ATLANTIC LAW JOURNAL
VOLUME 19
2017

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- ARTICLES -

I DON'T WANT TO GO TO SCHOOL TODAY; I HAVE TO TEACH NEGOTIABLE INSTRUMENTS! THREE SIMPLE HANDS-ON EXERCISES TO ENRICH LESSONS ON ARTICLE 3

DONNA STESLOW*

I. INTRODUCTION

Many Business Law courses include a unit on Negotiable Instruments as part of the course. Negotiable Instruments is a possible topic on the Regulation (REG) portion of the Certified Public Accountant Examination, and is therefore of particular importance to accounting majors.[1] All business majors, however, benefit from a basic understanding of the nature and function of negotiable instruments as future businesspersons. Through the three simple hands-on exercises described in this paper, students exposed to the

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[1] *See* AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, *Content and Skill Specifications for the Uniform CPA Examination,* http://www.aicpa.org/BecomeACPA/CPAExam/ExaminationContent/ContentAndSkills/ DownloadableDocuments/CSOs-SSOs-Effective-Jan-2017.pdf, 22 (last visited Dec. 30, 2016).

complexities of Article 3 of the Uniform Commercial Code (UCC) learn key concepts such as the requirements of a negotiable instrument, holder in due course, and liability and defenses. These in-class interactive exercises can turn a normally dry topic into an engaging lesson. With increased engagement, students may better understand and retain the concepts related to negotiable instruments.

Generally, in experiential learning exercises, students are "actively engaged in posing questions, investigating, experimenting, being curious, solving problems, assuming responsibility, being creative, and constructing meaning."[2] Kolb's model of experiential learning breaks the process into four stages:

1. "Concrete experience," involving learning by doing;
2. "Reflective observation," involving thinking about the experience;
3. "Abstract conceptualization," involving drawing conclusions based on the experience; and
4. "Active experimentation," involving the application of the new experience and information.[3]

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[2] ASSOCIATION FOR EXPERIENTIAL EDUCATION, *What is Experiential Education?* http://www.aee.org/what-is-ee (last visited Dec. 30, 2016).

[3] DAVID A. KOLB, EXPERIENTIAL LEARNING: EXPERIENCE AS THE SOURCE OF LEARNING AND DEVELOPMENT, 21-22 (1984); *See also Anne T.* Nees, Susan Willey, & Nancy R. Mansfield, *Enhancing the Educational Value of Experiential Learning:*

To summarize, experiential learning theory recognizes that while content is essential, the learning focus centers on the *process*.[4]

Hands-on (kinesthetic) exercises represent or constitute a type of "learning by doing." Scholars in the field of kinesthetic learning have proposed that tactile exercises may benefit all learners, including those at the college level.[5] It is important, however, to continue on to steps two through four in Kolb's model in order to reflect, analyze and apply the experience. Throughout this less-structured process, the instructor serves as a guide and facilitator in contrast to the lecture format.[6] Various studies have concluded that the average student's attention span is 15 minutes. The introduction of planned hands-on activities into lectures and other passive teaching methods may further enhance learning."[7]

The three-part exercises described below may be completed in one class period, or over the course of several classes. The required supplies are easy to obtain and the directions to students are straightforward. Students may perform the exercises

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The Business Court Project, 27 J. LEGAL STUD. EDUC. 171-208, 176 (2010).

[4] *Experiential Learning*, NORTHERN ILLINOIS UNIVERSITY, FACULTY DEVELOPMENT AND INSTRUCTIONAL DESIGN CENTER, http://www.niu.edu/facdev/resources/guide/strategies/experiential_learning.pdf (last visited Dec. 30, 2016).

[5] See Meshayla Moyer, The Role of the Kinesthetic Learning Style and Prompted Responses in Teaching *Management Courses*, GLOBAL EDUC. J. 85-105 (March 2015).

[6] Experiential Learning, supra note 4, at 2.

[7] Moyer, *supra* note 5, at 87.

individually or in groups, depending on class size. The teaching notes included at the end of the article list needed supplies, proposed discussion questions and suggested forms of assessment.

II. LEARNING OBJECTIVES

After completing the exercises, students will be able to:

A. Define "negotiable instrument" under Article 3 of the Uniform Commercial Code;
B. Explain the types of negotiable instruments and their characteristics;
C. Describe the six requirements of negotiable instruments and apply these requirements by creating a negotiable instrument;
D. Discuss the requirements for "negotiation" of a negotiable instrument and demonstrate negotiation;
E. Contrast an "ordinary holder" of a negotiable instrument from a "holder in due course;" and
F. Identify rules related to forged and altered negotiable instruments and determine liability for payment.

III. CLASS EXERCISES

Although it varies by specific text, units on Negotiable Instruments and Banking are generally comprised of coverage through several chapters. Instructors may complete the following exercises sequentially over three class periods or in combination during a single class period.

Alternatively, the instructor may choose to utilize only one or two of the exercises based upon coverage and course content.

A. First Exercise: Draft a Colorful, Creative Negotiable Instrument

The introductory section in many negotiable instruments units often includes the basic definition of negotiable instruments under the UCC and the legal requirements for negotiable instruments.[8] For the first exercise, students read the text and review supplemental materials such as Power Points in advance, paying particular attention to the legal requirements for negotiability: in writing;[9] signed by the maker or the drawer;[10] unconditional promise or order to pay;[11] fixed amount of money;[12] payable on

[8] See, e.g., Mark E. Burge, Apple Pay, Bitcoin, and Consumers: The ABCs of Future Public Payments Law, 67 HASTINGS L. J. 1493, 1498-1505 (2016); Jonathan Yovel, Relational Formalism and the Construction of Financial Instruments, 48 AMER. BUS. L. J. 371, 376 (2011); Kurt Eggert, Held up in Due Course: Codification and the Victory of Form over Intent in Negotiable Instrument Law, 35 CREIGHTON L. REV. 363, 374-75 (2002).
[9] U.C.C. §§3-103(a)(6), (9) (Am. Law Inst. & Unif. Law Comm'n 1977).
[10] U.C.C. §3-103(a)(3), (5) (Am. Law Inst. & Unif. Law Comm'n 1977).
[11] U.C.C. §3-104(a) (Am. Law Inst. & Unif. Law Comm'n 1977).
[12] *Id.*

demand or at a definite time;[13] and payable to order or to bearer.[14]

Students are asked to draft simple negotiable instruments in this exercise. The instructor provides the needed materials, divides the students into groups, and provides instructions. If they have not prepared, not to worry- they are told to look up examples on their computers, tablets, or phones as guides. Students are urged to "have fun," "use color"[15] and make sure they satisfy the legal requirements of a negotiable instrument under the UCC.

After the groups complete their negotiable instruments, they affix their finished work to the board or walls around the classroom and provide brief summaries to the rest of the class.[16] The instructor asks the class whether the six requirements are present. If something is missing, the instructor

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[13] U.C.C. §3-104(a)(2) (Am. Law Inst. & Unif. Law Comm'n 1977).

[14] U.C.C. §3-104(a)(2) (Am. Law Inst. & Unif. Law Comm'n 1977).

[15] Using color in the exercise is not just for fun. "Colors are powerful psychological triggers that help users learn better by changing their perception and evoking emotions." Karla Gutierrez, *6 Ways Color Psychology Can be Used to Design Effective Learning*, http://info.shiftelearning.com/blog/bid/348188/6-Ways-Color-Psychology-Can-Be-Used-to-Design-Effective-eLearning (last visited Dec. 30, 2016).

[16] Many times the negotiable instruments drafted by students have contained sizeable amounts of money promised to this instructor!

may prompt the class as to any missing requirements. Students then correct any missing requirements as necessary.

While the class is drafting their negotiable instruments, the instructor drafts a document that would *not* meet the legal requirements of a negotiable instrument: for example, "I owe my Business Law II students $1,000,000.00 each if they all score 100% on the Negotiable Instruments test, payable out of my Powerball winnings from next week's Powerball drawing." Students critically analyze this instrument as a class to identify the problems with negotiability.

Students are asked to write their names on the back of the drafted instruments to be used in the next exercise.

B. Second Exercise: "Negotiate" the Negotiable Instrument

The second exercise is relatively simple. Depending on whether the instrument created by the groups was an order instrument (negotiated by proper indorsement and delivery)[17] or a bearer instrument (negotiated by delivery),[18] students then properly negotiate the instruments so that the transferees become "holders."[19] Students may

[17] U.C.C. §3-201(b) (Am. Law Inst. & Unif. Law Comm'n 1977).
[18] *Id.*
[19] U.C.C. §1-201(20) (Am. Law Inst. & Unif. Law Comm'n 1977).

negotiate the instrument within the group or to another group.

Next, after reviewing the requirements for Holder in Due Course (HDC) status,[20] students (again in their groups) decide how an ordinary holder becomes a holder in due course.[21] In addition to learning the mechanical requirements for a holder in due course, the rationale behind the doctrine is important to note:

> "…[T]he holder in due course doctrine was to make negotiable instruments more easily transferrable by removing a great barrier to their transferability, the fear that the maker of a note will have a defense to it. The holder in due course doctrine is intended to increase the liquidity of notes and thus their usefulness to commerce."[22]

The instructor may assign this exercise and subsequent Discussion Questions in the Teaching

[20] U.C.C. §3-302 (AM. LAW INST. & UNIF. LAW COMM'N 1977). The instrument is taken 1) for value; 2) in good faith; and 3) without notice that it is defective (overdue, dishonored, irregular or incomplete). *See* CLARKSON, ET AL. BUSINESS LAW, TEXT AND CASES, 502 (13th ed. 2015).
[21] U.C.C. §3-302 (AM. LAW INST. & UNIF. LAW COMM'N 1977); Eggert, *supra* note 8, at 375-77.
[22] Eggert, *supra* note 8, at 376.

Notes as a presentation to the class, or alternatively, as a written assignment.

C. Third Exercise: Forged and Altered Checks

The many provisions of Articles 3 and 4 of the Uniform Commercial Code pertaining to liability on forged and altered negotiable instruments are confusing to students (and sometimes, the instructor)! By demonstrating one type of check fraud, check washing, students understand how easy it can be for businesses and individuals to become victims of this crime.[23] According to the National Check Fraud Center, check washing of $815 million takes place each year.[24] It is important to emphasize during this exercise that check fraud is a crime with serious criminal penalties. Question 5 of the Discussion Questions in the Teaching Notes can guide the instructor on ways to reinforce the seriousness of the offense by having students research the criminal penalties.

For the third exercise, students are asked to again assemble into groups to discuss the many rules, liabilities and defenses applicable to forged and altered negotiable instruments, in particular, checks.

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[23] *See* Nancy McCleary, " 'Check Washing' is a Dirty Way for Someone to Get Your Money," FAYETTEVILLE OBSERVER (Feb. 5, 2016), available at http://www.fayobserver.com/news/crime_courts/check-washing-is-dirty-way-for-someone-to-get-your/article_434f7313-d122-51e5-afb3-822f586215e3.html.

[24] NATIONAL CHECK FRAUD CENTER, *Check Washing, What is It?* http://www.ckfraud.org/washing.html (last visited Dec. 29, 2016).

The objective here is not to necessarily have students memorize the rules or arrive at a definitive answer, but to understand that even courts wrestle with these issues and that many factors may come into play in a particular case.

In order to demonstrate check washing, the instructor has several options: perform the activity live in class, ask for student volunteers to participate, or show a video of the process in class or post it online.[25] After viewing the demonstration in-class or the video online, students answer discussion questions regarding liability on an altered negotiable instrument.

If the demonstration is done live in class, a cancelled check is dipped in acetone (the chemical contained in nail polish remover and some paint thinners) for about five minutes. Additional supplies are noted in the Teaching Notes. One caution: As some newer checks are "wash-proof," make sure the ink dissolves by practicing prior to the demonstration. After the check is removed from the acetone (it quickly dries by either waving it a few times or lightly blowing on it), display it to the class. When the check is removed the paper looks completely normal.[26] Then, ask the students to

[25] "Dr. Uniball's" five-minute video explains the process and why pigment-based pens cannot be washed: https://www.youtube.com/watch?v=1gN8MHDWTB4 (last visited Dec. 30, 2016). It is recommended that if the demonstration is done in class, the instructor view the "Dr. Uniball" video in order to prepare.

[26] *Id.*

consider Question 4 in the Teaching Notes pertaining to liability on an altered negotiable instrument.

All three exercises and discussion questions have been successfully utilized by the author over the course of several years. It is continually surprising how lively the activities are and how engaged the students become in the topic. When students were surveyed about their favorite topics of the entire course, the day on which they created the negotiable instruments is repeatedly mentioned.

IV. TEACHING NOTES

A. Supplies Needed for Negotiable Instruments Exercises

Drafting and Negotiating Negotiable Instruments (Exercises 1 and 2 above):

1. One large pad of newsprint or poster board – Post-its™ offer a large pad of paper with an adhesive back on the top (like the smaller adhesive notes) which may be affixed to a classroom wall or board;
2. Several boxes of colored markers;
3. Masking tape to affix finished projects to board or walls of classroom.

Check Washing Demonstration (Exercise 3 above):

1. Note – Perform exercise in a well-ventilated area
2. One can of acetone, a type of paint thinner commonly available in hardware stores;
3. One shallow plastic tub or bowl;
4. One set of tongs or a utensil to stir the check while it is in the acetone;

5. Rubber gloves (optional);
6. Cancelled check (remove the account and routing numbers);
7. Pen, and if desired, Uniball 207™ gel pen to show how this pigment-based ink does not wash away.

B. Discussion Questions

1. What are the requirements of a negotiable instrument? Applying each of these requirements to the negotiable instrument you prepared, does it satisfy Article 3 of the UCC?

One way to address this question is for each of the groups to move about the room to review and comment upon the other groups' work. Alternatively, the instructor can review the drafted instruments with the class while reinforcing each of the UCC requirements for a negotiable instrument.[27]

2. Now, consider the "lottery winnings" instrument drafted by the instructor (described above containing the conditions and missing elements): Does this instrument meet each of the requirements? Why or why not?

The document drafted by the instructor[28] does not meet almost any of the UCC requirements for a negotiable instrument, with the exception of being in writing. It is an I.O.U., thus not a promise or order to pay; it is not "unconditional" because it is

[27] *See* notes 8-14, *supra.*
[28] Described in Part III. A., *supra*.

payable only if the lottery is won and each student scores 100% on the test; it is not signed by the maker or drawer. Compare and contrast this "failed" instrument to the ones drafted by the groups.

3. *What are the requirements for Holder in Due Course status? Why is this status important in the commercial environment?*

After the instruments are negotiated to "holders" and to "holders in due course," a discussion can occur regarding defenses to payment on negotiable instruments.[29] The difference between personal defenses, which do not apply to holders in due course, and universal defenses, which may be asserted against holders in due course, should be reviewed. Personal defenses are: breach of contract or warranty, lack or failure of consideration, fraud in the inducement, illegality, mental incompetence, duress or undue influence, discharge by previous payment or cancellation.[30] Universal defenses are: forgery of a signature, fraud in the execution, material alteration, discharge in bankruptcy, minority, illegality, mental incapacity and extreme duress.[31] The rule that personal defenses do not apply to holders in due course promotes greater marketability of negotiable instruments. If payment was not ensured through holder in due course status, it would lead to uncertainty and make these transactions more risky.

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[29] U.C.C. §3-305 (AM. LAW INST. & UNIF. LAW COMM'N 1977); Eggert, *supra* note 8, at 375-77.
[30] *See* CLARKSON, ET AL., *supra* note 20, at 522-23.
[31] *Id.*

At this point in the discussion, the instructor may refer to cases in the chosen text focusing on whether a party is a holder in due course and the ramifications of the decision on payment of the negotiable instrument.[32]

4. *After watching the check washing demonstration/video, answer the following: If a thief steals a check, washes and changes the name of the payee but leaves the drawer's signature, who suffers the loss? Is the drawer subject to any type of liability? Are defenses available because of the alteration of the check? Which rules in the U.C.C discussed in the text and in class apply here?*

In our check-washing scenario, the amount and the name of the payee are altered. The signature is not forged. There are a myriad of rules that potentially apply here. The point of this discussion question is to have students think about the relationship between the various rules and approaches related to liability for payment of negotiable instruments.[33]

Students given this question in past classes have responded in interesting ways. Some have

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[32] *See, e.g., Georg v. Metro Fixtures Contractors, Inc*. 178 P.3d 1209 (Sup. Ct. Colo. 2008) contained in Chapter 26 of CLARKSON ET AL., *supra* note 20, at 505-6.

[33] See Melissa Waite, *Check Fraud and the Common Law: At the Intersection of Negligence and the Uniform Commercial Code*, 54 B. C. L. REV. 2205 (2013) for a thorough discussion of U.C.C. rules related to check fraud, negligence, and defenses to payment.

referred to U.C.C. §3-407, which provides that an ordinary holder can recover nothing on an altered instrument. A holder in due course, however, can enforce the instrument according to the original amount if the amount has been altered. Other students have raised the issue of possible negligence on the part of the drawer of the check. How was it stolen? Did the drawer of the check take reasonable precautions to safeguard the instrument? In terms of payment on a forged or altered check, the loss generally falls on the first party to whom the check is presented. If the customer's negligence contributes to the alteration, the loss can shift back to the customer.[34] An interesting related question is whether it is negligent to leave a check in a residential mailbox for mailing to the creditor.[35]

Another rule students point out is the requirement that customers have an obligation to timely examine their bank statements; failure to report forgeries or alterations will shift liability for the loss back to the customer.[36]

Additional legal issues which may be incorporated into this question are the rules regarding

[34] U.C.C. §4-406 (Am. Law Inst. & Unif. Law Comm'n 1977).
[35] In past discussions in which this question was presented, the class was mostly split on whether it is negligent to pay a bill with a check and leave it in your residential mail box with the flag raised.
[36] U.C.C. § 4-406(c) (Am. Law Inst. & Unif. Law Comm'n 1977).

signature liability[37] and warranty liability[38] on instruments. Drawers of checks incur secondary liability under Article 3 if the required conditions are met.[39] If a thief of the check forges an indorsement, some general rules regarding who bears the loss are applicable. One of the more significant rules to note is that the first party receiving the forged or unauthorized indorsement bears the loss since that party is in the best position to detect or prevent the loss.[40]

5. *Ask students to research the crime of check fraud, in particular, the penalties if convicted. Ask them to locate specific instances of individuals convicted of check fraud or check washing.*

The National Check Fraud Center provides examples of check washing and recent examples of criminal charges filed against suspected check washers.[41] Basic Internet searches in class will quickly produce examples of individuals charged and sentenced for check fraud crimes. Briefly discuss several cases located by students,

[37] U.C.C §§3-412, 413, 415 (Am. Law Inst. & Unif. Law Comm'n 1977).
[38] U.C.C. §§3-416, 417 (Am. Law Inst. & Unif. Law Comm'n 1977).
[39] 1) Proper and timely presentment; 2) Dishonor; and 3) Timely notice of the dishonor. CLARKSON ET AL., *supra* note 20, at 513.
[40] *Id.*at 518.
[41] National Check Fraud Center, *supra* note 24.

emphasizing the potential fines and imprisonment faced by the individuals.

6. *Are the rules pertaining to checks even relevant to 21st Century business transactions? Does Article 3 need to be updated to reflect the way payments are processed electronically?*

   The check-watching demonstration may be tied to a discussion on electronic banking and the shift over the past decade away from paper check writing.[42] Poll the students to see whether any of them have written actual checks in the past month. Ask them to research the statutes and regulations related to electronic payment systems. Consider whether the law has kept up with the technology. The most recent amendments to Article 3 were proposed in 1990,[43] and have been enacted in all 50 states. That is now over 25 years ago, a time considered "ancient history" for most students.

C. Methods of Assessment:

Content may be evaluated through a variety of methods. One suggestion is to provide class participation points for the group activities or completion of worksheets containing the discussion questions. Content may be further assessed through

[42] *See* Burge, *supra* note 8, at 1504-17 (discussing the shift away from paper checks and various forms of electronic payment).

[43] *U.C.C Article 3, Negotiable Instruments (1990) Summary,* http://www.uniformlaws.org/ActSummary.aspx?title=UCC%20Article%203,%20Negotiable%20Instruments%20(1990) (last visited Dec. 30, 2016).

objective and subjective exam questions upon conclusion of the unit. As part of the examination, students may be asked to again draft a simple negotiable instrument in order to recall the exercise performed in class.

As further reinforcement, classroom groups could create and present a "mind map" on the negotiable instruments unit.[44] A mind map begins with the central concepts and branches into further subcategories under the concept. It is a more visual form of an outline. The instructor may ask groups to draw their mind maps on the board and provide brief summaries to the class.

V. CONCLUSION

Knowledge of laws pertaining to negotiable instruments continues to be a relevant topic for business majors as commercial paper remains a primary method for financial transactions. Students can connect many of the legal rules contained in Articles 3 and 4 of the Uniform Commercial Code in their minds by the use of these hands-on exercises. By beginning with the general requirements of negotiable instruments and then transitioning into

[44] Mind mapping is a type of visual outline. Using images and words, students begin with the central ideas and branch out to sub-topics while creating connections between the ideas.. http://www.inspiration.com/visual-learning/mind-mapping (last visited Jun. 13, 2016). *See also* Sarah Edwards & Nick Cooper, *Mind Mapping as a Teaching Resource*, CLINICAL TEACHER; Dec. 2010, Vol. 7 Issue 4, 236-239.

liability, crimes, and future (electronic) forms of payment, students acquire the "big picture" of the topic. This framework of understanding then enables them to fill in the specific details.

Utilization of these exercises in a negotiable instruments unit in a Business Law course can help the instructor make class sessions on negotiable instruments livelier and more engaging to their students. The small amount of preparation and collection of supplies on the part of the instructor is a worthwhile investment into enhancing the learning environment. The customization of the exercises to the size of the class and the time available allows flexibility for any instructor teaching negotiable instruments.

Varying the method of how a topic is taught benefits the instructor in addition to the students. In this author's experience, it has turned what was once a dreaded topic into classes which are enjoyable and interactive for both the instructor and students. Based on informal surveys over the course of several years, students have expressed positive reactions to these exercises and have shown increased understanding of negotiable instruments law and its complexities.

THE EVOLUTION OF THE ILLINOIS "SUPER BUSINESS ENTITY" AND ABSOLUTE LIMITED LIABILITY FOR LLC MEMBERS AND MANAGERS

NICHOLAS C. MISENTI*

> Creating a super business entity which would shield all wrongdoing and bar all civil causes of action against controlling owners of LLCs even for the most egregious acts of fraud or other wrongdoing would serve no public purpose.[1]

I. INTRODUCTION

The Illinois LLC statute has a standard limited liability shield similar to legislation found in other states. The shield provides that personal liability cannot be imposed upon a member of an

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[1] The Bankruptcy Court for the Central District of Illinois, objecting to the Illinois Super Business Entity. *In re Suhadolnik*, No. ADV 08-7116, 2009 WL 2591338, at *4 (Bankr. C.D. Ill. Aug. 20, 2009).

LLC *by virtue of that person's status as a member.* Except for Illinois, courts have universally interpreted this language as allowing for the imposition of personal liability on members who engage in tortious conduct, who enter into contracts on behalf of a nonexistent, unidentified, or undisclosed entity, or who enter into contacts in an unauthorized manner. The Illinois appellate courts have adopted a unique interpretation of the LLC limited liability shield based on the shield's legislative history in Illinois. According to the Illinois appellate courts, the *only* way to hold a member or manager personally liable is to prove that: (a) the Articles of Organization contained a provision authorizing personal liability; and (b) the member or manager voluntarily consented to the provision in writing. Based on the unique interpretation of the LLC limited liability shield adopted by the appellate courts in Illinois, a member or manager has the power to avoid personal liability simply by not agreeing to assume personal liability in the Articles of Organization

This protection *may* extend to an Illinois LLC that is operating in other states as a foreign entity. Imposition of personal liability on LLC members, notwithstanding the limited liability shield, poses a significant risk to members. The Illinois LLC offers an exceptional, and unique, opportunity to avoid this risk. It is important to note, however, that the Illinois exception does not apply to Illinois LLC's that render professional services as separate limited liability shields govern those entities. Illinois has essentially created a type of super entity where LLC members

and managers enjoy absolute, or near absolute, immunity from personal liability. Although there is no legislative record to suggest a discussion or debate occurred on this issue, the doctrine went into effect in 2006 and is now well entrenched.

II. PERSONAL LIABILITY EXCEPTIONS TO A LIMITED LIABILITY SHIELD

Exceptions to limited liability shields pose a significant risk for LLC members and corporate shareholders. Specifically, limited liability shields do not immunize LLC members and corporate shareholders from personal liability when:

1. The member or shareholder engages in tortious conduct;[2]
2. The member or shareholder enters into a contract on behalf of a nonexistent principal,[3] unidentified principal,[4] or undisclosed principal,[5] or in an unauthorized manner;[6] and
3. Piercing of the veil of limited liability is

[2] THE RESTATEMENT (THIRD) OF THE LAW OF AGENCY § 7.01 (2006). *See also* Nicholas C. Misenti, *Personal Liability for Commission of a Tort: A Significant, and Often Overlooked, Exception to Limited Liability in the LLC and Corporation,* 8 S. J. BUS. & ETH. 11 (2016).
[3] Restatement (Third) of the Law of Agency § 604 (2006).
[4] Restatement (Third) of the Law of Agency § 602 (2006).
[5] Restatement (Third) of the Law of Agency § 603 (2006).
[6] Restatement (Third) of the Law of Agency § 610 (2006).

applied.[7]

An LLC member or a corporate shareholder is personally liable when he commits a tort because, "a person is responsible for the legal consequences of torts committed by that person. A tort committed by an agent constitutes a wrong to the tort's victim independently of the capacity in which the agent committed the tort."[8] Exceptions to limited liability also stem from contract law. For instance, a valid contract requires mutual assent, or a meeting of the minds, between the parties to a contract. A meeting of the minds does not occur between a third party and a principal where the third party does not know the identity of the principal, or that the agent represents the principal. The resulting mutual assent is between the third party and the agent.[9] Similarly, a valid contract requires capacity. Capacity at a minimum requires existence insofar as a nonexistent principal cannot have capacity. Once again, the agent, rather than the principal, becomes the party to the contract.[10] Except in the case of an LLC that renders professional services, an Illinois LLC eliminates the first two risks and may also eliminate the third risk. The Illinois LLC represents a significant exception to the law that governs limited liability shields.

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[7] 18 Am. Jur. 2d *Corporations* §§ 48-60 (May 2017 Update).
[8] Restatement (Third) of the Law of Agency § 7.01 cmt. b (2006).
[9] Restatement (Third) of the Law of Agency § 603 cmt. b(2006).
[10] Restatement (Third) of the Law of Agency § 604 cmt. b (2006).

III. THE LLC SHIELD

Limited liability is a doctrine that shields corporate shareholders and LLC members from personal liability in most instances.[11] The doctrine is predicated on the recognition that an entity such as a corporation or LLC is separate and distinct from its owners.[12] Limited liability for contracts is a natural consequence of agency law as an agent has no personal liability for contracts entered into on behalf of a fully disclosed principal.[13]

The standard LLC limited liability shield typically provides that a member or manager of an LLC is not personally liable *solely by reason of being a member or manager*. Section 180/10-10(a) of 805 Ill. Comp. Stat. creates the limited liability shield for an Illinois LLC and provides that, "A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager." This language is fairly common. Illinois has not adopted the Uniform Limited Liability Company Act. Similar language is found in states that have adopted the Act. Section 304(a) of the Uniform Limited Liability Company Act (ULLCA) of 2006 *(Last Amended 2013)*, provides that:

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[11] 18 C.J.S. *Corporations* § 7 (April 11, 2017 Update).
[12] *Id.*
[13] The Restatement (Third) of the Law of Agency § 601 (2006).

> A debt, obligation, or other liability of a limited liability company is solely the debt, obligation, or other liability of the company. A member or manager is not personally liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation, or other liability of the company *solely by reason of being or acting as a member or manager.* (emphasis added).

IV. THE MAJORITY RULE

The majority rule is that ULLCA language impliedly contains a carve out from the shield that allows personal liability to be imposed on a member based on his personal conduct, because liability is not based on his status as a member or shareholder. The Comment to Section 304(a) of the Uniform Limited Liability Company Act (2006) *(Last Amended 2013)* refers to this interpretation as "the overwhelming weight of the case law."

This is an emerging area of law. In 2012, the South Carolina Supreme Court described the issue of personal liability of LLC members and managers for tortious conduct as "a question of first impression in this State," before holding that the LLC limited liability shield provided no immunity.[14] In 2013,

[14] 16 *Jade St., LLC v. R. Design Const. Co.*, 728 S.E.2d 448, 451 (2012), *opinion withdrawn and superseded on reh'g sub nom. 16 Jade St., LLC v. R. Design Const. Co., LLC.*, 747 S.E.2d 770 (Sp. Ct. S.C. 2013).

however, the Court revisited the case and withdrew this decision.[15] The Court found there were insufficient allegations to support personal liability of the LLC's members and managers, concluding, "We therefore find it unnecessary to reach the novel issue of whether the LLC Act absolves an LLC member of personal liability for negligence committed while acting in furtherance of the company business."[16] It is clear that the court's original decision represents the majority rule.

V. THE EVOLUTION OF THE "SUPER BUSINESS ENTITY:" THE ILLINOIS LLC RULE ELIMINATING PERSONAL LIABILITY

A. Immunity from Personal Liability Based on Agency Law

Notwithstanding the general rule that the standard LLC shield includes a carve out for personal liability based on commission of a tort and other personal conduct, the Illinois Appellate Court held otherwise in *Puleo v. Topel*.[17] In *Puleo*, the court held that an LLC member who entered into contracts on behalf of a dissolved LLC could not be held personally liable on the contracts due to the LLC limited liability shield, even though agency law

[15] *16 Jade St., LLC v. R. Design Const. Co., LLC.,* 747 S.E.2d 770, 773 (Sp. Ct. S.C. 2013).
[16] *Id.*at 773.
[17] *Puleo v. Topel*, 856 N.E.2d 1152 (Ill. App. 2006).

would impose personal liability in the case of any other type of business entity.[18]

The *Puleo* decision is based on a unique interpretation of the history of the limited liability shield in the Illinois LLC statute. Prior to 1998, 805 Ill. Comp. Stat. Sec. 180/10-10 provided the following carve out from the LLC limited liability shield:

> (a) A member of a limited liability company shall be personally liable for any act, debt, obligation, or liability of the limited liability company or another member or manager to the extent that a shareholder of an Illinois business corporation is liable in analogous circumstances under Illinois law.
> (b) A manager of a limited liability company shall be personally liable for any act, debt, obligation, or liability of the limited liability company or another manager or member to the extent that a director of an Illinois business corporation is liable in analogous circumstances under Illinois law.

P.A. 90-424, eff. 1-1-98, amended Sec. 180/10-10 by changing section (a) and deleting section (b) to read as follows:

[18] *See* Restatement (Third) of the Law of Agency § 604 (2006).

> (a) Except as otherwise provided in subsection (d) of this Section, the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager.
>
> (b) (Blank).
>
> ***
>
> (d) All or specified members of a limited liability company are liable in their capacity as members for all or specified debts, obligations, or liabilities of the company if:
>
> (1) a provision to that effect is contained in the articles of organization; and
>
> (2) a member so liable has consented in writing to the adoption of the provision or to be bound by the provision.

In rejecting a claim that the defendant could be personally liable for obligations incurred on

behalf of an LLC after the company was involuntarily dissolved, the Court in *Puleo* held that:

> In 1998 *** the legislature amended section 10–10 and in doing so removed the above language which explicitly provided that a member or manager of an LLC could be held personally liable for his or her own actions or for the actions of the LLC to the same extent as a shareholder or director of a corporation could be held personally liable. As we have not found any legislative commentary regarding that amendment, we presume that by removing the noted statutory language, the legislature meant to shield a member or manager of an LLC from personal liability. *Drury Displays, Inc.*, 327 Ill.App.3d at 888, 261 Ill. Dec. 875, 764 N.E.2d 166 ("When a statute is amended, it is presumed that the legislature intended to change the law as it formerly existed").[19]

The court also held, "Section 10–10 clearly indicates that a member or manager of an LLC is not personally liable for debts the company incurs unless each of the provisions in subsection (d) is met."[20] In short, a member or manager can be held personally

[19] *Puleo v. Topel*, 856 N.E.2d 1152, 1157 (Ill. App. 2006).
[20] *Id.*at 1156.

liable only if a provision to that effect is contained in the Articles of Organization, and the member or manager voluntarily consents in writing to that provision.

In 2007, the U.S. District Court for the Northern District of Illinois applied the *Puleo* holding and dismissed an action against an LLC member, Neuhauser, who had executed a contract on behalf of a dissolved LLC.[21] Neuhauser had signed a Partnership Account Agreement with Wachovia Bank on behalf of his company, NOLA, a Limited Liability Company, which had been dissolved prior to this date. Wachovia argued that because NOLA was dissolved at the time Neuhauser opened the account, Neuhauser can be held personally liable for NOLA's breach of the agreement. In rejecting that argument, the court held that:

> Despite Wachovia's assertions, when Section 10–10 was amended in 1998, the legislature removed the provision that allowed a member or manager of an LLC to be held personally liable for his or her own actions or for the actions of the LLC to same extent as a director or shareholder of a corporation. Puleo v. Topel, 368 Ill.App.3d 63, 306 Ill. Dec. 57, 856 N.E.2d 1152, 1158 (2006). The revised version also held that the

[21] *Wachovia Sec., LLC v. Neuhauser,* 528 F. Supp. 2d 834 (N.D. Ill. 2007).

> failure of an LLC to observe the usual corporate formalities is not a ground from imposing personal liability on its members or managers for the liabilities of the company. *Id.* Thus, the LLC Act did not provide for a member or manager's personal liability to a third party for an LLC's debts. *Id.* Accordingly, Neuhauser cannot be held liable for NOLA's debts even though NOLA was dissolved at the time Neuhauser opened the NOLA account.[22]

In 2011, the Illinois Appellate Court also has held that a defendant could not be held personally liable for debts incurred on behalf of an LLC prior to its formation, even though under the law of agency, the defendant would be personally liable for a contract he executed on behalf of the unformed LLC.[23] Here, the court stated:

> We have recognized the clear legislative intent to shield individuals from personal liability in transactions on behalf of LLCs, where the LLC did not exist because it was dissolved. In Puleo, we held that a managing member was not personally liable for debts that an LLC incurred after its dissolution because there was no

[22] *Id.*at 853.
[23] *Carollo v. Irwin*, 959 N.E.2d 77 (Ill. App. 1st 2011).

> evidence of a provision establishing the managing member's personal liability was contained in the LLC's articles of organization or that the managing member consented in writing to the adoption of such a provision, which are the requirements of section 10–10(d) of the Limited Liability Company Act.[24]

Given that protection applies when contracts are entered into by members or managers on behalf of a nonexistent entity, protection should also apply when members enter into contracts on behalf of undisclosed or unidentified entities, or in cases where members act as unauthorized agents. In short, members and managers of an Illinois LLC enjoy complete immunity from liability that is based on common law agency theory.

