructor can capture attention, lead students towards concept understanding and guide students towards critical consideration of an essential question. Each of these types of questions can be incorporated into the Business Law curriculum to

⁷¹ *Id.*

⁷² *Id.* at 11-12.

⁷³ *Id.* at 12.

help students critically consider essential questions. Section III sets forth how EQTS may be applied in the Business Law curriculum, providing three examples with accompanying teaching notes.

III. TEACHING WITH ESSENTIAL QUESTIONS IN BUSINESS LAW

Applying EQTS to the Business Law curriculum provides the opportunity to make clear connections with other business course concepts. The knowledge gained from exploring essential questions in business law may transfer to economics, management, marketing, finance, or other business disciplines, a key component to a properly executed EQTS.

One of the challenges with the Business Law curriculum is its breadth, which may result in a shallow course. Admittedly, I often refer to some weeks in Business Law as skipping a rock across water. The class skims a topic's surface but does not develop a deeper understanding of the reasons for the law or spend time exploring alternatives to existing law.

To make Business Law learning transferable to other business disciplines and to address the time and content crunch, I developed lesson plans and assignments using EQTS. I will share those examples as teaching notes. The following sections will provide topical examples and explanations of essential questions covered within Business Law, two of which use essential questions to frame the entire course and one which will help to frame one

subject within the Business Law curriculum. These three examples offer a beginning to what could be a substantial collection of EQTS teaching tools and resources.

The first section will focus upon essential questions used to frame the entire course. One question involves a U.S. Supreme Court concept of “competing interests” and asks how “competing interests” are resolved in society. The second question involves the central idea of capitalism asking, “How free should the free markets be?” The final section will focus upon using an essential question when covering tort law.

A. Introducing the Law: “How Does the Law Balance Competing Interests?”

The United States Supreme Court uses the concept “competing interests” to illustrate both legislative and judicial roles. The legislature is to consider competing interests when deciding content of legislation.⁷⁴ The judiciary resolves conflicts between/among “competing interests”⁷⁵ including

⁷⁴ *Arizona v. Navajo Nation*, 599 U.S. 555, 556 (2023)(“Under the Constitution, Congress and the President have the responsibility to update federal law as they see fit in light of the contemporary needs for water.”); *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 219 (2022)(stating that the members of the legislature consider a number of factors “when they draw lines that accommodate competing interests.”).

⁷⁵ *Landis v. N. Am. Co.*, 299 U.S. 248 (1936)(citing *Kansas City Southern Ry. v. U.S.*, 282 U.S. 760, 763 (1931) and stating that a court’s power to stay a judicial proceeding is

when legislation is unclear.⁷⁶ The Court has recently emphasized that determining the scope and limits of individual rights requires an evaluation and resolution of competing interests.⁷⁷ Across ideologies, the Court adopts “ordered liberty” to frame its evaluation of competing interests.⁷⁸ The

“inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh *competing interests* and maintain an even balance.” (emphasis added).

⁷⁶ See *E.M.D. Sales, Inc. v. Carrera*, 604 U.S. 45, 53 (2025)(The court interprets the Fair Labor Standards Act to determine when an employee is exempt from minimum wage and overtime pay and stating “Most legislation reflects a balance of competing interests. So it is here. Rather than choose sides in a policy debate, this Court must apply the statute as written and as informed by the longstanding default rule regarding the standard of proof.”).

⁷⁷ See *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022)(quoting *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006) in its reasoning that a public school employee has a first amendment right to pray on school property and that the court’s second step in its two-step analysis is to “engage in a delicate balancing of the competing interests surrounding the speech and its consequences.”); *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 217 (2022)(overruling *Roe v. Wade*, 410 U.S. 113 (1973)(holding that there is no explicit Fourteenth Amendment right to an abortion, and stating that “Ordered liberty sets limits and defines the boundaries between competing interests.”).

⁷⁸ *McDonald v. Chicago*, 561 U.S. 742, 767 (2010)(framing the question in the case as whether “the right to keep and bear arms is fundamental to our scheme of ordered liberty.”); *Timbs v. Indiana*, 586 U.S. 146, 150 (2019)(quoting *McDonald*, 561 U.S. at 767 in holding that the Eighth Amendment restrictions upon excessive fines applies to state action through the Fourteen Amendment’s Due Process Clause

concept has almost ninety-years of history in the Court's opinion, first appearing in Justice Cardozo's majority opinion in *Palko v. Connecticut*.⁷⁹ The use of these two concepts is a means to connect students to the history and tradition of our highest court while also encouraging a critical approach to legal issues.

For those seeking a clearer connection to Business Law content or concerned about managing emotionally charged decisions like *Dobbs*, other Court opinions offer this as well. For example, *Carpenters & Joiners Union v. Ritter's Cafe* addresses the breadth of competing interests in a dispute between employers and employees.⁸⁰ In *Carpenters*, unionized restaurant workers picketed their employer's restaurant after the employer permitted the hire of non-union carpenters and painters for work at a separate restaurant location.⁸¹ In his opinion, Justice Cardozo details the competing interests in employment disputes, including stakeholders beyond those immediately involved. A quote from the opinion illustrates this point:

“The economic contest between employer and employee has never concerned merely the immediate disputants. The clash of such conflicting interests inevitably

because the safeguard against such government abuse is “fundamental to our scheme of ordered liberty.”); *Dobbs supra* note 77, at 217.

⁷⁹ 302 U.S. 319, 325 (1937).

⁸⁰ 315 U.S. 722, 724-25 (1942).

⁸¹ *Id.* at 722-23.

implicates the well-being of the community. Society has therefore been compelled to throw its weight into the contest. The law has undertaken to balance the effort of the employer to carry on his business free from interference of others against the effort of labor to further its economic self-interest. And any intervention of government in this struggle has in some effect abridged the freedom of action of one or the other or both. The task of mediating between these competing interests has, until recently, been left to judicial lawmaking and not to legislation.”⁸²

What better way to frame a business-focused course in law than having students grapple with the concept of competing interests in a business context? On the first in-person meeting or in an initial discussion online, an instructor may incorporate a chosen Supreme Court’s language, like Justice Cardozo’s in *Carpenter*, to create related essential questions. Or an instructor may use Supreme Court language to help define competing interests then ask students to think about and research examples of competing interests they have experienced. This open-ended approach gives students permission to consider and offer their own challenges and experiences – either ones they were successful in

⁸² *Id.* at 724.

overcoming or those they were not quite able to get what they wanted.⁸³

If students are reluctant to offer examples, use a hype question to encourage them. For example, one that works on a college campus, or a large city, with limited parking spaces is: “Have you ever been late for class while trying to find a parking space?” A possible engaging follow-up, or leading, question could be “With the current parking rules, what categories of people that need parking are favored?” Students will quickly point out that faculty are favored and that student parking is more difficult, a somewhat accurate and sometimes incomplete assessment. Someone usually references disability parking as well. And a college sports fan may reference the changes when there is a Saturday football game. Instructors may guide students towards the fact that other laws – including laws affecting business – work the same way – creating hierarchies of treatment within the law.

These questions can be followed up by having students consider and come up with various ways they would change parking laws – with some specific guidance so as not to simply develop a self-interested solution. This student exploration with leading and guiding questions allows students to understand that more than one regulatory solution is possible. Students will begin to understand that balancing competing interests may have multiple solutions. This exercise also includes questions that expand the conversation beyond on-campus parking

⁸³ McTighe & Wiggins *supra* note 16, at 6.

and asks students to consider and provide other examples in their own lives where regulations affect their choices – for better or worse – and think about how those regulations could be different.

Appendix A outlines a teaching note for the first day of the semester class period. The teaching note models using campus parking restrictions to work through the essential question concerning law and competing interests. The following section offers another first day of class essential question to frame the entire course around the economic concept of free markets.

B. “How Free Should the ‘Free Market’ Be?”: An Essential Question Connecting Law & Markets

A second essential question to frame the entire business law course explores the balance between market regulation and market freedom.⁸⁴ The essential question posed is, “How free should the free markets be?” The point is for students to begin appreciating the fact that the law plays a significant role in shaping the market and to hold onto that idea through the entirety of the course. With EQTS, this essential question can be explored in the first meeting

⁸⁴ See Waheed Hussain, et al., LIVING WITH THE INVISIBLE HAND: MARKETS, CORPORATIONS, AND HUMAN FREEDOM (2023)(exploring the philosophical and ethical theories related to market freedom); *Eleven Things They Don’t Tell You About Law & Economics: An Informal Introduction to Political Economy & Law*, 37 LAW & INEQ. 97 (2019)(providing essays in which each piece “explores a facet of the theoretical foundations of law and economics.”).

of the course. Appendix B provides detailed teaching notes.

To begin exploration of the essential question, “How free should the free markets be?” I suggest the following hype question: “Why is alcohol consumption restricted to persons aged 21 and over?” Why start a conversation about the free market with a discussion of alcohol regulations? First, traditional college students in an on-campus business law course are, on average, younger than 21 and live around prevalent alcohol consumption.⁸⁵ Whether instructors consider this topic aged and irrelevant, the conversation among college students persists. Students continue to discuss and argue over this topic. A 2011 undergraduate economics thesis explores this very question and could be made a part of the class discussion.⁸⁶ College newspaper opinion pieces still take on the minimum drinking age.⁸⁷ Thus, whether they do consume alcohol or not, the question solicits responses on a topic they are experiencing.

Second, the age restriction is a government-imposed market limitation. There are other possible ways alcohol could be, and was, regulated, including

⁸⁵ *FACTS on College Student Drinking*, SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMIN. (2021)(stating that “full-time college students tend to drink more than others in their age group.”).

⁸⁶ Aly G. Crowley, *18 or 21: The Economic Implications of the Minimum Legal Drinking Age in the United States*, PENN. ST. UNIV. SCHEYER HONORS COLL. THESIS (2011).

⁸⁷ See Dan Stark, *Lower the Drinking Age*, THE DAILY CAMPUS, Mar. 6, 2024, <https://dailycampus.com/2024/03/06/lower-the-drinking-age/>.

a nationwide ban.⁸⁸ The arguments are readily available for the first day of class and present the opportunity for leading and guiding questions.