B. Immunity from Personal Liability for Tortious Conduct, Including Fraud

The *Puleo* doctrine also bars recovery against LLC members and managers for claims that are based on tortious conduct, including intentional misconduct. In a 2009 case, a federal trial court applied the Puleo holding and dismissed a negligence action against an LLC member.[25] In that case, the

[24] *Id.*at 93.

[25] *Aqua Thick, Inc. v. Wild Flavors, Inc.*, 2009 WL 4544696 (N.D. Ill. Dec. 1, 2009).

plaintiff sued the defendant for producing a defective beverage that the plaintiff sold. The defendant filed a third-party complaint against Charles E. Sizer and Charles E. Sizer Consulting, LLC, which asserted that their negligence was the cause of any problems with the beverage. In dismissing the action against Sizer personally, the United States District Court, N.D. Illinois, Eastern Division opined that the Illinois Supreme Court would likely uphold the *Puleo* holding:

> The state supreme court has yet to weigh in on the proper interpretation of this section of the statute. But, given the statute's plain language and history, that court is likely to adopt the interpretation set forth in *Puleo***,** and this Court does as well. Unless the articles of organization state otherwise, and Wild has not alleged that they do, Sizer cannot be sued individually for the corporate defendant's torts. Thus, the Court dismisses without prejudice the claims Wild asserts against him.[26]

In 2013, the Illinois appellate court went further by barring actions against members and managers based on fraud. It held that the manager of a limited liability company that sold condominium units to purchasers was not personally liable to purchasers for alleged fraud committed during the

[26] *Id.*at *2.

sale of the units because the LLC's articles of organization did not contain a provision for manager liability, and the manager never consented in writing to such a provision.[27]

The court made it clear that the holding of *Puleo* is that a member or manager has no personal liability unless the member or manager voluntarily assumed liability under Sec. 180/10-10 (d):

> In the case at bar, the plain language of section 10–10 states that, "[e]xcept as otherwise provided in subsection (d) of this Section, the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager." 805 ILCS 180/10–10(a) (West 2010). Thus, "[s]ection 10–10 clearly indicates that a member or manager of an LLC is not personally liable for debts the company incurs unless each of the provisions in subsection (d) is met." *Puleo*, 368 Ill.App.3d at 68, 306 Ill. Dec. 57, 856 N.E.2d 1152.

[27] *Dass v. Yale*, 3 N.E.3d 858 (Ill. App. 1st 2013).

> Here, there is no claim that Yale is liable under subsection (d), so Yale is not personally liable for the tort claim against Wolcott.[28]

In a 2011 case, the Illinois Appellate Court again applied the *Puleo* doctrine, holding that, "all claims against (members and managers) for personal liability must fail."[29] The plaintiff had claimed that it was cheated out of a 2.5% commission owed under an exclusivity agreement when the defendant arranged financing through a different source. In dismissing the case against member Lawrence Sisk personally, and against additional LLC's that acted as managers of the main defendant LLC, the court succinctly stated that:

> First, we note that defendants Sisk and the Sisk Companies as managers or members of LLC's are shielded from personal liability. See *Puleo v. Topel*, 368 Ill.App.3d 63, 70 (2006) (the Illinois Limited Liability Act does not provide for a member or manager's personal liability to a third party for an LLC's debts and liabilities). Thus, all claims against them for personal liability must fail.[30]

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[28] *Id.*at 866.
[29] *Johnson v. Sisk Companies, LLC,* 2011 IL App (1st) 103847-U, (appears incomplete, please confirm citation)
[30] *Id.*at ¶ 19.

In another 2011 case, the dispute at issue centered on the purchase of a Bentley automobile form a dealership. The plaintiff sued the dealership, an LLC, and its manager, Marc Iozzo, personally. The Illinois Appellate Court made it clear that an LLC member or manager has no personal liability, regardless of whether claims arise out of tort or out of contract.[31]

The rule in Illinois is that a member or manager of an LLC may avoid personal liability for tortious conduct simply by not agreeing to assume personal liability in the Articles of Organization. This creates a type of super business entity, where members and managers enjoy absolute immunity from personal liability.

C. Immunity from Personal Liability Based on Piercing of the Veil of Limited Liability

One area of Illinois LLC law remains unsettled: whether *Puleo* and its progeny preclude the imposition of personal liability on LLC members when courts pierce the veil of limited liability. The Illinois Appellate Court has stated that whether piercing of the veil of limited liability applies to an Illinois LLC, as opposed to an Illinois corporation, is "far from settled in Illinois."[32] The court applied the doctrine in that case "because the parties assumed

[31] *Tahir v. Imp. Acquisition Motors, LLC.*, WL 2836714, at *2 (N.D. Ill. 2010).

[32] *Cohen v. Basil, 2013* 120785-U, ¶ 45 (Ill..App. 2 Dist., 2013).

that "veil piercing" applied to limited liability businesses," finding that the veil should not be pierced under the facts of the case.[33]

Subsequently, the Illinois Appellate court stated that "no Illinois case has held that the doctrine of piercing the corporate veil applies to an Illinois limited liability company (LLC)."[34] The court went on to apply the doctrine "because neither party contends that the doctrine of piercing the corporate veil does not apply to an Illinois LLC, for purposes of this case," finding again that the facts in the case did not support application of the doctrine.[35]

In a somewhat confusing and inconstant ruling in 2008, the Illinois Appellate Court held that piercing of the veil of limited liability applied to a Delaware, LLC that was doing business in Illinois.[36] The court first concluded that Delaware law governed the issue:

> iMatchNetwork is a Delaware limited liability company. "Efforts to pierce the corporate veil are governed by the law of the state of incorporation." *Retzler v. Pratt & Whitney Co.*, 309 Ill.App.3d 906, 917, 243 Ill. Dec. 313, 723 N.E.2d 345 (1999). Therefore, Delaware law applies to this issue.[37]

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[33] *Id.*at ¶ 45.
[34] *Seater Const. Co. v. Deka Investments, LLC*, 2013 IL App (2d) 121140-U, ¶ 39 (Ill..App. 2 Dist., 2013).
[35] *Id.*at ¶ 39.
[36] *Westmeyer v. Flynn*, 382 Ill. App. 3d 952, 889 N.E.2d 671 (2008).
[37] *Id.*at 676.

The court found that:

> The doctrine of piercing the corporate veil applies to Delaware corporations. "Delaware law allows a court to pierce the corporate veil of an entity when there is fraud or when a subsidiary is the alter ego of its owner." *In re Kilroy*, 357 B.R. 411, 425 (Bankr. S.D. Tex. 2006); see *SR International Business Insurance Co. v. World Trade Center Properties, LLC*, 375 F.Supp.2d 238, 243 (S.D.N.Y.2005), quoting *Geyer v. Ingersoll Publications Co.*, 621 A.2d 784, 793 (Del.Ch.1992) . . . .

Delaware's LLC statute is silent on the issue of piercing of the corporate veil.[38] The court concluded, however, that, under Delaware law, "a limited liability company should be subject to the same treatment as a corporation." Westmeyer v. Flynn, 382 Ill. App. 3d 952, 958, 889 N.E.2d 671, 677 (2008)"for liability purposes, a limited liability company should be subject to the same treatment as a corporation." The court went on to hold that:

[38] *See* Del. Code Ann. Tit. 6, § 18–303 (2006).

> We conclude that under Delaware law, the doctrine of piercing the corporate veil applies to a limited liability company. Just as with a corporation, the members of an LLC are not generally liable for the obligations of the LLC. However, under Delaware law, just as with a corporation, the corporate veil of an LLC may be pierced, where appropriate.

The defendant also argued that the *Puleo* doctrine barred piercing of the veil of limited liability in an LLC. The court could have stated that Delaware law governed the outcome, making *Puleo* irrelevant. Instead, the court distinguished *Puleo*, suggesting that piercing of the veil of limited liability might be allowed in the case of an Illinois LLC:

> . . . *Puleo* did not address the doctrine of piercing the corporate veil. Moreover, while the Act provides specifically that the failure to observe the corporate formalities is not a ground for imposing personal liability on the members of an LLC, it does not bar the other bases for corporate veil piercing, such as alter ego, fraud or undercapitalization. See 805 ILCS 180/10–10(d) (West 2004).

This language is *dicta*, because the court had already

ruled that Delaware law governed the case. However, it does suggest that the Illinois Appellate Courts might be willing to apply piercing of the veil of limited liability to an Illinois LLC. Notwithstanding, the court's reasoning here is suspect. Its holding is based on the conclusion that Delaware corporate law applies to Delaware limited liability companies, and specifically that members can be held liable in the same circumstances as corporate shareholders. *Puleo* is based on the premise that the amendment to the Illinois LLC statute removed language that made LLC members liable to the same extent as corporate shareholders:

> In 1998 *** the legislature amended section 10–10 and in doing so removed the above language which explicitly provided that a member or manager of an LLC could be held personally liable for his or her own actions or for the actions of the LLC to the same extent as a shareholder or director of a corporation could be held personally liable. As we have not found any legislative commentary regarding that amendment, we presume that by removing the noted statutory language, the legislature meant to shield a member or manager of an LLC from personal liability. *Drury Displays, Inc.*, 327 Ill.App.3d at 888, 261 Ill. Dec. 875, 764 N.E.2d

> 166 ("When a statute is amended, it is presumed that the legislature intended to change the law as it formerly existed").[39]

In a 2009 case, a federal bankruptcy court for the Central District of Illinois seized on this *dicta,* and held that Illinois law allows piercing of the veil of limited liability in the case of an LLC:

> Creating a super business entity which would shield all wrongdoing and bar all civil causes of action against controlling owners of LLCs even for the most egregious acts of fraud or other wrongdoing would serve no public purpose. Thus, absent a clearly expressed intent of the Illinois legislature to create such an entity, this Court will not presume that such an entity exists. Accordingly, this Court will join the *Westmeyer* court and find that veil piercing is available with respect to members and managers of Illinois LLCs under traditional veil piercing theories such as alter ego, fraud, or undercapitalization.[40]

[39] *Puleo v. Topel*, 856 N.E.2d 1152, 1157 (Ill. App. 2006).
[40] *In re Suhadolnik*, No. ADV 08-7116, 2009 WL 2591338, at *4 (Bankr. C.D. Ill. Aug. 20, 2009).

As this decision is from a federal bankruptcy court, it is of limited precedential value. The value of the case is limited further given that the court based its decision, in part, on its disagreement with the *Puleo* court. Further, two premises the court used to justify its decision have already been rejected by the Illinois appellate court. An Illinois appellate court has already ruled that LLC members and managers are insulated from personal liability for fraudulent conduct.[41] The Illinois Appellate Court has rejected the argument that the interpretation of the ULLCA should govern the Illinois Act, noting that Illinois did not adopt the comment to the ULLCA.[42]

The case does, however, suggest one argument that Illinois courts could use in the future to allow piercing of the veil of limited liability of an LLC: The fact that the amendment to Illinois LLC law eliminated one ground for piercing of the veil of limited liability in an LLC, without eliminating other grounds, suggests the possibility that other grounds are available. The final resolution of this issue is difficult to predict.

D. The Illinois Super Business Entity is Unique

The Illinois LLC "super business entity" is unique. The Wisconsin appellate Court had ruled that the Wisconsin LLC shield insulated members and managers from personal liability for tortious

[41] *Dass v. Yale*, 3 N.E.3d 858 (Ill. App. 1st 2013).
[42] *Id.*at 858.

conduct,[43] but this decision was overturned by the Wisconsin Supreme Court.[44] In an unpublished decision, the Kentucky Supreme Court held that the Kentucky LLC shield insulated members and managers from personal liability for tortious conduct.[45] The Court reasoned in part that, "an LLC cannot act except through its representatives," so to hold otherwise would make members and managers personally liable by default when disputes arose with third parties.[46] In response, the Kentucky legislature amended 275 KRS 275.150 by adding Section (3), which provides that the LLC limited liability shield, "shall not affect the liability of a member, manager, employee, or agent of a limited liability company for his or her own negligence, wrongful acts, or misconduct."[47]

The situation in Illinois also was unique. The original LLC statute imposed liability on members and managers to the same extent as shareholders and directors/officers in a corporation. By repealing that language, the legislature set up the possible interpretation that LLC members and managers should no longer be liable in the way corporate actors are. As personal liability exceptions to a limited

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[43] *Brew City Redevelopment Grp., LLC v. The Ferchill Grp.,* 714 N.W.2d 582, *aff'd sub nom. Brew City Redevelopment Grp., LLC v. Ferchill Grp.,* 724 N.W.2d 879 (Wis. Sp. Ct. 2006).
[44] *Brew City Redevelopment Grp., LLC v. Ferchill Grp.,* 724 N.W.2d 879 (Wis. Sp. Ct. 2006).
[45] *Barone v. Perkins,* 2008 WL 2468792 (Ky. Ct. App. June 20, 2008).
[46] *Id.*at *4.
[47] *See* 2010 Acts Ch. 133 § 31.

liability shield developed in the context of corporations, the end result of this interpretation is absolute immunity from personal liability.

E. Ethical Implications of the Puleo Doctrine

The *Puleo* doctrine has serious public policy implications. The protections that are afforded to LLC members and managers, and, conversely, the detriments that befall plaintiffs who are suing based on agency law or tortious conduct, are substantial. Other courts have held that similar language preserves common law personal liability for commission of a tort.[48] The court was persuaded partly by the legislature's elimination of the express language that had made a member or manager personally liable to the same extent as a shareholder or officer in a corporation, coupled with a lack of legislative history that would justify a different interpretation. The court also was bound by 805 Ill. Comp. Stat. Sec. 180/10-10(a), which clearly states that "*Except as otherwise provided in subsection (d) of this Section*, the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company... (emphasis added)."

Perhaps this criticism is misdirected and should be placed on the Illinois legislature. The Illinois legislature appears to have created a limited

[48] *See* Comment to Section 304(a) of the Uniform Limited Liability Company Act (2006) (last amended 2013).

liability shield with no exceptions, other than consent to personal liability by an LLC member or manager which can easily be avoided if it is provided at all. As the *Puleo* court said, "We agree with plaintiff that the circuit court's ruling does not provide an equitable result, the circuit court, like this court, was bound by the statutory language."[49]

The creation of a super business entity, where owners enjoy near absolute immunity from liability, including liability for intentional misconduct, represents a significant exception in the law. It is reasonable to expect such changes would engender a meaningful debate in the Illinois legislature. As the *Puleo* court noted, however, there is no evidence the issue was ever discussed, much less debated, in the legislature.[50] As the origins of the doctrine date back to 2006, even the Illinois legislature did not intend this result

There is some strength to the argument that the Illinois Appellate court went too far in shielding LLC members from personal liability. The shield now extends to all tortious conduct, including willful misconduct, and even to situations where there was no principal at the time the member acted. It is unlikely that most people would agree that an agent should be shielded from personal liability when they engaged in intentional misconduct, even if the principal is liable under *respondeat superior*. Intentional misconduct could very well result in criminal charges, which would act as a deterrent.

[49] *Puleo v. Topel*, 856 N.E.2d 1152, 1158 (2006) (Ill. App. 2006).
[50] *Id.*at 1157.

Shielding the agent from liability where there was no principal at the time the agent acted will almost certainly mean that the plaintiff has no remedy at all because the LLC also would not likely be liable under any theory.

F. The Future of the Puleo Doctrine

It is possible that the Illinois Supreme Court will rule differently than the Appellate Courts in the future, or that the Illinois LLC statute will be amended. Given that the Illinois Appellate Court decisions were rendered between 2006 and 2016, however, with no responsive action from either the Illinois Supreme Court or Illinois legislature, the *Puleo* doctrine stands well entrenched. A federal trial court even predicted that ultimately the Illinois Supreme Court will embrace the *Puleo* doctrine.[51] It thus appears that Illinois has created a type of super business entity where LLC members and managers enjoy absolute, or near absolute, immunity from liability, even in the case of fraud. The only outstanding issue is whether this immunity will extend to piercing of the veil of limited liability of an Illinois LLC.

G. Professional LLC's Are Excluded

As legal precedent in Illinois, the *Puleo* decision presents a unique opportunity for a member

[51] *Aqua Thick, Inc. v. Wild Flavors, Inc.*, No. 08 C 6278, 2009 WL 4544696 (N.D. Ill. Dec. 1, 2009).

or a manager to avoid the imposition of personal liability through a limited liability shield. It is clear, however, that the opportunity to avoid personal liability is not available to professionals who operate as LLC's in Illinois. Illinois is one of many states where professionals are governed by a separate limited liability company law with a separate limited liability shield. Unlike the general LLC shield, this shield is clear cut:

> Nothing contained in this Act shall be interpreted to abolish, repeal, modify, restrict, or limit the law in effect in this State on the effective date of this Act that is applicable to the professional relationship and liabilities between the person furnishing the professional services and the person receiving such professional services or the law that is applicable to the standards for professional conduct. Any manager, member, agent, or employee of a professional limited liability company shall remain personally and fully liable and accountable for any negligent or wrongful acts or misconduct committed by him or her or by any person under his or her direct supervision and control while rendering professional services on

> behalf of the professional limited liability company.[52]

The Illinois Professional Limited Liability Company Act became effective on August 3, 2015, subsequent to *Puleo a*nd its progeny. As a result, these cases did not examine the impact of the Act. The language is clear and precludes arguments that the revision of the general Illinois LLC statute supersedes the LLC that governs professionals. The shield that governs professionals who operate in the form of an Illinois LLC was enacted after the revision of the general LLC law. This language establishes a carve out from the limited liability shield that allows for personal liability on professionals for negligent and other wrongful conduct when they operate in the form of an Illinois LLC.[53]

The definition of the term "professional services" varies by state, but may be limited to occupations that establish a professional relationship with a client, or patient, as opposed to "blue collar" occupations that render services to customers. Section 34-101(25) provides that:

> "Professional service" means any

[52] 805 Ill. Comp. Stat. Sec 185/35(a). This language is fairly commonplace. *See, e.g.,* CGS Sec. 34-133(b).

[53] Under 805 ILCS Comp. Stat. Sec. 185/5, "professional services" includes those services "that require the individuals engaged in the profession to be licensed by the Department of Financial and Professional Regulation."

> type of service to the public that requires that members of a profession rendering such service obtain a license or other legal authorization as a condition precedent to the rendition thereof, *limited to the professional services rendered by* dentists, naturopaths, chiropractors, physicians and surgeons, doctors of dentistry, physical therapists, occupational therapists, podiatrists, optometrists, nurses, nurse-midwives, veterinarians, pharmacists, architects, professional engineers, or jointly by architects and professional engineers, landscape architects, real estate brokers, insurance producers, certified public accountants and public accountants, land surveyors, psychologists, attorneys-at-law, licensed marital and family therapists, licensed professional counselors, licensed or certified alcohol and drug counselors and licensed clinical social workers (emphasis added).

Other states, including Illinois, have a much broader definition of professional services. The sheer breadth of the definition of "professional services" in Illinois is problematic for anyone who wants to take advantage of the Illinois super business entity. Section 185/5 defines professional services to include any "profession to be licensed by the

Department of Financial and Professional Regulation." As this definition includes virtually any occupation that requires a state license, it encompasses approximately 127 different occupations, including barbers, nail technicians, alarm installers, and roofers.[54] This limits the Illinois LLC super business entity. Despite this limitation, forming an LLC in Illinois for other purposes can provide significant protection by insulating members and managers from personal liability for tortious and other conduct, provided Illinois law applies when the LLC is operating in other jurisdictions. A sound approach would be to check the Illinois list of "professional occupations" and to form an LLC in Illinois if the activities of the business do not fall within the list. In some other cases where professional services are involved, with the notable exception of accountants and lawyers, the Economic Loss Doctrine could act as a viable defense against the imposition of personal liability.[55]

Personal liability for tortious conduct is not limited to individuals who provide professional services, despite the fact that the professional shield has an express carve out, while the general shield doesn't. For example, the Connecticut Supreme

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[54] *See Professions Regulated by IDFPR,* Ill. Dep't of Fin. & Prof'l Regulation, http://www.idfpr.com/profs/proflist.asp (last accessed February 5, 2017).

[55] *See* also Nicholas C. Misenti, *Personal Liability for Commission of a Tort: A Significant, and Often Overlooked, Exception to Limited Liability in the LLC and Corporation,* 8 S. J. BUS. & ETH. 11 at p.8 (2016).

Court held that a contractor operating in the form of an LLC could be held personally liable for tortious conduct, even though contractors do not come under the definition of individuals who provide professional services under Connecticut law.[56] The court stated: "The defendant's analysis fails, however, to acknowledge our well established common-law exception to individual liability in a corporate context for an individual's tort liability."[57]

VI. ILLINOIS LAW *MAY* GOVERN AN ILLINOIS LLC DOING BUSINESS OUTSIDE OF ILLINOIS

The Illinois LLC super business entity allows anyone organizing a business, other than a business that will render professional services, to avoid personal liability based on agency law or tortious conduct. Protection exists outside of Illinois only if Illinois law will govern the limited liability shield when the LLC is operating in other states.

The general rule is that law where the LLC is domiciled governs the "internal affairs" of the LLC,[58] but a legal issue exists as to whether the limited liability shield comes under the heading of "internal affairs." Anticipating this issue, Section 104 of the Uniform Limited Liability Company Act (ULLCA) (2006) *(Last Amended 2013)* provides that:

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[56] *Sturm v. Harb Dev., LLC*, 2 A.3d 859, 868 (2010) (Conn. 2010).
[57] *Id.*at 868.
[58] See Comment to Section 304 of the Uniform Limited Liability Company Act (2006) (last amended 2013).

> The law of this state governs:
> (1) the internal affairs of a limited liability company; and
> (2) the liability of a member as member and a manager as manager for a debt, obligation, or other liability of a limited liability company.

The Comment to Section 104 notes that the majority rule is that the law where the LLC is domiciled governs liability of its members. The Illinois LLC statute does not incorporate the language that is found in Section 104 of the ULLCA, and, in fact, is silent on the issue. Section …., however, 805 Ill. Comp. Stat. Sec 180/45-1 provides that:

> (a) The laws of the State or other jurisdiction under which a foreign limited liability company is organized govern its organization and internal affairs and the liability of its managers, members, and their transferees.
> (b) A foreign limited liability company may not be denied admission by reason of any difference between the laws of another jurisdiction under which the foreign company is organized and the laws of this State.

Similar language is found in other states. For instance, CGS Sec. 34-222 provides that:

> Subject to the Constitution of this state, the laws of the state or other jurisdiction under which a foreign limited liability company is organized shall govern its organization and internal affairs and the liability of its managers and members. A foreign limited liability company may not be denied registration by reason of any difference between those laws and the laws of this state.

If a foreign jurisdiction has a similar provision to 805 Ill. Comp. Stat. Sec 180/45-1, or CGS Sec. 34-22, then the outcome *should be* that a member or manager of an Illinois LLC operating as a foreign entity has no personal liability due to the limited liability shield. The majority rule also supports this conclusion.

On the other hand, absolute or near absolute, immunity from personal liability, even in the case of fraud, would be controversial. That the Illinois super entity doctrine is unique, and attempts in Wisconsin and Kentucky to do something similar have been thwarted, demonstrates this fact.[59] It is likely that courts would look for a public policy exception to the majority rule, especially if states in foreign jurisdictions do not have a clear cut statutory provision similar to Section 104 of the ULLCA.

[59] *See* fn 45 and fn 48.

The Comment to ULLCA Section 104 suggests one possible way this outcome could occur, and explains why paragraph (2) was included in Section 104:

> "Internal affairs" and the "liability of a member as a member" are mentioned separately because it can be argued that the liability of members and managers to third parties is not an internal affair. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 307 (1971) (treating shareholders' liability separately from the internal affairs doctrine). A few cases subsume owner/manager liability into internal affairs, but many do not. See, e.g., Kalb, Voorhis & Co. v. Am. Fin. Corp., 8 F.3d 130, 132 (2nd Cir. 1993) (holding that the corporation's "primary purpose is to insulate shareholders from legal liability" and therefore "the state of incorporation has the greater interest in determining when and if that insulation is to be stripped away") (quoting Soviet Pan Am Travel Effort v. Travel Comm., Inc., 756 F. Supp. 126, 131 (S.D.N.Y. 1991) (internal quotation marks omitted).

In short, in jurisdictions that have a provision that merely provides that the law of the domestic jurisdiction governs the "internal affairs" of a foreign LLC, and that treat shareholders' liability separately from the internal affairs doctrine, it's a real possibility that the Illinois LLC super business entity rule would be rejected. Consequently, whether Illinois law would govern liability of members and managers in a foreign jurisdiction would have to be determined on a state by state basis.

VII. CONCLUSION

Illinois has essentially created a supper business entity in the form of the Illinois LLC, where members and managers enjoy absolute, or near absolute immunity from personal liability. The Illinois LLC exists as the only entity that can shield members and managers from liability for tortious conduct, when acting for a nonexistent entity, an undisclosed entity, or an unidentified entity, or as an unauthorized agent, and, potentially, in the context of piercing of the veil of limited liability. Risks of personal liability in each situation are significant. Tthe protections that afforded by an Illinois LLC are significant. Illinois law *should* govern the personal liability of an Illinois LLC, irrespective of where it is operating, provided a foreign jurisdiction has a specific provision stating that the law of the domestic jurisdiction governs liability of the LLC's members and managers. A sound practice for business owners from any state would be to form an LLC in Illinois, keeping this issue in mind. An Illinois LLC that

renders "professional services" is governed by a separate limited liability shield, which doesn't' afford members and managers these protections. The list of occupations that are deemed to be rendering professional services under Illinois law is extensive, encompassing approximately 127 different occupations, which limits the Illinois LLC planning opportunity. Therefore, a review of the list law should first be undertaken.[60] Where an occupation is on the list, no advantage is gained by forming the LLC in Illinois. On the other hand, where professional services are not involved, the added costs and clerical burden in forming an LLC in Illinois are far outweighed by the protections from personal liability that are afforded to members and managers.

There is no evidence of any debate or discussion in the Illinois legislature as to whether the intent of amending the LLC limited liability shield was to confer on LLC members and managers absolute, or near absolute, immunity from personally liability. However, there is no doubt that legislatures have the power to eliminate the common law rule that imposes personal liability on LLC members or managers, despite a limited liability shield. The Illinois legislature has had ample time to change the statute if that was not its intent. By not acting, the

[60] *See Professions Regulated by IDFPR,* Ill. Dep't of Fin. & Prof'l Regulation, http://www.idfpr.com/profs/proflist.asp (last accessed February 5, 2017).

Illinois legislature has in effect ratified the *Puleo* doctrine. The result is the super business entity, and absolute, or near absolute immunity from personal liability for Illinois LLC members and managers.

COULD YOU REPEAT THE QUESTION? HOW MEDIA DISTRACTIONS DETRACT FROM LEARNING AND A COURTEOUS CLASSROOM ENVIRONMENT

NINA GOLDEN*

I. INTRODUCTION

College professors in the digital age face challenges that their predecessors did not. While rude students are nothing new (a 13th Century bishop commented about his students: "They attend classes but make no effort to learn anything!"[1]) there are decidedly new ways for them to show disrespect to their professors. With virtually all college students

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The author would like to thank Dr. Beth Lasky, Professor, Department of Special Education at California State University, Northridge, for her assistance with the initial research for this article, and Kurt Saunders, Professor, Department of Business Law, California State University, Northridge for his encouragement and support.
[1] C. M. Dzubak, Classroom Decorum: What's Happening and Does it Matter?, The Association for the Tutoring Profession, available at: *https://www.myatp.org/wp-content/uploads/2015/04/Synergy-Vol-2-Dzubak1.pdf at 3.*

cell phone owners,[2] texting in class has become epidemic, with computer ownership, often accompanied by laptop usage in class, also common.[3] Media distractions, such as Facebook and texting, have led to a generation of students who have difficulty focusing solely on course content, resulting in consequences such as lower grades.[4] And while students may assert that they are entitled to choose how they spend their time in class, that perspective fails to account for the impact that their actions have on their own learning, their classmates' learning, and their professor. This paper will examine civility, media distractions, where they intersect, and make recommendations for improving the learning environment in today's college classrooms. Part I will examine the decline of civility, and the impact that decline has had on students' behavior in the classroom. Part II will discuss the effect that media distractions have on learning, focusing on both laptop computers and cell phones. Finally, Part III will offer suggestions for how college professors can address the lack of civility demonstrated by their students through the use of their digital devices in the classroom.

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[2] Kelly Truong, *Student Smartphone Use Doubles; Instant Messaging Loses Favor*, The Chronicle of Higher Education, June 17, 2010, *available at*: http://chronicle.com/blogs/wiredcampus/student-smartphone-use-doubles-instant-messaging-loses-favor/24876

[3] Barbara E. Weaver & Linda B. Nilson, *Laptops in Class: What Are They Good For? What Can You Do With Them?*, 101 NEW DIRECTIONS FOR TEACHING AND LEARNING 3 (2005).

[4] *See* discussion *infra* Section II.

II. CIVILITY IN THE CLASSROOM

A. *The impact of politics*

The decline of civility in American society in general may help to inform and explain the lack of civil behavior of some of today's college students. Inevitably, the discussion begins with politics. The results of the September 2016 Zogby survey contrasted sharply with an Allegheny College 2010 survey on civility, showing that the 2016 election appeared to be "the most uncivil in recent American politics. And the uncivil behavior appears to be numbing the electorate."[5] In 2010, 89% of respondents judged commenting on someone's race or ethnicity in politics as unacceptable, but by 2016, that number plummeted 20 points to 69%.[6] In another significant drop, 81% of 2010 respondents found commenting on someone's sexual orientation improper, while in 2016 only 65% found that to be the case.[7] Even more dramatic was the increased tolerance in 2016 for behavior that in 2010 a strong majority of respondents found objectionable. Actions such as insulting someone or attacking those

[5] John Zogby, *2016 Presidential Campaign Reveals Chilling Trend Lines for Civility in U.S. Politics*, (October 17, 2016, 10:39 AM) https://zogbyanalytics.com/news/757-2016-presidential-campaign-reveals-chilling-trend-lines-for-civility-in-u-s-politics.
[6] *Id.*
[7] *Id.*

with whom you disagree were tolerated at a higher rate. Perhaps most striking was the 21% drop in objection to shouting over a person's opponent in an argument (from 86% to 65%), and questioning people's patriotism if they have a different opinion (from 73% to 52%).[8] With fewer people opposed to uncivil behavior, and a greater number of people indicating a higher tolerance for it, it is not surprising that the lack of attention to, and prioritizing the importance of, civil behavior has found its way into the classroom.

B. *Civility and millennials*

In the fifth installment of *Civility in America*,[9] the survey focused on millennials, who presumably make up most of today's college students.[10] Despite the breakdown by generation, a majority of those surveyed agreed "that incivility has reached crisis proportions in America."[11] As to who (or what) to blame for the lack of civility, results differ by age. Younger Americans blame the internet and social media, and older Americans blame either politicians primarily, or multiple sources.[12] Overall, most Americans agree that the internet encourages

[8] *Id.*

[9] Weber Shandwick et al., *Civility in America 2014*, http://www.webershandwick.com/uploads/news/files/civility-in-america-2014-infographic.pdf.

[10] For purposes of the survey, members of the millennial generation were born between 1980 and 1996, though that range may vary depending on the study or article. *Id.*at 2.

[11] *Id.*at 3.

[12] *Id.*at 5.

incivility.[13] While most Americans also agree that insufficient action is taken against those who act uncivilly, millennials are the generation least likely to hold this opinion. One possible explanation may be millennials are the most accustomed to the lack of civility of society, viewing it as the norm.[14] This explanation appears consistent with the survey's finding that more than any other generation, millennials accept incivility as part of the political process.[15]

Tolerance for a lack of civility is evident in college classrooms, where college professors find themselves teaching more than just the listed subject of their courses. Whether the class is physics or business law or creative writing, certain lessons that encompass civility and professionalism are universal across disciplines. Such lessons include everything from interacting respectfully with an authority figure to showing up for class on time. These lessons may or may not be explicit. Some may argue that students should start their college careers already armed with this knowledge. Nonetheless, professors are doing a disservice to their students if they assume that when mastering a course's specific subject matter, students automatically and concurrently master the necessary skills to succeed both in college and in the workplace.

C. *The impact of incivility in the classroom*

[13] *Id.*at 9.
[14] *Id.*at 12.
[15] *Id.*at 15.

Civility refers to showing respect to those we know, as well as those we do not know, and to engaging in self-restraint in order to get along better with others.[16] How many times during a class session do professors find themselves asking students not to yell out the answers, and instead wait their turn to be called upon? Or request that they be allowed to finish their thought before being interrupted by a question? But more than just listening to words, civility also means paying attention to the speaker's body language, tone and other nonverbal cues that add to the meaning of what the speaker is saying.[17] When students focus on what is on their computer screen or cell phone, they miss these cues. Missing cues become missed opportunities to improve interpersonal skills that can serve them well in life in general and in the workplace in particular.

Neuroscience indicates that civility aids people's emotional health by creating a positive, pleasant environment for social interactions. This, in turn, allows them to learn more effectively because, "When people feel good, they work at their best. Feeling good lubricates mental efficiency, making people better at understanding information and using decision rules in complex judgments, as well as more

[16] Sophie Sparrow, Practicing Civility in the Legal Writing Course: Helping Law Students Learn Professionalism, 13 LEGAL WRITING: J. LEGAL WRITING INST. 113, 120 (2007).
[17] *Id.*at 121.

flexible in their thinking."[18] Maintaining rules of common courtesy in the classroom benefits both the professor and the students. The professor can focus on the course's subject matter, rather than correcting the students' behavior; the students are better able to process the information when fewer distractions are present. By engaging in uncivil behavior, students not only "miss valuable learning time, they also may interfere with the learning of those around them."[19] From a practical standpoint, students also benefit from acting civilly. The more they can show their classmates and professors that they are honest, have integrity, and treat others with respect, the more likely they are to receive stellar letters of recommendation and be successful at making contacts that could lead to job opportunities or potential clients.[20]

Since professors have different notions of what constitutes civil behavior in the classroom and what does not, one study examined the topic from the students' perspective to evaluate what *they* viewed as uncivil. This study posed two related questions to the students: which behaviors the students viewed as most uncivil, and how frequently did those behaviors

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[18] Daniel Goleman et al., *Primal Leadership: Realizing the Power of Emotional Intelligence* 253-256, app. B. (Harvard Bus. Sch. Press 2002).

[19] Jennifer L. Schroeder & Harvetta Robertson, *Civility in the College Classroom*, Association for Psychological Science, APS Observer (November 1, 2008), http://www.psychologicalscience.org/observer/civility-in-the-college-classroom#.WOZyulKZO9Y.

[20] Sparrow, *supra* note 16, at 131.

occur.[21] Researchers found that what the students considered to be the most egregious behaviors (*e.g.*, coming to class under the influence, continuing to talk after being asked to stop) did not occur very frequently. But behaviors judged as being moderately uncivil happened with great frequency: allowing a cell phone to ring; using a computer for non-class work; arriving late or leaving early; packing up before lecture concluded; and text messaging.[22] To understand why these behaviors occur with such frequency, one only has to look at the world around us to see daily examples of incivility (*e.g.*, how people drive – cutting other drivers off, honking unnecessarily, and driving while holding a phone). Not only are students accustomed to a certain level of incivility in their everyday lives, but they are also used to multiple sources of stimulation that allow for fast responses and instant gratification.[23] Effective teaching and learning depend on the transmission of information and discussion requiring listening, thought, and active discussion. Those activities are very difficult to accomplish in combination with technological interruptions, ineffective classroom management, and rude or discourteous behavior by students.[24] Texting or utilizing any number of social media sites exemplify quick interactions that do not require deep

[21] *Id.*
[22] Wendy L. Bjorklund and Diana L. Rehling, *Student Perceptions of Classroom Incivility*, 58 COLLEGE TEACHING 15, 17 (2010).
[23] Dzubak, *supra* note 1, at 2.
[24] *Id.*

thinking, analysis, or problem solving. These quick, on-line interactions prevent students from being involved in the class and can disturb students around them. Additionally, by engaging in these diversions, students show a lack of respect for the professor. While instructors are most concerned with how devices such as cell phones can distract students from learning, they also found students' use of phones in class to be disrespectful.[25] Interestingly, despite their use of cell phones for non-classroom activities, students agreed. "The most frequently cited reason for why students think checking cell phones or texting in class is unacceptable is because it is rude."[26]

When looking at the decline of civility in the classroom, studies focus on how student incivility can not only interfere with the learning environment and classroom learning, but also impact students' respect for and connection to their institutions.[27] With students and their parents viewing education as a commodity, professors are "treated as mere service providers in a consumer transaction, neither automatically feared nor revered."[28] If a college

[25] Michael J. Berry & Aubrey Westfall, *Dial D for Distraction: The Making and Breaking of Cell Phone Policies in the College Classroom*, COLLEGE TEACHING, 63:2, 62 – 71 (May 7, 2015), http://dx.doi.org/10.1080/87567555.2015.1005040.

[26] *Id.*

[27] Bjorklund and Rehling, *supra* note 22, at 15.

[28] Gadi Dechter, Not so long ago, most college instructors were treated with dignity and respect, THE BALTIMORE SUN, Ideas Section, 1F (January 28, 2007).

education is a product that students (and their parents) have purchased, they are more likely to look at their professors as individuals who owe them services rather than as trained professionals who deserve respect and courteousness.[29] Some students believe they have the right to do as they please in class because after all, they are the customers, and they should be kept happy. One freshman commented that professors shouldn't embarrass students who are texting or surfing the web in class: "We pay attention when we want to…This is my time, this is my money. The teacher is paid to be here. He should try to be a good employee."[30]

Students accustomed to the instant gratification of performing a Google search and getting results in .16 seconds may not be willing or able to meet a professor's expectation that they take the time to listen thoughtfully to a lecture, ponder its meaning, and engage in a meaningful discussion about the subject matter.[31] Problems arise when students expect that professors will grab their attention as quickly as a tweet and professors expect that students will behave civilly and devote their undivided attention to the learning process. "What we are seeing in the classroom is a reflection of our society; fast pace, a lack of civility, and tolerance for rudeness. Add to that the differences in attitudes, motivations, and expectations that exist between the faculty and the students and we have the formula for

[29] Dzubak, *supra* note 1, at 4.
[30] Dechter, *supra* note 28.
[31] Dzubak, *supra* note 1, at 5.

significant classroom differences and conflict."[32] Both students and professors benefit from understanding the correlation between civility and learning: if the professor has to take time to manage rude and disruptive behavior, it impacts the learning of the entire class. Yet if professors fail to address incivility in the classroom, whether it's a student actively (arguing loudly) or passively (texting during class) being rude, they do a disservice to all students. Doing nothing sends the message that the professor condones the behavior and provides no motivation for the students to change it.[33] To the contrary, the students will see that they, or their classmates, can continue engaging in the behavior without experiencing any consequences. Such lack of consequences gives students the idea that they can behave similarly in other classes as well. Failing to set an example for students by disciplining misconduct both facilitates and perpetuates that which requires correcting.[34] By stressing the importance of civil behavior, professors assist students to be more successful since "[a] lack of civility…can lead to failure in the classroom and later in the boardroom."[35]

III. MULTITASKING, TASK SWITCHING, AND MEDIA DISTRACTIONS

[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] Schroeder & Robertson, *supra* note 19.

A. *The prevalence of digital devices in the classroom*

Students are using their digital devices in the classroom with increasing frequency. A 2015 survey investigated to what extent college students used digital devices in the classroom for non-classroom related purposes and how the distraction posed by those devices impacted their learning.[36] When asked how often they used digital devices in the classroom for activities such as texting, emailing, or tweeting, over 72% of students acknowledged using them from one to ten times, while almost 34% said they used them from 11 to more than 30 times.[37] A mere 3.26% reported never using them at all.[38] Of the activities the students engaged in, texting was the most frequent at 86.6%.[39] While students enjoyed using their devices to stay connected, almost 90% recognized that the distraction prevented them from paying attention.[40] Even as most students were using their devices for non-classroom related purposes, over half agreed that it would be helpful to have a classroom policy limiting such use,[41] while an overwhelming majority were opposed to an outright

[36] Bernard R. McCoy, Digital Distractions in the Classroom Phase II: Student Classroom Use of Digital Devices for Non-Class Related Purposes, 7 JOURNAL OF MEDIA EDUCATION 5 (2016), http://enotecalameo.com/read/00009178915b8f5b352ba.
[37] *Id.*at 11.
[38] *Id.*
[39] *Id.*at 12.
[40] *Id.*at 14.
[41] *Id.*at 19.

ban.[42] Compared to the results of a similar study done in 2013, students in the 2015 survey reported using digital devices for activities unrelated to the class at a higher frequency. The 2015 study found that on average, students were distracted almost 21% of the time they were in the classroom.[43] The number one reason students cited for using digital devices was boredom. This finding suggests both that students need "to learn more effective self-control techniques to keep them focused" and that "instructors might benefit from learning and experimenting with new ways to engage college students in classroom activities."[44]

B. *The impact of task switching on learning*

Texting, or Tweeting, or checking email, or engaging in a multitude of extraneous activities while in class, electronic or otherwise, is not solely discourteous or distracting. Multitasking, or more accurately, task switching, impacts a student's ability to learn, retain, and produce information, as well as the learning environment of the class as a whole. In order to learn, students have to pay attention to the information presented, process it, and then use it.[45]

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[42] *Id.*at 20.
[43] *Id.*at 27.
[44] *Id.*at 28.
[45] See Hillary Burgess, Deepening the Discourse Using the Legal Mind's Eye: Lessons from Neuroscience and Psychology that Optimize Law School Learning, 29 QUINNIPIAC L. REV. 1, 23 (2011).

Since the brain cannot possibly take in all available stimuli all the time, only the information paid attention to succeeds in entering short-term or working memory. [46] Some of the information from short-term memory then gets transferred to long-term memory, where it then must pass back through short-term memory to be accessed.[47] Psychologists may differ in classifying memory as short-term and long-term, or just placing it on a continuum where some memories are created by a more involved processing of the material.[48] But whichever way memory is formed, there must be an avenue to access the memories after the brain encodes and stores them.[49]

When task switching, students fail to pay full attention to the material being presented in class, which prevents the information from being encoded so that the brain can store, retain, and then retrieve it. With encoding classified as shallow, intermediate or deep, deeper encoding and processing "involves interpreting and understanding the material in a way other than surface characteristics, an analysis of purpose, and what can be inferred or implied by the information. The deeper the processing the longer

[46] *Id.*at 23 – 26.
[47] *See* Shailini Jandial George, *Teaching the Smartphone Generation: How Cognitive Science Can Improve Learning in Law School*, 66 MAINE L. REV. 164 (2013)(describing how memories are created, stored, and retrieved).
[48] Fergus I.M. Craik, *Levels of Processing: Past, Present…and Future?*, 10 MEMORY 305, 306 (2002).
[49] See Helene Hembrooke and Geri Gay, *The Laptop and the Lecture: The Effects of Multitasking in Learning Environments*, 15 J. COMPUTING HIGHER EDUC. 46, 50 (2003).

the item is retained and with more detail."[50] The ability to encode is limited, so when attention is divided, the brain cannot process the information deeply. Deeper processing leads to lasting memories, so the bigger the distraction, the greater the detrimental effect on memory. Distractions cause shallower processing, which, in turn, results both in remembering less, and remembering for less time.[51] Without attention, no memories can be created, and without memories, no learning can occur.[52] Learning new material can require "a substantial cognitive processing effort. While routine or familiar tasks can often be performed with relatively little cognitive effort, more complex, new, or unfamiliar tasks pose a cognitive processing load that may exceed the capacity of an individual's working memory."[53] The student who uses his laptop to text a friend or engage in any other behaviors unrelated to class effectively chooses not to learn the material presented in class while he is engaging in those behaviors. His side activities prevent him from forming memories sufficiently strong that they can later be retrieved. Without the ability to retrieve those memories, he is less likely to succeed when tested on the material he failed to learn due to his task switching during class.

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[50] Craik, *supra* note 48, at 306-308.

[51] Kevin Yamamoto, Banning Laptops in the Classroom: Is it Worth the Hassles?, 57 J. LEGAL EDUC. 477, 497 (2008).

[52] George, *supra* note 47, at 14.

[53] James M. Kraushaar & David C. Novak, Examining the Affects [sic] of Student Multitasking With Laptops During the Lecture, 21 J. INFO. SYS. EDUC. 241, 242 (2010).

C. *Task switching in the classroom*

Students think that they're multi-tasking when they're texting while listening to a lecture, or checking email while writing a paper. They are not. They are actually "task switching" and every time they switch from one task to another, they use different parts of the brain, which causes them to lose both time and efficiency. [54] Depending on what the student is switching back and forth between, additional time and energy is lost when the brain tries to pick up where it left off, or decide which task to focus on.[55] Despite many students' beliefs that they can switch back and forth between class-related material and non-class related material to no ill effect, evidence suggests otherwise. When students task switch in class, they make more memory errors, it takes them more time to learn topics that require a "significant cognitive load," they may be less able to recall and apply information to new situations, and they expend time and energy refocusing when they shift from one task to the next.[56]

The Unified Theory of the Multitasking Continuum explains task switching behaviors ranging from those that are virtually simultaneous (*e.g.*, taking notes while listening to a lecture) to those that are sequential (*e.g.*, writing a paper and

[54] George, *supra* note 47, at 17.
[55] *Id.*at 16.
[56] Kraushaar & Novak, *supra* note 53, at 241.

posting on Instagram).[57] The final part of the Theory addresses the latter type of task switching. When we switch from the first activity to the second activity, we must abandon the first activity and focus on the second one in order to complete it. It then takes time to refocus on the first activity. The first activity then takes more time to complete because of the time and energy spent focusing on the second activity.[58] Attempting either to attend to or process more than one task at a time overloads the capacity of the human information processing system, which results in real-world consequences due to the costs of task switching."[59] (One example of the high cost of task switching occurs when people talk on a cell phone while driving, leading to slower brake time and a higher incidence of rear-end collisions.)[60] So a student who updates her Facebook status in the middle of lecture and then resumes taking notes loses more than just the instruction time she spent posting on-line. She also loses the time it takes to figure out where the professor is in the lecture, and to regain her focus on the class. Losing mental energy and focus each time they switch between listening to lecture and texting, or between reading and surfing the web,

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[57] Larry D. Rosen, L. Mark Carrier, & Nancy A. Cheever, *Facebook and texting made me do it: Media-induced task-switching while studying*, 29 COMPUTERS IN HUMAN BEHAVIOR 948, 950 (2013).
[58] *Id.*
[59] Reynol Junco & Shelia R. Cotten, *No A 4 U: The relationship between multitasking and academic performance*, 59 COMPUTERS & EDUCATION 505, 506 (2012).
[60] *Id.*

ultimately can lead students not only to create fewer memories, but also to make more mistakes.[61] Student performance in law classes or any classes that require significant analytical functioning can suffer due to task switching. This negative impact is particularly the case when students engage in intellectually challenging work involving reasoning, analysis and problem solving.[62]

The issue with the distracting behaviors that college students frequently engage in while in class is that the same part of the brain is required for those extraneous behaviors and for class work. Psychology professor David Meyer studies how divided attention can affect learning and is unequivocal in his assessment of students' ability to multitask:

> Under most conditions, the brain simply cannot do two complex tasks at the same time. It can happen only when the two tasks are both very simple and when they don't compete with each other for the same mental resources. An example would be folding laundry and listening to the weather report on the radio. That is fine. But listening to a lecture while texting, or doing homework and being on Facebook - each of these tasks is very demanding, and each of

[61] George, *supra* note 47, at 22.
[62] *Id*.at 18

> them uses the same area of the brain, the prefrontal cortex.[63]

According to Meyer, students who think they can successfully perform two challenging tasks simultaneously "are deluded."[64]

D. *The impact of multi-tasking outside the classroom*

In addition to impacting learning in the classroom, media multi-tasking while doing class work outside the classroom also affects students' learning. Students do not remember material as well, they are less able to apply the information in different contexts, and their overall absorption of the material is less complete and thorough than if their schoolwork had their undivided attention.[65] There is a distinction between media multitasking and doing schoolwork, and media multitasking while engaging in other, less cerebral, activities. One study surveyed how 8- to 18-year-olds used media. The lead author of that study expressed concern regarding the study's findings on how multitasking affects learning, noting that, "It's multitasking while learning that has the

[63] Annie Murphy Paul, The New Marshmallow Test: Students Can't Resist Multitasking, (May 3, 2013, 10:45 AM), http://www.slate.com/articles/health_and_science/science/2013/05/multitasking_while_studying_divided_attention_and_technological_gadgets.html.
[64] *Id.*
[65] *Id.*

biggest potential downside...I don't care if a kid wants to tweet while she's watching American Idol, or have music on while he plays a video game. But when students are doing serious work with their minds, they have to have focus."[66]

California State University, Dominguez Hills psychology professor Larry Rosen oversaw a study in which observers noted how often during a 15-minute period did students do something other than studying. Even knowing that they were being observed, the middle school through college students spent only about 65% of the time doing their school work.[67] Doing things such as checking Facebook or texting diverted their attention from their "on-task behavior" only two minutes into the observation period.[68] This inability to maintain their attention on their schoolwork was consistent with their difficulty in maintaining their focus on his lecture. One way that Rosen addresses this problem is by purposely calling on students he sees using a cell phone while he is teaching. When asked what Rosen just said, the student is unable to answer the question.[69] Rosen notes that "Young people have a wildly inflated idea of how many things they can attend to at once, and

[66] *Id.*
[67] Rosen, Carrier, & Cheever, *supra* note 57, at 955.
[68] Paul, *supra* note 63.
[69] *Id.* (This author has repeatedly had the experience of calling on students who appear to be texting and having them ask, "Could you repeat the question?").

this demonstration helps drive the point home: If you're paying attention to your phone, you're not paying attention to what's going on in class."[70]

Multitasking while doing schoolwork negatively impacts academic performance in a variety of ways. Students take longer to complete the work, or do not learn it as well because of the distractions; students make more mistakes because of their divided attention when they switch back and forth between their school work and distracting activities, particularly when their homework calls for more formal language, and they interrupt that work to send texts, which use informal language.[71] If students are distracted when they are learning material, they either fail to recall it well, or do not recall it at all due to how the brain encodes information when first exposed to it. Some research indicates that when distracted, our brains do not use information in ways that are as useful as if we were not distracted. The brain utilizes a different type of memory when distracted, one that is not as flexible and able to be applied in different situations. All of the factors discussed lead to a negative correlation between students' grades and media multi-tasking.[72]

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[70] *Id.*
[71] *Id.*
[72] *Id.*

Studies indicate that multitasking does have a negative effect on the academic performance of students. In a study that measured what the impact would be when a peripheral task interrupted a primary task, researchers found that when interrupted, subjects perform their primary tasks from 3% to 27% slower than when not interrupted, commit twice the number of errors across tasks, and experience 31% to 106% more annoyance than when the peripheral task did not interrupt the primary one.[73] Examining the effects of Facebook and texting usage during studying on students' academic performance, a recent study found that both had a negative impact on students' overall GPA.[74] But more than just poor grades, Meyer believes that, "There's a definite possibility that we are raising a generation that is learning more shallowly than young people in the past...The depth of their processing of information is considerably less, because of all the distractions available to them as they learn."[75] Overall, "emerging research suggests that texting, Internet use, email, and social-networking sites such as Facebook can potentially increase multitasking and task-switching during

[73] Brian P. Bailey & Joseph A. Konstan, On the Need for Attention-Aware Systems: Measuring Effects of Interruption on Task Performance, Error Rate, and Affective State, 22 Computers in Hum. Behav. 685, 701-02 (2006).
[74] Junco & Cotten, *supra* note 59, at 511.
[75] *Id.*

academic activities and decrease academic performance."[76]

In fact, "[r]esearch on divided attention indicates that with few exceptions we have great difficulty attending to more than one thread of information at a time."[77] As previously mentioned, driving while on the phone has been found to impact negatively the time it takes to respond to things such as someone stopped in front of you. Texting while driving has an even more negative effect, likely because texting requires more attention and cognitive energy than talking on the phone.[78] Even though research on memory indicates that multitasking in the literal sense is not possible, students believe that they can perform two tasks at once, whether it is texting and driving or texting and listening to a lecture.[79] A study designed to examine whether or not task switching between texting and classroom instruction impacted learning found that it did, even when the material covered was relatively simple.[80] Students who had no access to phones

[76] Andrew Lepp, Jacob E. Barkley, & Aryn C. Karpinski, *The Relationship Between Cell Phone Use and Academic Performance in a Sample of U.S. College Students*, SAGE OPEN 1, 1-9 (2015), http://journals.sagepub.com/doi/full/10.1177/2158244015573169.
[77] Dakota Lawson & Bruce B. Henderson, *The Costs of Texting in the Classroom*, 63 COLLEGE TEACHING 119 (2015).
[78] *Id.*at 120.
[79] *Id.*
[80] *Id.*at 121.

performed better when quizzed on a video than the students who either received texts or those who both received and responded to texts.[81]

E. *Laptops*

1. The distraction of laptops in the classroom

Digital natives, a term used to describe those students who grew up with the Internet and who are as familiar with technology and computers as they are with English as a spoken language, populate today's college classes.[82] Many of them bring laptops to class. And while some do take notes on their laptops, others cannot resist the temptation to check their email, Facebook, Twitter, Instagram, or engage in a myriad of other activities available at their fingertips. One survey of law students found that they "overwhelmingly use their laptops for non-class related purposes."[83] An American University student remarked, "I use my laptop if the class is really boring," taking notes some of the time, "but when there is a lull in the class I buy stuff on e-Bay."[84]

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[81] *Id.*

[82] Joan Catherine Bohl, Generation X and Y in Law School: Practical Strategies for Teaching the "MTV/Google" Generation, 54 LOY. L. REV. 775, 776 (2008).

[83] Jana R. McCreary, *The Laptop-Free Zone*, 43 VA. U. L. REV. 989, 1025 (2009).

[84] Nicole Glass, *Laptops may be the ultimate classroom distraction*, (September 8, 2012, 6:32 PM), http://college.usatoday.com/2012/09/08/laptops-may-be-the-ultimate-classroom-distraction/.

In an effort to eliminate both the distraction and temptation caused by the presence of laptops in the classroom, one law professor decided to ban them outright, noting four distinct reasons for doing so: they distract both the students using them and those students around them from the lecture; they detract from class discussion "by creating both a physical and a mental barrier between the professor and students"; they have a negative impact on students' note-taking skills as they try to get down the lecture verbatim, instead of learning to write down the important points; and they have an overall negative impact on students.[85]

As reported anecdotally from both students and other law professors, without exception, students use laptops for non-class related activities during class (*e.g.* shopping, playing games, surfing the web).[86] These activities not only distract the student who is engaging in them from class, but any other student who can see the computer screen. While students may argue they can make their own choices and suffer the consequences, such as poor grades, this does not take into account the impact that their laptop usage has on those students around them. Any student within view of the screen may become distracted and fail to participate in class discussion, which then detracts from the overall learning

[85] Yamamoto, *supra* note 51, at 485.

[86] *Id.*at 485 – 486. (When doing class observations of other professors, this author has witnessed students check email, do online banking, post to Facebook, and in one instance, watch a soccer match).

environment of the class.[87] Another law professor ultimately decided against a complete ban of laptops in her classroom. She made this decision despite finding upon surveying law students that a mere 3.2% of students who used laptops in the classroom used them exclusively for classroom purposes.[88]

2. The impact of laptop use in the classroom on learning

Teaching subjects like law at either the graduate or undergraduate level involves teaching critical thinking and analysis. These higher order processes require that students pay attention in order to learn, otherwise the information cannot follow the short-term memory to long-term memory pathway. Failing to pay attention to both the professor and the accompanying discussion also prevents the distracted students from learning the skills necessary to engage in a reasoned, logical argument. Switching back and forth between material that is and is not related to the class may have a negative impact on learning.[89] One study found that on average, students had 65 windows open on their laptops, with 62% of those windows classified as "distractive" (no relation to the class material). There was mixed support for the hypothesis that there would be a positive correlation between the frequency of multitasking and academic performance, though students who paid more attention to the distractive windows rather

[87] *Id.*at 487.
[88] McCreary, *supra* note 83, at 1022
[89] Kraushaar & Novak, *supra* note 53, at 242.

than class related ones also performed at a lower academic level.[90] Generally, studies "suggest that laptop use in the classroom significantly increases distractions for students, which can diminish attention and learning."[91] Students become distracted both by their own use of laptops for non-coursework purposes, as well as that of their classmates. Laptops can have a negative impact on learning and performance when students become overly dependent on their computers to retrieve information, instead of trying to solve problems or analyze situations on their own.[92] A University of Colorado at Boulder professor tracked 17 students in her class who were using laptops, and discovered that they performed approximately 11% worse on the first exam than their non-laptop using classmates. Once she informed them of this result, laptop usage went down, and test scores went up.[93] While the sample size of the experiment was too small to draw significant conclusions, at least anecdotally the results are consistent with those of another, larger study. The latter study, which sought to find the

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[90] *Id.*at 249.

[91] Beth Fisher, *Laptop Use in Class: Effects on Learning and Attention*, (August 22, 2015), https://teachingcenter.wustl.edu/2015/08/laptop-use-effects-learning-attention/.

[92] Yamamoto, *supra* note 51, at 492.

[93] Josh Fischman, *Students Stop Surfing After Being Shown How In-Class Laptop Use Lowers Test Scores*, (March 16, 2009), http://chronicle.com/blogs/wiredcampus/students-stop-surfing-after-being-shown-how-in-class-laptop-use-lowers-test-scores/4576.

connection between laptop usage and learning, suggested two serious, negative consequences: that laptop usage negatively impacted students' learning and that it distracted other students.[94] Students who distract themselves and others by using their laptops for anything other than class work also impact the learning process of all those individual students by affecting the flow of classroom discussion. It does not move the conversation forward when a distracted student's response to a professor's invitation to participate consists of asking, "Could you repeat the question?"[95]

3. How laptop use in the classroom affects student engagement

Rather than solely measuring the overall impact of laptops in the classroom, a study conducted by the Center for Research on Learning and Teaching at the University of Michigan compared student engagement when instructors did and did not use a laptop program in the classroom. Researchers surveyed student perceptions of how laptops affected their attentiveness, learning, and engagement in sixteen different classes, half of which used a program called LectureTools,[96] while the other half

[94] Carrie B. Fried, *In-class laptop use and its effects on student learning*, 50 COMPUTERS & EDUCATION 906 (2008).
[95] Yamamoto, *supra* note 51, at 489.
[96] LectureTools is a program designed to go beyond clickers (which only allow simple multiple choice responses to questions) and engage students by providing them with a platform to do things such as ask questions anonymously in

did not.[97] Students who used their laptops in LectureTools courses reported a higher level of engagement and learning than students who took courses that allowed the use of laptops but did not integrate their use into the course.[98] However, even when viewed as a helpful learning tool, 75% of students from both groups reported that laptops posed a distraction to themselves and their classmates and increased the amount of time they spent on non-course related tasks. Additionally, approximately 35% of students in both groups reported engaging in activities unrelated to learning, such as email and social networking sites.[99] Results of the study indicated that when used for specific learning purposes, laptops can benefit student learning, while at the same time pose a potential threat of distraction.[100] Laptops, smartphones, and tablets "are like any classroom tool; they function best when they fulfill a clear instructional goal and when they are used in specific ways that support student learning."[101]

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lecture, take notes on PowerPoint slides, and review the lecture after class.

[97] Erping Zhu, Matthew Kaplan, R. Charles Dershimer, & Inger Bergom, *Use of Laptops in the Classroom: Research and Best Practices*, (2011), http://www.crlt.umich.edu/sites/default/files/resource_files/CRLT_no30.pdf.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

In addition to providing a significant source of distractions, both for the students using the laptops and for those within visual range, laptops also form a barrier between the student and the professor. If a student is looking at her laptop, even if she is taking notes, she is not making eye contact with the professor, nor is she giving visual cues that she understands the information being presented.[102] One law school professor experienced her teaching as "bouncing off a blank wall" when laptops filled the room, and noted a drop in "human interactions" because she could not read her students' body language and facial expressions.[103] Professors who cannot judge whether or not their students understand them are precluded from making the adjustments necessary to ensure that their students ultimately learn the material. Showing the professor a lack of common courtesy also acts as a barrier between student and professor. Those students who are not taking notes, but are playing solitaire or checking a restaurant's rating on Yelp place not just a physical barrier, but also a mental barrier between themselves and the professor. Engaging in extraneous activities instead of attending to the lecture or class discussion prevents learning and participation, and is disrespectful.

4. Laptops as note taking devices

[102] Yamamoto, *supra* note 51, at 490.

[103] Nancy G. Maxwell, From Facebook to Folsom Prison Blues: How Banning Laptops in the Classroom Made Me a Better Law School Teacher, 14 RICH.J.L. & TECH. 4, 22 (2007).

One recent study found that students who took notes with pen and paper scored significantly higher on tests than students who used Facebook during lecture. "Across the experimental and control groups, students who were classified as non-multitaskers scored better than multitaskers, regardless of the level of multitasking they reported."[104] Not all students use their laptops to engage in non-class related activities. Students using their laptops to take notes can be found in many, if not most, college classrooms. However, as a general rule, "unless students using laptops in class are highly disciplined note-takers, laptops do more harm than good to helping students learn."[105] Scientific studies indicate that typing rather than writing notes is a problem "because students who are transcribing are not thinking deeply into the material but are in a mad dash to write down every word. Verbatim transcription eliminates the ability to analyze any given issue, the exact skill most law school classes [and certain undergraduate classes] are trying to develop."[106] The goal of note taking is to help students process the information presented in class, and also provide them with a study tool to refer back to.[107] Writing instead of typing slows students down and forces them to think about what they are writing. Students who take notes on their laptops run the risk

[104] Junco & Cotten, *supra* note 59, at 507.
[105] Yamamoto, *supra* note 51, at 501.
[106] *Id.*at 491.
[107] *Id.*at 502.

of focusing more on typing every word spoken, rather than understanding what is being spoken and only noting the important concepts.

The act of note taking itself aids learning, as explained through two hypotheses: encoding and external storage. Encoding occurs when students take notes because they have to focus on the material, which allows them to organize and process it more deeply.[108] The encoding hypothesis refers to the processing that occurs when a student takes notes that leads to improved learning and retention.[109] If students act as transcribers – typing everything the professor says on their laptops – rather than as note takers, they miss an opportunity to process the information through deciding what is important enough to write down. External storage refers to the student using notes to create a resource for later use.[110] This might lead students and professors alike to conclude that students having access to a complete set of notes (*e.g.*, an outline or PowerPoint provided by the professor) would be more important than students creating the notes themselves. Yet significant differences exist between the usefulness of notes taken by the students themselves, and those that they either borrowed from other students, or

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[108] *Id*.

[109] Pam A. Mueller & Daniel M. Oppenheimer, *The Pen is Mightier Than the Keyboard: Advantages of Longhand Over Laptop Note Taking*, 25 PSYCHOLOGICAL SCIENCE 1 (2014), http://journals.sagepub.com/doi/abs/10.1177/0956797614524581.

[110] See Kenneth A. Kiewra, Students' Note-Taking Behaviors and the Efficacy of Providing Instructor's Notes for Review, 10 CONTEMP. EDUC. PSYCHOL. 378, 384-85 (1985).

were supplied to them by professors. Such results indicate that students benefit most from taking their own notes because simply using someone else's notes does not allow them to process the information themselves – the students might succeed in learning the facts presented, but fail to engage in "higher-order learning."[111] Particularly in classes that utilize critical thinking and analysis, the evidence indicates that students benefit the most from taking notes themselves, by hand, rather than typing notes on a laptop.[112] On the student evaluations of the law professor who prohibited students from using laptops, half of the positive comments (which constituted 71% of total evaluations, with an additional 18% being neutral) noted that they took "*better* notes because the lack of a laptop helped them to concentrate on what was being said in class...One interesting point made on three evaluation forms was that students were forced to pay attention to the content of the discussion rather than focus on typing every word."[113] Students also commented that they appreciated not having the distraction of other students playing games or using their laptops for other non-class related behavior, and that the class atmosphere improved because all the students were compelled to focus on learning the material.[114]

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[111] *Id.*at 384-85.
[112] For a contrasting discussion on using laptops to take notes, *see* McCreary, *supra* note 83.
[113] Yamamoto, *supra* note 51, at 511 – 512.
[114] *Id.*at 512.

Note taking can be classified as either generative, where the student performs tasks such as summarizing and paraphrasing, or nongenerative, where the student attempts to copy the material verbatim. While verbatim notetaking has generally indicated a shallow understanding of the material, deeper processing of information leads to greater encoding benefits.[115] Laptops present both an advantage and a disadvantage. Students can type faster than they can write, so they have greater external storage when using a laptop to take notes instead of taking notes by hand. But typing facilitates verbatim notes, which may negatively impact the encoding process and which do predict "poorer performance than nonverbatim notetaking, especially on integrative and conceptual items."[116] In response to the dearth of studies that directly compare the differences between notes typed on a laptop with those written by hand, researchers conducted a series of three experiments to compare how the method of notetaking impacted academic performance, and to explore if verbatim notetaking would serve as a substitute when considering the depth of processing.

In the first experiment, students engaged in their normal notetaking practices during a recorded class lecture, either using a laptop or using a pen and paper, and then completed "distractor tasks" before being tested on the material. While both groups did equally well on the factual-recall questions, the students who took notes by hand performed

[115] Mueller & Oppenheimer, *supra* note 109, at 2.
[116] *Id*.

significantly better than their laptop counterparts on the conceptual-application questions.[117] Although participants who took more notes performed better than those who took fewer notes, it was also the case that participants who took verbatim or close to verbatim notes performed worse.[118] The initial evidence indicated that even when used as intended, laptop use may negatively affect academic performance. "Although taking more notes, thereby having more information, is beneficial, mindless transcription seems to offset the benefit of the increased content, at least where there is no opportunity for review."[119]

For the second experiment, some laptop users were specifically instructed to try to avoid transcribing the recorded lecture, instead taking notes in their own words, while others were given no instructions. The results yielded no significant differences between the two laptop groups, while the longhand group once again performed better on the conceptual-application questions.[120] The instruction to avoid taking notes verbatim proved ineffective, and once again those participants with fewer verbatim or close to verbatim notes scored worse than those whose notes had less verbatim overlap.[121]

For the third experiment, the researchers investigated whether the increased external storage

[117] *Id.*at 3.
[118] *Id*.
[119] *Id*.
[120] *Id*.
[121] *Id.*at 5.

resulting from taking notes on a laptop mitigated the decreased encoding that occurred through verbatim notetaking.[122] In addition to having laptop note takers and longhand note takers, participants were also placed into study/no-study groups. Participants who took notes by hand and had the opportunity to study them scored significantly better than any other group. Again, the quantity of notes taken positively predicted how students performed in each group, with more notes leading to better performance. But for laptop users who had a chance to study their notes, the higher percentage of verbatim overlap in those notes negatively predicted their overall performance. As in the first two studies, verbatim overlap negatively impacted how participants performed on conceptual information. That the longhand/study participants scored the best suggests that "longhand notes may have superior external-storage as well as superior encoding functions."[123] This was the result despite the positive correlation between the quantity of notes taken and performance. One potential explanation suggests that since longhand note takers encoded the information better than the laptop note takers, reviewing their notes reminded them of the lecture material more effectively than when laptop users reviewed theirs.[124] "Even when allowed to review notes after a week's delay, participants who had taken notes with laptops performed worse on tests of both factual content and

[122] *Id.*at 6.
[123] *Id.*at 8.
[124] *Id*.

conceptual understanding, relative to participants who had taken notes longhand."[125]

Authors of the study found that "synthesizing and summarizing content rather than verbatim transcription can serve as a desirable difficulty toward improved educational outcomes" and "[f]or that reason, laptop use in the classrooms should be viewed with a healthy dose of caution; despite their growing popularity, laptops may be doing more harm in classrooms than good."[126]

F. *Cell phones in the classroom*

Texting in the classroom: it's rude, distracting, and it impacts the learning both of the students who text as well as of those around them. It seems to be the exception rather than the rule to be in a class where all the students attend to the lecture without any downward glances to their devices, held surreptitiously under their desks. A 2008 study of business majors found that over half of the students surveyed reported using their cell phones in every class they attended, but did not think doing so interfered with their learning.[127] In fact, by using their phones in class, students negatively impact their learning, and by extension, their grades. The best

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[125] *Id*.

[126] *Id*.

[127] Deborah R. Tindell & Robert W. Bohlander, The Use and Abuse of Cell Phones and Text Messaging in the Classroom: A Survey of College Students, 60 COLLEGE TEACHING 1, 2 (2012).

predictor of learning requires that the students be engaged and actively involved in processing the information presented,[128] which they cannot do if they are too busy texting to pay attention in class. Multiple studies have shown a negative correlation between multitasking and academic performance: college students who spent more time on media distractions, particularly Facebook and texting, had lower GPA's than those who did not; students who sent messages or used Facebook during a lecture performed worse on an exam than those who did not, and "students who did not multitask during the lecture did better than those who multitasked and the more multitasking they did the worse they performed."[129]

1. The impact of cell phone use on academic performance

In a 2009 study of the impact of texting on learning, students who responded to two or three texts while watching an instructional video performed significantly lower on the follow-up test than those students who responded to zero or one text.[130] A similar study in 2011 found that students' memories were impaired when they fell into the "high text message group" – those that sent or received on average 19 texts during a taped lecture – as compared to the "low text message group" – those that, on average, received less than two messages.

[128] Dzubak, *supra* note 1, at 2.
[129] Rosen, Carrier, & Cheever, *supra* note 57, at 949.
[130] Tindell & Bohlander, *supra* note 127, at 2.