Third, using alcohol regulation provides a real example of legal changes from United States history. For a brief period, the U. S. Constitution banned the production, distribution, and sale of alcohol.⁸⁹ And, later, the prohibition was lifted.⁹⁰ There is an opportunity to connect a modern conversation to the past, a component of developing critical thinking skills.

Following the hype question about minimum age drinking, leading and guiding questions may be used to explore the ways that a 21-year-old age minimum affects the economy – in both positive and negative ways. Students are provided time to research information as to why the legal drinking age in the United States is 21 years old. The leading questions ask what benefits an older drinking age may have as opposed to a younger one and what potential problems exist with the current law.

Following the leading questions, guiding questions can be used to shift the class conversation from current alcohol consumption restrictions to discussions of other relevant consumer markets and restrictions. Some guiding questions include: “What other types of consumption or behavior is subject to

⁸⁸ See U.S. Const. amend. XVIII, § 1 (making illegal “the manufacture, sale, and transportation of intoxicating liquors” within the United States and for export from the United States), repealed by U.S. Const. amend. XXI, § 1.

⁸⁹ U.S. Const. amend. XVII, § 1.

⁹⁰ U.S. Const. amend. XXI, § 1.

government regulation?” or “Is there something that you do/consume where you wish the laws were different?” Current issues that may interest college students include the proper regulations of the online gambling market,⁹¹ cannabis production and consumption,⁹² and social media and influencer behavior.⁹³ But guiding questions also give students to freedom to raise their own topics and explore those topics further. Instructors should expect and allow students to do so.

As students conduct initial research into market regulation and the class discussion continues, students will begin to see the interaction between the government and market regulation in a real sense. This class discussion can be further enforced with an out-of-class assignment. The assignment would require students to research a different government regulation upon a product. Instructors should allow students to choose their own product.

⁹¹ Julia Hörnle, et al., *Regulating Online Advertising for Gambling – Once the Genie is out of the Bottle...*, 28 INFO. & COMM. TECH. L. 311 (2019); Virve Marionneau, et al., *Gambling Harm Prevention and Harm Reduction in Online Environments: A Call for Action*, 20 HARM REDUCTION J. 92 (2023).

⁹² Aubree L. Walton, *Cultivating Evidence-based Pathways for Cannabis Product Development: Implications for Consumer Protection*, 57 AM. BUS. L. J. 773 (2020).

⁹³ Craig C. Carpenter & Mark Bonin II, *To Win Friends and Influence People: Regulation and Enforcement of Influencer Marketing After Ten Years of the Enforcement Guides*, 23 VAND. J. ENT. & TECH. J. 253 (2021); Jack M. Balkin, *How to Regulate (and Not Regulate) Social Media*, 1 J. FREE SPEECH L. 71 (2021).

The above two sections provide examples of the EQTS to frame a business law course. The following section will provide an example of how to use EQTS for a specific topic covered in Business Law. The section will focus upon assumption of risk as a part of torts.

*C. EQTS for a Specific Business Law Topic:
Liability (or Not) for Injuries*

Liability for the injuries of others – torts - is covered in the Business Law curriculum. Also covered are the various defenses to tort liability, including assumption of risk, two contract-related defense – waiver and release, and legislative limitations. EQTS is a useful tool to help students understand tort liability and the defense of assumption of risk in both tort and contract terms. The learning objective in this course discussion would be for students to understand the concept of assumption of risk and how business may use contracts and other legal strategies to protect against tort liability. Framed as an essential question for Business Law, the learning objective would attempt to have students answer: “Who should hold legal responsibility when someone is injured?”

Introducing torts is often simpler than other topics in Business Law. And students find the concepts in torts easier to grasp. Some of this has to do with its dichotomous nature where, once the general principles are understood, weighing and balancing tort liability can be an approachable

intellectual exercise.⁹⁴ For this reason, I often place tort coverage in the last quarter of the course. Further, tort coverage provides the opportunity to connect directly with a university's surroundings, making the discussion relatable to students.

I will use a hypothetical university that is located 30-40 minutes from a ski mountain. Many students enjoy snow sports and some work in the industry. So, at this university, I would incorporate winter sports into the tort liability discussion. Caselaw is readily available for this discussion.⁹⁵ Thus, the hype question to begin the class on tort liability would be, "Has anyone been injured, almost injured, or seen someone injured while skiing or snowboarding?" But other forms of activities may serve to ask the same question. Instructors are encouraged to match this lesson to activities they find more relatable to students. The question is designed

⁹⁴ Marshall S. Shapo, *Millennial Torts*, 33 GA. L. REV. 1021, 1029-30 (1999)(citing Marshall S. Shapo, *Changing Frontiers in Torts, Vistas for the 70's*, 22 STAN. L. REV. 330, 333-34 (1970) and stating that torts "was an especially good vehicle for teaching the weighing and balancing that is so much the intellectual armament of any lawyer" and that "torts provided good instruction not only in weighing and balancing for private law, but also in the balancing required in the fashioning of administrative and legislative rules.").

⁹⁵ A few examples include: *Hardin v. Ski Venture*, 848 F. Supp. 58 (N.D. W.V. 1994); *Miller v. Sunapee Difference*, 918 F.3d 172 (1st Cir. 2019)(holding that an unsigned release may still protect a ski resort from liability for a skier's injuries) and *Bodden v. Holiday Mtn. Fun Park, Inc.*, 200 A.D.3d 1432 (N.Y. App. 2021)(holding that, despite a signed release, a ski resort could be found liable for an employed ski instructor's decision that led to a patron's injuries.).

to have students talk about their experiences concerning injuries they have suffered (and they feel comfortable enough to discuss) or they know others have suffered. Someone in the class will know of a mountain sports injury and the discussion can begin.

Following the hype question, proper leading questions can help students consider whether the injured person or the ski resort should be responsible for the injuries. To lead students towards understanding assumption of risk an instructor may ask, "What about winter sports, skiing or snowboarding, or even tubing, should someone know before they participate in it?". Another leading question about the participant may be, "Are there behaviors expected of any participant in the activity?", "What about safety gear and equipment?" These two leading questions help develop an understanding of the responsibilities of those choosing to participate.

Other leading questions may focus upon the ski resort operators. A suggested question may be: "What responsibility might there be in relation to the condition of the ski areas?" and a follow-up to that may include addressing the ways dangerous or poor conditions might be addressed. This is an opportunity, if the instructor wishes, to divide the class one group list the responsibilities of the participant and the other create a list of the responsibilities of the ski slope business.

Following a discussion of the responsibilities, a guiding question may be posed that has students consider whether the listed responsibilities might be shifted to the other list, i.e.,

from skier responsibility to ski slope operator and vice versa. This will lead to a discussion of waivers, releases, and eventually state legislation that provides varying liability protections for ski slope operators.⁹⁶ Students will also begin to realize that any shift often happens away from the operator and onto the participant, which provides the opportunity to discuss why this may be the case (political, economic, and even social explanations may arise).

This topical exploration would conclude with students beginning to understand the essential question, “Who should hold legal responsibility when someone is injured?” The class time focuses upon building student interest in the topic and encouraging students to conduct their own research, to think through different presented scenarios, and, more broadly, to understand why tort liability is an important component of the legal environment. Using EQTS, professors are not simply presenting torts concepts and terms but guiding students towards an understanding of how tort law applies in the real world.

IV. CONCLUSION

In 1940, Justice William Douglas recognized the complexities in business decision-making. Our Business Law students are set to face an even more complicated business environment. Instructors must provide students with both important legal content

⁹⁶ For an overview of state legislation related to ski resort liability, see Chalut, Hatten & Baker PC, *Ski Law State by State*, SKILAW.COM, <https://skilaw.com/ski-law-state-by-state/>.

and critical thinking development. This article, and the included teaching notes, introduces, and only begins to develop, EQTS to do so. The article shows that EQTS helps teachers integrate critical thinking and content learning objectives valued by business instructors, schools, and accrediting bodies. As advocates for life-long learning, Business Law instructors can utilize EQTS to develop course materials, including teaching notes and assignments. Examples of EQTS teaching notes and assignments are included in the appendices. The models used here are nowhere near exhaustive. There is a significant opportunity to develop EQTS for Business Law. There is also the opportunity to develop pedagogy where students are charged with developing the essential questions for the course, a topic which deserves more detailed attention in a separate article. I hope that this article sparks an interest in both using the included suggestions as well as adding to the resources for EQTS in Business Law.

APPENDIX A

**TEACHING NOTE FOR THE FIRST DAY OF
BUSINESS LAW:
AN ESSENTIAL QUESTION: HOW DOES LAW
BALANCE “COMPETING INTERESTS?”**

This teaching note is for a 40-minute teaching session. 40 minutes provides time in a 50-minute class period to (1) take attendance, (2) provide introductory information concerning the course, and (3) allow some leeway for the teaching session to expand without going over the allotted class time. The italics in this teaching note are used for instructions or suggestions for teachers. The regular font is used for prompts to share with students, either made available to students beforehand or during the class itself.

**THE ESSENTIAL QUESTION: HOW DOES
LAW BALANCE “COMPETING INTERESTS”?**

Learning Objective: Students will begin to understand that one purpose of the law is to balance various competing societal, business, and individual interests that often compete.

I. 3 - 5 min. - The Hype Question

There are plenty of potential hype questions to attract student attention. Professors are encouraged to create new ones for each class. Here is one example that I use to attract student attention

and to generate interest in the essential question concerning “competing interests.”

On a college campus where parking is often a challenge, ask one of the following hype questions:

- A. How difficult is it to park on this campus?
- B. Have you ever been late to class because you could not find a place to park?

This should generate some grumbling and comments in relation to disappointment in the system. Professors are encouraged to share their own experiences with parking as well, whether positive or negative.

II. 5-10 min. - The Leading Questions

The following questions encourage students to gather information about the current on-campus parking system and to begin to think about how the parking system works. Students are also encouraged to research and find the current restrictions. I sometimes use a word document table and project it in front of the class but have also had a student write out answers on a whiteboard as students provide answers.

- A. The stakeholders: What categories of people need parking on campus?
- B. How are the categories of people given parking priority?
- C. Do parking restrictions change based upon the time or based upon an event?

D. Are there events or situations where the parking restrictions should change?

Explain that, in relation to creating parking regulations or any other forms of regulations, laws attempt to balance “competing interests.” Competing interests are recognized in both economics and law as part of a capitalistic society. The more competing interests exist, the more complex decision-making may become, as U.S. Supreme Court Justice William O. Douglas recognized in 1940.