Even for those students who did not send or receive a high volume of texts, the fact that there were students around them who did could have acted as a distraction, contributing to difficulties with classroom management.[131] Students who received and responded to a high number of texts in another study performed poorly on an exam as compared to students who received no texts.[132] Perhaps even more interestingly, the same study also found that those students who succeeded in postponing their responses to the texts (up to five minutes) performed considerably better than those who responded immediately. This result suggests that in addition to teaching students strategies to focus on one task at a time, they would also benefit from learning to overcome the impulse to respond immediately when distractions do occur.[133]

A recent study investigated the relationship between cell phone use and academic performance and found that after controlling for established predictors of academic performance such as GPA, class standing, sex, and academic majors, "total cell phone use was found to be a significant negative predictor of GPA."[134] Part of the negative impact of cell phone use on academic performance could be attributed to students being distracted by the temptation provided by smart phones to engage in non-academic activities instead of studying, or

[131] *Id.*
[132] Rosen, Carrier, & Cheever, *supra* note 57, at 950.
[133] *Id.*
[134] Lepp et al., *supra* note 76, at 6.

studying without interruption.[135] This study focused on the relationship between how students use their cell phones and how well they do academically without pinpointing causality. However, the study's results suggest that, "educators and administrators in higher education may wish to carefully consider policies regarding cell phone use in the classroom, laboratories, and other settings where learning occurs."[136] While few students recognize that using their cell phones impacts their academic performance, another study found that over 30% admitted to missing important information because they were texting or checking their phones.[137] Analysis of the study's student survey data indicated that the frequency with which students use their cell phones correlates with their GPA, with those who use their phones more frequently having lower GPAs than those who use them less so. Stopping short of attributing a causal effect, the researchers did find the relationship between phone use and GPA to be significant.[138]

Acknowledging that "[p]erhaps one of the biggest challenges instructors face in the 21st-century college classroom is the struggle of retaining student interest and engagement while students remain connected to the outside world through their mobile devices," the authors of another study examined the impact of Tweeting and texting on student

[135] *Id.*at 7.
[136] *Id.*
[137] Berry & Westfall, *supra* note 25, at 65.
[138] *Id.*at 66.

learning.[139] Building on previous studies that found that the use of mobile devices can negatively impact student learning, they looked at the difference between students who did not use their phones at all in class and those that either used them for course-relevant or course-irrelevant tasks. Irrelevant texts and tweets had a negative effect on student learning and note-taking, interfering with external storage, and apparently the encoding process as well.[140] Even sending relevant tweets resulted in students having more difficulty with learning and taking notes. Within the confines of the experiment, students who sent and responded to relevant texts performed similarly to those who did not use a mobile device, potentially because answering and composing course-related texts was similar to the process used to take notes. Rather than rush to integrate tweeting and texting into classrooms, the authors suggest providing students with a break in order to compose messages and responses to relevant texts and tweets.[141] This would avoid any interference with the students' ability to take notes and could serve to increase student engagement in the class.

2. Texting in class

[139] Jeffrey H. Kuznekoff, Stevie Munz & Titsworth, *Mobile Phones in the Classroom: Examining the Effects of Texting, Twitter, and Message Content on Student Learning*, 64 COMMUNICATION EDUCATION 344 (2015), http://dx.doi.org/10.1080/03634523.2015.1038727.
[140] *Id.*at 360.
[141] *Id.*at 361.

So how often do students text while in class? A 2011 study examined several issues surrounding texting in the class by surveying a cross section of students (male and female, an even distribution of freshman through seniors, 21 different majors) at a small private university.[142] The first issue addressed general cell phone usage in the classroom, asking students how much they used their phones before class, during class, and during exams. Virtually all students (97%) reported sending or receiving texts while waiting for class to begin.[143] While 30% reported texting in class everyday, approximately 92% admitted to sending or receiving texts during class at least once or twice, with an overwhelming number (97%) noticing other students texting during class at least once or twice.[144]

The next issue questioned how distracting text messaging was, both to the students texting and to those around them. But before addressing the texting issue, researchers found that ringing phones also constituted a problem. Even though all students reported either setting their phone to vibrate or turning it off, most of them admitted that their phones had rung in class and that they had been in classes where another student's phone had rung.[145] Despite a reluctance to support an outright ban on phones in the classroom, most students agreed that texting had

[142] Tindell & Bohlander, *supra* note 127, at 3.
[143] *Id.*
[144] *Id.*
[145] *Id.*

a negative impact on the learning of both the student texting and on those around that person.[146]

Finally, the study investigated if instructors or classrooms possess certain characteristics that made texting more likely to occur, and what might be an effective cell phone policy. Not surprisingly, the larger the class, the easier it was both to send and receive texts. This was also the case if professors turned their backs to the class, or were too focused on lecturing to notice the students who were texting.[147]

Professors at the University of Colorado, Boulder, examined the effect of cell phones and other digital distractions in the classroom. They found that cell phone use was, in fact, "significantly correlated with reduced learning outcomes: students who reported no cell phone use earned significantly higher grades than those who used their phones during class."[148] Despite this significant correlation, the study did not prove causation. One could argue that those students who were self-disciplined enough to ignore the urge to text or check email during a lecture would be the same students who would achieve higher grades.

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[146] *Id.*

[147] *Id.*

[148] Douglas K. Duncan, Angel R. Hoekstra & Bethany R. Wilcox, *Digital Devices, Distraction, and Student Performance: Does In-Class Cell Phone Use Reduce Learning?*, ASTRONOMY EDUCATION REVIEW (July 2012), http://aer.aas.org/resource/1/aerscz/v11/i1/p010108_s1.

Approaching multitasking from a more general perspective, a study at the University of Utah asked college students whether or not they drove and texted at the same time and if they thought they were good at multi-tasking. Postulating that multitaskers would be more likely to be risk-takers and impulsive, the researchers' conclusions were correct.[149] The students who thought they were good at multitasking, and who did things like text and drive at the same time, scored worse on a test of their multitasking skills than the students who rarely drove and texted; the latter group was able to maintain their focus and complete their work.[150] Lead author of the study, psychology professor David Sanbonmatsu, noted that "People don't multitask because they're good at it...They do it because they are more distracted. They have trouble inhibiting the impulse to do another activity."[151] In general, undergraduates overestimate their ability to multitask, [152] which can negatively impact their academic performance, among other things.

IV. RECOMMENDATIONS

A. *What to say in class*

[149] Nancy Shute, *If You Think You're Good At Multitasking, You Probably Aren't* (January 2013), http://www.npr.org/blogs/health/2013/01/24/170160105/if-you-think-youre-good-at-multitasking-you-probably-arent.
[150] *Id.*
[151] *Id.*
[152] Duncan et al., *supra* note 148.

Explaining how the class will be run in advance, both by discussing expectations in class and by including them in the syllabus, can increase compliance, particularly if students contribute to the policies and have something to gain by complying with class rules. If students are involved in a discussion both of rules and consequences, they can also be asked to aid in enforcement of those rules so that it's not the professor on one side and the students on the other.

B. *What to write in a syllabus*

Maintaining high standards for civility in the classroom by being proactive, not reactive, can aid professors in reaching the desired level of civility in the classroom. A statement in the syllabus that addresses courtesy, appropriate behavior, as well as academic integrity sets the tone for the class.[153] To promote a courteous environment, professors can also note in their syllabi that cell phones should be turned off or put on silent mode.

Stressing a "health exercise" image instead of a "consumerism" approach to education in a syllabus can help professors frame for their students how to view the latter's responsibilities in the class. Rather than going to class because they (or their parents) paid for it and expecting to get their money's worth by being entertained, students should be encouraged

[153] Dzubak, *supra* note 1, at 6.

to attend class because it will help them learn the material and be beneficial to their grades. Since the learning process begins at the start of class, the syllabus should state the expectation that students arrive on time. Prompt arrivals avoid any distraction to the professor and classmates that occur when students enter the classroom late and search for a seat.[154]

One professor included the following in her syllabus as a way to inform students what she expected of them: "Everyone who registers for this class is an adult. You are legally able to marry without parental consent, buy a home, pay taxes, vote, work, budget your money, defend your country in military service, etc. You should also be adult enough not to disturb others. Mindless talking [and texting and web surfing] is immature, inconsiderate behavior."[155] This could also be phrased in a more positive way, emphasizing the importance of students showing respect both to the professor and to their classmates by giving speakers their full and undivided attention.

Professors should include a clear statement in their syllabi regarding laptop use.[156] Lack of a statement regarding expectations surrounding laptop

[154] Dzubak, *supra* note 1, at 2.

[155] Excerpt from Prof. Suzanne J. Warma's syllabus, http://math.scu.edu/~dsmolars/warma.html.

[156] Zhu et al., *supra* note 97 (One example from a 2010 Northern Michigan University Syllabus included the statement: "When you use laptops during class, do not use laptops for entertainment during class and do not display any material on the laptop which may be distracting or offensive to your fellow students").

use in the classroom may well be interpreted as an indication that there are no restrictions.[157]

C. *What to do in class*

Professors can incorporate civility into their students' grades, rewarding them with points for appropriate behavior such as being prepared when called upon and for contributing to class discussion. Conversely, a professor might deduct points when a student is unprepared or is caught texting in class. Calling on students who are obviously texting or web surfing sends the message both to that student and to the rest of the class that that behavior will not be tolerated, and that their grades will reflect as much.

It can also be helpful to give students feedback during the course that does not count towards their grade in the class. Something as simple as praising students for raising their hands rather than blurting out the answers to questions, since not all students can process information as quickly as those who answer without being called upon, can promote a civil classroom environment.[158]

Asking students to inform you in advance if they need to answer a phone call in the middle of class can be an effective classroom management technique. Understanding that a student is experiencing stress, waiting to hear about a hospitalized family member, can reduce the

[157] *Id.*
[158] Sparrow, *supra* note 16, at 145.

professor's irritation when the student walks out in the middle of class. It also gives the professor the opportunity to minimize the disruption of the class since the professor can ask the student to sit on an aisle, near the door.

Professors need both to model appropriate behavior and to address that which is not; by doing so effective teaching and learning can follow.[159] It may seem less disruptive *not* to call on the texting student. But not addressing the issue sends the message that the behavior is acceptable and that the professor is not willing to correct the behavior in the interests of supporting a more courteous and effective learning environment. Failing to set an example for students by disciplining misconduct both facilitates and perpetuates that which requires correcting.[160]

Students may be more likely to put off sending that text about dinner plans if they knew it could impact their learning, generally, and the grade they are likely to get in the class, specifically. Informing students how multitasking slows the learning process could serve as motivation for them to focus just on a lecture or their classwork, without checking a baseball score or shopping for a new iPad. Most students likely do not know that studying or listening to a lecture while texting or checking email acts "to create a cognitive style based on quick,

[159] *Id.*
[160] *Id.*

superficial multitasking rather than in-depth focus on one task."[161]

If faculty do not integrate technology into their courses, they should consider ways to limit use of laptops in class, or at least inform students of the issues involved in laptop use, such as the possible negative effect on their grades, and how they distract other students.[162] A study performed in one law school found that simply stating a prohibition against using laptops for non-class use had no impact. In fact, when a professor announced the prohibition against engaging in activities such as surfing the web, three students were surfing the web and continued to do so after the professor made the announcement.[163] The same study found that instead, an explicit laptop policy can make a difference, as evidenced by the highest laptop use in classes where there was no stated policy, either in the syllabus or announced by the professor.[164] The professor who banned laptops outright was able to assess more accurately what his students did and did not understand, since they could not reference outside materials. Perhaps even more importantly, he could see their faces and make eye contact, and judge how the class was going by noting their body

[161] Laura E. Levine et al., Electronic Media Use, Reading, and Academic Distractibility in College Youth, 10 CYBERPSYCHOLOGY & BEHAV. 560, 565 (2007).
[162] Fried, *supra* note 94, at 912.
[163] Jeff Sovern, Law Student Laptop Use During Class for Non-Class Purposes: Temptation v. Incentives, 51 U. LOUISVILLE L. REV. 483, 507 (2013).
[164] *Id.*at 508.

language. At the same time, student performance on examinations indicated a better understanding of the material than student performance in previous semesters when he had allowed laptops.[165]

Rather than banning laptops altogether, professors may indicate when during the class laptops can and cannot be used. Asking students to lower the lids on their laptops so that their full attention can be on class discussion or lecture clearly communicates to students both what the policy is on laptop use at that moment and the rationale for requesting that they lower the lids. Also, while some professors are comfortable with the use of technology in the classroom, others may need professional development and ongoing support. But despite the pervasiveness of mobile technology, educators "should always ask the pedagogical question: *Is mobile technology necessary to support students in reaching the intended learning outcomes?*"[166]

Recommendations for creating an effective cell phone policy include: having the professor answer a phone if it rings in class; confiscating until the end of class any phone that rings, vibrates, or that a student uses to text in class; the professor counting as an absence any day that a student is caught texting in class; and during exams, if a phone is seen or

[165] Yamamoto, *supra* note 51, at 510 – 511.

[166] Baiyun Chen, Ryan Seilhamer, Luke Bennet, & Sue Bauer, *Students' Mobile Learning Practices in Higher Education: A Multi-Year Study*, (June 22, 2015), http://er.educause.edu/articles/2015/6/students-mobile-learning-practices-in-higher-education-a-multiyear-study.

heard, the student receives a zero on the exam.[167] Having students contribute to developing a cell phone policy may increase the chances that they will comply with it. But ultimately, faculty members must enforce the cell phone policy in order for students to take it seriously and for it to be effective.[168]

Other policies regarding cell phones in the classroom run the gamut from an outright ban to no restrictions whatsoever. When asked to rate the effectiveness of instructors' cell phone policies, students judged general university or classroom policies to be the least effective. Professors verbally reprimanding students caught using cell phones in class was the most common approach. But it also was considered generally ineffective, even when the reprimand was a public one.[169] Despite students' preference for having free rein to use their phones as they like in class, they acknowledged that the most punitive measures were the most effective: grade reduction and removal of offending students.[170] The results of this study indicate that if instructors want to curtail cell phone use in the classroom, they will have to institute stricter policies in order to be successful in doing so.

In looking at other factors that impact cell phone use in the classroom, researchers found that smaller class sizes acted to constrain students' cell

[167] *Id.*at 6.
[168] *Id.*at 7.
[169] Berry & Westfall, *supra* note 25, at 68.
[170] *Id.*

phone use because they felt less anonymous and more a part of the group than in larger lecture classes.[171] Classes that use a more "active learning" approach also reduce the use of cell phone use by engaging students through discussion and other classroom activities.[172] Encouraging students "to be active participants should reduce the likelihood that students will be causing distractions or tuning out with the aid of their phone."[173]

Considering the ubiquity of digital distractions, student success may depend on the ability to ignore those distractions and be able to concentrate solely on the task at hand. In a survey of law students who used laptops in the classroom, in addition to using them because they were bored, they used them to "stay current" and "on top of what's going on" - because most students are members of the Millennial generation, they have grown up in an age where they have instant access to information with instant feedback, so they are accustomed to instant gratification.[174] Why wait until after class to ask a friend a question when that same question can be texted or emailed in the middle of class?

So how can we train students to maintain focus on a lecture, class discussion or a professor's question posed to them without wandering into cyberspace to chat with friends or shop for shoes? How can students practice delaying behavior that allows for immediate answers or feedback? One

[171] *Id.*at 70.
[172] *Id.*
[173] *Id.*
[174] McCreary, *supra* note 83, at 1024.

answer may be found in the marshmallow test of over 40 years ago. Psychologist Walter Mischel gave children a marshmallow and told them that if they could wait and not eat it right away, they would receive a second one. Years later, studies showed that those who delayed gratification not only received higher grades in school and on exams, but were more likely to succeed both academically and professionally. Put in today's digital terms, students can be encouraged to focus on their school work for a set period of time, such as the length of a class, before taking a break to check their email or reply to a text. This, in turn, would lead to increased focus and the ability to focus on just one thing, such as a lecture.[175] Once students understand how such a skill can serve them well once out of the classroom and in a professional work environment, they may be more inclined to resist the urge to check their phones every few minutes.

One option for professors: pay no attention to students texting or obviously using their laptops for non-class related purposes. Instead, work to engage students so they are not distracted by their devices. In practice, this approach is problematic for a number of reasons. Students will not be motivated to curb their cell phone or laptop use, with the distraction negatively impacting their learning. Professors will be burdened with having to be so consistently engaging that students will not be tempted to use their devices.[176]

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[175] Paul, *supra* note 63.
[176] Lawson & Henderson, *supra* note 77, at 122.

Another option: ban devices outright, which will likely be both the least popular approach among students and the one most difficult to enforce. Alternatively, cell phones and laptops could be incorporated into the curriculum, though this option seems less than optimal when looking at the research on laptop use and how it can both lower academic achievement and distract those sitting near the laptop user.[177] A two-fold approach may ultimately be most effective and realistic. First, educate the students about the impact that task switching can have on learning, as well as how distracting phone use in the classroom can be for both students and instructors. Second, take breaks to allow students to use their devices.[178] Increasing awareness as to the potential detrimental impact that media distractions can have on their academic performance, coupled with opportunities to use their devices for limited amounts of time, may present the best option when combatting students' use of digital devices for non-classroom related purposes.

V. CONCLUSION

When speaking to my colleagues on the subject of courtesy, many describe reactions ranging from mild irritation to horrified disbelief at the behavior exhibited by some of our college students. But all of us agree that part of our job as professors is to prepare students for the work force, and provide

[177] *Id.*at 123.
[178] *Id.*

them with the skills necessary to function outside the school setting. Critical thinking, analysis, writing and any other of the skills taught at the college level constitute a vital part of our students' education. Teaching students how to focus in class, and by extension, in a meeting, also make up an important part of their education. A number of approaches may assist professors in accomplishing this task and can be explained to students at the beginning of the semester, noted in the syllabus, and included in the student's grade.

Creating a courteous classroom environment not only makes for a more pleasant teaching experience for professors, but also a more effective learning environment for students. As college professors, our job includes preparing our students for the workforce. Teaching students to be polite and attentive in class can assist their interactions with future employees and coworkers. Being polite and attentive includes learning how to maintain focus on one person, or one subject, or one task, without being distracted by a text, or a tweet, or an email message. Students need opportunities to focus on one thing at a time. Professors who insist on as few distractions in the classroom as possible may be instrumental in their students' future success.

It may well be impossible to prevent students from multitasking – or task switching – while in class. Finding the balance between the use of and prohibition of cell phones and laptops in the classroom may well represent one of the biggest challenges faced by college professors today. But

using a variety of techniques, from incorporating technology on a limited basis to explaining the impact media distractions may have on their academic success to creating a digital device policy with students, may serve to increase student engagement and reduce distractions. By teaching students to take "technology breaks" and learn to focus on just one task, they can learn to delay responding to distractions such as text messages and email.[179] Effective educational models "include a combination of technology breaks and metacognitive skills that will teach students focus and attention, delayed gratification and knowing when multitasking is appropriate and when it may interfere with the learning process."[180] Building up the ability of students to maintain their focus on a lecture or class discussion can help lead them to both academic and professional success and result in a more pleasant and productive learning environment.

[179] Rosen, Carrier, & Cheever, *supra* note 57, at 956.
[180] *Id.*

PHILADELPHIA AND SPORTS LAW

ADAM EPSTEIN*
BRIAN J. HALSEY **

I. INTRODUCTION

From birth[1] to death[2] and from race[3] to *Rocky*, one would be hard-pressed to demonstrate that a city has

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[1] *See* Amy Hatch, *Parents Get Phillies Fever, Name Babies After Baseball Champs*, PARENT DISH (Oct. 22, 2009), http://www.parentdish.com/2009/10/22/parents-get-phillies-fever-name-babies-after-baseball-champs/ (noting that when the Philadelphia Phillies advanced into the World Series for the second straight year, the fans of the 2008 World Series champs were having a mini baby boom and naming their kids after Philadelphia players).
[2] NESN Staff, *Minor League Team to 'Celebrate Life' by Offering Fans Free Funeral in Ballpark Giveaway* (JUNE 26, 2013), http://nesn.com/2013/06/minor-league-team-to-celebrate-life-by-offering-fans-free-funeral-in-ballpark-giveaway/ (noting that the Philadelphia Phillies Triple-A affiliate Lehigh Valley IronPigs offered a free funeral to one "lucky" fan who submitted an essay about what their "dream funeral" would include).
[3] MSNBC.com News Services, *Pool Denies Turning Away Minority Kids*, (JULY 7, 2009), http://www.nbcnews.com/id/31833602/ns/us_news-life/t/pool-

had more of a cultural and legal impact on sports generally and sports law specifically than the city of Philadelphia.[4]

The purpose of this article is to introduce Philadelphia-based cases and incidents that have influenced sports law, sometimes at a national level.

After reading the article, we hope that professors, students and practitioners will agree that the *City of Brotherly Love*[5] has earned a unique position within the sports law landscape.

This piece serves historical, legal and pedagogical purposes, and we hope it will also serve as a springboard to further research. Tort law and the criminal law are the most prevalent cases within this jurisdiction, so to speak, but Philadelphia has an array of other influential cases in a variety of contexts and subjects, especially those that impact contract law and issues related to gender and harassment.[6] We will include excerpts from a variety

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denies-turning-away-minority-kids/#.UfFerm03fYQ (reporting that a suburban Philadelphia swim club said that safety, not racism, was the reason for the cancellation of the memberships of minority kids).

[4] ROCKY (Metro-Goldwyn-Mayer Studios Inc. 1976)

[5] For a general history of the city and state at its founding as an English colony, *see* Jean R. SODERLUND, ED., WILLIAM PENN AND THE FOUNDING OF PENNSYLVANIA, A DOCUMENTARY HISTORY (1983). Philadelphia means *brotherly love* from the Greek φιλεω (phileo) "to love" and αδελφος (adelphos) "brother." CASSELL, PETTER AND GALPIN, ED. THE POPULAR EDUCATOR 262 (YEAR UNKNOWN).

[6] *See, e.g.*, ADAM EPSTEIN, SPORTS LAW 412 (2013) (discussing the notable arbitration case involving former Philadelphia Eagles wide-receiver Terrell Owens who was suspended for four games in 2005 and arbitrator Richard

of commentary and news reports as well where we feel it is appropriate to add flavor and perspective. First, however, we address how Philadelphia fits into the geographical, legal, and societal landscape.

II. THE CITY

Philadelphia is the largest city in the Commonwealth of Pennsylvania[7] and the seventh most populous metropolitan area in the U.S.,[8] as well as a former Federal capital.[9] The city is the place where the Declaration of Independence was signed (1776) as well as the U.S. Constitution (1787).[10] It is a diverse metropolis located minutes from some of the wealthiest and some of the poorest areas in the

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Bloch's 38-page decision which upheld the suspension on account of "unparalleled detrimental misconduct" by Owens involving both public and private disputes with the team).

[7] PHILADELPHIA COUNTY, PENNSYLVANIA, http://quickfacts.census.gov/qfd/states/42/42101.html (last visited July 25, 2013).

[8] METROPOLITAN AREAS: ASSESSING COMPETITIVE POSITION AND CHANGE, http://proximityone.com/metros2013.htm (last visited July 25, 2013).

[9] THE INTERIM FEDERAL CAPITAL IN PHILADELPHIA , http://history.house.gov/HistoricalHighlight/Detail/37153 (last visited July 25, 2013) (Philadelphia served as the U.S. capital from 1790 to 1800. "[M]embers chose Philadelphia as an interim capital, largely because the city served as the social, financial, cultural, and geographic center of the young nation then clustered along the eastern seaboard.").

[10] INDEPENDENCE HALL, http://www.ushistory.org/tour/independence-hall.htm (last visited July 25, 2013).

country.[11] The city is also the home to U.S. District Court for the Eastern District of Pennsylvania[12] and the U.S. Court of Appeals for the Third Circuit.[13] In Philadelphia, as in the Commonwealth of Pennsylvania, trial courts (other than municipal or traffic courts) are known as Courts of Common Pleas.[14] Numerous law schools in the area provide

[11] *See* Mike Armstrong, *Chester County is No. 21 on List of Wealthiest U.S. Counties* (Mar. 31, 2009), http://www.philly.com/philly/blogs/phillyinc/Chester_County_is_No_21_on_list_of_wealthiest_US_counties.html#bgfroJgBVUyG6t5E.99 (offering that Chester County, which is in Philadelphia suburbs, is one of the wealthiest areas in the country); *see also* Matthew DeLuca, *What's the Matter with Camden?* (Mar. 7, 2013), http://inplainsight.nbcnews.com/_news/2013/03/07/17226041-whats-the-matter-with-camden?lite (noting that Camden, New Jersey, just across the Delaware River from Philadelphia, holds the distinction of being either first (2005 and 2011) or second (2008) most dangerous city in the country).

[12] UNITED STATES DISTRICT COURT EASTERN DISTRICT OF PENNSYLVANIA, http://www.paed.uscourts.gov/ (last visited July 25, 2013).

[13] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, http://www.ca3.uscourts.gov/(last visited July 25, 2013).

[14] PENNSYLVANIA COURTS OF COMMON PLEAS, http://www.pacourts.us/courts/courts-of-common-pleas/ (last visited July 25, 2013); *see also* THE AMERICAN LAW INSTITUTE, http://www.ali.org/index.cfm?fuseaction=contact.generalinformation (last visited July 25, 2013) (noting that the headquarters of the American Law Institute (ALI) is based in Philadelphia).

ample opportunity to pursue a law degree and subsequent employment in the legal profession.[15]

Philadelphia is also only one of twelve U.S. Cities to have all *Big Four* major sports teams.[16] Philadelphia's teams include the Philadelphia Eagles (NFL, Lincoln Financial Field),[17] Philadelphia Flyers (NHL, Wells Fargo Center),[18] Philadelphia Phillies (MLB, Citizens Bank Park),[19] and the

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[15] *See, e.g.*, Rutgers School of Law-Camden, *Career Services Job Fairs and Law School Consortia*, http://camlaw.rutgers.edu/career-services-job-fairs-and-law-school-consortia (last visited Aug. 18, 2013) (recognizing that law schools in or near Philadelphia include The University of Pennsylvania (Penn), Drexel, Temple, Rutgers-Camden, Villanova, Widener and Penn State-Dickinson).

[16] The "Big Four" is an expression usually relating to the National Football League (NFL), National Hockey League (NHL), Major League Baseball (MLB), and the National Basketball Association (NBA). *See* THE U.S. PROFESSIONAL SPORTS MARKET AND FRANCHISE VALUE REPORT (2012), http://www.wrhambrecht.com/pdf/SportsMarketReport_2012.pdf (last visited July 25, 2013). In addition, in 2010 the *Philadelphia Union* became a member of Major League Soccer (MLS) and plays their games at (PPL Park in Chester, Pennsylvania.). *See* CLUB HISTORY, http://www.philadelphiaunion.com/club/history (last visited July 25, 2013).

[17] *See generally* PHILADELPHIA EAGLES, http://www.philadelphiaeagles.com/ (last visited July 25, 2013).

[18] *See generally* PHILADELPHIA FLYERS, http://flyers.nhl.com/ (last visited July 25, 2013) (The Flyers played at the venue named the Spectrum originally, then played at First Union Center. The Flyers won Stanley Cup in 1974 and 1975).

[19] *See generally* PHILADELPHIA PHILLIES, http://philadelphia.phillies.mlb.com/index.jsp?c_id=phi 2008 (last visited July 25, 2013) (recognizing that the Phillies won

Philadelphia 76ers (NBA, Wells Fargo Center).[20] Philadelphia sports venues have been named re-named and rebuilt over the years and are now all world-class venues.[21] Ironically, Philadelphia is also one of the only cities to have one of its own *Big Four* teams file for bankruptcy.[22] The city boasts several influential and competitive colleges and universities among the National Collegiate Athletic Association (NCAA) membership including the Philadelphia *Big 5*: St. Joseph's University, The University of

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the World Series in 2008); *see also* THE OAKLAND ATHLETICS, http://oakland.athletics.mlb.com/oak/history/timeline.jsp (last visited July 25, 2013) (noting that today's Oakland Athletics (A's) were at one time Philadelphia-based but moved in 1954 to Kansas City and then 1968 to Oakland).

[20] PHILADELPHIA 76ERS, http://www.nba.com/sixers/ (last visited July 25, 2013). In 1983 the76ers won the NBA Championship. The Golden State Warriors were Philadelphia based but moved to San Francisco in 1962). PHILADELPHIA WARRIORS, http://www.sportsecyclopedia.com/nba/pwar/phlwarriors.html (Last visited July 25, 2013).

[21] *See generally* PHILADELPHIA'S PRO FOOTBALL STADIUMS, http://home.comcast.net/~ghostsofthegridiron/stadiums.htm (last visited July 25, 2013).

[22] *See* Edwin Shrake, *If You Know a Good Joke, Tell It to Philadelphia* (Sept. 23, 1968), *available at* http://sportsillustrated.cnn.com/vault/article/magazine/MAG1081610/index.htm (offering, "With an owner who is in bankruptcy court, a coach who is ridiculed by the press and the fans and a quarterback who broke his leg in the first exhibition game, the poor Eagles are in need of a few laughs.").

Pennsylvania, La Salle University, Temple University, and Villanova University.[23]

Sports, in general, have imbedded themselves into the nation's perception of Philadelphia. Readers of a certain age will recall the influence on pop culture that the 1976 movie *Rocky* and its sequels have had on the American landscape.[24] In fact, so many movies have been filmed in the city of Philadelphia that some have coined the term *Phillywood* to describe this phenomena.[25] There are numerous other Philadelphia-based sport-related films that one should recognize including

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[23] *See* THE PHILADELPHIA BIG FIVE, http://www.philadelphiabig5.org/about/index.html (last visited July 25, 2013).

[24] *See* ROCKY, *supra* note 4; *see also* ROCKY II (United Artists 1979); ROCKY III (MGM/UA Entertainment Company 1982); ROCKY IV (MGM/UA Entertainment Company 1985); ROCKY V (MGM/UA Entertainment Company 1990); ROCKY BALBOA (Metro-Goldwyn-Mayer 2006).

[25] *See* NBC 10 Philadelphia, *'Phillywood' -- The New Hollywood* (Feb., 2009), http://www.nbcphiladelphia.com/entertainment/celebrity/Phillywood----The-New-Hollywood.html; Other non- sports related Philadelphia based movies include THE PHILADELPHIA STORY (Metro-Goldwyn-Mayer 2006); THE PHILADELPHIA EXPERIMENT (Cintel Films 2012); THE PHILADELPHIA EXPERIMENT (New World Pictures 1984); THE PHILADELPHIA EXPERIMENT II (Trimark Pictures 1993); PHILADELPHIA (Tristar Pictures 1993); THIS IS 40 (Apatow Prods. 2012); *see also* BROAD STREET BULLIES (HBO Sports 2010) (chronicling the nickname given to the pugilistic Philadelphia Flyers and the notable and downtown street, from their birth as an expansion team in 1967, to three straight championship finals appearances (1974–76), winning the Stanley Cup in 1974 and 1975).

Invincible,[26] *The Mighty Macs*,[27] and *Silver Linings Playbook*.[28] All of these films both reflect and demonstrate the influence that Philadelphia has had in American sports culture.

III. PHILADELPHIA FANDOM

A. Misbehavior

This unique sports culture of Philadelphia (and the attendant legal ramifications) can be understood as an outgrowth of the region's fanbase. In short,

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[26] INVINCIBLE (Walt Disney Pictures 2006); *see also* IMDB.COM, *Invincible*, http://www.imdb.com/title/tt0445990/ (last visited July 25, 2013) ("Based on the story of Vince Papale, a 30-year-old bartender from South Philadelphia who overcame long odds to play for the NFL's Philadelphia Eagles in 1976.").

[27] THE MIGHTY MACS (Quaker Media 2009); *see also* IMDB.COM, *The Mighty Macs*, http://www.imdb.com/title/tt1034324/?ref_=sr_5 (last visited July 25, 2013) (referencing Immaculata College, "In the early 70s, Cathy Rush becomes the head basketball coach at a tiny, all-girls Catholic college. Though her team has no gym and no uniforms-and the school itself is in danger of being sold-Coach Rush looks to steer her girls to their first national championship.")

[28] SILVER LININGS PLAYBOOK (The Weinstein Company 2012); *see also* IMDB.COM, *Silver Linings Playbook*, http://www.imdb.com/title/tt1045658/plotsummary?ref_=tt_stry_pl (last visited July 25, 2013) ("[The main character] finds there are certain instances where he doesn't cope well, however no less so than some others who have never been institutionalized, such as his Philadelphia Eagles obsessed OCD father who has resorted to being a bookie to earn a living.")

Philadelphians care about their sports teams to the point that "Philly fans have become more notorious for their senseless behavior, than for their major sports accomplishments."[29] For instance, in 2008 "[f]ormer Vice Presidential candidate Sarah Palin was booed, as she was introduced to drop the first puck at the Philadelphia Flyers' home opener against the New York Rangers."[30] Booing, however, is nothing compared to earlier (and subsequent) incidents of misbehavior.

For example, in 1989 at the venerable Veterans Stadium the "…[c]rew failed to remove the snow that had piled up for several days leading Eagles fans, including future governor Ed Rendell, no choice but to pelt the Dallas Cowboys' players and coach Jimmy Johnson with massive amounts of snowballs."[31] In 1997, Major League Baseball draftee J.D. Drew was drafted by, but refused to sign with the Philadelphia Phillies in Major League Baseball.[32] As a result, on his next return to the city while playing for the St. Louis Cardinals, "Philly fans welcomed Drew back home by throwing "D" batteries at him. The game was delayed for roughly ten minutes after debris landed near Drew in center

[29] *See* Adam Rosen, *10 Worst Philadelphia Sports Fans Moments*, BLEACHER REPORT (May 5, 2010), http://bleacherreport.com/articles/388192-10-worst-philadelphia-sports-fans-moments.
[30] *Id.*
[31] *Id.*
[32] *Id.*

field. Philly fans could've injured Drew, and they still wouldn't have felt any remorse."[33]

Further, in 1999, the Philadelphia Eagles selected Syracuse University quarterback Donovan McNabb in the NFL draft.[34] Instead of jubilation, "McNabb was greeted with a chorus of boos because the Philadelphia fans who were in attendance were pushing for the Eagles to draft Texas running back Ricky Williams."[35] And then there is the *pièce de résistance* that is detailed under the *criminal law* section, *infra*, at Citizen's Bank Park in 2010 when a 21 year old Phillies fan vomited intentionally on the 11-year-old daughter of an off-duty police officer.[36]

B. The Curse of Billy Penn

In short, Philadelphia fans take their sports seriously, and have little compunction about sharing their feelings with the players, owners, other fans, and the world. Fans have even blamed forces beyond the earth for the performance of the city's teams, including the curse of Billy Penn named after William Penn who founded the city in 1682.[37]

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[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] PHILLIES FAN CHARGED WITH INTENTIONALLY VOMITING ON COP'S KID (Apr. 16, 2010), http://content.usatoday.com/communities/gameon/post/2010/04/phillies-fan-charged-with-intentionally-vomiting-on-cops-kid/1#.UfLNRW03fYQ.
[37] *See* note 5, s*upra; see also,* PENNSYLVANIA HISTORICAL & MUSEUM COMMISSION, *THE QUAKER PROVINCE: 1681-1776*, http://www.portal.state.pa.us/portal/server.pt/community/over

Philadelphia's City Hall mounts a statue of Penn at its highest point, which for years was also the highest point within the city limits.[38] There was a tremendous outcry from the fans as the city's buildings went higher and higher above Penn's head and there was a commensurate decline in championship wins from the city's teams.[39] The outcry was enough that in 2007, as the new Comcast Center building became the city's highest point, the builder placed a 25-inch statute of Penn at the highest point of the structure, thus again restoring Penn at the

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view_of_pennsylvania_history/4281/1681-1776__the_quaker_province/478727 (last visited July 29, 2013).