Have students read Justice William O. Douglas’ quote from a 1940 speech:

“Most of the issues of human and social relationships are not of the black and white variety. Right and wrong, sound and unsound are elusive in the complexities of modern business and finance.”

III. 10-15 mins. – Guiding Questions

Following a discussion, with research into on-campus parking restrictions, students are now prepared to explore the various ways that parking regulations may exist. These guiding questions focus upon parking but begin to demonstrate to students that decision-making can follow a particular pattern of thought and inquiry, an important component of critical thinking.

A. If you were in charge of parking on campus:

1. Would you have parking regulations at all?
2. How might you design the regulations?
3. What categories of people would you favor and why?
4. What issues might you expect from your regulation scheme?

B. In other areas of society – from your own experience:

1. What regulations would you prefer to be different?
2. What ways are interests balanced by laws that regulate the business world?

IV. 3 -5 mins. - Wrapping up the First Day of Class

Either provide to, or explain to, students the following:

Choices in a particular situation, whether personal or professional, may require balancing the good and bad of each choice. One way to look at this is to say that each choice contains “competing interests.” Weighing competing interests, through deliberation, research, counsel, and possibly experience helps us work through complex issues – as Justice Douglas recognized.

The law is similar – in both creating laws for society and, sometimes, interpreting laws for society. Laws are intended to balance “competing interests” and the value society places upon those interests often influences the way laws are shaped.

V. Optional post-class assignment

An assignment to explore the concept of competing interests might be an option as graded work early in the class. The instructions are below.

Assignment: Further Research into Competing Interests

In our first class, we discussed how laws attempt to balance competing interests. Our discussion and research during class provide an example of this. We are going to continue this exploration in this assignment. For this assignment, you will complete all the following steps in 12-pt font, double-spaced essay format. The assignment should be between 1.5- and 2-pages total:

- A. Choose a career or a business topic of interest. (10 points)
- B. Research, identify, and summarize two law(s) or case(s) that affect your chosen topic. (30 points)
- C. Review those law(s)/case(s) and identify, in list form if you choose, the competing interests. Evaluate which competing interests are most favored in the law(s)/case(s) and explain why you think those interests are favored. (30 points)
- D. Explain potential changes to the law that would balance those competing interests differently and explain whether you would adopt those changes to the law. In this explanation, identify the benefits to

the changes in the law. You may use research sources to support your work here. (30 points)

APPENDIX B

**TEACHING NOTE FOR THE FIRST DAY OF BUSINESS
LAW:
THE ESSENTIAL QUESTION: HOW FREE SHOULD
THE FREE MARKET BE?**

This teaching note is for a 40-minute teaching session. 40 minutes provides time in a 50-minute class period to (1) take attendance, (2) provide introductory information concerning the course, and (3) allow some leeway for the teaching session to expand without going over the allotted class time.

The italics in this teaching note are used for instructions or suggestions for teachers.

The regular font is used for prompts to share with students, either made available to students beforehand or during the class itself.

Learning Objective: In introducing students to the Business Law course, students will critically consider and explore how the law influences economic activity, i.e., the market.

The idea that laws affect the economy (the markets) is a component of a business school curriculum. But debate over the amount, types, and intensity of regulations exists. Business students should understand the constant interaction between law and markets – both positive and negative. A 200-level Business Law course is an ideal place to introduce that concept. This teaching note provides guidance for a class session on the first day of the

semester to introduce that general principle using the Essential Questions Teaching Strategy.

The essential question is this: How free should the free market be? The question is based upon a capitalistic understanding of markets, beginning with Adam Smith's theory of the invisible hand. Teachers are encouraged to provide resources to help students understand or refresh their understanding of the economic principles as the class discussion progresses. But a detailed understanding of the theories is not needed for this first day discussion in business law. In fact, too much economic detail may burden the intended objective.

I. 5-7 min. - Introduce the topic with a Hype Question...

There are numerous hype question possibilities. Instructors are encouraged to create their own in relation to what they feel will work well. This teaching note provides one example that often captures student interest.

Why is alcohol consumption restricted to those aged 21 and over?

This initial question will generate a significant amount of opinion and speculation. After a few students provide commentary, instructors should ask students to research the question. Students may find historical reporting that includes

reference to the regulations⁹⁷ as well as scientific and public policy explanations.⁹⁸ After a discussion of those sources, have students read the following:

The economic theory of capitalism promotes a degree of freedom for markets and corporate entities.⁹⁹ Yet, the law plays a role in a capitalist economy. Consider the following quote from the International Monetary Fund:

“[A] capitalist economy must be steered in the right direction by government policies and the general public to ensure that Smith’s invisible hand continues to work in society’s favor.”¹⁰⁰

Section II below helps guide students as they consider the above quote.

⁹⁷ Denali Tietjin, *Why 21? A Look at Our Nation’s Drinking Age*, BOSTON.COM, Jul. 17, 2014 (last visited May 20, 2025).

⁹⁸ Traci L. Toomey, *The Minimum Legal Drinking Age: History, Effectiveness, and Ongoing Debate*, 20 ALCOHOL HEALTH & RES. WORLD, 213 (1996).

⁹⁹ Sarwat Jahan & Ahmed Saber Mahmud, *What is Capitalism?*, FIN. & DEVELOPMENT MAG., 2, <https://www.imf.org/en/Publications/fandd/issues/Series/Back-to-Basics/Capitalism> (last visited May 19, 2025)(providing an overview of capitalism as an economic theory).

¹⁰⁰ *Id.* at 3.

II. 7 – 10 min. - Use Leading Questions to Encourage Further Thought and Research

To continue the conversation, choose a couple of the following questions to encourage student research about the legal minimum drinking age.. Emphasize that these questions are not seeking opinions but are prompting the exploration for concrete answers and understanding.

- A. Does the Minimum Age Drinking Law influence the economy? Does the law work in society's favor?
- B. What benefits might an older drinking age have as opposed to a younger one?
- C. What types of businesses must consider these laws in their business models and how have they done so?
- D. What might a person affected by the law choose to do and how might this affect society?

Encourage students to think about choices to either follow or violate a law. In the context of alcohol consumption, college students may respond that those over the age of 18 are adults and should be allowed to drink. Or they may bring up the fact that people under the age of 21 will drink anyway, so the law does not matter. In any sense, these statements evidence students' engagement in and attention to the topic.

III. 10-15 min. - Develop a Deeper Understanding with Guiding Questions

For the final part of the class, students are asked to go beyond the Minimum Drinking Age Laws to research and discuss other economic areas that are affected by law. Instructors may pose one or all of the following guiding questions:

- A. Whether positive or negative, what are some other examples of laws that influence economic activities and choices? Research to find examples if needed.
- B. Research the justifications for and arguments against the laws you expressed here. For you, which are the stronger arguments?
- C. What changes in the law would you consider? Are the regulations found too strict? Should the regulations be stricter?

IV. 5 – 10 min. - Summarize & Emphasize the Essential Point, Introduce the Post-Class Assignment

As the class period ends, summarize the point that the market is constantly affected by law and that the course provides the opportunity to see this interaction. Professionals should have the skill set to understand laws and critically evaluate their business models and personal decisions to abide by the law.

Instructors may choose to assign homework related to the class discussion for early credit in the course. A suggestion to continue student work on the essential question

of “How Free Should the Free Market Be?” follows:

This assignment is a 1.5 to 2-page, double-spaced response that continues the class’s first day discussion on law and its influence on the market. You may choose to continue research that you began in class or start with a new topic. Here are the steps:

- A. Think about a career you would like to pursue or consider an interest of yours that you’d like to know more about.
- B. Conduct research to find a law that affects that career or interest.
- C. In essay form, respond to the following questions:
 1. Name your chosen career or research interest. (10 Points)
 2. Research and identify 2 law(s) or case(s) related to your chosen topic. (25 points)
 3. Clearly explain how the law(s) or case(s) relate to our discussion of the law and the free market. This can include ways that are either positive or negative so think through this before responding. (20 points)
 4. Evaluate and show strategic ways to work within the law(s) or case(s) found. You may find existing business models or come up with ways on your own. (It is unacceptable to simply say, “Follow the law.”) (25 points)
 5. Finish your assignment by suggesting changes to the existing law(s) or case(s) and explain what

potential benefits within the market those would bring. (20 points)

APPENDIX C

**TEACHING NOTE FOR TORTS IN BUSINESS LAW –
THE SKI SLOPE EDITION
THE ESSENTIAL QUESTION: “WHO SHOULD HOLD
LEGAL RESPONSIBILITY WHEN SOMEONE IS
INJURED?”**

This teaching note is for a 40-minute teaching session. 40 minutes provides time in a 50-minute class period to (1) take attendance, (2) provide introductory information concerning the course, and (3) allow some leeway for the teaching session to expand without going over the allotted class time. This example uses a hypothetical ski slope located 30 minutes from the hypothetical university the students in the course are attending.

The italics in this teaching note are used for instructions or suggestions for teachers.

The regular font is used for prompts to share with students, either made available to students beforehand or during the class itself.

Learning Objective: Students will understand the concept of assumption of risk and the ways that businesses may successfully shift risk onto customers or patrons.

***I. 5-7 min. - Introduce the topic with a Hype
Question...***

There are numerous hype question possibilities. Instructors are encouraged to create

their own in relation to what they feel will work well. This teaching note provides one example that often captures student interest.

“Has anyone been or do you know anyone who has been injured in a skiing or snowboarding accident?”

The question gives students the opportunity to bring up their own examples to begin the conversation. A professor may refer to the students’ examples throughout the class discussion to see if the facts from each experience apply to the questions asks.

II. 7 – 10 min. - Use Leading Questions to Encourage Further Thought and Research, A Group Discussion

To continue the conversation, choose a couple of the following questions to encourage their own research and lead them to specific knowledge about tort law and assumption of risk. Instructors may first focus upon either the activity participant (skier) or the company (ski resort) with the following leading questions:

“Are there expected behaviors or standards expected of a skier or snowboarder in relation to their own safety?”

“Is there an expectation upon the ski resort for the condition of the ski slopes or ski areas?”

In the context of dangerous activities, college students may quickly draw the conclusion that the

person engaged in the activity should always be responsible or that a business that offers such an activity should always be responsible. In any sense, these statements evidence a student's engagement in and attention to the topic and should not be completely disregarded. Follow-up suggestions may include economic reasons a business cannot be completely responsible or consumer-related reasons that the person should be responsible. At this point, an instructor may divide the class and have one group of students create a list of responsibilities for the skier/snowboarder and the other group create a list of responsibilities for the ski resort.

III. 10-15 min. - Develop a Deeper Understanding with Guiding Questions

With lists of responsibilities generated, use guiding questions that help students understand the ways that risk may be legally transferred or is legally non-transferable. A guiding question may direct students towards the fact that some of the dangers associated with skiing cannot shift to the ski resort. Here are a couple of questions:

“What are some of the dangers that we can assume are associated with skiing or snowboarding?”

“What, in your identified dangers, is (are) always the responsibility of the skier?”

This may seem obvious now – but these questions provide the opportunity to make the point

that the skier “assumes” those dangers (risks). And, so, a ski resort would argue that the skier assumed the risk of the activity if injured. A second guiding question gets students to see the use of waivers and releases.

“If anyone in the room has been skiing or snowboarding, did you have to sign something before you were allowed to go on the slopes?”

“If so, do you remember what they were called.?”

Answers to this are often accurate. An answer of “waivers” is most common. You may also emphasize the use of a release. You may ask students to bring in a waiver or release form they’ve recently signed or the next time they sign one. You can also expand the question to other activities that require waivers – like amusement parks and ticketed events. Finally, and more difficult to bring into a discussion is the idea that legislation may limit tort liability. This is true for businesses managing ski slopes.¹⁰¹

¹⁰¹ A useful website to include here that provides information on each state’s ski slope regulations is Chalat, Hatten & Baker PC, *Ski Law State by State*, SKILAW.COM, <https://skilaw.com/ski-law-state-by-state/> (last visited May 22, 2025).

IV. 5 – 10 min. - Summarize & Emphasize the Essential Point, Introduce the Post-Class Assignment

As the class period ends, summarize the point that tort law and assumption of risk evaluations are factually specific evaluations of legal responsibility, but there are some basic steps businesses may take to enhance their tort protections. Business owners have various legal strategies available to them to limit exposure to liability. The class discussed those strategies including waivers, releases, and the defense of assumption of risk. There may also be legislative protection as well.

To end the class, you may be able to connect to course-wide essential question. If the course began with one of the course-focused essential questions – a connection to one of those questions may be highlighted. For example, the question “How free should the ‘free market be?” in the tort context is a balance of competing interests in relation to business activity and responsibility for injuries. An explanation may include the idea that the law attempts to hold the appropriate party responsible for injuries but also may allow participants to agree to take more risks or to provide legislative protections for economic reasons. This, of course, has an impact upon business decision-making and, ultimately, affects the types of choices available in the market.

Instructors may choose to assign homework related to the class discussion to continue exploration of the topic. A suggestion to continue

student work on the essential question of “Who is legally responsible when someone is injured?” follows:

This assignment is a 1.5- to 2-page, double-spaced response that continues the class discussion on tort liability and the question of “Who is legally responsible when someone is injured?” You may choose to continue research that you began in class or start with a new topic. Here are the instructions:

- a. Think about a career you would like to pursue or consider an interest of yours that you’d like to know more about.
- b. Conduct research and consider the possible injuries associated with your chosen career or something in which you are interested. This could be injuries to anyone – customers, employees, business partners, or others you may be able to find in your response.
- c. In essay form, respond to the following questions:
 1. Name your chosen career or research interest. (10 points)
 2. Research and briefly explain at least two (2) of either laws or court cases that relate to both (1) your topic and (2) potential injuries related to that topic. (25 points)
 2. Clearly explain how the law(s) or cases affect (1) business decisions and (2) the economy in general. This can include ways that are either positive or negative so think through this before responding. (20 points)

3. Evaluate and show strategic ways to work within the law(s) and case(s) found. You may find existing business models or come up with ways on your own. (It is unacceptable to simply say, "Follow the law.") Think about and write about how one would follow the law. (25 points)4. Finish your assignment by suggesting changes to the existing law(s) or case outcome(s) and explain what potential benefits those changes might bring. (20 points)

**PRACTICING PREVENTIVE LAW: WHAT IS
IT AND HOW CAN IT SET YOUR BUSINESS
LAW STUDENTS APART IN THE
WORKPLACE?**

JASON R. HILDEBRAND*

I. INTRODUCTION

Professor Marc Lampe, in his excellent article “A New Paradigm for the Teaching of Business Law and Legal Environment Classes,”¹ noted that business law instructors “should impress upon students that *preventive law* includes training themselves and employees they supervise in relevant legal aspects of their job and industry.”² Preventive law has been defined as “proactive lawyering that ‘emphasizes the lawyer’s role as a planner and proposes the careful private ordering of affairs as a method of avoiding the high costs of litigation and ensuring desired outcomes and opportunities.’”³

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¹ Marc Lampe, *A New Paradigm for the Teaching of Business Law and Legal Environment Classes*, J. LEGAL STUD. EDUC., 23(1), March 2006 (emphasis added).

² *Id.* at 5.

³ Z. Jill Barclift, *Preventive Law: A Strategy for Internal Corporate Lawyers to Advise Managers of Their Ethical Obligations*. J. LEGAL PROF., 33:31 (2008), p. 31, n. 3

This is in contrast to traditional lawyering which has been called “legal triage for acute legal problems.”⁴ In essence, preventive law redirects the focus from litigation to risk management.⁵

However, as Lampe observed, most business students are not going to become lawyers; instead, they will become business leaders.⁶ Therefore, how is preventive law training to be implemented in a business law classroom of future non-lawyers? In seeking to answer that question, this article looks at the history of preventive law, addresses the need for business managers to practice preventive law, defines preventive law for a non-lawyer, business context, and provides three pedagogical “experiential exercises”⁷ for instructors to present in class. In doing so, this article builds upon Lampe’s research by extending and applying existing lawyer-focused preventive law pedagogy directly to future business leaders.

(quoting Jeffrey W. Stempel, *TheraLaw and the Law-Business Paradigm Debate*, 5 PSYCOL. PUB. POL’Y & L. 849, 849-50 (1999)).

⁴ Jeffrey W. Stempel, *TheraLaw and the Law-Business Paradigm Debate*, 5 PSYCOL. PUB. POL’Y & L. 850, n. 4 (1999).

⁵ Barclift, *supra* note 3.

⁶ Lampe, *supra* note 1.

⁷ Susan Marsnik et al., *Oh Naturelle! Health & Beauty: An Integrated Law, Ethics, and Strategy Case for the First Day of Class*, 39 J. LEGAL STUD. EDUC. 39, 40 (2022) (experiential exercises include simulations or cases, among other teaching methods).

II. A BRIEF HISTORY OF PREVENTIVE LAW

American attorney Louis M. Brown has been recognized as the “Father of Preventive Law.”⁸ However, Abraham Lincoln arguably could hold that title. In 1850, then-attorney Lincoln wrote “Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time.”⁹ More qualitatively, however, the notion of preventive law can be traced to 1870. Before 1870, “both in their own eyes and in the common opinion of laymen, lawyer’s distinctive business was contest in court. ... The years after 1870 showed ... increasing effort to use law and lawyers preventively.”¹⁰ Further, “[t]he jurisprudence on Preventive Law traces its origins to the scholarship of ... Brown and Edward A. Dauer. ... Brown is credited for authoring one of the first publications in the field of preventive law in 1952, entitled Preventive Law.”¹¹

⁸ George J. Siedel and Helena Haapio, *Using Proactive Law for Competitive Advantage*, 47 AMERICAN BUS. L.J. 4, 641-686 (2010).

⁹ Collected Works of Abraham Lincoln, vol. 2 (Sept. 3, 1848-Aug. 21, 1858). Univ. of Mich. Digital Collections, <https://quod.lib.umich.edu/l/lincoln/lincoln2?view=toc>.

¹⁰ JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 302 (1950).

¹¹ Barclift, *supra* note 3 (although preventive law jurisprudence had grown from early works by Brown in the 1950s and later influenced by Dauer in the 1970s, there was a renewed interest during the 1990s in preventive law, its

According to Brown:

Preventive law probably began with that far-reaching client who, realizing that he would find it necessary to retain a lawyer if litigation developed, determined that he might engage counsel ahead of time. As a minimum, counsel could be better able to assist if future litigation developed. At best, counsel might prevent and avoid litigation.¹²

Thus, preventive law avoids the common approaches to litigation and instead focuses, or redirects the emphasis, on planning and collaboration.¹³ The preventive lawyer's "primary concern is not conflict but coordination."¹⁴

During the early 2000s, the European version of preventive law,¹⁵ called "the Proactive Law Movement,"¹⁶ gained momentum in Europe. Proactive Law is defined as:

connection to therapeutic jurisprudence, and a return to Brown and Dauer's foundational teachings).

¹² Louis M. Brown, *The Law Office – A Preventive Law Laboratory*, U. PA. L. REV. Vol. 104, 942 (1956).

¹³ Barclift, *supra* note 3.

¹⁴ Edward D. Re, *The Lawyer as Counselor and the Prevention of Litigation*, 31 CATHOLIC U. L. REV. 685, 692 (1982), citing L. Patterson & E. Cheatham, *The Profession of Law* 130 (1971).

¹⁵ Edward A. Dauer, *The Role of Culture in Legal Risk Management*, 49 SCANDINAVIAN STUD. L. 93 (2006).

¹⁶ Siedel and Haapio, *supra* note 8 at 656.

[A] future-oriented approach to law placing an emphasis on legal knowledge to be applied before things go wrong. It comprises a way of legal thinking and a set of skills, practices and procedures that help to identify opportunities in time to take advantage of them – and to spot potential problems while preventive action is still possible. In addition to avoiding disputes, litigation and other hazards, Proactive Law seeks ways to use the law to create value, strengthen relationships and manage risk.¹⁷

The first publication relating to the European Proactive Law Movement was a paper entitled “Quality Improvement through Proactive Contracting” that Professor Helena Haapio presented at the Annual Quality Congress of the American Society for Quality in Philadelphia in 1998.¹⁸ In a business context, the goal of Proactive Law “is to embed legal knowledge and skills in clients’ strategy and everyday actions to actively promote business success, ensure desired outcomes, and balance risk with reward.”¹⁹ In short, “Proactive Law plays a *preventive* role by ‘vaccinating’ business people

¹⁷ *Id.*

¹⁸ *Id.* at 13.