[38] *See* Kevin Horan, *William Penn Atop Philly Once Again*, MLB.COM (Oct. 30, 2008), http://mlb.mlb.com/news/article.jsp?ymd=20081027&content_id=3648489&fext=.jsp&c_id=mlb ("Superstitious sports fans here have long believed that Philadelphia irreparably angered the sports gods over an architectural snafu more than two decades ago. It all started in 1987, when the Liberty Place skyscraper rose higher than the statue of William Penn that sits atop City Hall. Prior to that, a gentleman's agreement had been in place, mandating that no building could exceed the height of the city's founding father. Ever since then, a troubling distinction had grown more and more clear: The city experienced a golden age of sports success before the skyscraper, with the Flyers winning the Stanley Cup in 1974 and '75, the 1980 Eagles reaching the Super Bowl and the Phillies of the same year winning their only World Series.").

[39] *Id.* The authors are aware, however, of the statistics' maxim that *correlation is not causation*. *See, e.g.*, Nathan Green, *Correlation is Not Causation*, GUARDIAN (Jan. 6, 2012), http://www.theguardian.com/science/blog/2012/jan/06/correlation-causation.

pinnacle of the city.[40] The Phillies won the World Series in 2008[41] in seeming vindication of the fans' beliefs and in confirmation that the "curse" was lifted.

IV. PHILADELPHIA-RELATED SPORTS LAW CASES

What follows are summaries of significant sports law cases (or incidents) that have emanated from, occurred or passed through Philadelphia. We have divided cases by major legal category. We recognize that many cases do not fit nicely within one legal theory alone. However, we have attempted to place the cases under the most appropriate category for simplicity. Some cases are yet undecided or in the process of settlement while others can be traced back to the 19th Century.

A. Torts

1. Concussion Effects and Lawsuits

Those familiar with former Philadelphia Flyers hockey player Eric Lindros are cognizant of how head injuries can adversely affect and end a participant's career.[42] Those familiar with Owen

[40] Horan, *supra* note 38.
[41] 2008 WORLD SERIES (4-1): PHILADELPHIA PHILLIES (92-70) OVER TAMPA BAY RAYS (97-65), http://www.baseball-reference.com/postseason/2008_WS.shtml (last visited July 29, 2013).
[42] *See* David Fleming, *"Not So Crazy Now, am I?"* ESPN.COM (May 1, 2013),

Thomas, a former student-athlete and football player for the University of Pennsylvania who committed suicide in 2010, are cognizant of how brain injuries might adversely affect and end a participant's life.[43] An autopsy showed evidence of a repetitive brain trauma known as CTE (Chronic Traumatic Encephalopathy).[44] The issue of whether teams, leagues, coaches, trainers, or the manufacturers of football helmets could be held responsible remains unresolved at this point, however it is at the forefront of a national debate regarding the risks involved in professional and amateur team sports.[45]

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http://espn.go.com/nhl/story/_/page/Mag15notsocrazynowami/former-hockey-player-eric-lindros-redefined-nhl-culture-playing-injuries-espn-magazine (writing that Lindros sat out 18 games following the first concussion, and he suffered at least five more over the next two seasons, resulting in his retirement out of concern for the repeated injuries and the potential long term impact on his health).

[43] *See* Matt Flegenheimer, *A Year after Suicide of Penn Football Player, Many Questions Remain*, SI.COM (MAY 10, 2011), http://sportsillustrated.cnn.com/2011/writers/the_bonus/05/10/owen.thomas/index.html#ixzz2aBN6aU5Q (discussing that Thomas hanged himself in an apartment, had depression and evidence of CTE).

[44] *See* ESPN.com News Services, *Penn's Owen Thomas had CTE*, ESPN.COM (Sept. 10, 2010), http://sports.espn.go.com/ncf/news/story?id=5569329 (writing that "A detailed examination of his brain … showed he had the same disease caused by hard hits that has been associated with NFL players.").

[45] *See, e.g.*, Alan Schwarz, *As Injuries Rise, Scant Oversight of Helmet Safety*, N.Y. TIMES (Oct. 21, 2010), http://www.nytimes.com/2010/10/21/sports/football/21helmets.html?pagewanted=all&_r=0 (discussing the evolution (or

Philadelphia became the hub of a lawsuit related to sports concussions and alleged medical malpractice, and in 2013, a federal judge heard oral arguments as to whether lawsuits by thousands of former NFL players alleging concussion injuries should survive in the courts in *In Re: Nat'l Football League Players' Concussion Injury Litigation*.[46] Reaction to the Philadelphia-based lawsuit has already began to ripple through the sports community, with the NFL enacting changes to the rules of the game already in order to mitigate the chances of future head injury to players.[47]

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lack thereof) of football helmet safety standards primarily since 1973).

[46] *See* Gary Mihoces, *Judge Breaks Down Arguments in Concussion-related Suit*, USA TODAY (Apr. 9, 2013), http://www.usatoday.com/story/sports/nfl/2013/04/09/nfl-concussion-lawsuit-federal-judge-anita-brody/2066933/ (offering that U.S. Eastern District Judge Anita Brody in Philadelphia addressed more than 100 lawsuits against the NFL that have been consolidated, with more than 3,500 former players suing the NFL alleging that not enough was done to inform the players about the dangers of concussions and not enough is being done today to take care of them either.); In Re: Nat'l Football League Players' Concussion Injury Litigation, MDL No. 2323, (E.D. Pa. Aug. 29, 2013) *available at* http://www.paed.uscourts.gov/documents/opinions/13D0728P.pdf (last visited Sept. 4, 2013).

[47] *See* Mike Wobschall, *Helmet Use, Illegal Challenge Procedure Highlight Rules Changes*, MINNESOTA VIKINGS (Mar. 21, 2013), http://blog.vikings.com/2013/03/21/helmet-use-illegal-challenge-procedure-highlight-rules-changes/ (offering that the rule change "has been adopted in the name of player health and safety, and the passage of this rule represents a significant victory for the NFL in its effort to promote and enhance player safety.").

On August 29, 2013 the NFL concussion lawsuits were resolved with the aid of a court appointed mediator.[48] The agreement was approved by U.S. Eastern District Judge Anita Brody in Philadelphia.[49] The NFL has agreed to remit $765 million in medical benefits and injury compensation to retired NFL players, to finance research related to medical and safety improvements, and to pay litigation costs.[50] Attorneys' fees are in addition to the $765 million settlement amount.[51]

We now begin a more detailed discussion of Philadelphia sports law cases. The following three cases represent specific examples of how Philadelphia has played a part in the sports torts discussion in the context of negligence. Interestingly, these three examples all involve the Philadelphia Phillies baseball team.

2. Schentzel

In *Schentzel v. Philadelphia Nat'l League Club*, a husband sued on behalf of his wife after she

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[48] Judge Layn Phillips, *NFL, Retired Players Resolve Concussion Litigation; Court Appointed Mediator Hails "Historic" Agreement*, NFL LABOR FILES (Aug. 29, 2013), http://nfllabor.files.wordpress.com/2013/08/press-release-2.pdf; In Re: Nat'l Football League Players' Concussion Injury Litigation, MDL No. 2323, (E.D. Pa. Aug. 29, 2013) *available at* http://www.paed.uscourts.gov/documents/opinions/13D0728P.pdf (last visited Sept. 4, 2013).

[49] *Id.*

[50] *Id.*

[51] *Id.*

was hit by a foul ball at a Phillies baseball game on June 5, 1949.[52] The plaintiffs, residents of Allentown, traveled to see a doubleheader between the Philadelphia Phillies and the Chicago Cubs at Shibe Park in Philadelphia.[53] Their seats were located in the upper deck on the first base side, but they were not protected by any screening.[54] About ten minutes after the husband and wife sat down, she was hit by the foul ball.[55] She testified that she had never seen a baseball game before and even though had seen televised games she had seen no balls go into the stands.[56] The case was one of first impression for the court.[57]

The court analyzed whether the defendant baseball team owed the spectators a duty of care. In order to recover in a negligence action, the court

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[52] Schentzel v. Philadelphia Nat'l League Club, 96 A.2d 181 (Pa. Super. 1953). One of the original legal theories was loss of consortium.

[53] *Id.;* Shibe Park (also known as Connie Mack Stadium) was razed in 1976. *See, e.g.*, Connie Mack Stadium, http://www.conniemackstadium.com/ (last visited Aug. 18, 2013).

[54] *Schentzel* at 182 ("The seats, it developed, were located in the upper stand, on the first base side of the diamond, but not behind the protective screen, being removed therefrom by about 15 or 20 feet.").

[55] *Id.*

[56] *Id.*at 183 ("Plaintiff testified that she had never seen a baseball game prior to the one at which she was injured, that she knew nothing about it, that she had seen televised games but had seen no balls go into the stands on television." However, the husband was familiar with foul balls, stating, "There is a million foul balls, maybe three or four or five in an inning, goes into the stand."). *Id.*

[57] *Id.*at 188.

acknowledged the classic negligence formulation that a plaintiff must prove: (1) a legal duty owing to him by defendant; (2) an unintentional breach of that duty by careless conduct; (3) a causal connection between defendant's conduct and plaintiff's injury.[58] Furthermore, the court noted the classic defense that the plaintiff's case must not disclose that he voluntarily assumed the risk or was guilty of contributory negligence.[59]

The plaintiff made arguments that a special duty of sports teams to female patrons should be recognized and that *exceptional precautions* should have been taken toward them especially – the 1953 argument went – because many women were "[i]gnorant of the hazards involved in the game."[60] The argument did not persuade the court.[61] The court acknowledged that there was screening at the game, but the court pointed out that there was enough

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[58] *Id.*at 183-184.

[59] *Id.*at 184 (noting that just because there is an accident does not mean there is negligence, citing Thompson v. Gorman, 366 Pa. 242, 246, 77 A.2d 413 (1951). The court then stated, "One who maintains a 'place of amusement for which admission is charged, is not an insurer, but must use reasonable care in the construction, maintenance and management of it, having regard to the character of the exhibitions given and the customary conduct of patrons invited:' *Haugh v. Harris Bros. Am. Co.*, 172 A. 145 (Pa. 1934)." Kallish v. American Base Ball Club of Philadelphia, 10 A. 2d 831 (Pa. Super. 1940)."). Consider that the Kallish case was a directed verdict in favor of the defendant and did not involve a foul ball but rather a spectator who fell on the four-year old plaintiff during an overcrowded game.

[60] *Id.*at 185-188.

[61] *Id.*at 191.

screening behind home plate and that even if there was a wider screening area that there was no proof that she would not have been hit.[62] In fact, there was no proof of deviation from the sections of grandstands at other baseball parks.[63] The court stated that, "[i]n our opinion [the defendants] exercise the required care if they provide screen for the most dangerous part of the grand stand and for those who may be reasonably anticipated to desire protected seats, and that they need not provide such seats for an unusual crowd, such as the one in attendance at the game here involved."[64] Additionally, there was no claim that the screen was defective either.[65]

Thus, the court sided with the appellant baseball club.[66] Key to the decision was the theory that as a spectator at the Philadelphia game the wife voluntarily assumed the risk of being struck by batted

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[62] *Id.*at 185.
[63] *Id.*
[64] *Id.*(stating, "In general accord with this view are these cases from other jurisdictions" and citing *Quinn v. Recreation Park Ass'n*, 3 Cal. 2d 725, 46 P. 2d 144 (1935); *Brown v. San Francisco Ball Club, Inc.*, 99 Cal. App. 2d 484, 222 P. 2d 19 (1950); *Keys v. Alamo City Baseball Co.*, Tex. Civ. App. 150 S. W. 2d 368 (1941); *Williams v. Houston Baseball Ass'n*, Tex. Civ. App. 154 S.W. 2d 874 (1941); *Ratcliff v. San Diego Baseball Club*, 27 Cal. App. 2d 733, 81 P. 2d 625 (1938); *Blackhall v. Capitol District Baseball Ass'n,* 154 Misc. 640, 278 N.Y.S. 649, City Ct., 154 Misc. 640, 278 N.Y.S. 649, *affirmed*, 157 Misc. 801, 285 N.Y.S. 695 (1936); *Wells v. Minneapolis Baseball & Athletic Ass'n,* 122 Minn. 327, 142 N.W. 706 (1913).).
[65] *Id.*at 185.
[66] *Id.*at 191.

or thrown balls.[67] The court recognized that there was no *express consent*, but there was *implied consent*, citing PROSSER ON TORTS and providing numerous examples from other jurisdictions.[68] The court also recognized that at 47 years old Mrs. Schentzel had significant life experience.[69] It concluded that she was presumed to have the "neighborhood knowledge with which individuals

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[67] *Id.*at 186-187.

[68] *Id.*The court cited PROSSER ON TORTS, 383-384, "By entering freely and voluntarily into any relation or situation which presents obvious danger, the plaintiff may be taken to accept it, and to agree that he will look out for himself, and relieve the defendant of responsibility. *Those who* participate or *sit as spectators at sports* and amusements *assume all the obvious risks of being hurt by* roller coasters, *flying balls* [Kavafian v. Seattle Baseball Club Ass'n, 105 Wash. 215, 177 P. 776, 181 P. 679; Brisson v. Minneapolis Baseball & Athletic Ass'n, 185 Minn. 507, 240 N.W. 903 (baseball); Schlenger v. Weinberg, 107 N.J.L. 130, 150 A. 434, 69 A.L.R. 738 (golf); Douglas v. Converse, 248 Pa. 232, 93 A. 955 (polo); Ingersoll v. Onondaga Hockey Club, 245 App. Div. 137, 281 N.Y.S. 505 (hockey)], fireworks, explosions, or the struggles of contestants. 'The timorous may stay at home.' [Chief Justice Cardozo in Murphy v. Steeplechase Amusement Co., 250 N.Y. 479, 166 N.E. 173.]…One who enters upon the premises of another, even as a business visitor, assumes the danger of all known or obvious conditions which he finds there. The consent is found in going ahead with full knowledge of the risk.' (Italics ours.)."

[69] *Id.*at 188. (Stating that "[p]laintiff was a woman 47 years of age. There is nothing whatever in the record to support an inference that she was of inferior intelligence, that she had subnormal perception, or that she had led a cloistered life.").

living in organized society are normally equipped."[70] More specifically, the court noted that "all" should know that foul balls go astray during a baseball game and that such matters are so common every day at baseball games that it should be the "subject of judicial notice."[71]

Ultimately, the court ruled as a matter of law the plaintiff had failed to prove negligence on the part of defendant, and that she had impliedly assumed the risks of the normal and ordinary risks incident to attendance at a baseball game.[72] The 1953 *Schentzel* decision has served as precedent and has been cited by many other sport-related flying object cases including baseball, golf and soccer, becoming one of the classic foul-ball cases in sports law.[73]

3. Loughran

[70] *Id.*For example, such language is directly cited in Loughran v. Phillies, 888 A.2d 872, 876 (Pa. Super. 2005), discussed *infra*.

[71] *Schentzel*, 96 A.2d at 188 (stating that "[i]t strains our collective imagination to visualize the situation of the wife of a man obviously interested in the game, whose children view the games on the home television set, and who lives in a metropolitan community, so far removed from that knowledge as not to be chargeable with it.").

[72] *Id.*

[73] We Shepardized via the Lexis.com database the decision and discovered that among the 90 total cites the following popular sports law cases referenced *Schentzel* including, but not limited to, Jones v. Three Rivers Mgmt. Corp., 483 Pa. 75, 394 A.2d 546, 1978 Pa. LEXIS 1133 (1978), Benejam v. Detroit Tigers, Inc., 246 Mich. App. 645, 635 N.W.2d 219, 2001 Mich. App. LEXIS 146 (2001), and Loughran v. Phillies, 2005 PA Super 396, 888 A.2d 872, 2005 Pa. Super. LEXIS 4093 (Pa. Super. Ct. 2005).

Over half a century later in *Loughran v. Phillies,*[74] the *Schentzel* decision impacted a case involving a spectator who claimed that the Philadelphia Phillies owed fans a duty of care during the period in between innings when outfielders routinely tossed the baseball into the stands after making a catch.[75] The Philadelphia Phillies were down 5-1 to the Florida Marlins at Veterans Stadium on the night of July 5, 2003.[76] Marlins third baseman Mike Lowell hit a fly ball to center field, and Phillies centerfielder Marlon Byrd caught it to end the

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[74] 888 A.2d 872 (Pa. 2005).

[75] *See, e.g.*, Jeff Elliott, *Suns Players will Still Toss Balls to Fans, but One Promotion will Change*, JAX AIR NEWS (July 9, 2011), http://jaxairnews.jacksonville.com/sports/baseball/2011-07-09/story/suns-players-will-still-toss-balls-fans-one-promotion-will-change#ixzz2aSvQDRzN (expressing concern over using the eighth-inning promotion of using an oversized slingshot to fling T-shirts into the stands following the days-before death of fan Shannon Stone, at Rangers Ballpark in Arlington, Texas, who fell 20 feet onto concrete while reaching for a ball tossed by Texas Rangers outfielder Josh Hamilton and stating, "Jacksonville Suns players Suns players routinely throw balls into the stands if they've made the catch for the third out of the inning. Most will carry the ball all the way to the Jacksonville dugout before throwing an underhand toss into the stands. Some of the outfielders will turn and throw the ball into the center-field or right-field bleachers.").

[76] *Loughran*, 888 A.2d at 872; *See also* BASEBALL-REFERENCE.COM, *Saturday, July 5, 2003, 7:05PM, Veterans Stadium*, http://www.baseball-reference.com/boxes/PHI/PHI200307050.shtml (last visited July 29, 2013) (providing the box score of the game).

seventh inning.[77] On his way back to the dugout, Byrd threw the ball into the center-field seats and allegedly hit spectator Jeremy Loughran in the face.[78] Loughran sued for negligence.[79] Loughran claimed in the suit that as of a result of being hit by the baseball he was treated for "severe headaches, vomiting, confusion, incoherence, hallucinations, loss of balance, head and neck pain, photophobia, eye spasms, sleep disruption, and depression."[80]

In a parallel to the *Schentzel* decision,[81] the court was asked to address whether or not spectators know that the tossing of a ball by an outfielder into the stands in between innings is a common occurrence, for "[o]nly when the plaintiff introduces adequate evidence that the amusement facility in which he was injured *deviated in some relevant respect from established custom* will it be proper for an 'inherent-risk' case to go to the jury."[82]

The court found that experiences that have become a part of the game but lie outside the official rulebook can still be considered to be "established custom."[83] The court explained that fans often clamor for souvenir baseballs, and like "[h]ot dogs, cracker jack, and seventh inning stretches," some activities have become a part of the game of baseball even though not found in the Major League Baseball

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[77] *Id.*
[78] *Id.*at 874.
[79] *Id.*
[80] *Id.*
[81] *Schentzel*, 96 A.2d at 188.
[82] *Loughran*, 888 A.2d at 875 (quoting Jones v. Three Rivers Mgmt. Corp., 394 A.2d 546, 550 (Pa. 1978).
[83] *Id.*

rulebook.[84] It stated, "Although not technically part of the game of baseball, those activities have become inextricably intertwined with a fan's baseball experience, and must be considered a customary part of the game. Similarly, both outfielders and infielders routinely toss caught balls to fans at the end of an inning."[85]

The Phillies organization and Marlon Byrd were granted summary judgment by the trial court which held that "[t]he applicable law clearly states that recovery is not granted to those who voluntarily expose themselves to risks by participating in or viewing an activity."[86] Thus, the court affirmed that "[c]ountless Pennsylvania court cases have held that a spectator at a baseball game assumes the risk of being hit by batted balls, wildly thrown balls, foul balls, and in some cases bats [and all the other flying debris that have become part of the Philadelphia baseball experience]."[87] Thus, in the *Schentzel* and *Loughran* cases, the Phillies were vindicated by the courts.

4. The Phillie Phanatic

[84] *Id.*at 875.
[85] *Id.*at 876.
[86] *Id.*
[87] *Id.*

It might be considered *negligence per se,*[88] so to speak, if we did not address the Phillie Phanatic.[89] The Phanatic is the large, green, and mildly annoying mascot of the Philadelphia Phillies.[90] It is one of the most notable mascots at any level in any sport and has been characterized as the "most-sued mascot in the majors."[91] The fuzzy green creature started in 1978 and was played by Dave Raymond.[92] It was created with the help of Jim Henson, founder of the

[88] *See, e.g.*, McCloud v. McLaughlin, 837 A.2d 541, 545 (Pa. Super. 2003) (discussing negligence per se in Pennsylvania in the context of a dog-related injuries to a passerby and noting that this legal theory recognizes that ordinances and statutes regulate conduct and impose legal obligations and conformities to the states and that, "… through an individual's violation of a statute or ordinance, it is possible to show that the individual breached his duty to behave as a reasonable person: in other words, that the individual is 'negligent per se.'").

[89] *See* MLB.COM, *The Phillie Phanatic*, http://philadelphia.phillies.mlb.com/phi/community/phi_community_phanatic.jsp (last visited Aug. 18, 2013) (discussing the debut of the Phillie Phanatic in 1978 and exploring the profile generally of the character).

[90] *Id.*

[91] *See* Robert M. Jarvis & Phyllis Coleman, *Hi-Jinks at the Ballpark: Costumed Mascots in the Major Leagues*, 23 CARDOZO L. REV. 1635, 1661 (2002) (providing that jury awards against the Phanatics' misdeeds include $2.5 million to an individual who suffered back injuries from being hugged too hard at the May 1994 opening of a paint store; $25,000 to a pregnant woman who was accidentally kicked in the stomach at an August 1993 game between the Phillies and the Cincinnati Reds; and $128,000 to a retired bus driver who was knocked over at a May 1991 church carnival).

[92] *See* MLB.COM, *supra* note 89.

Muppets.[93] The Phanatic quickly developed a national reputation, exemplified by a prominent confrontation with Manager Tommy Lasorda of the Los Angeles Dodgers in 1988.[94]

That trouble-maker, lawsuit-magnet reputation was maintained in 2010 by a lawsuit filed by a 70-year-old woman who claimed that the Phanatic injured her knees climbing through the stands in a 2008 minor league game in Reading, Pennsylvania.[95] The plaintiff sued the man who played the Phanatic, the Philadelphia Phillies, and the minor league Reading (Pennsylvania) Phillies.[96]

More litigation continued in 2012 when the Phanatic was sued again by a woman who claimed that in 2010, at her sister's wedding, the Phillies' mascot lifted the Plaintiff and her lounge chair and tossed both into a nearby pool. Her lawsuit maintains that she suffered "[s]evere and permanent injuries to her head, neck, back, body, arms and legs, bones, muscles, tendons, ligaments, nerves and tissues ...

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[93] *Id.*

[94] *See* Tommy Lasorda, *I Hate the Phillie Phanatic*, TOMMY LASORDA'S WORLD (July 20, 2005), http://tommy.mlblogs.com/2005/07/20/i-hate-the-phillie-phanatic/ (blogging by Lasorda about the incident).

[95] Associated Press, *Phillies' Furry Phanatic Mascot Facing Civil Suit*, DAILY TIMES (June 30, 2010), http://www.delcotimes.com/articles/2010/06/30/news/doc4c2b5745be101881300576.txt (stating that the plaintiff claimed that "the bumbling bird exacerbated her arthritis, ultimately forcing her into knee replacement surgery" and sought at least $50,000 for the incident). According to the article, the man who played the Phanatic on that day was Tom Burgoyne.

[96] *Id.*

[and] although the pool had water [the plaintiff] was tossed into the shallow end."[97]

It does not appear that the Phillie Phanatic, at least at the time of this writing, has an interest in modifying its behavior to avoid litigation.

B. Philly Misconduct and the Criminal Law

We believe that no city in the United States has become more infamous with regard to spectator misbehavior and criminal activity than Philadelphia.[98] Examples misconduct in sport-related activities involving Philadelphians are simply too numerous to list.[99] As we outline in chronological

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[97] *See* Jason Nark, *Phanatic Sued by Abington Woman over Alleged Pool Horseplay*, PHILLY.COM (June 13, 2012), http://mobile.philly.com/news/?wss=/philly/news/breaking/&id=158591835#YAVFDQ7QoZSTT5VU.99.

[98] *See* discussion under the sections examples of Philadelphia Fandom, Misbehavior & the Curse of Billy Penn, *supra.*

[99] *Id.*A Google search of "Philadelphia Sports Fan Behavior" on July 31, 2013 yielded roughly 3,750,000 results. One of the most unfortunate included an event on national television on Nov. 10, 1997, in which a spectator shot a flare across Veteran's Stadium field into the stands during a nationally televised Monday night game against the San Francisco 49ers. *See* Marisol Bello and Nicole Weisensee, *Police Pursuing Flare-ups at Vet*, PHILLY.COM (Nov. 15, 1997), http://articles.philly.com/1997-11-15/news/25541800_1_flare-eagles-owner-jeffrey-lurie-fan-behavior.; *see also* Mark McDonald and Julie Knipe Brown, *Brew-haha over Brawl Pols Deman Answers for Vet Melee on Opening Day*, PHILLY.COM (Apr. 16, 1999), http://articles.philly.com/1999-04-16/news/25520901_1_prep-students-beer-sales-school-administrator (discussing the April 13, 1999 high school brawl

order, some of this behavior is criminal legend within the sports community.[100] In a few instances, "criminal" misconduct never resulted in criminal charges or even a lawsuit, including the *Goon-Gate* incident in 2005 in which Temple University head basketball coach John Chaney sent in backup player Nehemiah Ingram into the game against St. Joseph's University resulting in an intentional foul against St. Joe's John Bryant, breaking Bryant's arm and ending Bryant's senior season.[101] Chaney's actions resulted only in his apology, along with a three-game suspension, and Bryant never filed a lawsuit against Ingram, Chaney or Temple.[102] Some commentators

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in the stands between local students from St. Joe's Prep and Bonner High at the Phillies' home opener which was actually broadcast on ESPN national television.; *see also* Leah Goldman, *Philly Sportswriters Get Into Fistfight after Explosive Twitter Fight*, BUS. INSIDER (Sept. 28, 2011), http://www.businessinsider.com/les-bowen-jeff-mclane-fight-2011-9#ixzz2cLS9l5KL (discussing the punch thrown by Philadelphia sports writer Les Bowen at the face of sports writer Jeff McLane after a Twitter debate and subsequent Eagles press conference).

[100] *See, e.g.*, EJ Dickson, *The New York Times Can't Stop Trolling Philadelphia*, SALON.COM (Jun. 13, 2013), http://www.salon.com/2013/06/13/the_new_york_times_cant_stop_trolling_philadelphia/ (detailing 16 different "bad Philly fan" articles in the New York Times and how the newspaper cannot stop writing about such Philadelphia-based misdeeds).

[101] *See* Joshua D. Winneker, Esq., *Re-living "Goon-Gate" and its Potential Legal Consequences for Universities and Colleges*, COLLEGE SPORTS BUS. NEWS (Feb. 1, 2011), http://collegesportsbusinessnews.com/issue/february-2011/article/re-living-goon-gate-and-its-potential-legal-consequences-for-universities-and-colleges.

[102] *Id.*

have stated that "[i]n a just world, Chaney would face both criminal and civil charges, spend at least a few nights in jail, and be removed from the Basketball Hall of Fame."[103] However, the incident quickly disappeared.[104]

1. Santa Claus Incident (1968)

Still, almost forty years earlier, on December, 1968, Philadelphia sports fans etched their name into permanent, national ignominy after throwing snow balls at Santa Claus at an Eagles game.[105] "Frank Olivo, the Santa in question, was not drunk, nor was his red suit in tatters that December day in 1968, when he walked onto the field for the [Eagles] halftime show, only to be met by a chorus of jeers and a snowball fusillade from Eagles fans."[106] The incident was covered by an ESPN special video documentary in 2011 covering the incident which

[103] *See* Willisms, "*Goon-Gate" Strikes College Basketball: The Downfall of John Chaney*, WILLISMS.COM (Feb. 27, 2005), http://www.willisms.com/archives/2005/02/goongate_strike.html.

[104] *See* Mike Jensen, *St. Joe's? So what for Chaney with "Goon-gate"in the past, the Temple Coach Put No Special Emphasis on Tonight's Matchup*, PHILLY.COM (FEB. 14, 2006), http://articles.philly.com/2006-02-14/sports/25409608_1_owls-coach-john-chaney-temple-owls-senior-guard.

[105] *See* Dickson, *supra*; *see also* Associated Press, *Philadelphia's Boos Still Ringing for Santa* (Jan. 30, 2005), http://www.nytimes.com/2005/01/30/sports/football/30nfl.html?_r=0 (discussing the Santa Claus incident).

[106] *Id.*

occurred at Franklin Field.[107] The crowd was whipped up and with that day's loss ended a sad 2-12 season.[108] Interestingly, apparently there were no criminal charges from the most infamous Philadelphia sport-related incident.[109]

2. Eagles Court (1997)

Though the Santa Claus incident has its place in shaping Philadelphia's negative (or passionate) reputation, other incidents involving misbehavior at Eagles' games became out-of-control. As a result, in 1997 the Philadelphia Eagles established a courtroom at Veterans Stadium where the Eagles

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[107] *See* Elizabeth Merrill, *Philly Booed Santa, but Santa Still Smiles*, ESPN.COM (Dec. 22, 2011), http://espn.go.com/nfl/story/_/id/7377416/philadelphia-eagles-fans-once-booed-santa-santa-jovial-63-year-old-frank-olivo-loves-philly-teams https://www.youtube.com/watch?v=AWvza6en5Rg. Merrill states, "The snowstorm prevented the Eagles' regular Santa, who was based in Atlantic City, N.J., from coming to the game. So an Eagles employee asked Olivo to fill in. The instructions were simple: When the song "Here Comes Santa Claus" started, that was his cue to walk through a column of cheerleaders and the Eagles' orchestra from one end zone to the other, then head back along the track."

[108] *Id.*

[109] *See* GLEN MACNOW AND ANTHONY L. GARGANO, THE GREAT PHILADELPHIA FAN BOOK 34-38 (2003) (Discussing the Santa Claus Incident generally. In this, and in all other accounts of the incident that were reviewed by the authors, there has never been a mention of criminal charges filed in connection thereto.)

played at that time.[110] It was established due to the extremely unruly behavior of Eagles fans against fans of visiting teams, combined with struggles related to managing acts of public drunkenness,[111] prompting Philadelphia municipal judge Seamus McCaffrey (and the Philadelphia Police Department) to establish a small, in-stadium courtroom known as *Eagles Court*.[112] This subterranean courtroom handled unruly fans with quick judgment and swift sentencing.[113] Cases usually included disorderly conduct, public intoxication, and like offenses.[114] The court commonly levied sentences that forced offenders to give up season tickets, or forced fans to pay up to a $400 fine and sit in jail for the remainder of the game.[115]

Technology superseded Eagles Court in later years and *Eagles Court* no longer exists.[116] Still, after having moved to Lincoln Financial Field in 2003, the Eagles then became the first NFL team to encourage

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[110] *See* Rosland Briggs, *20 Fans Go Before 'Eagles Court' Most Were Fined for Disorderly Conduct. The Legal Debut Was Judged a Success by Officials*, PHILLY.COM (Nov. 27, 1997), http://articles.philly.com/1997-11-24/news/25542778_1_steelers-fans-eagles-court-disruptive-conduct. The Eagles moved their home field to Lincoln Financial Field in 2003. *See* Philadelphia Eagles, *Lincoln Financial Field*, ESPN.COM, http://espn.go.com/travel/stadium/_/s/nfl/id/21/lincoln-financial-field (last visited Aug. 18, 2013).

[111] *Id*.

[112] *Id*; *see also*, EPSTEIN, SPORTS LAW at 171.

[113] EPSTEIN, at 171.

[114] *Id*.

[115] *Id*.

[116] *Id*.

fans to use text messaging to report misbehaving fans to security personnel beginning in 2007.[117] One wonders how the Santa Claus and Goon-Gate incidents might have been resolved and played-out today given the ubiquitous nature of YouTube, Facebook, Twitter and other social media websites that provide instant access and commentary regarding public behavior and events.

The following examples demonstrate more recent ways in which Philadelphians have generated national discussion as to the extent that the criminal law is involved in sport-related incidents. The three involve spectators or fans both inside and outside of stadium venues.

3. Attack on David Sale, Jr. (2009)

In 2009, three people were charged in an attack on David Sale, Jr.[118] Sale was beaten and kicked to death near Citizens Bank Park during a Philadelphia Phillies baseball game.[119] The three

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[117] *Id*.

[118] *See* Michael Newall, *Three to Face Trial in Beating Death at Phillies Game*, PHILADELPHIA WEEKLY (Aug. 5, 2009), http://www.philadelphiaweekly.com/news-and-opinion/phillynow/Three-To-Face-Trial-in-Beating-Death-at-Phillies-Game-52557192.html#ixzz2b8cOaeWp.

[119] *See Three Men Sentenced in Fatal Phillies Ballpark Attack*, FOXNEWS.COM (DEC. 20, 2011), http://www.foxnews.com/us/2011/12/20/three-men-sentenced-in-fatal-phillies-ballpark-attack/#ixzz2b8bfgEga (noting that Francis Kirchner, Charles Bowers and James Groves each pleaded guilty to voluntary manslaughter and criminal conspiracy, and Kirchner, 30, was sentenced to consecutive

perpetrators plead guilty to manslaughter and conspiracy charges.[120] The incident was not the only one that weekend, but it seemed to confirm the city's reputation.[121] Sale was attacked over a spilled beer at the game.[122] He was beaten so badly that in one hearing the medical examiner spent almost an hour listing Sale's injuries.[123]

4. "Vomit Man" (2010)

terms totaling nine to 18 years, Bowers got consecutive terms totaling five to 10 years, and Groves was sentenced to concurrent terms of two to four years).

[120] *See* Associated Press, *Men Plead Guilty in 2009 Fatal Beating*, ESPN.COM (Oct. 18, 2011), http://espn.go.com/mlb/story/_/id/7119750/three-men-plead-guilty-fatal-philadelphia-phillies-ballpark-beating.

[121] *See* St. John Barned-Smith, *Phils Fans: The New Broad Street Bullies?*, PHILLY.COM (July 27, 2009) ("David Sale Jr., 22, of Lansdale, was beaten to death in a parking lot near the stadium following a dispute in McFadden's restaurant in the Citizens Bank Park complex."… "It was a new chapter in Philadelphia sports fans' bad behavior over the years - overhyped, in the eyes of many locals - highlighted by the batteries thrown at J.D. Drew in 1999 and the infamous booing of Santa Claus in 1968.").

[122] *Id*.; *see also* Mike Newall, *Judge Sentences 3 in Beating Death after Phillies Game*, PHILLY.COM (Dec. 20, 2011), http://articles.philly.com/2011-12-20/news/30538470_1_judge-sentences-plea-bargain-phillies-game.

[123] *Id.*("They included severe brain trauma and lacerations to the spleen, liver, left kidney, and bowels. His left ear was partially torn off, and he suffered a tear in his left vertebral neck artery that was so deep it caused blood to pour into his spinal column . . .").