¹⁹ *Id.* at 15.

against the ‘disease’ of legal trouble, disputes, and litigation.”²⁰

Over time, preventive law also has been introduced into the United States corporate setting. Specifically in a business or corporate context, legal matters can be handled by “internal corporate lawyers,”²¹ perhaps more commonly known as in-house counsel. Preventive Law encourages lawyers to embed themselves into client matters, intervene before a crisis arises, and map a plan for legal risk.²² According to law professor Z. Jill Barclift, “because internal corporate lawyers are employees of the corporation and embedded with the client, they are able to deliver more effectively the proactive legal services advocated by Preventive Law.”²³ Barclift notes that in-house counsel describe their benefit to corporate clients as “the ability to engage in proactive legal risk management,”²⁴ which is at the heart of preventive law. In-house counsel are uniquely positioned “to design creative solutions to legal challenges, and to understand the client’s business and legal needs in assessing legal risk.”²⁵ In short, “internal corporate law practice is Preventive Law practice.”²⁶ While Brown’s work and Barclift’s work on preventive law was targeted towards

²⁰ *Id.* at 15 (emphasis in original).

²¹ Barclift, *supra* note 3 at 32.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 33.

lawyers,²⁷ the need for preventive law is not limited to businesses that have in-house counsel. How, then, can a non-lawyer business manager practice preventive law?

III. LEARNING TO PRACTICE PREVENTIVE LAW AS A BUSINESS LAW STUDENT

A. The Need

Smaller, closely-held businesses represent over 90% of businesses in the United States.²⁸ According to legal marketing agency Firesign, 87% of small businesses do not have in-house lawyers.²⁹ As noted by Professor George Siedel, “[a] ... Corporate Executive Board Leadership Council survey concluded that middle managers make 75% of legal decisions and that almost 80% of corporate employees made a decision or completed an activity with a significant legal implication in the past year.”³⁰

According to Professor Michael Conklin:

An unfortunate omission from many legal environment curricula is the real-

²⁷ Siedel and Haapio, *supra* note 8.

²⁸ *Id.*

²⁹ *How Small Businesses Hire Lawyers, Part 1: Before the Need*, Firesign (Oct. 2023), <https://firesignmarketing.com/how-small-businesses-hire-lawyers-part-1-before-the-legal-need/>.

³⁰ GEORGE SIEDEL, THE THREE PILLAR MODEL FOR BUSINESS DECISIONS: STRATEGY, LAW & ETHICS 32-33 (2016) (internal citation omitted).

world application of the blackletter law that they are learning. For example, when confronted with a hypothetical legal question, students will often respond by accurately identifying the law on the matter but then demonstrating ignorance as to the real-world implications. Students may respond, “This course of action is not a problem because the law maintains that we would win at trial if anyone were to sue us.” Responses like these demonstrate that educators need to do a better job emphasizing the more practical aspects of the law. It can be an effective tactic to ask such a student, “Well, what exactly do you ‘win,’ as a defendant when you win at trial?” The answer, of course, is nothing, just the ability to not lose even more money over and above what you have already lost having to defend yourself at trial. And this is to say nothing of the non-financial costs of time, stress, and potentially bad publicity. Avoiding a trial is far superior to “winning” at trial as a defendant.³¹

³¹ Michael Conklin, *Scott's Tots: A Class Activity in Contract Formation*, J. LEGAL STUD. EDUC. 2025; 42:23-29 at 28.

Stated differently, the result of victorious litigation is often “another loss by winning.”³² In a 1982 address to the American Bar Association, Warren Burger, Chief Justice of the United States Supreme Court noted:

Even when an acceptable result is finally achieved in a civil case, the result is often drained of much of its value because of the time lapse, the expense, and the emotional stress inescapable in the litigation process.... The adversary process...often leaves a trail of stress and frustration.... Business executives are also competitors, and when they are in litigation, they often transfer their normal productive and constructive drives into the adversary contest. Commercial litigation takes business executives and their staffs away from the creative paths of development and production and often inflicts more wear and tear on them than the most difficult business problems.³³

³² Gregory J. Myers, *When the Small Business Litigant Cannot Afford to Lose (Or Win): Litigation Consequences for Small Businesses, Strategies for Managing Costs, and Recommendations for Courts and Policymakers*, WM. MITCHELL L. REV. VOL. 39:1, 151 (2012).

³³ Warren E. Burger, *Isn't There a Better Way?* 68 A.B.A. J. 274-75 (1982).

Two years later, Chief Justice Burger was even more direct in saying: “Our [adversarial] system is too costly, too painful, too destructive, [and] too inefficient for a truly civilized people.”³⁴ Similarly, Judge Learned Hand commented: “I must say that, as a litigant, I should dread a lawsuit beyond almost anything else short of sickness and of death.”³⁵ In sum, “[t]he most important question to a small business litigating ... might not be the merits but the cost. The hard costs, not to mention the distraction and delay, are likely to be among the business’ largest liabilities and could threaten its existence.”³⁶

So, how can practicing preventive law as a business manager potentially avoid the traditional legal pitfalls observed by Lincoln, Conklin, Burger, and Hand? The next part looks at the practical implications of practicing preventive law and why business managers are well-positioned to do so.

B. The Solution

It has been recognized that there is a “need for incorporating the law into management in order to be successful.”³⁷ Lampe correctly noted that the role of business leaders with respect to legal

³⁴ Warren E. Burger, Chief Justice, Supreme Court of the United States, Annual Report on the State of the Judiciary Speech to the American Bar Ass’n House of Delegates (Feb. 13, 1984), in 52 U.S.L.W. (BNA) 2471 (Feb. 28, 1984).

³⁵ *Id.* at 275.

³⁶ Myers, *supra* note 32 at 153.

³⁷ Constance E. Bagley, Gavin Clarkson, and Rachel M. Power, *Deep Links: Does Knowledge Of The Law Change*

issues is two-fold: prevent and resolve; that is, to *prevent* legal problems from occurring and to *resolve* legal conflict when it does arise.³⁸ This is in stark contrast to “the classical *reactive* management approach to the law that views lawyers as emergency room personnel who are brought in after a company is confronted with a legal problem such as litigation.”³⁹ According to Siedel and Haapio, this more traditional reactive management approach is probably still dominant today, especially among smaller, closely-held businesses.⁴⁰ When business managers “underuse preventive law there is a consequential tendency to overuse legal triage.”⁴¹ Thus, practicing preventive law can be offered as the solution to the ongoing reactive management problem.

To begin, preventive law for non-lawyer business managers can be defined as proactively managing a business or business unit with a careful focus on preventing and resolving legal issues to best serve the business.

According to Dauer:

The objective of [preventive law] is the management of legal risk through identifying, anticipating and planning

Managers' Perceptions Of The Role Of Law And Ethics In Business? HOUS. L. REV. 47:2, 273 (2010).

³⁸ Lampe, *supra* note 1.

³⁹ Siedel and Haapio, *supra* note 8 at 652 (emphasis in original).

⁴⁰ *Id.*

⁴¹ Barclift, *supra* note 3 at 34.

for it in advance... While it is not economical to worry through every remote contingency and every minor legal question that could possibly arise in the course of a business venture, it is decidedly uneconomical to ignore risk management entirely.... [L]egal-risk-creating behavior is most often just the everyday behavior of people doing anything and everything that people ordinarily do.⁴²

Summarized by Brown, in preventive law it is essential to predict what *people* will do,⁴³ “[a]nd, of course, to appreciate what makes them do it.”⁴⁴ Stated differently, “the practice of preventive law requires prediction and foresight.”⁴⁵ In effective business management, anticipated legal results are not enough; practical extra-legal results must be anticipated.⁴⁶

Business managers often are in the best position to engage in prediction and foresight in the workplace. This is because business managers often are experts in their company’s culture. According to Dauer, culture refers to “the unspoken vocabulary of

⁴² Dauer, *supra* note 15 at 93-94.

⁴³ See generally LOUIS M. BROWN, *LAWYERING THROUGH LIFE: THE ORIGIN OF PREVENTIVE LAW* (1986); LOUIS M. BROWN & EDWARD A. DAUER, *PLANNING BY LAWYERS: MATERIALS ON NONADVERSARIAL LEGAL PROCESS* (1978); LOUIS M. BROWN, *PREVENTIVE LAW* (1950).

⁴⁴ Dauer, *supra* note 15 at 94.

⁴⁵ Brown, *supra* note 12 at 942.

⁴⁶ *Id.*

behavior in a given place or time, and the aspects of a local environment that create expectations about what should and what should not be done.”⁴⁷ Effective legal risk management “requires attention to culture.”⁴⁸ In a business context, culture can extend beyond the walls of a particular company to also include vendors and other stakeholder relationships. Business managers, therefore, can often reduce legal risk by predicting, and then shaping or accounting for, the ordinary, well-meaning, everyday behaviors of the stakeholders within their respective culture.⁴⁹

That understanding should lead businesses to develop, in advance, programs and patterns of response that nip potential legal claims in the bud, allowing businesses to be managed in other, less costly and more satisfying ways.⁵⁰ As noted by Brown, “[t]he detection of early symptoms of legal trouble is an important facet of preventive law. If legal trouble is early detected, minimizing legal risks is more nearly assured.”⁵¹ Brown’s lesson to us then is, “that if we can predict what people are actually likely to do in whatever particular setting or situation we are concerned with, we may be able to limit the incidence of legal risk to a degree that might at best be more difficult to achieve otherwise.”⁵²

⁴⁷ Dauer, *supra* note 15 at 95.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Brown, *supra* note 12 at 947.

⁵² Dauer, *supra* note 15 at 95.

Contracts offer an especially appropriate application of the importance of practicing preventive law because “[c]ontracts and contract law lie at the core of procurement and sales, and all business functions and activities – including research and development, finance, accounting, strategy, human resources, information technology, operations management, research and development, outsourcing, and networking – depend on the success of the contracting process.”⁵³ In short, contracts lie at the heart of most business relationships.⁵⁴ The late Northwestern University Professor Ian Macneil even argued that, as society becomes more complex, contractual relations have become more important than what is written in a contract, as these relations are “characterized by long duration, flexibility and the tolerance of uncertainty.”⁵⁵

Notwithstanding Macneil’s argument, one of the most striking opportunities for preventive law by a business manager lies in the content of contracts, as a contract creates the rules and standards of conduct for a given business transaction.⁵⁶ According to Dauer:

One of the truisms of legal risk management ... is that people are moved to bring claims when they

⁵³ Siedel and Haapio, *supra* note 8 at 667.