The aforementioned *pièce de résistance*[124] occurred when a 21-year-old New Jersey man intentionally vomited on another fan and his 11-year-old daughter in the stands at a Philadelphia Phillies game in April 2010.[125] Matthew Clemmens, ostensibly the very model of a modern Major-General,[126] attended the game in Citizen's Bank Park. Clemmens and his friend were cursing and heckling other spectators, and after a spilled beer and some spitting, Clemmens put his fingers down his throat and vomited on a father and daughter sitting below him, and punched the father and was eventually tackled by other spectators and arrested.[127]

There was tremendous concern throughout the Phillies fan community regarding if the park was a safe place for families, and questioning how and why a fan could behave as Clemmens did here.[128] The story made national news and did nothing to help

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[124] *See* note 36, *supra*.

[125] ESPN.com News Services, *Man Accused of Vomiting on Girl at Game*, ESPN.COM (Apr. 26, 2010), http://sports.espn.go.com/mlb/news/story?id=5098407.

[126] The reference is to a musical satire of an educated 19th century British Army officer from Gilbert & Sullivan's 1879 *The Pirates of Penzance*. "[T]he song is replete with historical and cultural references, in which the Major-General describes his impressive and well-rounded education." MAJOR-GENERAL'S SONG, https://en.wikipedia.org/wiki/Major-General''s_Song (last visited Aug. 6, 2013).

[127] *See* Associated Press, *Jersey Man Gets up to 3 Months in Jail*, ESPN.COM (July 30, 2010), http://sports.espn.go.com/mlb/news/story?id=5423356.

[128] *Id.*

the perception of the Philadelphia sports community within the rest of the sporting world.[129]

5. Geno's Brawl (2012)

Unfortunately, the violent reputation of Phillies fans crosses sports, and it crops up around hockey games too.[130] One infamous 2012 hockey incident had both tort and criminal law elements. Dennis Veteri, the main perpetrator in this incident, was sentenced to house arrest and probation after pleading guilty to aggravated and simple assault and conspiracy after attacking a fan of a rival team.[131]

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[129] *Id.*; *see also* Crimesider Staff, *Matthew Clemmens, Phillies Fan, "Vomit Man"; Admits He Threw up on Cop, Kid at the Ol' Ballgame*, CBS NEWS (May 25, 2010), http://www.cbsnews.com/8301-504083_162-20005950-504083.html; *see also* Vince Lattanzio, *Police: Phillies Fan Assaults, Vomits on Cop and Family*, NBC 10 PHILADELPHIA (Apr. 16, 2010), http://www.nbcphiladelphia.com/news/local/Off-Duty-Officer-Daughters-Assaulted-at-Phillies-Game-90983739.html.

[130] *See* Kyle Scott, *Oh Boy… Flyers and Rangers Fans Fight Outside Geno's*, CROSSING BROAD (Jan. 3, 2012), http://www.crossingbroad.com/2012/01/oh-boy-flyers-and-rangers-fans-fight-outside-genos.html; *see also* Travis Hughes, *Wanted: 'Flyers fans' who beat up Rangers fans at Geno's Steaks*, (Jan. 4, 2012), http://www.broadstreethockey.com/2012/1/4/2682057/philadelphia-flyers-fan-fight-rangers-winter-classic-genos-steaks.

[131] *See* Ryan Hutchins, *Woodbridge Cop Beaten after Flyers-Rangers Hockey Game Files Suit*, NJ.COM (Jan. 24, 2013), http://www.nj.com/news/index.ssf/2013/01/neal_auricchio_jr_beating_pres.html.

After drinking during the hockey game, Veteri attacked a decorated Marine veteran, Neal Auricchio, Jr., who had previously been wounded in Iraq.[132] Veteri inflicted head and face injuries in the attack on Auricchio that it required a titanium plate in order to fix.[133] In January 2013, a six count civil complaint was filed against Veteri and the South Philly Bar and Grill, the place where he watched the NHL's New York Rangers beat the Philadelphia Flyers 3-2 leading to the confrontation outside Geno's Steaks, the popular landmark in South Philadelphia.[134]

C. Contract Law

After reading the above discussion, one might think that Philadelphia is the center of all things tortious or criminal within sports, but the city also has been a bastion of sports contract law and related issues throughout its history (or at least since 1890).[135] Consider from a contract drafting perspective (such as a *force majeure* clause)[136] the

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[132] *Id.*

[133] *Id.*

[134] *Id.; see also* Ray Rossi, *Woodbridge Cop Beaten after Flyers-Rangers Winter Classic Game Files Suit. Should the Bar be Held Liable?* NJ1015.COM (Jan. 24, 2013), http://nj1015.com/woodbridge-cop-beaten-after-flyers-rangers-winter-classic-game-files-suit-should-the-bar-be-held-liable-pollgraphic-video-nsfw/.

[135] *See* Hallman discussion, *infra*.

[136] "The term force majeure relates to the law of insurance and is frequently used in construction contracts to protect the parties in the event that a segment of the contract cannot be

Snowmageddon incident on December 26, 2010.[137] In that incident a Sunday Night Football game between the Minnesota Vikings and Eagles in Philadelphia was postponed to Tuesday, December 28, due to a snow emergency.[138] It resulted in the first Tuesday NFL game in 64 years.[139] The snow emergency and the impact on the game's schedule could serve as an excellent pedagogical inquiry in a legal course as to how to draft contracts with an eye on what can go wrong during the contract's performance. But beyond *Snowmageddon*, we now focus on six of the most influential Philadelphia-based contract law sports cases.

1. Darko Milicic (2004): Minors and Contracts

Milicic v. Basketball Marketing Co.,[140] a Pennsylvania Superior Court case, dealt with an

performed due to causes that are outside the control of the parties, such as natural disasters, that could not be evaded through the exercise of due care." WEST'S ENCYCLOPEDIA OF AMERICAN LAW, 2.ed (2008), *available at* http://legal-dictionary.thefreedictionary.com/Force+majeure+clause (last visited Aug. 6, 2013).

[137] *See* Rob Gloster, *Philadelphia Eagles-Minnesota Vikings Game Postponed to Tomorrow by Storm*, BLOOMBERG (December 27, 2010), http://www.bloomberg.com/news/2010-12-27/philadelphia-eagles-minnesota-vikings-game-postponed-to-dec-28-by-storm.html.

[138] *Id.*

[139] *See* Tim Molloy, *'Nation of Wussies' Gets First Tuesday Night NFL in 64 Years*, THE WRAP (Dec. 27, 2010), http://www.thewrap.com/tv/column-post/nation-wussies-get-first-tuesday-night-nfl-64-years-23489.

[140] 857 A.2d 689 (Pa. Super. 2004).

injunction that permitted Darko Milicic, a professional basketball player in the National Basketball Association (NBA), to disaffirm an endorsement deal signed as a minor at age 16 with The Basketball Marketing Co.[141] The contract contained a choice of law clause requiring the agreement to be governed by Pennsylvania law.[142] Milicic was not well-known in the United States, but his draft status and potential for fame skyrocketed by the time he turned 18 years old and was eligible for the NBA draft."[143] Upon turning 18, Milicic disaffirmed the agreement.[144] Within ten days of his birthday he started to return all monies and products from the marketing company (or their equivalent value) that he had received per the contract.[145] However, the sponsor refused to accept this disaffirmance and communicated with other companies about its intent to hold Milicic to the agreement.[146] Milicic lost a potential Adidas sponsorship as a result.[147]

Milicic received a temporary restraining order and injunction.[148] On appeal, the court upheld the order[149] and held that Milicic had timely

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[141] *Id*.; *see also generally* Jenna Merten, *2004 Annual Survey: Recent Developments in Sports Law*, 15 MARQ. SPORTS L. REV. 531, 552 (2005)
[142] *Milicic* at 691.
[143] *Id.*at 691-92.
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] Merten, *supra* note 141 at 552; *Milicic* at 692.
[149] *Milicic* at 697.

disaffirmed the contract.[150] It also noted the very real harm (for example the lost Adidas endorsement contract) to Milicic's negotiation position vis-à-vis sponsors.[151] The court also found that Basketball Marketing's letters to potential sponsors were *prima facie* evidence of a plausible claim of intentional interference with prospective contractual relations.[152]

2. Allen Iverson (2003): Past Consideration

Allen Iverson joined the Philadelphia 76ers basketball team in 1996.[153] As a rising star at the time, Iverson had the usual opportunities for endorsement deals, marketing contracts, and unfortunately, human leaches. A family friend sued Iverson for breach of an oral contract in *Blackmon v. Iverson*.[154] The plaintiff brought a breach of contract claim stemming from Iverson's reference to himself as "The Answer" and marketing himself accordingly.[155] The record showed that the plaintiff had suggested that Iverson use "The Answer" as a

[150] *Id.*at 696.
[151] *Id.*at 694.
[152] *Id.*at 697.
[153] *See* ALLEN IVERSON | GUARD, ROTOWORLD (Jan. 29, 2013), http://www.rotoworld.com/player/nba/409/allen-iverson (last visited Aug. 8, 2013).
[154] 324 F. Supp.2d 602 (E.D. Pa. 2003); *see also* Brent C. Moberg, *2003 Annual Survey: Recent Developments in Sports Law*, 14 MARQ. SPORTS L. REV. 603, 615-616 (2004).
[155] *Iverson*, 324 F. Supp.2d at 605-606.

nickname in 1994, before Iverson went professional.[156]

The issue centered on the fact that the idea was shared with Iverson willingly, without compensation.[157] However, later on same night that the idea was willingly revealed Iverson orally promised to give the plaintiff a share (25%) of the royalties stemming from the "The Answer" moniker.[158] The plaintiff worked on the promotion and marketing of the nickname and he was reassured multiple times that he would be paid his share.[159] "The parties also discussed using "The Answer" as a logo."[160] The court focused on the timing of when "The Answer" nickname was attributed to Iverson by the plaintiff.[161] The court found that because disclosure of the nickname by plaintiff occurred *before* Iverson made any promises to the plaintiff, and *before* Iverson decided to use "The Answer" in his 1996 shoe contract and *before* sales of products bearing "The Answer" began in 1997, the disclosure was past consideration insufficient to create a new and binding contract.[162] The complaint was dismissed.[163]

3. Bill Hallman: The Reserve Clause I (1890)

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[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.*at 612; *see also* Moberg, *supra* note 154, at 615-616.
[163] *Id.*

One of the first sports law cases in the United States involved Bill Hallman, a utility infielder, who signed an agreement in October 1888 with the Philadelphia Ball Club of the National League to play for the 1889 season.[164] At that time, the existence of a reserve clause or the *reserve rule*, essentially held players hostage to the team they signed with in that league.[165] Hallman later signed a contract with the Philadelphia Athletics of the rival Players' League for the following season.[166] His old team sued, asserting that Hillman must renew the old contract for the following year "'[o]f similar tenor, form and terms' as the old contract."[167]

Judge M. Russell Thayer delivered the opinion of the Philadelphia County Court on March 15, 1890, expressing his discontent, stating that under this rule Hallman would be "[a]bsolutely at [the owner's] mercy, and may be sent adrift at the beginning or in the middle of a season, at home or two thousand miles from it, sick or well, at the mere arbitrary discretion of the plaintiffs," and, thus

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[164] *Phila. Ball Club v. Hallman*, 8 Pa. C. C. 57, 61 (Pa. Ct. C.P. 1890).

[165] *See* Reserve Clause, BASEBALL-REFERENCE.COM, http://www.baseball-reference.com/bullpen/Reserve_clause (last visited Aug. 18, 2013) ("[P]layers were forced to accept a system built around the reserve clause. [O]nce signed to a professional contract, players could be re-assigned, traded, sold, or released at the team's whim. The only negotiating leverage that most players had was to *hold out* at contract time, refusing to play unless their conditions were met.").

[166] *Phila. Ball Club*, 8 Pa. C. C. at 57.

[167] *Id.*at 63.

"[s]uch a contract is so wanting in mutuality that no court of equity would lend its aid to compel compliance with it."[168] In short, the court found that a player cannot be forced to renew a contract that could bind effectively him for life to a particular team.

4. Napoleon Lajoie: The Reserve Clause II (1902)

The Player's League was a briefly active (one year) baseball league that attempted to change the owner-player dynamic that was exemplified by the *Hallman* case.[169] Unfortunately, the league ceased operation at the conclusion of the 1890 season.[170] Professional baseball was legally uneventful from 1890 to 1900.[171] However after the expansion and reorganization of what used to be known as the Western League,[172] its successor American League literally joined the major leagues.[173] There were now *two* major leagues, the "junior" American League

[168] *Id.*at 62. Judge Thayer further asserted that equity courts would not require performance of "hard and unconscionable bargains, or where the decree would produce injustice." *Id.*at 63.

[169] James R. Devine, *Curt Flood a Triumph of The Show Me Spirit,* 77 MO. L. REV. 9, 27-28 (2012); For a discussion of the history of the Player's League *see also* ED KOSZAREK, THE PLAYERS LEAGUE: HISTORY, CLUBS, BALLPLAYERS AND STATISTICS 9 (2006).

[170] *See* Devine, *supra* note 169, at 27-28.

[171] *Id*.

[172] *Id.; See* TED TAYLOR, THE ULTIMATE PHILADELPHIA ATHLETICS REFERENCE BOOK 1901-1954, 359 (2010).

[173] Devine, *supra* note 169, at 27-28.

and the "senior" National League.[174] As competitors providing fans with the same product, using the same raw materials (players) the two leagues were ripe for a collision. It happened in Philadelphia, in the name of a player called Napoleon Lajoie.[175]

After the 1900 season, Philadelphia American League owner Clark Griffith, "under cover of darkness . . . stole into Philadelphia" and signed Lajoie away from Philadelphia of the National League to Philadelphia of the American League.[176] The National League Phillies tried to prevent Lajoie from playing for the American League A's.[177] However, the trial court did not grant an injunction before the 1901 season.[178]

The court noted that Lajoie's National League contract was negotiated for three years and provided for renewal on six month intervals.[179] This was different than player contracts in earlier cases because the contract was nonstandard in that it gave the Philadelphia club an option to renew for the 1901, 1902, and 1903 seasons, instead of the regular one year renewal;[180] Also, the *reserve clause* itself was different than those at issue in earlier cases because under paragraph 18, the right to reserve was a part of Lajoie's consideration, for which Philadelphia in

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[174] *Id*.
[175] Philadelphia Ball Club, Ltd. v. Lajoie, 51 A. 973 (PA. 1902).
[176] *See* Devine, *supra* note 169, at 28 (citations omitted).
[177] *Id*.
[178] *Id*.
[179] *Id*.at 29; 51 A. at 974-975.
[180] *Id*.at 29.

turn agreed "[t]o pay him for his services ... the sum of twenty-four hundred dollars."[181] As a result, the Pennsylvania Supreme Court found all the contract provisions to have been bargained for by the parties and therefore enforceable.[182]

The court further found that the injunction remedy was the only appropriate one because Lajoie's services were *unique*, stating:

> He may not be the sun in the baseball firmament, but he is certainly a bright particular star. We feel, therefore, that the evidence in this case justifies the conclusion that the services of the defendant are of such a unique character, and display such a special knowledge, skill, and ability, as renders them of peculiar value to the plaintiff, and so difficult of substitution that their loss will produce 'irreparable injury,' in the legal significance of that term, to the plaintiff.[183]

Therefore, the *Lajoie* court enjoined the player from working for any other club within the court's jurisdiction during the term of his contract.[184]

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[181] 51 A. at 974.

[182] *See* Devine, *supra* note 169, at 28 (citations omitted); 51 A. at 974-975.

[183] 51 A. at 974.

[184] *See* Devine, *supra* note 169, at 29 (citations omitted). ("The National League described the Pennsylvania Supreme Court

As a result, the court prevented him from playing for the American League A's during the remaining term of his National League Phillies' contract.[185] Interestingly, the injunction did not force Lajoie to return to his National League team as it only prevented him from playing games for another team *within Pennsylvania*.[186] So, when he was traded to Cleveland by the American League A's he did not accompany his new Ohio team to games played in Pennsylvania.[187]

As a result of this Philadelphia case, the standard for the granting of injunctions prohibiting athletes and others under contract from performing elsewhere was whether the services to be performed are *unique*.[188] Notwithstanding the National League's win in *Lajoie*, the decision represented a major success for both owners on a broader level; subsequent courts adopted the rationale that professional athletes possessed sufficiently *unique* talents to fit within the category of impossible to replace.[189]

5. Curt Flood: The Reserve Clause III (1972)

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decision as a "great legal victory" and predicted that Lajoie would land in jail if he played for the rival A's.").

[185] *Id.*; 51 A. at 976.

[186] *See* Devine, *supra* note 169, at 29-30 (citations omitted).

[187] *Id.*

[188] *See* Devine, *supra* note 169, at 29-30 (citations omitted); 51 A. at 974-975.

[189] *Id.; see also* Adam Epstein, *An Exploration of Interesting Clauses in Sports*, 21 J. LEGAL ASPECTS OF SPORT 5, 6-12 (2011) (discussing a history of the reserve clause in professional baseball and other professional sport leagues).

In *Flood v. Kuhn*,[190] Major League Baseball player Curt Flood challenged the reserve system in a landmark case that went all the way to the Supreme Court of the United States.[191] Though the *Flood* case involved Philadelphia only from the aspect that Flood was traded to the Phillies, as the *Hallman*[192] and *Lajoie*[193] cases *supra* demonstrate, this was not the first time that Philadelphia sports impacted professional baseball.[194] The *Flood* case arose when Curt Flood filed a $4.1 million lawsuit after sitting out a season because he did not want to play for the Philadelphia Phillies.[195] Flood was specifically challenging the placement of "[p]rofessional baseball's reserve system . . . within the reach of the federal antitrust laws."[196]

In 1922, the Supreme Court of the United States had held that antitrust laws do not apply to professional baseball as the game was merely an exhibition did not affect interstate commerce.[197] In a

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[190] 407 U.S. 258 (1972).
[191] *See* Epstein, *supra* note 189 at 9-10.
[192] *Phila. Ball Club*, 8 Pa. C. C. 57 (Hallman)
[193] *Phila. Ball Club*, 51 A. 973 (Lajoie)
[194] *See generally* Brett J. Butz, *Grounding into a Double Standard: Understanding and Repealing the Curt Flood Act*, 8 U. MASS. L. REV. 302 (2013) (providing in part a detailed history of professional baseball cases between the Philadelphia cases and *Flood*).
[195] 407 U.S. at 265.
[196] *Id.*at 259 (also stating that it was the third time in 50 years for the same challenge for the courts to decide).
[197] Federal Baseball Club of Baltimore, Inc., 259 U.S. 200, 208-09. Justice Oliver Wendell Holmes stated that baseball was "purely state affairs."

unanimous decision, known as the *Federal Baseball* decision, Justice Oliver Wendell Holmes noted that even though teams and players traveled across state lines, such activity was perceived as only incidental to the game and that baseball was merely a form of entertainment and not subject to commerce.[198] The unique *Federal Baseball* decision has caused legal controversy and criticism for almost 100 years regarding baseball's antitrust exemption under federal law.[199] This decision was affirmed by the unsuccessful legal challenge by George Toolson, a minor league pitcher in the New York Yankees' organization.[200]

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[198] *Id*.

[199] *See, e.g*., Jonathan D. Gillerman, *Calling Their Shots: Miffed Minor Leaguers, the Steroid Scandal, and Examining the Use of Section 1 of the Sherman Act to Hold MLB Accountable*, 73 ALB. L. REV. 541, 565-570 (2010); *see also* Toolson v. New York Yankees, 346 U.S. 356 (1953) (holding by the majority that Congress did not intend it to include baseball under the federal antitrust laws); Gardella v. Chandler, 172 F.2d 402, 408-09 (2d Cir. 1949) (discussing violation of reserve clause by player who commenced employment in the Mexican League); *see also* Craig F. Arcella, *Major League Baseball's Disempowered Commissioner: Judicial Ramifications of the 1994 Restructuring*, 97 COLUM. L. REV. 2420, 2440-1 (1997) (noting that though ultimately settled out of court, Danny Gardella demonstrated MLB violated antitrust laws and that he was blacklisted due to his breach of a contract with New York Giants in order to play professional baseball in Mexico); *but see* U.S. v. Int'l Boxing Club of New York, 348 U.S. 236 (1955) (denying antitrust exemption to professional boxing).

[200] *Toolson*, 346 U.S. at 356. In a 7-2 decision, the Supreme Court reaffirmed the *Federal Baseball* decision with a one-paragraph majority opinion.

Despite the history of decisions exempting professional baseball from antitrust laws, Flood continued his legal battle. In sum, the Supreme Court of the United States in Flood's case again upheld baseball's antitrust exemption in general, and found the reserve system within the reach of the federal grasp, stating "[a]nd what the Court said in *Federal Baseball* in 1922 and what it said in *Toolson* in 1953, we say again here in 1972: the remedy, if any is indicated, is for congressional, and not judicial, action."[201] Thus, the Supreme Court did not protect Flood from service in Philadelphia.

Though he lost his legal battle, his persistent refusal to accept the trade to Philadelphia resulted in free agency starting in 1976.[202] Flood passed away in 1997, and the next year The Curt Flood Act of 1998 was, at least, an attempt by Congress to legislatively override the antitrust ruling in *Federal Baseball*.[203] Signed into law by President Clinton, the Curt Flood Act of 1998 gave MLB players, like their counterparts in other leagues, the right to sue the league under antitrust laws provided they first

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[201] *Flood*, 407 U.S. at 285.

[202] *See* Philip R. Bautista, *Congress Says, "Yooou're Out!!!" to the Antitrust Exemption of Professional Baseball: A Discussion of the Current State of Player-Owner Collective Bargaining and the Impact of the Curt Flood Act of 1998*, 15 OHIO ST. J. ON DISP. RESOL. 445, 458 (2000).

[203] *Id.*at 472; *see also* Curt Flood Act of 1998, 15 U.S.C. § 26b (effective Nov. 2, 2002).

decertify as a union.[204] Many feel that the Act, however, is not as special as it could be.[205]

6. Philadelphia World Hockey Club: The Reserve Clause IV (1972)

The reserve clause was not limited to professional baseball.[206] In professional hockey, for example, a reserve clause was in effect for some decades prior to 1972.[207] In the same year as the *Flood* decision, another case, in Philadelphia, *Philadelphia World Hockey Club v. Philadelphia Hockey Club, Inc*. was decided by the United States District Court for the Eastern District of Pennsylvania and barred the National Hockey League from enforcing its commonly used reserve clause.[208] The case centered on a suit involving the National Hockey League (NHL) by a competing new league, the now defunct World Hockey Association

[204] *See generally* Joshua P. Jones, *A Congressional Swing and Miss: The Curt Flood Act, Player Control, and the National Pastime*, 33 GA. L. REV. 639 (1999).
[205] *Id*.; *see also generally* Lacie L. Kaiser, *Revisiting the Impact of the Curt Flood Act of 1998 on the Bargaining Relationship between Players and Management in Major League Baseball*, 2 DEPAUL J. SPORTS L. CONTEMP. PROBS. 230 (2004).
[206] *See* EPSTEIN, *supra* note 189, at 11-12.
[207] *See generally* Ian Craig Pulver, *A Face Off Between the National Hockey League and the National Hockey League Players' Association: The Goal a More Competitively Balanced League*, 2 MARQ. SPORTS L. J. 39 (1991)
[208] 351 F. Supp. 462 (E.D. Pa. 1972).

(WHA). The WHA was seeking to enjoin the NHL from continuing to enforce its reserve system.[209]

There was a natural competition between the NHL and WHA for the limited supply of professional quality players. The reserve system grated on players and the WHA.[210] The reserve system prevented NHL players from freely contracting with the WHA teams, thus restricting the WHA's ability to compete in the market for staging professional sporting events. The court found that there existed "[a] clear and substantial likelihood that at trial, the interlocking agreements among the NHL teams, the reserve clause in the Standard Player's Contract, and the agreements between the NHL and the minor and amateur hockey organizations will be found to have given the NHL the power of a monopoly in violation of § 2 of the Sherman Act."[211] This was especially so because "[t]here was never really any bargaining

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[209] *Id*.; In 1971 the WHA announced Miami as the home ice for one of its teams, but the team never played there and was moved to Philadelphia, as the Blazers who competed unsuccessfully for fans against the more established Flyers. The team was moved to Vancouver. *See* Philadelphia Blazers, WHA HOCKEY.COM, http://www.whahockey.com/blazers_phil.html (last visited Aug. 20, 2013).

[210] *See* Associated Press, *World Hockey League Spurns Reserve Clause*, MONTREAL GAZETTE (October 21, 1971 at 19, *available at* http://news.google.com/newspapers?nid=1946&dat=19711021&id=7YY1AAAAIBAJ&sjid=5qEFAAAAIBAJ&pg=7183,2881100 (last visited Aug. 20, 2013).

[211] *Philadelphia World Hockey Club*, 351 F. Supp. at 518.

over the restraint."[212] Thus, the WHA won a fleeting victory and by 1979 the league had folded and the remaining teams were absorbed into the NHL.[213]

D. Gender Discrimination

Philadelphia has had its share of sports-related gender discrimination lawsuits and sexual harassment cases as well. We have selected two federal, gender-related cases to illustrate the point.

1. Haffer v. Temple Univ. (1987)

In *Haffer v. Temple Univ.*, [214] female athletes at Philadelphia's Temple University brought a class action that alleged sex discrimination by the University in violation of Title IX, the Equal Protection Clause of the U.S. Constitution, and Pennsylvania Constitution, claiming that the school did not provide equal opportunities in athletics.[215] In its defense, Temple claimed "[t]hat its athletic programs were exempt from Title IX requirements because it received no federal funds earmarked for athletics."[216]

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[212] John C. Weistart, *Judicial Review of Labor Agreements: Lessons Form the Sports Industry*, 44 L. & CONTEMP. PROBS. 110, 115 (1982).
[213] *See* ED WILLES, THE REBEL LEAGUE: THE SHORT AND UNRULY LIFE OF THE WORLD HOCKEY ASSOCIATION 262-265(2005).
[214] 678 F. Supp. 517 (E.D. Pa. 1987).
[215] *Id.*at 521.
[216] A. Jerome Dees, *Do The Right Thing: A Search For An Equitable Application Of Title Ix In Historically Black*

The *Haffer* court held, consistent with subsequent decisions and interpretations of the federal law, that federal funds given to one program constitute indirect funding to all programs, thus mandating institutional wide scrutiny under the law.[217] The court stated, "[I]t is clear that the only result we can reach in this appeal is to affirm: if Temple University as a whole is to be considered the "program or activity" for Title IX purposes, it follows that because the University as a whole receives federal monies, its intercollegiate athletic department is governed by Title IX."[218]

Haffer's ultimate legal significance was that it added to the clarification that college and university athletic departments were required to comply with Title IX if the university received *any* federal funding, as that received federal funding freed funds for the athletic program.[219] Interestingly, just a few years earlier in another Pennsylvania case *Grove City College v. Bell*,[220] which also weaved its way through the Third Circuit Court of Appeals in Philadelphia, the Supreme Court held that only the specific program that receives federal financial aid is subjected to the regulations imposed by Title IX.[221]

Colleges and University Athletics, 33 CAP. U. L. REV. 219, 251 (2004).

[217] *See, e.g.*, Andrew A. Ingrum, *Civil Rights: Title IX and College Athletics: Is There a Viable Compromise?*, 48 OKLA. L. REV. 755, 759-60 (1995).

[218] Haffer v. Temple Univ., 688 F.2d 14, 17 (3rd Cir. 1982) (per curiam).

[219] *Id.*

[220] 465 U.S. 555 (1984).

[221] *Id*; *see also* Epstein, *supra* note 6 at 215.

Congress reacted to this decision, and over a presidential veto passed a statutory institution-wide approach under the Civil Rights Restoration Act of 1987 four years later.[222]

2. Medcalf v. Trustees of Univ. of Pa. (2003)

In *Medcalf v. Trs. of Univ. of Pa.*,[223] after the filing an E.E.O.C. complaint alleging reverse gender discrimination, the Third Circuit Court of Appeals upheld a jury verdict in federal court that had awarded the male-plaintiff $71,996 in lost wages and medical benefits, $18,130 for compensatory damages, and $ 25,170 in punitive damages.[224]

Andrew Medcalf was an Assistant Men's Crew Coach at the University of Pennsylvania ("Penn") for six years in the 1990s, and he worked with the men's heavyweight crew (rowing) team.[225] In the spring of 1997, Penn sought to fill the position of full-time Women's Rowing Coach.[226] Penn hired a female coach, and in the course of litigation the Medcalf proved fundamental elements of discrimination: (1) that he was a male; (2) who applied for and was qualified to perform the job of Women's Crew Coach at Penn; (3) that he was

[222] *Id.*at 215; *see also* Christopher Paul Reuscher, *Giving the Bat Back to Casey: Suggestions to Reform Title IX's Inequitable Application to Intercollegiate Athletics*, 35 AKRON L. REV. 117, 128-129 (2001).
[223] 71 Fed. Appx. 924, 2003 (3d Cir. 2003).
[224] *Id.*at 925-26.
[225] *Id.*at 926.
[226] *Id*.

rejected; and (4) that Penn selected a woman for the position."[227]

At that point the burden shifted to Penn to show a legitimate non-discriminatory reason why someone other than the plaintiff was hired.[228] Penn did so by showing that the female coach offered the job "[w]as more qualified with respect to (1) knowledge of NCAA and Ivy League rules, (2) recruiting, (3) fundraising, (4) administering budgets, and (5) knowledge of Ivy League student financial aid requirements and constraints."[229]

In response, however, Medcalf was able to show that sufficient evidence existed to persuade a rational jury that the proffered reasons for the hire were pretext.[230] His successful argument centered on the fact that "[th]e Position Announcement placed a high importance on actual coaching ability,…"[231] yet Penn hired the female coach inconsistent with that premise.[232] The court found that "Penn's sudden de-emphasis of the value of actual coaching skills is at the least a "weakness" which tends to indicate that Penn's proffered reasons were not credible."[233] Medcalf also showed that other female candidates

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[227] *Id.*at 927.
[228] *Id.*at 927-928.
[229] *Id*.
[230] *Id*.; *See* McDonnell Douglas v. Green, 411 U.S. 792, 804 (1973).
[231] 71 Fed. Appx. at 928.
[232] *Id.*at 929.
[233] *Id.*

with less administrative experience than he received interviews.[234] Medcalf never received one.[235]

E. Race Discrimination

Philadelphia has not been free of race-related issues with regard to its sports teams and facilities either.[236] Most recently, Eagles wide-receiver Riley Cooper did not help matters in June 2013 by utilizing racial slurs in a video posted on YouTube stating, "I will fight every n***** here, bro!" at a Kenny Chesney concert."[237] He returned after just four days away from the team[238] and fan reaction in the

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[234] *Id.*at 930.
[235] *Id*.
[236] *See, e.g.,* Robert Moran, *Nutter Goes after Philadelphia Magazine over Race Article* , PHILLY.COM (Mar. 17, 2013), http://articles.philly.com/2013-03-17/news/37789817_1_philadelphia-magazine-race-relations-mayor-nutter; *see also generally* Shaun R. Harper, Collin D. Williams Jr. & Horatio W. Blackman , *Black Male Student-Athletes and Racial Inequities in NCAA Division I College Sports*, CENTER FOR THE STUDY OF RACE AND EQUITY IN EDUCATION, *available at* www.gse.upenn.edu/equity/sports (last visited Aug. 20, 2013).
[237] *See* Gamedayr, *New Video of Riley Cooper Drunk on Stage at Kenny Chesney Concert Emerges*, GAMEDAYR.COM (Aug. 2, 2013), http://gamedayr.com/gamedayr/video-riley-cooper-drunk-on-stage-kenny-chesney-concert/.
[238] *See* Will Brinson, *Remorseful Riley Cooper Appears to Understand 'Severity' of Incident*, CBS SPORTS (Aug. 6, 2013), http://www.cbssports.com/nfl/blog/eye-on-football/23040891/remorseful-riley-cooper-back-with-eagles-understands-severity-of-incident.

stadium to his first pre-season game was mixed.[239] To illustrate our point we have chosen to explore four cases to that address sport-related litigation involving race and Philadelphia.

1. Swim Club I: Lansdowne Swim Club (1990)

In *United States v. Lansdowne Swim Club*,[240] the Lansdowne Swim Club (LSC) was sued by the government alleging racial discrimination in violation of Title II of the Civil Rights Act of 1964. Lansdowne, Pennsylvania is just southwest of Philadelphia in the inner suburbs.[241] The federal case was brought in Philadelphia-based United States District Court for the Eastern District of Pennsylvania.[242] The District Court found for the government that the swim club violated Title II of the Civil Rights Act of 1964[243] by engaging in racial discrimination.[244]

On appeal LSC attempted to demonstrate that the district court erred on three grounds: "that it is an exempted private club, that it is not a place of public accommodation, and that the United States failed to

[239] *See* Michael David Smith, *Riley Cooper: I Didn't Pay Attention to the Fans*, NBC SPORTS (Aug. 10, 2013), http://profootballtalk.nbcsports.com/2013/08/10/riley-cooper-i-didnt-pay-attention-to-the-fans/.
[240] 894 F.2d 83 (3rd Cir. 1990).
[241] *See* THE BOROUGH OF LANSDOWNE, PENNSYLVANIA, http://lansdowneborough.com/ (last visited Aug. 11, 2013).
[242] U.S. v. Lansdowne Swim Club, 713 F. Supp. 785 (E.D. Pa 1989).
[243] 42 U.S.C.S. §§ 2000a - 2000a-6.
[244] 713 F. Supp. at 823.

prove a pattern or practice of racial discrimination."[245] However, as the appellate court showed, in order to be considered to be a private club a club must have a genuinely selective membership process, the court must consider the origins of the club, and it must limit the use of the facility by non-members.[246] The appellate court found that Lansdowne had a perfunctory membership process that required a deposit, an application, recommendations and an interview that was not selective.[247] The court also found that "[t]he origins of [the club] suggest that it was intended to serve as a 'community pool' for families in the area and not as a private club."[248]

The court further identified the swim club engaged in interstate commerce as a "place of ... entertainment" covered by the statute, and then it established that the club's snack bar was a "[f]acility principally engaged in selling food for consumption on the premises," another category of covered establishments under Title II. [249] Therefore, Lansdowne was subject to Title II of the Civil Rights Act of 1964.[250] The court noted that "[r]epeated rejections of three qualified black applicants [were] highly probative of a pattern or practice of discrimination . . ." and that up until 1989 "[e]very non-black applicant—even [a previous rejected

[245] 894 F.2d at 84.
[246] *Id.*at 85-86.
[247] *Id*.
[248] *Id.*at 86.
[249] *Id.*at 87.
[250] *Id.*

white family] has obtained membership at some time."[251] These findings indicated that the swim club engaged in a regular pattern of racial discrimination, that there were no, legitimate, nondiscriminatory reasons for its rejection of black applicants, and that its offered reasons for applying discriminatory standards were pretexts to mask the discrimination.[252]

2. Swim Club II: Echoes of Lansdowne at Valley Club of Huntingdon Valley (2009-2010)

Almost twenty years later, Justice Department brought a claim under Title II of the Civil Rights Act of 1964[253] alleging that in 2010 another Philadelphia-area swim club engaged in a pattern or practice of discrimination on the basis of race or color.[254] From the Department of Justice Press Release,

> The [government alleged] that on June 30, 2009, one day after a group of 56 school children from Creative Steps Inc., a Philadelphia-area summer camp program, visited Valley Club, the club's president and

[251] *Id.*at 88-89.
[252] *Id.*at 89.
[253] 42 U.S.C. § 2000a (e).
[254] Press Release, *Justice Department Files Lawsuit Against Huntingdon Valley, Pennsylvania, Country Club Alleging Discrimination* (Jan. 13, 2010), http://www.justice.gov/opa/pr/2010/January/10-crt-033.html.

> board of directors adopted a policy to bar all summer camps from using its facilities. The complaint further alleges that the Valley Club adopted this policy in response to racially-motivated opposition from the Valley Club's members to the children of Creative Steps, which had contracted with the club to permit elementary school-aged campers to swim there for 90 minutes once per week during the summer. Immediately after Valley Club adopted the policy, it informed Creative Steps that the children could not return to the club and refunded the camp's money.[255]

The club claimed it was a safety issue because of a lack of lifeguards, but some witnesses claimed that they heard members of the club ask about the presence of African-American children at the pool.[256] The claims devastated the club, and "Valley Club filed for Chapter 7 Bankruptcy protection in November 2009. The club property was sold in June 2010 for $1,460,000."[257] The

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[255] *Id.*

[256] *See* Rob Chakler, *Valley Swim Club Racial Discrimination Case Settled*, LOWER MORELAND PATCH (Aug. 17, 2012), http://lowermoreland.patch.com/groups/politics-and-elections/p/valley-swim-club-racial-case-settled-by-justice-department.

[257] Press Release, *Justice Department Settles Race Discrimination Case Against Pennsylvania Country Club*

settlement agreement ended all claims by the individual plaintiffs, the federal suit, and discrimination claims filed with the Pennsylvania Human Relations Commission (PHRC) under the Pennsylvania Human Relations Act.[258] "The settlement agreement stipulates that once the administration of the estate and the bankruptcy case is closed and after paying allowed costs and fees, the remaining assets will be paid to more than 50 children, their camp counselors and to [the children's camp]."[259]

3. Cureton v. NCAA (1999)

In *Cureton v. NCAA*,[260] plaintiffs Tai Kwan Cureton and Leatrice Shaw were African-Americans who graduated from Simon Gratz High School in Philadelphia.[261] Cureton was a member of the track team and earned both academic and athletic honors as a high school student.[262] He had met National Collegiate Athletic Association (NCAA) high school grade thresholds, but he did not meet the required SAT score.[263] He alleged that he was recruited by

(Aug. 16, 2012), http://www.justice.gov/opa/pr/2012/August/12-crt-1017.html.

[258] *Id.*

[259] *Id.*

[260] Cureton v. Nat'l Collegiate Athletic Ass'n, 198 F.3d 107 (3d Cir. 1999) (Cureton I); Cureton v. Nat'l Collegiate Athletic Ass'n, 252 F.3d 267 (3d Cir. 2001) (Cureton II).

[261] *Id.*at 109. There were actually four lead plaintiffs in the case.

[262] *Id.*

[263] *Id.*

Division I schools until his SAT score became known, and he eventually enrolled in a Division III school.[264] Shaw was a member of the National Honor Society and track team in high school.[265] She met NCAA grade thresholds for freshmen but her SAT's were below par.[266] Because of her SAT score and the relevant NCAA regulations, she was not permitted to participate on her Division I school's track team during her freshman year.[267]

The plaintiffs brought suit against the NCAA under section 601 of Title VI of the Civil Rights Act of 1964 which states, "No person . . . on the grounds of race, [shall] be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[268] The

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[264] *Id.; see also* Thomas A. Baker III, & Daniel P. Connaughton, *Cureton v. NCAA: A Blow-by-Blow Account of the Landmark Title VI Challenges to the NCAA and Their Recent Implications*, 13 J. LEGAL ASPECTS OF SPORT 145, 146 (2003) (analyzing the basis of a landmark class action case filed against the NCAA for racial discrimination in which the plaintiffs alleged that the NCAA's use of the qualifying standards under Proposition 16 violated Title VI of the Civil Rights Act of 1964. The article continues with a summary of the United States Court of Appeals for the Third Circuit's decision overturning the lower court, a new case (Cureton II), and the subsequent decision by the NCAA to voluntarily change its initial eligibility requirements).

[265] *Cureton* I, 198 F.3d at 110.

[266] *Id.*

[267] *Id.*

[268] *Id.*at 113 (citing 42 U.S.C. § 2000d). The plaintiffs alleged a Title VI violation based on the theory that Proposition 16 creates a *disparate impact* on racial minorities and was, therefore, racially biased.

appeals court overturned the Eastern District of Pennsylvania which had permanently enjoined the NCAA from using its Proposition 16 eligibility standards[269] to establish basic academic standards for freshmen athletes.[270] The Third Circuit determined that the NCAA is not a program or activity that receives federal funds.[271] Thus, the court determined that Title VI does not apply to the NCAA even though it does apply to its member institution colleges and universities.[272] The case was ultimately settled out of court by way of a Consent Decree with the Department of Justice regarding initial eligibility rules for student-athletes.[273]

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[269] *Cureton* II, 252 F.3d 267 (2001).
[270] *Cureton* I, 198 F.3d 107 (1999).
[271] *Id*.
[272] *Id*.In the court's analysis, the Title VI regulations did not apply to the NCAA because the NCAA did not exercise *controlling authority* over its member institutions' ultimate decision about a student-athlete's eligibility to participate in collegiate athletics.
[273] *See* EPSTEIN, 202-203; *see also* Susan M. Denbo, *Disability Lesson in Higher Education: Accommodating Learning-Disabled Students and Student-athletes under the Rehabilitation Act and the Americans with Disabilties Act*, 41 AM. BUS. L.J. 145, 163-64 (2003). Ultimately, the Department of Justice settled with NCAA in a consent decree regarding initial-eligibility requirements for students with learning disabilities which required placing certain language in its Bylaws. This resulted in NCAA Bylaw 14.02.5, *Education-Impacting Disability*, which states, "An education-impacting disability is a current impairment that has a substantial educational impact on a student's academic performance and requires accommodation." (NCAA DIVISION I MANUAL 2013-14); *see also generally* Jeffrey M. Waller, *A Necessary Evil: Proposition 16 and Its Impact on Academics and Athletics in*

4. Lehigh Valley IronPigs (2007)

In Allentown, the Lehigh Valley IronPigs, the Triple-A, minor league baseball team affiliate to the Philadelphia Phillies, were thrust into a public debate two days after naming its mascot *PorkChop*, and the organization actually dropped the team nickname after receiving complaints from Hispanics that it was racially offensive.[274] The team, which began play in 2008, changed the name to *Ferrous* instead.[275] There were mixed reactions to the name change,[276] but the majority reaction as judged by the local paper was that the name should not have been changed in the first place.[277] The team had recently moved from Ottawa, Canada to the Philadelphia exurbs[278] and apparently the team management was not aware of the local connation *PorkChop* had for

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the NCAA, 1 DEPAUL J. SPORTS L. CONTEMP. PROBS. 189 (2003).

[274] *See* Associated Press, *Baseball Mascot Gets New Name After 'PorkChop''Is Deemed Offensive*, FOX NEWS (Dec. 4 2007), http://www.foxnews.com/story/0,2933,314901,00.html#ixzz2bgpR5yiK.

[275] *Id.*(referencing the Latin word for iron, *ferrum).*

[276] *Tolerance in the Lehigh Valley*, MORNING CALL (DEC. 5, 2007), http://articles.mcall.com/2007-12-05/opinion/3823982_1_puerto-ricans-mascot-fan-contest.

[277] *Id.*

[278] Malcolm MacMillan, *Lehigh Valley IronPigs History*, THE BALLPARK GUIDE.COM, http://www.theballparkguide.com/minors/lehigh-valley-ironpigs/lehigh-valley-ironpigs-history (last visited Aug. 20, 2013).

Hispanics in the area.[279] In the end, and quickly to its credit, the team dropped the mascot name two days later to avoid the controversy as soon as it realized that the name could be considered offensive.[280]

V. CONCLUSION

Our purpose in drafting this article was to illustrate the flavor of how Philadelphia and its culture helped to impact and shape sports law from a broad spectrum of legal issues. We have demonstrated by a sampling of cases and current news stories the attention and depth of Philadelphia sports' impact on tort law, criminal law, contract law, and issues related to gender and harassment. Having professional sports teams all the Big Four sports leagues and housing some of the most prominent universities in the country, there is reason to believe that more cases and stories will emanate from the largest city in Pennsylvania. No doubt, Philly fans will continue to go the distance, often too far, when challenged - whether in the courts, on the courts, or in the streets.

[279] *See* Associated Press, *supra* note 274.
[280] *Id*.

USING MOOT COURT SIMULATIONS AS TEACHING TOOLS: AN IMPLEMENTATION GUIDE FOR BUSINESS LAW INSTRUCTORS

FRANKLYN P. SALIMBENE*

I. INTRODUCTION

We have heard it before— "There's too much to cover; I don't have time to do:_____." Fill in the blank—simulations, service-learning, field trips, guest speakers, and so on.[1] So with much to cover, is

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The author is grateful to Nikki Marquez for her research assistance in preparing this paper.
An abridged version of this paper appears in the *Academy of Legal Studies in Business National Proceedings* (2016).
[1] There is no denying the bulk of material included in the typical Legal Environment course. A cursory internet survey of syllabi at distinctly different universities turns up the same long list of course topics ranging from the dispute resolution system and constitutional law to contracts, torts, criminal law, employment, and business organizations to name only a partial list. *See, e.g.*, *Course Syllabus: Business Finance 3500-Legal Environment of Business*, OHIO STATE UNIV., http://fisher.osu.edu/supplements/10/10078/fall15_3500_irvine_term2.pdf (last visited Sept. 23, 2016); *Course*

there time easily to fit a moot court simulation into a Legal Environment or Business Law course? The answer is a resounding—yes!

In answering *yes*, this article first provides a brief review of relevant literature regarding experiential learning and moot court. In doing so, it touches upon applicable AACSB standards and goals for business education. It then offers suggestions on organizing a class for a moot simulation including specific roles for students and expected deliverables. Next, the paper provides three ready-to-use sample moot court assignments complete with cases for argument and relevant precedents upon which students can base those arguments. The samples include a products liability case problem, a problem in contract, and a Commerce Clause problem. Finally, to get a student perspective on the learning value of moot court, the paper provides the results of a recent survey of Legal Environment students who participated in moot court simulations during fall semester 2015.

II. EXPERIENTIAL LEARNING AND MOOT COURT

Syllabus, UNIV. OF N. ALABAMA, http://www.una.edu/education/docs-syllabi/syllabus_BL240 (last visited Sept. 23, 2016); *Course Syllabus: BLA 361: Legal Environment of Business*, UNIV. OF N. CAROLINA WILMINGTON, http://www.csb.uncw.edu/people/eversp/classes/BLA361/Basic%20Class%20Materials/BLA%20361%20Syllabus%20Fall%202010.pdf (last visited Sept. 23, 2016).

Writing in the Bulletin of the American Association for Higher Education in 1987, Arthur Chickering and Zelda Gamson identified seven principles of good practice in undergraduate education.[2] One of the seven was using *active learning techniques*.[3] In explaining the principle of active learning, the authors made a profound, yet simple, observation—"Learning is not a spectator sport."[4] Indeed, it is not! From our own experience during law school, whether working at a legal clinic as part of an externship, on law review, or on our law school moot court team, we as law faculty know this to be true. Perhaps, even as undergraduate instructors, we might agree with Chickering's 1987 assessment that "[s]tudents do not learn much just by sitting in classes listening to teachers, memorizing pre-packaged assignments, and spitting out answers."[5]

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[2] Arthur W. Chickering & Zelda F. Gamson, *Seven Principles for Good Practice in Undergraduate Education*, AAHE BULL. 2 (Mar. 1987), http://files.eric.ed.gov/fulltext/ED282491.pdf.

[3] *Id.*at 4. The seven principles are

> (1) encourages contacts between students and faculty; (2) developes reciprocity and cooperation among students; (3) uses active learning techniques; (4) gives prompt feedback; (5) emphases time on task; (6) communicates high expectations; and (7) respects diverse talents and ways of learning.

*Id.*at 3–5.

[4] *Id.*at 4.

[5] *Id.*

Yet, even in 1987, this view of the significance of active learning in education was not new. Going back to and moving forward from Dewey in the early twentieth century, we have seen meaningful discussion about the role that experience can play in undergraduate learning.[6] That discussion thread has been taken up by accreditation agencies of business school programs and by educators of business students. For example, the 2016 update of accreditation standards issued by AACSB

[6] John Dewey is well known for his work on the relation between learning and experience. His writings in the early twentieth century focus on the important role in learning played by experiential education. He explained this belief in such works as DEMOCRACY AND EDUCATION (1918) and EDUCATION AND EXPERIENCE (1938). A number of contemporary educators continue in this vein, further adding to the scope and reach of Dewey's thinking. For example, Alice and David Kolb, referencing Dewey and reflecting on common teaching habits, note that "many programs of higher education are much more focused on impressing information on the mind of the learner than on opportunities for the learners to express and test in action what they have learned." Alice Y. Kolb & David A. Kolb, *Learning Styles and Learning Spaces: Enhancing Experiential Learning in Higher Education*, 4 ACAD. MGMT. LEARNING & EDUC. 193, 208 (2005). Also, Linda F. Smith, in discussing law school externships and service-learning pedagogy, cites Dewey's belief that the mere memorization of facts without connection to experience and without reflecting on that experience does not promote genuine education. Linda F. Smith, *Why Clinical Programs Should Embrace Civic Engagement, Service-Learning and Community Based Research*, 10 CLINICAL L. REV. 723, 727 (2004).

International[7] includes several areas of skill development that sprout from experiential learning. These include effective oral and written communication, the ability to translate knowledge into practice, the ability to analyze and frame a problem, and the ability to work in a team environment.[8] Many of us who experienced moot court in law school can easily see the relationship between these skills and moot court.[9]

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[7] The mission of The Association to Advance Collegiate Schools of Business International (AACSB), as stated on its website, is to advance "quality management education worldwide through accreditation, thought leadership, and value added services." For this and more information about AACSB, go to its website at http://www.aacsb.edu (lasted visited Mar. 14, 2016).

[8] AACSB's standards for business school accreditation list these and other general student skills that should be developed through accredited programs. *Eligibility Procedures and Accreditation Standards for Business Accreditation*, AACSB 31–33 (Jan. 2016), http://www.aacsb.edu/accreditation/standards/2013-business.

[9] A number of commentators indicate goals of moot court pedagogy that mirror AACSB standards. *See* Becky K. da Cruz & John Kearns, Mooting as Pedagogy 5 (Feb. 18, 2006) (unpublished manuscript) (affirming that moot court enhances student ability to think critically and to refine rhetorical skills), http://citation.allacademic.com/meta/p_mla_apa_research_citation/1/0/1/3/6/pages101364/p101364-1.php; Michael V. Hernandez, *In Defense of Moot Court: A Response to "In Praise of Moot Court—Not!,"* 17 R. LITIG. 69 (1968)(arguing that moot court aids in the development of public speaking skills and professional objectivity); Charles R. Kneer & Andrew Sommerman, Undergraduate Moot Court in American Colleges and Universities 17

Not surprisingly, undergraduate business educators have picked up on the AACSB standards and the need to build curricula for business students that enhance skills development. For instance, in their text on management education, Bowditch, Buono, and Stuart [hereinafter Bowditch], highlight the importance of excelling in oral and written communication, thinking critically and analyzing situations, influencing others, and identifying legal issues.[10] In promoting such skills development, Bowditch recommends using an experiential teaching model, a model that moves students to a greater understanding of business management by

(Nov. 8, 2000) (unpublished manuscript) (indicating that moot court promotes improved analytical skills, improved oral communication skills, and increased self confidence), http://files.eric.ed.gov/fulltext/ED449747.pdf; William J. McDevitt, *Active Learning through Appellate Simulation: A Simple Recipe for a Legal Environment of Business Course*, 26 J. LEGAL STUD. EDUC. 245, 246–47 (2009) (arguing that moot court polishes oral communication skills and helps students think more clearly).

[10] JAMES L. BOWDITCH ET AL., A PRIMER ON ORGANIZATIONAL BEHAVIOR 2 (2008). The full list of skills includes 1) strong functional expertise: technical proficiency and cross-functional awareness; 2) ability to work in unstructured, team environment; 3) interpersonal competency and diversity-related skills; 4) excellent negotiating and influencing skills; 5) outstanding information technology skills; 6) global/transnational perspective; 7) exceptional written and verbal communication skills; 8) ethical awareness and legal sensibilities; 9) critical thinking and analysis capabilities; 10) change agent skills and leadership capabilities. *Id.*

taking a *how-to* approach.[11] Again, for lawyers, both the skills Bowditch identifies and the experiential teaching model he suggests parallel the moot court experience. And just what is that experience?

In a nutshell, as all lawyers know, moot court is a simulated appellate court argument that engages students in oral and written advocacy. As a pedagogical tool in undergraduate education it has been amply described in a number of academic papers.[12] It begins with a fact pattern that raises one or two specified legal issues in the form of questions for argument. A team of students is then assigned to argue each side of the question or questions posed. The assignment entails researching the issues, preparing a written brief, and then presenting an oral argument before a panel of judges.

Thinking of law school, one might be inclined to react that this is all too much to accomplish with undergraduates within the confines of a Legal Environment or Business Law course. On the contrary, however, it is not. First, because we are not teaching students to be lawyers, but rather to spot legal issues that they may encounter as business

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[11] *Id.*at 1–2.

[12]*See* Kimi King et al., *Making Moot Court Matter: How to Get the Most out of Moot Court Simulations*, 39 ACJS TODAY 1 (2009); Charles R. Kneer et al., *Undergraduate Appellate Simulation in American Colleges*, 19 J. LEGAL STUD. EDUC. 27 (2001); McDevitt, *supra* note 9; Franklyn P. Salimbene & Amanda C. Mongell, *It's Not Just for Law School Anymore: Moot Court and the Enhancement of Business Student Skills*, 40 ACAD. OF L. STUD. BUS. NAT'L PROC. __ (2009). *See also* HOW TO PLEASE THE COURT (Paul I. Weizer ed., 2004).

professionals, we can afford to be flexible in the design of an undergraduate moot court simulation. Second, we can design the simulation so that it takes place within one class meeting that involves far more students than just the usual four advocates who argue against each other in law school moots. Third, we can opt to provide our students in advance with the precedent cases that they are to use in fashioning their respective arguments, in effect creating a *closed case*.[13] These adjustments not only reduce student anxiety, but also reduce the amount of work with which an instructor might otherwise confront if students researched an open problem and incorporated cases unknown to the instructor from all over the judicial landscape. Finally, the written briefs need not follow the minutiae of *Bluebook* criteria, but rather be written as two- or three-page persuasive essays similar to what undergraduates write in their English courses. As explained in what follows, these briefs may be either individual submissions or, where class size is large and instructor grading time is limited, group submissions. So, taking a flexible approach, how does one organize a class for a moot court simulation?

[13] da Cruz and Kearns describe the advantage of a closed case as one that saves students time in preparing for the moot simulation. They also indicate the advantage of an "open case" (one in which students must do research to find their own precedential support) as one that improves research skills. da Cruz & Kearns, *supra* note 9, at 8.

III. ORGANIZING AN UNDERGRADUATE MOOT SIMULATION

The place to begin is to find a case that lends itself to a moot.[14] Some have suggested that such cases can be found on the United States Supreme Court website by searching the Court's docket.[15] This is one useful avenue, of course, particularly for constitutional cases, but for cases with the usual business law implications my experience is that the state courts provide a much more fertile ground. State courts deal daily with the tort and contract issues that make up much of the curricula of Legal Environment and Business Law courses. Nonetheless, conducting a cold word search online whether at the Supreme Court's website, a specific state court website, or via a random Google search for unknown cases to use in a moot simulation can

[14] Those case decisions that can be most useful in undergraduate moot simulations are those where the court's opinion includes excerpts or reformulations from the trial court transcripts. In such instances the opinion can provide students with useful additional factual background information that will contribute to their understanding of the case problem and their arguments. For example, one such case that I have used in my Legal Environment course is *Jablonski v. Ford Motor Co*., 955 N.E.2d 1138 (Ill. 2011)(involving a products liability claim arising out of injuries sustained in an automobile accident). In its opinion, the court provided an expansive overview of expert testimony at trial. *See id.* at 1143–54.

[15] McDevitt, *supra* note 9, at 253.

be both frustrating and time-consuming. There is an easier approach, however—use the class textbook.[16]

At the end of each chapter, and also in footnotes within the chapters, textbook authors often reference cases that can be adapted for moot court simulations. For example, in their Legal Environment text, Frank Cross and Roger Miller provide six business case problems at the end of their chapter on product liability.[17] The case problems include a brief summary of the facts with the relevant case citation and one or two thought questions.[18] Other texts also include similar end-of-chapter problems and citations.[19] Although the citations are to appellate decisions, which might indicate that the legal issues in the case are already settled, the facts can nevertheless be adapted for a classroom moot so that the case is balanced, thereby giving each side a fair opportunity to win the argument. There almost always remain two sides to the issue, even after the appellate judges have had their say—certainly the

[16] In addition to the texts we actually use in class, sample texts from publishers that end up on our shelves are also good sources for moot case problems.

[17] FRANK B. CROSS & ROGER LEROY MILLER, THE LEGAL ENVIRONMENT OF BUSINESS (9th ed. 2015).

[18] *See id.* at 318–19.

[19] See HENRY CHEESEMAN, LEGAL ENVIRONMENT OF BUSINESS 136–37 (8th ed. 2016) and GERALD R. FERRERA ET AL., THE LEGAL AND ETHICAL ENVIRONMENT OF BUSINESS 634–35 (2014) for other examples of texts with useful end-of-chapter case problems in product liability.

trial court judges who were reversed on appeal likely think so, and appellate courts in other states also might think so.

Once a case problem that suits the learning objective[20] of the moot is found, there are a few preliminary organizational matters for the instructor to consider. First, should fictitious proper names be used in place of the actual names identified in the selected case decision? Preferably, yes. Here, the reference is not only to the names of the parties, but also to place names and any other names that could lead an adept student *Googler* to find the actual decision.[21] This is an important consideration for the obvious reason that one team's finding the actual

[20] Considering the value of moot court simulations for students generally, my learning objectives encompass not only reinforcing student understanding of course material, but also giving students the experience of public speaking, fashioning logic argument, and thinking on their feet. As already noted in this paper these are included in the oft-cited benefits of moot court. *See supra* text accompanying note 9.

[21] Several years ago I adapted a Massachusetts product liability case for a moot simulation and was very careful to change the names of the plaintiff and the defendant company. The case involved an injury caused by a milling machine. After the simulation a student came to me to say proudly that he had found the case. Dismayed, I asked how. He told me that he had Googled the name of machine, which in the case was identified only as "VMC 150." I realized that I had to redouble my efforts to protect against similar occurrences in the future, so a few years later, when I used the case again, the VMC 150 became the JLX 250. That seemed to solve the problem. The adapted case in this scenario was *Simmons v. Monarch Mach. Tool Co.*, 596 N.E.2d 318 (Mass. 1992).

decision gives it an unfair advantage over the other. Second, should the case be *open* or *closed*? Preferably closed. A closed case is easier to manage. It allows the instructor to choose and limit the precedents upon which the teams are to argue their cases. These precedents can come right from the relevant chapters in the class textbook and may be supplemented by others specified in the assignment and either distributed to the class electronically or obtained by the students through an online LEXIS, WESTLAW, or Google citation search. Third, should all students in the class be engaged in some aspect of the moot court simulation? Preferably, again, yes. It is best not to have any student play the role of mere spectator; everyone should have some part in the simulation.[22] Obviously, this is easier to accomplish with smaller classes of 18 or 20, but it can also be done with classes of 30 or 35.

A sample assignment sheet that I give to students prior to the moot simulation appears in Appendix 1. It explains both the role that each student is to play and each student's expected work product. I try to ensure that all students have a role, even those in large classes.[23] Three specific roles that I assign

[22] In keeping with the principles enunciated by Chickering and Gamson, all students are given a role. *See supra* text accompanying notes 2, 3, and 4.

[23] Whether the class is large or small, the setting in which the simulation is held is important. The goal should be to mimic as closely as possible a real appellate courtroom. This adds to the drama and the fun of the simulation. For instance, consider moving the simulation out of the

include lawyers, judges, and *amici curiae*. In preparing for their roles, students work in teams.[24] Lawyer teams usually consist of four students organized in two teams to prepare and argue the case for the parties to the suit. At oral argument, all members of the team present to the court on some aspect of their party's case. For instance, in the sample product liability case which is included in this paper, there are four questions to be decided, each of which can be argued by a member of the team— Was the product defectively designed? Were the warnings adequate? Was the manufacturer negligent or grossly negligent? And was the damage award excessive? As for the court, nine or eleven students act as judges with one student appointed as chief judge; for obvious reasons an odd number works best, but is not critical. The judges together review the case problem and assigned precedents outside of class prior to the hearing and come prepared to ask questions of the lawyers during oral argument. At the conclusion of the argument, the judges are assigned to write the decision in the case. The remaining students, divided in teams of three or four, act as *amici*. In many actual

classroom and into another space on campus that can be set up like a courtroom with tables, chairs, a podium, and a flag. Also, require advocates to dress formally and, if available, consider robes for the judges. Ask fellow faculty or the registrar if they have robes you can borrow. I asked our university registrar and she happily provided nine robes from her graduation day collection.

[24] The ability of students to work in teams is another necessary skill identified in the AACSB accreditation process and seconded by Bowditch. AACSB, *supra* note 8, and BOWDITCH, *supra* note 10.

appellate opinions, courts will reference *amici* or other interested parties.[25] Teams of three or four students each can be assigned these and other instructor-selected *amici* to represent and prepare briefs on their behalf. To add some context to their briefs, the *amicus* teams should be required not only to review the case problem and assigned precedents before writing, but also to visit the website of their respective *amici* to determine what position they should argue in their brief.[26]

The written work product, both briefs and court decisions, can either be team submissions or individually written papers, and, as previously noted, written in a simple persuasive essay style. The lawyers' and *amicus* briefs are due on the day of argument while the court's opinion or opinions

[25] For instance, in the Bradford Tire case that I used this year, and which is reproduced in this paper as one of the sample cases, the opinion of the court included references to the Rubber Manufacturers Association and the Tire and Rim Association. The case involved injuries sustained by plaintiff during the inflation of an automobile tire. These two associations and two other entities, the American Automobile Association and the National Highway Traffic Safety Administration, were assigned to *amicus* teams. The Bradford case was adapted from *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328 (Tex. 1998).

[26] To engage *amici* more fully in the simulation, ask each *amicus* team to submit a copy of its brief to the court for its consideration in rendering a decision or alternatively select one member of the team to argue following the arguments of the lawyers representing the parties.

should be due at the next class meeting. The student judges who write the majority and dissenting opinions should be given several minutes during that subsequent class to announce their decisions. This also gives the instructor an opportunity to correct any misunderstanding of the material included in the opinions or the arguments.

IV. SAMPLE CASE PROBLEMS[27]

Over the years in adapting actual case decisions for moot court simulations, I have used topics that have included employment discrimination, commercial speech, equal protection, products liability, and contract issues. In the Legal Environment course, I have come most recently to rely on issues related to products liability, primarily because there are many such issues within the student frame of reference; contract, particularly public policy issues such as covenants not to compete and releases of liability; and the Commerce Clause. The three sample cases that follow are from these areas. The precedents that I assign students to use as support material for these samples are found in the endnotes.

A. Products Liability Sample Case

[27] Instructors are encouraged and should feel free to use the three case problems provided here in any way deemed suitable for conducting their own moot simulations.

1. Rembert Martin v. Bradford Tire, Inc.[28]

Rembert Martin sued Bradford Tire, Inc., manufacturer of the tire at issue, for personal injuries he suffered when he was struck by an exploding 16" Bradford tire that he was mounting on a 16.5" wheel rim. Attached to the tire on a white 5"x3" plastic adhesive label was a warning in red and yellow type and a separate small pictograph of a worker being thrown into the air by an exploding tire. The label stated:

[28] The Bradford Tire case is adapted from *Uniroyal Goodrich Tire*, 977 S.W.2d 328 (Tex. 1998). The cases assigned as precedents for this moot simulation include *Palsgraf v. Long Island. R. Co.*,162 N.E. 99 (N.Y. 1928)(holding that duty in negligence cases is determined by foreseeability); *Weirum v. RKO Gen., Inc.*, 539 P.2d 36 (Cal. App. 1975)(discussing foreseeable risk in assessing liability for negligence); *Costa v. Boston Red Sox Baseball Club*, 809 N.E.2d 1090 (Mass. App. 2004)(involving the "open and obvious" defense to a negligence claim); *Wilson Sporting Goods Co. v. Hickox*, 59 A.3d 1267 (D.C. App. 2013)(involving a defectively designed product in a strict liability case); *Crosswhite v. Jumpking, Inc.*, 411 F.Supp. 2d 1228 (D. Or. 2006)(discussing the adequacy of warnings in a strict liability case); *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757 (Ct. App. 1981)(defining "malice" for the purpose of awarding punitive damages); and *Buell-Wilson v. Ford Motor Co*., 160 Cal. App. 4th 1107 (2008) (discussing the amount of a punitive damage award in the context of due process).

> Danger! Never mount a 16" size diameter tire on a 16.5" rim. Mounting a 16" tire on a 16.5" rim can cause severe injury or death. While it is possible to pass a 16" diameter tire over the lip or flange of a 16.5" size diameter rim, it cannot position itself against the rim flange. If an attempt is made to seat the bead by inflating the tire, the tire bead will break with explosive force. Never inflate a tire which is lying on the floor or other flat surface. Always use a tire mounting machine with a hold-down device or safety cage or bolt to vehicle axle. Never inflate to seat beads without using an extension hose with gauge and clip-on chuck. Never stand, lean or reach over the assembly during inflation. Failure to comply with these safety precautions can cause the bead to break and the assembly to burst with sufficient force to cause serious injury or death.

Martin, who had been hired six months earlier, did not see the warning label. While leaning over the assembly, he attempted to mount a 16" tire on a 16.5" rim without a tire mounting machine, a safety cage, or an extension hose. Martin testified that because he had removed a 16" tire from a 16.5" rim, he thought he was mounting the new 16" tire on a 16" rim. Moreover, the evidence revealed that Martin's

employer failed to make an operable tire-mounting machine available to him at the time he was injured, and there was no evidence that the other safety devices mentioned in the warning were available.

In his suit, Martin claimed that the warnings were inadequate. He also alleged that Bradford was negligent and strictly liable for designing and manufacturing a defective tire and failing to warn of its dangers. Martin claimed that the tire manufactured by Bradford was defective because it failed to incorporate a safer alternative bead design that would have kept the tire from exploding. This defect, he asserted, was in part the cause of his injuries. Further, he alleged that Bradford's failure to adopt this alternative bead design was negligence that proximately caused his injury.

The bead[29] is the portion of the tire that holds the tire to the rim when inflated. It consists of rubber-encased steel wiring that encircles the tire a number of times. When the tire is placed inside the wheel rim and inflated, the bead is forced onto the bead-seating ledge of the rim and pressed against the lip of the rim. When the last portion of the bead is forced onto this ledge, the tire has "seated," and the air is properly sealed inside the tire.

[29] Often in products liability cases it helps student understanding if a diagram or picture of the product is included with case materials. For the Martin case simulation I was able to locate a cut-away drawing of a tire showing the bead at http://www.hstextil.com/tire.html (last visited Sept. 23, 2016).

At trial, Martin's expert, Alan Metner, a metallurgical engineer, testified that a tape bead, like the one in this case, is prone to break when the spliced portion of the bead is the last portion of the bead to seat. This is commonly called a "hang-up." Metner testified that an alternative bead design, a single strand "programmed bead," would have prevented Martin's injuries because its strength and uniformity make it more resistant to breaking during a hang-up. Metner explained that the single strand programmed bead is stronger because it is 0.013" thicker than the tape bead and that it is uniform because it is wound, or programmed, by a computer, eliminating the spliced portion of the bead that can cause the tire to explode during a hang-up. Metner also testified that Bradford's own testing department was aware by at least 1976 that a 16" tire mounted on a 16.5" rim would explode during a hang-up. Metner explained that the computer technology required to manufacture the *programmed bead* was developed in 1972, and available by 1975. Based upon this evidence and his expert opinion, Metner testified that the tire manufactured by Bradford with a tape bead was defective and unreasonably dangerous.

Bradford's principal argument regarding the warning label was that there was no evidence that supported Martin's contention that the tire was defective. First, "the tire bore a warning which was unambiguous and conspicuously visible; the tire was safe for use if the warning was followed; and the cause of the accident was mounting and inflating a tire in direct contravention of those warnings."

Second, Bradford argued that redesigning the tire with a programmed bead would have introduced other risk factors not present with its tape bead. For instance, Bradford's expert witness, Tim Connor, a forensic scientist, testified that while a tire with a programmed bead might not fail when inflated on a mismatched rim, it would definitely fail when driven on the road and likely cause far more injuries to those in the vehicle and other road users than would a failure during inflation of the tire in a repair shop. Third, Bradford introduced evidence that converting its manufacturing process to adopt the programmed bead design would have cost approximately $50 per tire during the first year of production, resulting in a cost increase to consumers.

At the close of trial, the jury found that the tire manufactured by Bradford was defective and that Bradford was grossly negligent. It allocated 100% of the cause for Martin's injuries to the acts and omissions of Bradford. The jury awarded Martin $5.5 million in actual damages and $25.5 million in punitive damages.

Bradford filed this appeal arguing that as a matter of law the tire was not defectively designed and otherwise included adequate warnings as to inflation. Further Bradford appealed the gross negligence verdict and the punitive damages award.

Bradford's appeal raises the following questions:

1) Was Bradford's tire defectively designed?
2) Did the tire have adequate warnings?

3) Was Bradford negligent or grossly negligent in designing and labeling the tire?
4) Should punitive damages have been awarded? Were they excessive?