⁵⁴ *Id.*

⁵⁵ Ian Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law*, 72 N.W. L. REV. 854 (1978).

⁵⁶ Re, *supra* note 14 at 694.

experience a feeling of injury. Often, having a sense of injury arises from having suffered a disappointed expectation. Some of the expectations in a contractual transaction are in turn created by the ‘rules’ that describe who gets to do, or has to do, what. Precision, clarity, and comprehensiveness in those kinds of rules promotes shared expectations, as well as creating norms for resolution if need be; and in that way they help create expectations in the contracting parties which, due to their clarity and accuracy, reduce the possibility that one party’s acts will be seen by the other as an injurious disappointment of a legitimate expectation. Thus much of [Preventive] Law involves predicting the possibilities of legal risk and then either restructuring the transaction to avoid it, or articulating more clearly the shared norms – the rules – by which any such future events will be assessed.⁵⁷

Though “almost no contract covers all future contingencies,”⁵⁸ careful contract drafting can help lessen the possibility of future dispute – one of the objectives of preventive law – because the parties know in advance the performance expected of them.

⁵⁷ Dauer, *supra* note 15 at 95-96.

⁵⁸ Brown, *supra* note 12 at 946.

In short, contracts often must leave room for some give and take of legal, as well as practical, problems.⁵⁹

For a business manager then, it may be more vital to predict what people will do than to predict what courts will do. For example, “[i]t may be more important to predict with accuracy that a promise will be performed than to predict the legal result at the completion of a lawsuit. Sometimes the accurate prediction that a lawsuit will not be commenced is more significant than the prediction of the outcome of a suit that is commenced.”⁶⁰ For the “legally astute”⁶¹ business manager, this foresight could mean purchasing additional insurance to mitigate against a possible tort risk or in an instance where contracting parties are unlikely to sue in the event of a default, considering non-lawsuit means of assuring performance, like acceleration of obligations, enforceable security, or arbitration.⁶²

To paraphrase Judge Edward D. Re, the business manager must be aware of the practical and social consequences of a particular act, especially if a perfectly lawful act creates the likelihood of a dispute and, perhaps, a lawsuit. The effect should be to prevent or avoid both the dispute as well as the

⁵⁹ *Id.*

⁶⁰ *Id.* at 944.

⁶¹ Constance E. Bagley, *Winning Legally: The Value of Legal Astuteness*, 33 ACAD. MGMT. REV. 378-390 (2008).

According to Bagley, legal astuteness is the ability of a management team to communicate effectively with counsel and to work together to solve complex problems and to protect and leverage firm resources.

⁶² Brown, *supra* note 12.

possible lawsuit. Given the facts of legal life, the possibility of litigation may be enough to deter a manager from embarking upon an otherwise lawful course of conduct.⁶³

Considering that “there is no such thing as a corporation ... in compliance with law; rather, there are only corporations (and businesses) out of compliance with the law to varying degrees’.... [I]t is unrealistic to assume... that legal risk can be eliminated.”⁶⁴ Preventive law, therefore, considers the long-term risk of current decision-making, while preventive law skills encourage planning for future legal risks and creative problem solving in managing those risks.⁶⁵

Nevertheless, it should be observed that litigation itself can be a form of preventive law. For example, a firm’s strategy might be to litigate all cases to the end, regardless of cost, to send a signal to potential plaintiffs and thereby prevent future copycat litigation. “In the words of Columbia Law School Professor John Coffee, settlement is ‘like putting out warm milk for a stray cat that meows You get 30 more cats the next night. This will create an incentive for others to’ seek a legal remedy.”⁶⁶ However, because often “[a] small business cannot

⁶³ Re, *supra* note 14.

⁶⁴ Adi Libson & Gideon Parchomovsky, *Are All Risks Created Equal? Rethinking The Distinction Between Legal and Business Risk In Corporate Law*, 102 B.U. L. REV. 1601, 1616 (2022) (citing Norwood P. Beveridge, *Does the Corporate Director Have a Duty Always to Obey the Law?*, 45 DEPAUL L. Rev. 729, 732 (1996).

⁶⁵ Barclift, *supra* note 3.

⁶⁶ Siedel and Haapio, *supra* note 8 at 644.

afford several months of litigation”⁶⁷ and because “almost any litigation scenario will put almost every small business in long-term hardship or worse,”⁶⁸ the default approach should be avoidance of litigation. The hard costs of litigation weigh heavily against the limited revenues of a small business.⁶⁹ According to Professor Gregory J. Myers:

Hiring a lawyer to evaluate a dispute and prepare a complaint or answer can consume many thousands of dollars in fees. Preparing and responding to written discovery can be even more expensive, especially if it is coupled with motion practice and multiple depositions.

...

The financial consequences not only threaten a small business’s health but also interfere with operations, and can force key people within the business to shift substantial time and energy to the dispute, rather than running and building the company.⁷⁰

More specifically:

Each day at trial can involve two or more lawyers working twelve to

⁶⁷ Myers, *supra* note 32 at 140.

⁶⁸ *Id.* at 141-42.

⁶⁹ *Id.*

⁷⁰ *Id.* at 141-42.

eighteen hours a day, plus paralegal support, and possibly legal support in the office to work on trial motions and other matters. The small business litigant's owner or principal representative will often attend trial every day, while he or she and maybe several employees are pulled from their tasks to come to court and (usually after a long wait) testify.⁷¹

With this, it is easy to see that a small business would have a hard time absorbing any significant amount of litigation.⁷²

However, it also should be noted that business managers practicing preventive law has its limitations. As summarized by Professor Matthew Edwards, there simply will be situations in business when retaining legal counsel is necessary:

Businesspeople may not be able to answer the very hardest legal questions themselves, but they can learn to recognize when such an issue is before them and understand why they might need skilled counsel to navigate particularly challenging legal (or ethical) terrain. In short ... students [can] become knowledgeable

⁷¹ *Id.* at 147.

⁷² *Id.*

and critical consumers of legal services.⁷³

As Brown's (and others) work on preventive law "was targeted toward lawyers,"⁷⁴ the next part seeks to extend and apply that scholarship directly to the business law classroom.

C. *The Business Law Classroom*

Just as marketers who "know their customers" are better able to create persuasive messages that resonate with their customers, so would educators who understand how managers view the role of law in business "be able to create stronger and more positive links between legal compliance, value creation, and ethical conduct."⁷⁵ To a large extent, managers often think of law as a burden or obstacle.⁷⁶ Because "reactive management"⁷⁷ is still dominant today, business law instructors have a ripe opportunity to equip their students to stand out in the workplace by practicing preventive law as a business manager.

It has been observed that traditional law courses in business schools "frequently omit the

⁷³ Matthew A. Edwards, *Is a Burrito a Sandwich? Introducing Business Law Students to the Fundamentals of Legal Reasoning*, 40 J. LEGAL STUD. EDUC. 85, 89 (2023) (internal quotation omitted).

⁷⁴ Siedel and Haapio, *supra* note 8 at 659.

⁷⁵ Bagley, *supra* note 37 at 266-267.

⁷⁶ Barclift, *supra* note 3.

⁷⁷ *Id.* at 9

practical considerations of managing legal implications.”⁷⁸ Consequently, business students (i.e., future business managers) should learn about law in a way that better enhances their abilities as business decision makers.⁷⁹ To best serve student needs, instructors should offer a managerial approach that is realistic and practical for future business leaders.⁸⁰ These courses “should be taught from the perspective of planning, prevention and managerial participation in the resolution of legal problems.”⁸¹ As stated by Lampe, business law and legal environment instructors must engage and train business students in the “strategic management of the legal function through prevention of legal problems and cost-effective resolution of conflict.”⁸² Business law and legal environment courses, which are part of the core curriculum in business schools, are especially valuable because they provide future business managers with the frameworks, concepts, and tools necessary for business decision making.⁸³ “Managers who do not have a fundamental understanding of tort law and contract law, for example, face difficulty in minimizing legal risks and

⁷⁸ Rene Sacasas & Anita Cava, *A Legal Studies Major: The Miami Model*, 9 J. LEGAL STUD. EDUC. 339, 340 (1991).

⁷⁹ John Collins, *Learning to Make Business Decisions in the Shadow of the Law*, 17 J. LEGAL STUD. EDUC. 117, 118 (1999).

⁸⁰ Lampe, *supra* note 1.

⁸¹ John R. Allison, *The Role of Law in the Business Curriculum*, 9 J. LEGAL STUD. EDUC. 239, 246 (1991).

⁸² Lampe, *supra* note 1 at 6.

⁸³ Siedel and Haapio, *supra* note 8.

taking advantage of law's value creating opportunities."⁸⁴

Further, business law instructors should be aware of and highlight to their students where law schools fall short with regard to preventive law in a business context. This can equip their students to provide additional value in the workplace. For example, Chief Justice Burger highlighted that "[l]aw schools have traditionally steeped the students in the adversary tradition rather than in the skills of resolving conflicts."⁸⁵ According to Siedel and Haapio, surveys of business executives and corporate attorneys have shown that contract law is considered to be one of the most important legal topics for business managers.⁸⁶ Significant, then, to business law instructors is that: "The traditional approach in law schools is not to teach students how to make good contracts that facilitate business, but to focus on how to make good decisions in court. The education of lawyers does not prepare them for either business contracting or teamwork."⁸⁷

In their casebook on contracts, Professor Paul Gudel and the late Ian MacNeil noted that "[o]nly lawyers and other trouble-oriented folk look on contracts primarily as a source of trouble and

⁸⁴ *Id.* at 9.

⁸⁵ Burger, *supra* note 33 at 275.

⁸⁶ Siedel and Haapio, *supra* note 8.

⁸⁷ *Id.* at 25.

disputation, rather than a way of getting things done.”⁸⁸

Similarly, the thought has been expressed that, trained in a competitive setting, taught the adversary system, and rejoicing in talks of legal battles in the courtroom, many lawyers tend to see disputes as occasions for victories in the courtroom, rather than opportunities for settlement and peace. Business law instructors should teach a “rearrangement of values and reorientation of priorities,”⁸⁹ focused on practicing preventive law. For example, preventive law looks at “the long-term risk of current decision-making. Therefore, Preventive Law skills encourage planning for future legal risk and creative problem solving in managing those risks.”⁹⁰

What skills, then, should business law instructors teach to their students so that they can effectively practice preventive law as business managers? As summed up by Lampe, those skills must center on practical aspects of preventing legal problems from occurring and resolving legal conflict when it does arise.⁹¹ Because the most common legal challenges faced by small businesses include contract breaches, intellectual property violations,

⁸⁸ IAN R. MACNEIL & PAUL J. GUEDEL, *CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS* vii-viii (3d ed. 2001).

⁸⁹ Re, *supra* note 14 at 698.

⁹⁰ Barclift, *supra* note 3 at 35.

⁹¹ Lampe, *supra* note 1.

and employment disputes,⁹² this part introduces a pedagogical “experiential exercise”⁹³ for each aimed at equipping business law students to prevent and resolve legal issues.

1. Contract Dispute: Litigate or Negotiate?

Instructors can use the famous contract law case *Leonard v Pepsico, Inc.*⁹⁴ to guide students on how to approach resolving a contract dispute through negotiation. As observed by Judge Re, another facet of preventive law is “the process of private dispute resolution – the process of settling existing disputes through negotiation, conciliation and compromise.... Negotiating skills are not possessed in equal measure by everyone, but they are skills which can be learned.”⁹⁵ Also, negotiating skills can be crucial for a business manager because controlling the outcome of a legal issue through effective negotiation can help mitigate against “[p]erhaps the most troubling aspect

⁹² Manotar Tampubol, *Avoiding Legal Pitfalls: Common Lawsuits Faced by Small Businesses and How to Prevent Them*, 28 J. LEGAL, ETHICAL AND REGULATORY ISSUES (Issue 45 2025).

⁹³ Marsnik et al., *supra* note 7 at 40 (experiential exercises include simulations or cases, among other teaching methods).

⁹⁴ 88 F. Supp. 2d 116 (S.D.N.Y. 1999). It can be helpful and impactful to show a short video about this case. See *Flashback 1996: Man Sues Pepsi to Win Harrier Jet*, CBS (Jan. 29, 2015), <https://www.cbsnews.com/video/flashback-1996-man-sues-pepsi-to-win-harrier-jet/>. Also, Netflix produced a four-part documentary in 2022 titled “Pepsi, Where’s My Jet,” <https://www.netflix.com/title/81446626>, which instructors can use as desired.

⁹⁵ Re, *supra* note 14 at 694-697.

of the litigation route for any company ... that the outcome of the litigation is essentially out of their hands.”⁹⁶ Specifically regarding contracts, “each party can receive greater protection and subject himself to fewer risks if his negotiation is well-planned. Negotiation involves, among other things, an awareness of legal possibilities and alternatives.”⁹⁷ Effective negotiation often will suggest and provide solutions which are fair, reasonable and practical, and therefore acceptable to both parties.⁹⁸

In 1995, a Pepsi promotion entitled “Pepsi Stuff” encouraged consumers to collect “Pepsi Points” from select packages of Pepsi and Diet Pepsi and redeem the points for Pepsi-branded merchandise.⁹⁹ In conjunction with this promotion, Pepsi ran a television advertisement that became the subject of the contract dispute. In short, the commercial, in dramatic fashion, presented three items that could be received in exchange for Pepsi Points – a t-shirt for 75 points, a leather jacket for 1,450 points, and sunglasses for 175 points. The commercial concluded with a Harrier Jet landing next to a high school and suggested that consumers could redeem 7,000,000 Pepsi Points and receive a

⁹⁶ Sara Marie Andrzejewski, “*Leave Little Guys Alone!*”: *Protecting Small Businesses from Overly Litigious Corporations and Trademark Infringement Suits*, J. INTELL. PROP. L., Vol 19:1, 135 (2011).

⁹⁷ Brown, *supra* note 12 at 946.

⁹⁸ Re, *supra* note 14 at 695.

⁹⁹ 88 F. Supp. 2d at 118.

Harrier Jet.¹⁰⁰ “Sure beats the bus,” a teenage boy chortled at the end of the commercial.¹⁰¹

A nuance of the promotion was that if a consumer lacked enough Pepsi Points to redeem a desired item, additional points could be purchased for ten cents each.¹⁰² John Leonard, a business student at the time, capitalized on the option to purchase Pepsi Points and raised approximately \$700,000.00 through acquaintances – enough for 7,000,000 points. Mr. Leonard then submitted the required Order Form and a check for \$700,008.50. At the bottom of the form, Mr. Leonard wrote “1 Harrier Jet” and “7,000,000” in the “Total Points” column.¹⁰³ In a letter accompanying his submission, Mr. Leonard wrote that the check was to purchase additional Pepsi Points “expressly for obtaining a new Harrier jet as advertised in your Pepsi Stuff commercial.”¹⁰⁴

Pepsico, through its fulfillment house, rejected Mr. Leonard’s submission and returned the check to him.¹⁰⁵ In part, Pepsico noted that the requested item “is not part of the Pepsi Stuff collection” and that “[t]he Harrier jet in the ... commercial is fanciful and is simply included to

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 119. It should be noted also that the promotion required at least fifteen original Pepsi Points (i.e., not purchased points) with each order. Mr. Leonard complied with this requirement.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

create a humorous and entertaining ad.”¹⁰⁶ Through legal counsel, Mr. Leonard responded by formally demanding that Pepsico honor its commitment “and make immediate arrangements to transfer the new Harrier jet.”¹⁰⁷ Pepsico again refused, stating, through its advertising company, that “no reasonable person would agree with [Mr. Leonard’s] analysis of the Commercial.”¹⁰⁸ Mr. Leonard sued, seeking specific performance of the alleged offer of a Harrier Jet.¹⁰⁹

In ruling against Mr. Leonard, the court noted, among other rationales, that “no objective person could reasonably have concluded that the commercial actually offered a Harrier Jet.... If it is clear that an offer was not serious, then no offer has been made.... In light of the obvious absurdity of the commercial, the Court rejects [Mr. Leonard’s] argument that the commercial was not clearly in jest.”¹¹⁰

Though Pepsico won the case against Mr. Leonard, it was not without cost. The matter embroiled Pepsico in at least three years of “jurisdictional and procedural wrangling” and over \$88,000 in attorneys’ fees.¹¹¹ Therein lies the pedagogical opportunity to introduce a small group

¹⁰⁶ *Id.* at 120.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 127 - 130.

¹¹¹ *Id.* at 121. This amount represents attorney fees for approximately the first two years of litigation regarding largely jurisdictional matters. Therefore, the full amount of attorneys’ fees likely well exceeded \$88,000.

experiential exercise focused on negotiation as a means to practice preventive law in order to resolve a contract dispute. Research has shown that students have found exercises involving small groups to be more welcoming and community-building than other types of non-substantive exercises.¹¹² An instructor could call this exercise “Pepsico: Litigate or Negotiate?”¹¹³

For this exercise, instructors can divide their class into small groups of about four students (more or less depending on class size) and announce that each group is a Pepsico management group. Groups can be asked to recommend, without the benefit of hindsight, whether Pepsico should litigate or negotiate Mr. Leonard’s demand, and provide a business rationale for their choice. Do students believe that settlement in this instance would be, as in Professor Coffee’s words, “like putting out warm milk” that is likely to attract “30 more cats the next night,”¹¹⁴ or, would settlement be the wiser business decision, heeding the advice of Lincoln, Conklin, Burger, and Hand? What if Pepsico was a small business that ran a similar promotion? Would that make a difference in the group’s decision-making process?

As a second part to this exercise, groups can be told that Pepsico executives have tasked them with negotiating a resolution with Mr. Leonard that

¹¹² Marsnik et al., *supra* note 7.

¹¹³ In this context, “negotiate” is used for rhyming effect, but represents any form of alternative dispute resolution (negotiation, mediation, or arbitration).

¹¹⁴ Siedel and Haapio, *supra* note 8 at 644.

avoids ongoing litigation. Groups can be asked to consider and present reasonable and “creative problem solving”¹¹⁵ approaches that are in Pepsico’s best interest and that present a “value creating opportunit[y]”¹¹⁶ for the company. As a thought-provoking example, instructors can suggest Pepsico arrange for Mr. Leonard to be flown in an actual Harrier Jet as part of a larger Pepsi Stuff promotion.¹¹⁷ Group answers can provide instructors with a better understanding of how creatively students are thinking about ways to practice preventive law.

2. Intellectual Property: DIY Trademark Searches

“Disputes over intellectual property are often fierce and have earned some corporations the reputation of being trademark bullies, a nickname that carries with it images of a deep-pocketed, faceless corporation stamping out mom-and-pop style shops.”¹¹⁸ Of particular importance to small businesses, “while certain areas of trademark law make it easy for large companies to bully smaller companies, stories where the little guy wins are few and far between.”¹¹⁹ Consequently, practicing

¹¹⁵ *Id.* at 35.

¹¹⁶ *Id.* at 9.

¹¹⁷ See *Flashback 1996: Man Sues Pepsi to Win Harrier Jet*, CBS (Jan. 29, 2015), <https://www.cbsnews.com/video/flashback-1996-man-sues-pepsi-to-win-harrier-jet/>.

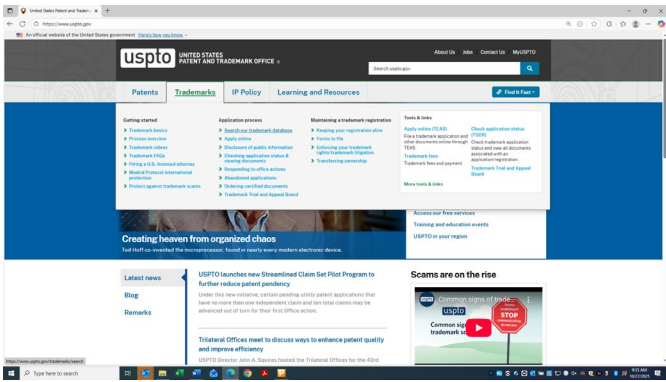
¹¹⁸ Andrzejewski, *supra* note 96 at 118.

¹¹⁹ *Id.* at 20.

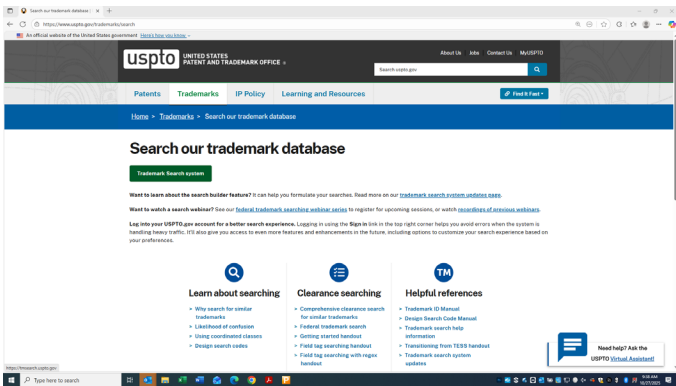
preventive law with respect to intellectual property can set business managers apart in the workplace by spotlighting potential legal issues before they arise. One way a business manager can provide value is conducting an initial “do-it-yourself” or “DIY” search on free-to-access government websites to evaluate whether a proposed trademark is already registered. Regularly conducting such searches can save a business hundreds, if not thousands, of dollars per search compared to using legal counsel to do so, plus the significant savings that come from potentially avoiding the wrath of deep-pocketed marketplace bullies.¹²⁰ Instructors easily can demonstrate in class how to access and navigate the trademark office website, and students can show comprehension by displaying each step on their phone.

To get started, a link to the United States Patent and Trademark Office’s website is provided here for reference: <https://www.uspto.gov/>. On the USPTO.gov homepage, the Trademarks tab contains a section for “Application process” which provides a link for “Search our trademark database.” The applicable screenshot follows:

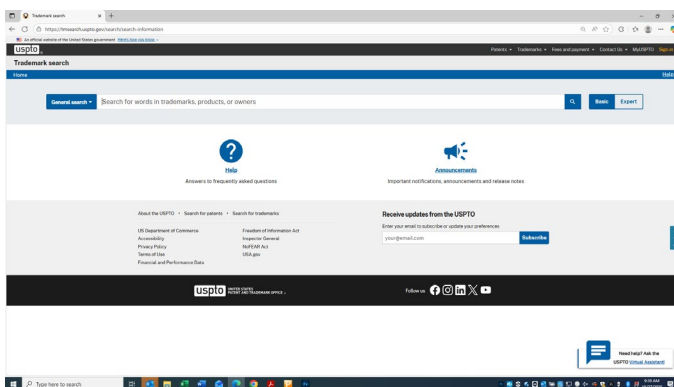
¹²⁰ *Id.*



From there, instructors can click “Trademark Search system:”

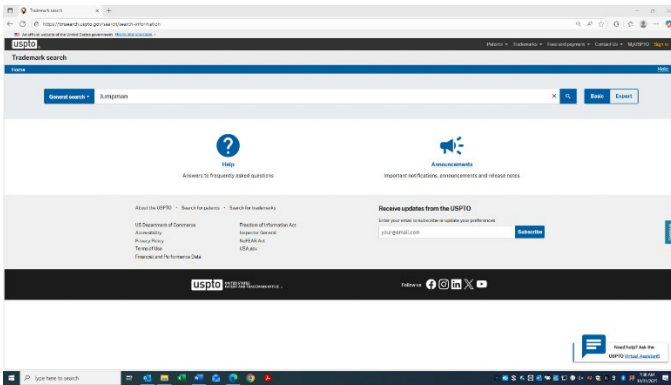


The next page displays the “General search” box wherein a user can enter the applicable mark to be searched:

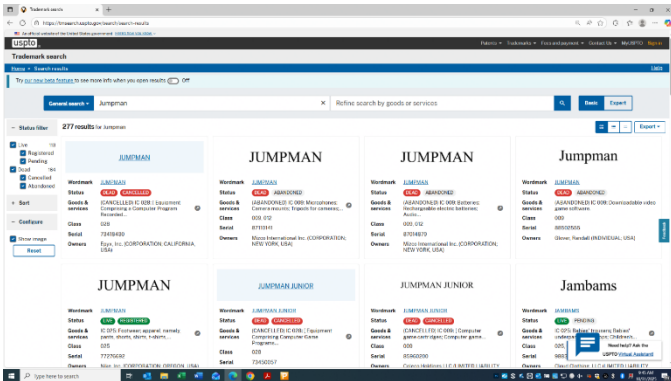


According to the Office of Chief Economist, “[t]he Trademark Case Files Dataset contains detailed information on 12.69 million trademark applications filed with or registrations issued by the USPTO between October 1870 and March 2024.”¹²¹ Therefore, classroom examples are effectively endless, so instructors have wide discretion to select an example that is unique and applicable to their particular students and environment. An almost universally recognizable example, however, could be to demonstrate Nike’s Jumpman registration. An instructor could offer that a business wants to start a new line of basketball clothing called Jumpman, and wants to know if that brand name is available to use. Within the Trademark Search system, enter the term “Jumpman” in the General search box:

¹²¹ <https://www.uspto.gov/subscription-center/2024/updated-trademark-datasets-now-available#:~:text=The%20Trademark%20Case%20Files%20Dataset,subscribing%20to%20regular%20email%20updates.>



Next, click the search button and the next screen will show approximately 277 results. To simplify class discussion, an instructor can untick the “Dead” registrations, leaving 113 “Live” registrations. Both screenshots are below:



another opportunity for a business manager to recognize when a hard legal question or issue is before them, requiring “skilled counsel to navigate.”¹²² In short, these DIY searches can provide another opportunity for students to “become knowledgeable and critical consumers of legal services.”¹²³

In the Jumpman example, it would be wise, of course, for a business manager to begin considering other options for the name of their new line of basketball clothing. A final step of this exercise could be to have students come up with an alternative name, clear it through a DIY trademark search, and turn in the findings as either a graded or a pass/fail assignment as a way for instructors to assess student understanding.

3. Employment Law

Employment disputes present another opportunity for business managers to effectively prevent and resolve legal issues. During fiscal year 2023, the Equal Employment Opportunity Commission (EEOC) received 81,055 new discrimination charges.¹²⁴ According to the EEOC, the most frequently alleged bases of discrimination

¹²² Edwards, *supra* note 73 at 89.

¹²³ *Id.*

¹²⁴ Press Release, Equal Opportunity Employment Commission, EEOC Releases Annual Performance Report for Fiscal Year 2023 (March 11, 2024), <https://www.eeoc.gov/newsroom/eeoc-releases-annual-performance-report-fiscal-year-2023>.

were retaliation, sex, disability, and race.¹²⁵ Presenting a simple employment law example similar to the one offered below can begin to get business law students thinking about and recognizing their role as business leaders to prevent legal issues from occurring and to effectively resolve them when they do arise.

In 2024, the EEOC announced that Walmart would pay \$60,000 “and provide other relief” to settle a sex discrimination lawsuit.¹²⁶ According to the EEOC’s Press Release, the suit charged “that Walmart refused to promote an employee to a department manager position ... based on sex stereotypes about women with young children.”¹²⁷ The Press Release continued:

[W]hen the employee asked why she was passed over for the promotion, a store official noted that she had young children at home and that store management assumed she was not interested in advancing her career at Walmart long-term. Walmart instead promoted a woman who did not have any children.¹²⁸

¹²⁵ *Id.*

¹²⁶ Press Release, Equal Opportunity Employment Commission, Walmart to Pay \$60,000 to Settle EEOC Sex Discrimination Lawsuit (Jan. 11, 2024), <https://www.eeoc.gov/newsroom/walmart-pay-60000-settle-eeoc-sex-discrimination-lawsuit>.

¹²⁷ *Id.*

¹²⁸ *Id.*

The EEOC noted that this alleged conduct was impermissible sex discrimination, which “includes discrimination against an employee because of sex-based stereotypes, such as the stereotype that mothers are unreliable or uncommitted employees.”¹²⁹ From a pedagogical standpoint, this case provides an opportunity to present an experiential exercise that looks at both resolving an existing legal dispute and potentially preventing one from occurring in the first place. As noted by Bagley, “knowledge of the law can prompt managers to become more legally compliant and more socially responsible.”¹³⁰

Suppose that each student is a newly-hired Human Resources manager reviewing their company’s hiring, firing, and promotion practices. They learn that department supervisors are allowed to hire, fire, and promote without needing to run the decision through Human Resources, as long as they document their reasons for doing so. As they review files, they come across a department supervisor’s recent decision to not promote one of his direct reports. The supervisor’s documented reason for not promoting the employee is that she has young children at home and therefore the supervisor simply assumed that she was not interested in advancing her career with the company long-term. Based on this example, an instructor can pose the following questions to students either as another group exercise, to the class as a whole, or as a discussion prompt for an online class: As a business leader, what

¹²⁹ *Id.*

¹³⁰ Bagley et al, *supra* note 37 at 265.

changes can be made to help this company better prevent legal problems from occurring? If the passed-over employee comes to your office and threatens legal action, how can you effectively resolve the conflict? How do the suggested changes advance the broader concepts of corporate compliance and governance? Regarding the first question, possible preventive measures include changing the existing policy to now require hiring, firing, and promotion decisions to be vetted through Human Resources, and training employees regarding the policy change. Regarding the second question, a possible resolution could be to find an alternative, comparable position into which to elevate the passed over employee that ensures the same pay and other benefits as the position for which s/he originally applied. Corporate compliance and governance can be advanced by reestablishing and communicating the company's commitment to a clear set of values and ethical standards focused on integrity and accountability.

IV. CONCLUSION

Business law classes should prepare students to practice preventive law as future business managers. As defined in this article, preventive law for non-lawyer business managers is proactively managing a business or business unit with a careful focus on preventing and resolving legal issues to best serve the business. By adopting a preventive law approach, business managers can help their organization reduce the likelihood of legal disputes

and more effectively address those that do arise. Because management generally takes a “reactive”¹³¹ approach to legal matters, integrating preventive law principles into business law education can help set future business leaders apart in the workplace.

¹³¹ Siedel and Haapio, *supra* note 8 at 652.

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