B. Contracts Sample Case

1. Bobby Blue, by Patricia Blue, Parent v. The Town of Lincoln[30]

In August 2013, Patricia Blue registered her eleven-year-old son, Bobby Blue, for football activities with Lincoln Town Football Club ("Club"), for the 2013-2014 season. The Club is a town-sponsored organization that provides children in the greater Lincoln area with the opportunity to learn and play football and related field activities. The Club is managed by town officials and primarily composed

[30] The Town of Lincoln case is broadly excerpted from *Sharon v. City of Newton*, 769 N.E.2d 738 (Mass. 2002). The cases assigned as precedents for this moot simulation include *Hamer v. Sidway*, 27 N.E. 256 (N.Y. 1891)(explaining the concept of consideration); *Lucy v. Zehmer*, 84 S.E.2d 516 (Va. 1954) (explaining the concepts of offer, acceptance, mental assent, and capacity); *Vokes v. Arthur Murray, Inc*., 212 So. 2d 906 (Fla. Dist. Ct. App. 1968)(discussing generally unfairness in the bargaining process); *Chauvlier v. Booth Creek Ski Holdings, Inc.*, 35 P.3d 383 (Wash. App. 2001)(discussing clarity and conspicuousness of language in upholding the validity of a release clause as not violative of public policy); and *Calarco v. YMCA of Greater Metro. Chicago*, 501 N.E.2d 268 (Ill. App. 1986)(discussing the express negligence doctrine in invalidating a release clause).

of parents and other volunteers who provide their time and talents to help fulfill the Club's mission. The Club's registration form, signed by Patricia Blue, contained the following release language:

> Release: Recognizing the possibility of physical injury resulting from negligence associated with football and other activities, and in consideration for the Lincoln Town Football Club accepting my child(ren) into its football and activities program, I hereby release the Lincoln Town Football Club, the Town of Lincoln, their employees, volunteers, and associated personnel from any claim by me or by my child that may result from my child's participation in any and all football activities sponsored by the Lincoln Town Football Club.

On October 7, 2013, Bobby attended football practice. During practice, the boys participated in an intra-league game. Bobby's team won. Excited by the victory, Bobby and all 25 of his teammates, jumping up and down, piled onto each other on the field. Bobby landed at the bottom of the pile with most of his teammates on top of him. He sustained a broken ankle, torn knee cartilage, and a laceration to his thigh requiring 17 stitches. He has experienced continuing leg pain since.

The release language was included in a two-sided document. Except for the heading written in 12 point font, the document was single-spaced and written in 10-point font. On the front side, the document contained the heading:

> Lincoln Town Football Club
> Parental Agreement
> Please Read Carefully

It was followed by a 500-word historical narrative of the Lincoln Town Football Club. The front side also included space for the name, address, and other contact information of the family enrolling its child or children in the Club's activities. There was also a space at the bottom for the signature of the parent(s) who enrolled their children in the Club. This section was in red-color type. The text fully filled the page. There was nothing else written on the front side except at the very bottom of the document beneath the margin was written. "This is a 2-sided document." This note, printed in black, was in 10-point font similar to the rest of the page.

The back side, which is where the release language was located, was also written in 10-point font. The first section included a listing of the officers of the Club and their contact information. That was followed by a single-spaced 300-word description of the football activities offered by the Club and of the playing field. The next paragraph included the 74-word release, which was written in bold 10-point font. The page ended with the schedule of Club activities for 2013-2014. The text filled the

back side fully. There was nothing else written on the back side.

Patricia Blue is a caring single-parent. She works 40 hours per week. While physically strong, she has very poor eyesight and suffers from migraine headaches. On August 15, 2013, the day she signed the registration form that included the release statement at the Club headquarters, she had a severe migraine. Earlier that day for her migraine she had taken a prescription medication that left her glassy-eyed, light-headed, and slurring her words. For example, during her visit to the Club headquarters when speaking with the volunteer to sign the form, she repeatedly mispronounced the word "Lincoln" to sound like "London" and also became slightly dizzy during her meeting with the volunteer, who brought her a glass of water to comfort her. She asked if she could return the next day, August 16, when she would likely be feeling better to sign the form, but was told that the town deadline for registering children for the 2013-2014 season was at 5:00pm on the 15th. Barely able to read her watch, it was already 4:15pm. Feeling pressure she decided she should not delay signing.

In giving her the registration form to sign, the volunteer did not explain it, but told Patricia if she had any questions she should ask. Patricia read the front side of the document, signed at the bottom where indicated, and returned it to the volunteer at the desk. She did not see or read the back side.

On September 5, 2015, Patricia Blue filed a complaint against the Lincoln Town Football Club

for injuries sustained by Bobby. The complaint alleged negligence on the part of the Club for its failure to supervise the children, to have a medic available on the field, and otherwise to take precautions to assure the safety of the children.

In its answer to the complaint the Club not only denied all the allegations, but also filed a motion for a declaratory judgment that the release language, which appeared on the registration form that Patricia Blue signed, is enforceable as a matter of law against plaintiff and her son barring all claims by either of them now and in the future. [**Note that there is no applicable governmental immunity statute in this case.]

A hearing on the Club's motion is scheduled for Tuesday, October 21. The questions before the court are the following:

1) Is the release a valid contract?
2) Is the release voidable or unenforceable under theories relating to capacity, unconscionability, and public policy?

C. Commerce Clause Sample Case

1. Jean DeSouza et al. v. United States[31]

[31] The DeSouza case is adapted from *Gonzales v. Raich*, 545 U.S. 1 (2005). The cases, which are significantly abridged, assigned as precedents include *Wickard v. Filburn*, 317 U.S. 111 (1942)(relating the Commerce Clause broadly to apply to a farmer's home grown and consumed wheat); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964)(applying the Commerce Clause to a case involving racial discrimination); *United States v. Lopez*, 514 U.S. 549

In 2014, Maine voters passed Referendum 109, legalizing the medical use of marihuana in the state. Joe Montana and Jean DeSouza, both Maine residents, were users of medical marihuana. The record indicates that DeSouza stated that she used marihuana "to keep herself alive." Her physician, Dr. Kildare, claimed to have prescribed dozens of prescription medicines for her numerous medical conditions, but that she was allergic to most of them, and those to which she was not allergic, were ineffective. Kildare testified under oath that DeSouza's life was at risk if she could not continue to use marihuana.

Joe Montana suffered from chronic pain caused by an auto accident in 2006. He also used marihuana to relieve pain and to reduce serious muscle spasms along his spine. Montana's physician, Dr. Livingston, stated that without marihuana Montana would live a life of excruciating and debilitating pain.

To augment the availability of marihuana following passage of Referendum 109, and to reduce potential prescription costs, DeSouza and Montana began cultivating marihuana on their respective properties. On August 15, 2015, however, agents of

(1995)(denying application of the Commerce Clause to a case involving guns in a school zone); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (finding that Congress exceeded its authority under the Commerce Clause when it passed the Patient Protection and Affordable Care Act).

the U.S. Drug Enforcement Agency (DEA) became aware of their marihuana cultivation and obtained a search warrant. With warrant in hand, agents entered both properties, seized all marihuana under cultivation, and issued a warning that arrest would follow unless DeSouza and Montana each agreed to desist in growing the plant.

DEA acted pursuant to the Cannabis Narcotic Act (CNA) passed by Congress in 1980. CNA makes trafficking, defined as "illegal commercial activity," in marihuana punishable by imprisonment and fine. Because CNA does not recognize the medical use of marihuana as a legal activity under federal law, agents were assigned to break up Maine's medical marihuana co-ops and seize their assets. Agents did not make an exception for DeSouza's and Montana's home-grown marihuana. As they testified in court, making a single exception in this case would render CNA unenforceable in practice because of the many other potential cases involving home-grown marihuana. Agents also contended that consuming one's home-grown marihuana for medical purposes would affect the interstate market in marihuana, and hence the federal government may regulate—and prohibit—the home grown substance.

Seeking to prohibit DEA from interfering in their right under Maine law to produce and use marihuana for medical purposes, they each filed for injunctive relief in U.S. District Court for the District of Maine. They each premised their suit on the claim that DEA had overreached under the Commerce Clause. They claimed that they were not engaged in a "commercial activity," and that growing marihuana in Maine and

consuming it in Maine was not an act in interstate commerce. The District Court disagreed in each case and ruled for DEA. DeSouza and Montana appealed to the Court of Appeals for the First Circuit. Their cases were joined.

The questions certified for argument are:

1) Is the growing of marihuana for home use a "commercial activity?"
2) Is the growing of marihuana for home use an act in interstate commerce?

V. ASSESSING STUDENT DELIVERABLES

The general outline that I ask students to follow in organizing their briefs and decisions includes stating the issues, identifying the rules from the assigned precedents, and applying the rules to the facts to reach a conclusion.[32] This outline also becomes my guide in assessing the deliverables. Here I focus on *application*: do the students understand the rule of law to be applied and do they apply it in a reasoned way? In applying reason to

[32] This pattern of issue, rule, application, and conclusion is basic to oral advocacy. *See, e.g.*, DAVID S. ROMANTZ & KATHLEEN ELLIOTT VINSON, LEGAL ANALYSIS: THE FUNDAMENTAL SKILL (2d ed. 1998). The authors propose that advocates follow the CREAC construct in organizing argument—state the desired Conclusion, identify the applicable Rule, Explain the rule, Apply the rule to the case at bar, and restate the Conclusion. *Id.*at 119–42.

develop their argument, students are expected to use both the assigned precedent cases and their textbooks as source material. A few examples of what one might look for in assessing follow.

In the products liability case discussed above, students should demonstrate an understanding that a manufacturer could be liable because of its negligence and also strictly liable because the product itself is defective. Students should also show that the product can be defective either because of its design or because of a failure to warn of its dangers. Further, the case includes materials on punitive damages and how courts assess them, which requires students to discuss whether they should be assessed against Bradford, the manufacturer of the tire, and if so, to what extent. To demonstrate that they have read the materials and understand the rule, I ask students to make specific references in their arguments to the assigned precedents and textual materials. For instance, regarding negligence did students refer to the rule in *Palsgraf*: "The risk reasonably to be perceived defines the duty to be obeyed…it is the risk to…others within the range of apprehension."[33] Did they then apply the rule to the actions of Bradford to demonstrate that Bradford may have been negligent because it knew as early as 1976 that a 16" tire mounted on a 16.5" rim would explode under circumstances similar to those involving Martin and that Martin was within Bradford's "range of apprehension." Alternatively, in defense of Bradford, did the warnings included on

[33] *Palsgraf,*162 N.E at 100.

the tire demonstrate its exercise of reasonable care so as to disprove any breach of duty?

The sample contracts case gives students the opportunity to demonstrate their understanding of the major elements of a contract using material from both the *Lucy* and *Hamer* decisions. For example, in reference specifically to the element of acceptance, the question students should argue relates to plaintiff Patricia Blue's state of mind and whether she was capable of understanding the nature and consequences of signing the release of liability. Further, students need to address the matter of the release itself and whether it is unconscionable. In this context, both the *Chauvlier* and *Calarco* decisions provide ample material for arguing points relating to the clarity and conspicuousness of the release, and the extent to which the signer of a contract should be held to it even if she does not read it.

The Commerce Clause case asks students to argue two issues related to interstate commerce. First, relying on *Sebelius*, they must address whether the activity of growing marihuana is a "commercial activity." In doing so they should demonstrate an understanding that the power to regulate interstate commerce presupposes that the activity regulated is indeed commercial. Second, they need to argue the extent of the federal government's ability to regulate commerce. The parameters of this argument are set by *Filburn* and *Lopez*. Here student focus should be on whether the local activity of DeSouza and Montana has a substantial economic effect on interstate commerce.

My grading of students in these moots is guided by three considerations. First, I weigh the extent to which students have incorporated into their deliverables the assigned materials. Do they demonstrate in their reasoning that they have read them and understand the law? Second, I consider the fact that my students in these moots are freshmen. They are not only trying to understand legal concepts, but also dealing with a new language for which not even television dramas like *Suits* and *Boston Legal* have prepared them. This consideration serves as a counterbalance to any deficiencies apparent in their understanding of the law. Third, while I realize that those members of the class who have speaking parts, primarily students assigned the role of lawyer, have played the most prominent role in the moot, I grade based on written submissions only. This is because not all students have speaking parts, and, therefore, the only deliverable relevant to all students that allows assessment on an equal footing is their written submission.

VI. STUDENT SURVEY RESULTS SUMMARY[34]

During fall 2015, thirty-three honors freshmen[35] in two sections of a Legal Environment course at the

[35] I do not mean to imply by referring to this surveying of honors students that moot simulations are only for honors students. They are not. I have used moot simulations with both honors and non-honors freshmen. It is merely coincidental that my most recent use of moots was during fall 2015, when I taught honors students.

author's institution participated in several moot court simulations. To gauge the impact of these simulations on their learning, they were asked to respond to a survey. The survey was conducted anonymously during February 2016, using Perseus software. Twenty-five of the 33 students responded. Accepting that the survey results represent a self-assessment of the student experience, they are nonetheless a useful indication of student reaction to the moot as a teaching tool. The complete survey and the results are located in Appendix 2.

The surveyed freshmen included 22 males and 11 females. Two-thirds of respondents (68%) had some prior public speaking experience in high school, including speaking at a public meeting, running for student government, and debating. Despite this prior experience, 21 respondents (88%) identified their moot court experience as a moderate to significant challenge. The challenges they identified related primarily to the delivery of the oral argument, answering judges' questions, and researching the cases.[36] In one response a student wrote, "I would say the moot was like running a marathon; it was a drag

[36] During the fall semester I conducted three moot simulations. Two were closed cases which required no outside research. The final moot was an open case, which I assigned following a basic LEXIS tutorial for finding precedents relevant to the case problem. The fact that the final moot was an open case likely accounts for survey responses indicating that students were challenged by researching cases. As already noted, researching is unnecessary in closed cases.

to prepare for it and dreadful doing it in front of my peers, but the experience overall was positive because it helped me improve and I felt good about doing it afterward." Another said, "Prior to moot court I was uneasy with my public speaking. Now although I am not 100% confident in my public speaking I know that I am good at it which helps to quell the nerves."

Selecting from a list of perceived benefits provided by the moot simulation, 21 students responded that the moot enhanced their confidence in their oral communication skills. Twenty-two students responded that the moot enhanced their legal research skills. The same number responded that the moot enhanced their learning about the law and legal process. One student stated, "I learned way more about the law than I ever thought I would. It was very interesting to see how the legal process plays out and even more interesting to role play it." Other categories of learning benefits indicated by students included enhancing analytical skills (14 students), improving public speaking skills (14 students), and improving writing skills (8 students).

In responding to questions seeking an overall assessment of their experience with moot simulations as a learning tool, 10 students (40%) responded that the moot was an extremely positive tool.[37] Likewise, in asking students to compare the moot as a learning tool to learning assignments,

[37] The remainder of students responded to this question as follows: 7 students identified it as moderately positive; 4 as slightly positive; 2 as neutral; 1 as moderately negative; and 1 as extremely negative.

projects, and simulations used in all other courses they had taken, 10 students (40%) responded that it was one of the two best experiences they had had and two students (8%) responded that it was their best experience. There were seven other students (28%) who indicated that it was a good learning experience. In response to this question, one student wrote, "It was a challenging way to exercise the skills learned in class while still leaving room for individual creativity." Another said, "Even though the moot court presented a lot of challenges and work, I think I got even more skills and experience out of it."

VII. CONCLUSION

While this article has been about infusing some interest, challenge, and fun into the student experience, it also is about the instructor experience. Teaching a Legal Environment or Business Law course can be onerous. There is indeed much to cover, but there are opportunities to lighten the load, if not in terms of material, at least in terms of the delivery of that material. Moot court simulations engage students in the delivery dynamic. Students teach themselves and they learn from each other. Instructors who share in that student-centered dynamic will find it to be a rewarding and enlivening way of teaching material in a Legal Environment or Business Law course.

APPENDIX 1

Sample Assignment Handout

Moot Court Assignment: Tuesday, October 21, Back Bay Room 125C

Lawyers—Each team has 20 minutes for its argument. Rebuttal for appellants should be about 2 minutes of the 20, but will come after argument for appellee. Each side should:

- explain the facts—what happened?
- explain the law to be applied
- discuss the relevant precedents and how your teams uses them. (If a precedent goes against you, try to distinguish it from your case; if a precedent supports your argument, analogize it.)
- be persuasive in your argument explaining why the court should find in your favor
- give me a copy of your written argument. I should receive one from each member of the team. (While you will likely only argue a portion of the case, your written argument must discuss the whole case.)
- to begin, each advocate will say: "May it please the court, I am _____, and I represent _____." Also remember to address judges during argument as "Your Honor."

Judges—You must meet as a group to discuss the issues before hearing argument. Be sure that you know the issues and have questions ready to be asked during argument.

- each judge is to come into the argument with at least one or two written questions that you want answered by the lawyers. This means that you will ask the questions of the lawyers during the argument. This is extremely important.
- you must schedule a meeting to discuss the case and hear each other's views within a day or two of the argument. This may not be logistically easy, but do your best to attend.
- by 3pm on Wednesday afternoon either at a meeting or by email, you must let the Chief Judge know how you vote on the case. The Chief will tally the vote and get back to you so that you know whether you are writing the majority opinion, which the Chief Judge will assign (volunteering is ok), or a concurring or a dissenting opinion. You've been reading case decisions since early September so the format should be obvious to you. Your written opinion in due on Thursday, Oct 23. We will set aside some time that day to discuss the outcome.

Amici—Your amicus brief is due on the day of the hearing. Each member of the team is to submit a written brief to me. Also select one brief from your group to submit to the court for its consideration in deciding the case. While the lawyers' arguments are key, amicus briefs can be helpful to the court in reaching its decision.

Finally to everyone, this is your first experience with a moot. We won't get it perfect so I'll be flexible. My objective is that you know how to apply strict

liability and negligence analysis to a products liability case.

APPENDIX 2

Student Survey Results

Q1. Before your GB110 Moot Court experience, did you have any public speaking experience?

Answer	%	Count
yes	68.00%	17
no	32.00%	8
Total	100%	25

Q2. If you answered "yes" to Question 1, mark all that apply from the list below. If you answered "no," skip to Question 3.

Answer	%	Count
debate	47.06%	8
high school political speech	47.06%	8
speaking at a public meeting	70.59%	12
other (specify):	41.18%	7
Total	100%	17

other (specify):
Specific speaking class
Various speeches I was asked to write and give at my high school on a wide variety of topics. (probably 6 different speeches in total)
Graduation
speaking in Church and Graduation
DECA, Model UN
High School Mock Trial
Presenter at a statewide DECA conference

Q3. On the scale below, measure the level of challenge that moot court presented for you.

Answer	%	Count
significant challenge	36.00%	9
moderate challenge	52.00%	13
low-level challenge	8.00%	2
little challenge	4.00%	1
no challenge	0.00%	0
Total	100%	25

Q4. If you answered Question 3 indicating any level of challenge, please identify the source of the challenge from the list below. Mark all that apply.

Answer	%	Count
researching cases	62.50%	15
reading cases	33.33%	8
organizing an argument	25.00%	6
preparing the written brief	25.00%	6
delivering your oral argument	62.50%	15
answering judges questions	62.50%	15
working with teammates	4.17%	1
other (specify):	4.17%	1
Total	100%	24

other (specify):
arguing based on fact, not opinion

Q5. Did your moot court experience help to enhance your confidence in your communication skills?

Answer	%	Count
yes	84.00%	21
no	16.00%	4

Total	100%	25

Q6. In a sentence or two, please explain your answer to Question 5.

It requires you to step out of your comfort zone
I learned how to be more put together during an argument and how to present myself intelligently.
I felt much more confident in handling myself when the judges asked me question which helped me think on my feet
It allowed me to become more confident in my ability to present my findings and to research topics
It provided me with the opportunity to think on my feet more in public speaking and being able to organize a rational well organized thought in a short period of time
Following the moot courts, I felt much more comfortable and confident standing up in front of people and making a case/presentation. Before, I would get really nervous, but I feel much better about it now.
The more I practiced delivering an oral argument the more confident I became. It helped me figure out how to communicate what I was thinking, especially on the spot.
The experience definitely helped me grow as a speaker. It was something that I have never done before and was good time to learn in my freshman year.

Prior to the moot court I was uneasy with my public speaking. Now although I am not 100% confident with my public speaking I know that I am good at it which helps to quell the nerves.
Having to communicate with my partner helped me develop not only communication skills but teamwork skills as well.
The moot court reminded me of certain public speaking habits I have that I need to break. It also helped me put my thoughts into words better in order to more clearly communicate.
Moot Court helped me formulate arguments better. I already felt I had good public speaking skills, I just learned to argue in a new way.
I feel more comfortable talking in front of superiors and voicing my opinion.
My moot court experience taught me to organize my arguments better and to tailor my arguments to my audience (the judges) better.
I'm more scared of public speaking than I was prior.
Although I think I am an experienced public speaker, the process helped to refine those skills.
It was good exposure to a high-pressure scenario.
It helped me become more confident in myself with speaking because it was my first experience with public speaking and I was able to perform pretty well.
After the moot court exercises I felt much more capable of expressing in explicit language what I wanted to say and how I wanted to say it

Q7. Did your moot court experience help to enhance your learning about the law and legal process?

Answer	%	Count
yes	88.00%	22
no	12.00%	3
Total	100%	25

Q8. In a sentence or two, please explain your answer to Question 7.

You had to realistically perform
I was exposed to a wide variety of cases and experience what it is like to research law in depth
I learned more about the judging process and how to argue different sides and present facts in a supportive way.
It forced me to have a deeper understanding of the material because not only did I have to write about it, but also know it well enough to speak about it fluently and answer questions.
I learned way more about law than I ever thought I would. It was very interesting to see how the legal process plays out and even more interesting to role play it.
I know more about battery and scope of employment then ever before. I would feel comfortable arguing about those topics later in my life

The research of cases and then having to organize the argument and defend your stance was very helpful and a great learning experience.
Because it ruined my grade. Thanks for that
The very strict legal process that had to be followed in the moot court helped ingrain the process into my mind.
It built upon topics we had already covered in a way that made it imperative to use critical thinking skills to formulate an argument.
I really enjoyed this class. Law truly interests me and it expanded my knowledge base beyond US Government and Politics and AP US history.
I learned the extensive process of law and the effort lawyers put into their arguments.
I was forced to become much more familiar with the law and legal process in order to make a compelling argument and to be prepared to answer questions from judges.
I never had any experience with the law before this.
Didn't know that much about the legal process, and not nearly as in depth as i did afterwards.
It gave me a feel of how argumentation happened in courts.
The actual moot court itself is very limited in what it can teach about the law process
It helped me learn about what lawyers actually do in the court room and how tough it is to make a judge’s decision clear

Doing a simulation of what lawyers do for a career gave a lot of insight into the court system as a whole

Q9. As a result of your moot court experience, if applicable, mark those areas of your learning that benefitted most. Mark all that apply.

Answer	%	Count
legal research skills	91.67%	22
analytical skills	58.33%	14
public speaking skills	58.33%	14
writing skills	33.33%	8
working with teammates	20.83%	5
thinking on your feet	91.67%	22
other (specify):	0.00%	0
Total	100%	24

Q10. Considering other learning tools used in the GB110 course, was the moot court experience more beneficial to your learning than any of the following? Mark all that apply.

Answer	%	Count
briefing cases	66.67%	16

classroom discussions	29.17%	7
other assigned team projects	62.50%	15
mid-term exam	45.83%	11
other (specify):	0.00%	0
the moot experience was less beneficial than any listed above	0.00%	0
Total	100%	24

Q11. Overall, how would you assess your moot experience as a learning tool?

Answer	%	Count
extremely positive	40.00%	10
moderately positive	28.00%	7
slightly positive	16.00%	4
neither positive nor negative	8.00%	2
slightly negative	0.00%	0
moderately negative	4.00%	1
extremely negative	4.00%	1
Total	100%	25

Q12. In a sentence or two, please explain your answer to Question 11.

Overalls speaking abilities were improved and my ability to research
The moot experience was well worth the effort, but the effort required to organize and prepare for them detracted a bit from the overall experience. That said, it was a challenge and i still encourage it to be continued to be assigned.
The only real downside was the stress and preparation in advance of the moot court, but I felt very accomplished afterwards and certainly learned a lot.
I would say my moot experience was like running a marathon; it was a drag to prepare for it and dreadful doing it in front of my peers, but the experience over all was positive because it helped me improve and I felt good about doing it afterward.
Communication skills are very important to have
Overall I feel that it was greatly beneficial and although I did not like the moot courts while doing them, once they were over Is aw the value in them.
It had no benefit on my life
Even though the moot court presented a lot of challenges and work, I think I got even more skills and experience out of it.
I think it was helpful, but also extremely stressful. I expected to be able to go through more of my planned/structured oral argument than I was allowed.

I think moot court helped me to grow a lot as an individual and a thinker.
While it provided a base to help me with public speaking, I have a lot more to learn.
I would have liked the judges to have more guidance in their questions when I was being judged by my peers.
Even though it was more beneficial than typical discussions, I still don't feel like I learn best in this way.
I learned a lot about the Law processes.
I really enjoyed the process and it felt like I was actually delivering something of substance at the end.
It was a challenging way to exercise the skills learned in class while still leaving room for individual creativity
It was a lot of preparing and was very stressful on students but overall, helped in the end

Q13. In reflecting upon other learning assignments, simulations, and projects used in other courses that you've taken at Bentley, how would you evaluate moot court as a tool for enhancing your education?

Answer	%	Count
the best experience	8.00%	2
one of the two best experiences	40.00%	10

a good experience	28.00%	7
an average experience	12.00%	3
a less than average experience	8.00%	2
the worst experience	4.00%	1
Total	100%	25

Q14. You may choose to add any other comments here:

None. Thanks for a great semester Prof. Salimbene
I miss GB 110! It was a wonderful class, and I look forward to taking more classes with you, Prof Sal.
The grading was too strict. We worked hard on our assignments all semester and we believe that we received a lower grade than the other classes. For all other freshmen, 110 is a simple class. We are honors students that must maintain a certain GPA. This class was difficult yet the knowledge we accumulated was worth it. However, when we received our grades and the rest of the freshman received theirs for their particular class, it was disappointing to know how much more work we did to receive a lower grade.

SUSTAINABILITY AND CORPORATE GOVERNANCE IN A BUSINESS LAW COURSE: A "REAL WORLD" PROJECT

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I. INTRODUCTION

MGT 641 (Commercial Law and Corporate Governance) was offered for the first time at the University at Buffalo during the Spring 2014 semester. The course is an elective, and course enrollment is primarily open to students completing their final semester in a one-year M.S. Accounting program. During the Summer of 2013, we received a PwC INQuires Program grant[1] to, among other things, develop a corporate governance and sustainability case study to be used in the course. After considering various alternatives, we ultimately created a project that got students involved in

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[1] *See* https://www.pwc.com/us/en/faculty-resource.html.

advising not-for-profit organizations on issues of governance, succession planning and financial planning – all of which are relevant to an expanded definition of sustainability that includes the continued existence of the organization.

This article describes how we included sustainability and an experiential corporate governance project in a business law course. Part II of this article begins by asking the question of whether these topics belong in a business law class. After concluding that they can and do belong, Part III describes how we incorporated sustainability and corporate governance into MGT 641. Part III also provides a detailed description of the project, including a discussion of how we identified organizations with which to work and created the student teams. Part IV of this article offers recommendations for instructors implementing a similar assignment, based on our experience over the three semesters that we have included it as a course requirement. Throughout Parts III and IV of this article, we have incorporated feedback we received from students and non-profits regarding the project. That feedback is also summarized in a chart provided at the end of this article.

Given the positive and thankful responses of the organizations involved and the student feedback received, we believe that incorporating a corporate governance and sustainability project in MGT 641 has been a worthwhile and successful endeavor and we plan to continue to incorporate this project in future offerings of the course. Significant benefits to our students include the opportunity to engage in

"real world" consulting, contribute to a not-for-profit organization's future, gain a broader understanding of sustainability, and observe corporate governance in action and make suggestions for its improvement.

II. DO SUSTAINABILITY AND CORPORATE GOVERNANCE BELONG IN A BUSINESS LAW COURSE?

The linkage between business law and corporate governance, which encompasses topics like executive compensation, independence of directors and similar subjects, is obvious. Most business law textbooks provide an extensive discussion of corporate topics, such as formation, operation, management and liquidation,[2] and now also incorporate coverage of governance issues, including the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010[3] and the Sarbanes-Oxley Act of 2002.[4] The connection between business law and sustainability may be less obvious, however, and prompts two questions. The first, what is sustainability, and the second, whether the topic belongs in business law. In part, the response to the latter question turns on the answer to the former.

A. What is Sustainability?

[2] *See, e.g.*, KENNETH W. CLARKSON ET AL., BUSINESS LAW: TEXT AND CASES, (13th ed., 2015); HENRY R. CHEESEMAN, CONTEMPORARY BUSINESS LAW (8th ed. 2015).
[3] Pub. L. No. 111-203, 124 Stat. 1376 (2010).
[4] Pub. L. No. 107-204, 116 Stat. 745 (2002).

If sustainability is defined strictly as environmental stewardship and responsibility, the topic may be better housed in an environmental law course.[5] However, many scholars and organizations use a "triple bottom line" approach when discussing sustainability that includes economic viability, in addition to environmental and social considerations.[6] One example of this thinking can be found in the work of the World Commission on Environment and Development (more commonly known as the Brundtland Commission). Although not without its critics,[7] the Brundtland Commission adopted a definition of sustainable development as "development which meets the needs of current generations without compromising the ability of future generations to meet their own needs."[8]

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[5] For a discussion of sustainability instruction in an environmental law setting, see Paulette L. Stenzel, *Teaching Environmental Law and Sustainability for Business: From Local to Global*, 30 J. LEGAL STUDS. ED. 249 (2013).

[6] *See, e.g.*, *Definition of Business Sustainability*, FINANCIAL TIMES, http://lexicon.ft.com/Term?term=business-sustainability (last visited June 26, 2016).

[7] Edward Z. Fox, *The Role of Law and Lawyers in a Sustainable Society*, 43 ARIZ. ST. L.J. 713, 715 (2011).

[8] *Sustainable Development – Concept and Action*, UNITED NATIONS ECON. COMM'N FOR EUROPE, http://www.unece.org/oes/nutshell/2004-2005/focus_sustainable_development.html (last visited June 26, 2016). Some criticize the Brundtland Commission because of its focus on economic development. *See, e.g.*, Fox, *supra* note 7, at 715.

While recognizing the environmental and social aspects of sustainability,[9] the American Institute of Certified Public Accountants, or AICPA, describes the term as also incorporating "the business systems, models and behaviors necessary for long-term value creation."[10] This approach is similar to that adopted by the Global Reporting Initiative, when discussing sustainability reporting:

> A sustainability report is a report published by a company or organization about the economic, environmental and social impacts caused by its everyday activities. A sustainability report also presents the organization's values and governance model and demonstrates the link between its strategy and its commitment to a sustainable global economy.[11]

[9] "[T]he most widely accepted definition of sustainability that has emerged over time is the 'triple bottom-line' consideration of 1) economic viability, 2) social responsibility, and 3) environmental responsibility." *Sustainability Accounting and Reporting – FAQ*, AM. INST. OF CPAS, http://www.aicpa.org/InterestAreas/BusinessIndustryAndGovernment/Resources/Sustainability/Pages/SustainabilityFAQs.aspx (last visited June 26, 2016).

[10] *Id.*

[11] *Sustainability Reporting*, GLOBAL REPORTING INITIATIVE, https://www.globalreporting.org/information/sustainability-reporting/Pages/default.aspx (last visited June 26, 2016).

B. Inclusion of Sustainability in a Business Law Course

When viewed in this broader light, inclusion of sustainability in a business law class is compelling. Whether the course is geared solely to accounting students or also includes students pursuing other business disciplines, strategies emphasizing financial viability and strategic governance practices geared toward long-term organizational success are integral parts of the business and accounting curricula. In other words, inclusion of sustainability reinforces tools and concepts students have learned already or are otherwise learning.

Discussion of sustainability in a business law setting provides value to students on another very important level. Studies have shown that businesses are increasingly likely to adopt environmentally friendly policies as part of their strategic plans. For example, the third annual Massachusetts Institute of Technology Sustainability and Innovation Global Executive Study and Research Project reported that 70% of companies had permanently incorporated sustainability on management agendas; two-thirds of the managers who responded to the survey stated that sustainability was "necessary to being competitive in today's marketplace."[12] The 2016 edition of MIT's survey found that 75% of investors list improved

[12] Knut Haanes et al., *Sustainability Nears a Tipping Point*, MITSLOAN MGMT. REV. (2012), *available at* http://sloanreview.mit.edu/reports/sustainability-strategy/introduction/.

revenues and operational efficiencies resulting from sustainability practices as important reasons to invest.[13] Significantly, approximately 60% of investment firm board members stated they would divest from companies with poor sustainability records.[14]

Increased attention to sustainability as a strategy and the value in implementing a more formal sustainability structure suggest that CPAs and business managers have an important role to play in the successful adoption of a profitable sustainability strategy. The Big Four accounting firms all offer sustainability services[15] and the profession as a whole has transformed in terms of the competencies clients expect of their accountants. No longer are CPAs called upon for strictly audit and tax-related services; now many accountants occupy a more holistic role in which they provide advice on a wide

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[13] Gregory Unruh et al., *Sustainable Future – Investors Care More About Sustainability than Many Executives Believe*, MITSLOAN MGMT. REV. (2016), *available at* http://sloanreview.mit.edu/projects/investing-for-a-sustainable-future/.

[14] *Id.*

[15] *See Sustainability and Climate Change*, PWC, http://www.pwc.com/gx/en/sustainability/ (last visited June 26, 2016); *Sustainability Home*, ERNST & YOUNG, http://www.ey.com/US/en/Services/Specialty-Services/Climate-Change-and-Sustainability-Services (last visited June 26, 2016); *Services: Sustainability*, DELOITTE, http://www.deloitte.com/us/sustainability (last visited June 26, 2016); *Sustainability Services*, KPMG, http://www.kpmg.com/global/en/topics/climate-change-sustainability-services/pages/default.aspx (last visited June 26, 2016).

range of issues facing clients. For example, CPAs may be a part of succession planning or involved in counseling troubled businesses on possible financing options.[16] Further, many companies have implemented sustainability programs or adopted more sustainable long-term management strategies.[17] This means that business and accounting educators would serve students well by exposing them to these concerns, but it also raises a question of how to implement sustainability in the university curriculum. Many schools offer courses and entire concentrations devoted to this subject,[18] but for students who are studying accounting or concentrating in other business disciplines another

[16] The authors gratefully acknowledge the contributions of an anonymous referee to this point.

[17] For examples of environmental practices that have been adopted in corporate America, s*ee Sustainability*, WALMART, http://corporate.walmart.com/global-responsibility/environmental-sustainability (last visited June 26, 2016); *Sustainability Report 2015/16*, FORD MOTOR CO., http://corporate.ford.com/microsites/sustainability-report-2015-16/index.html. Considering sustainability defined as long-term value creation, Jones and Burchman offer a discussion of issues that can arise when trying to implement long-term management practices. *See* Blair Jones & Seymour Burchman, *How Incentives for Long-Term Management Backfire*, HARV. BUS. REV. (May 6, 2016), https://hbr.org/2016/05/how-incentives-for-long-term-management-backfire.

[18] *See, e.g.*, the University of Maine's business school, which offers an MBA concentration in "Business and Sustainability." *MBA Concentrations – Business & Sustainability*, UNIV. OF ME. BUS. SCH., https://umaine.edu/business/degrees-and-programs/mba/graduate-programs/mba-tracks/the-mba-track-in-business-sustainability/ (last visited June 15, 2016).

approach is required. One solution, recognizing the importance of governance to this topic, is to look to business law classes.

III. HOW WE INCORPORATED SUSTAINABILITY AND GOVERNANCE IN A BUSINESS LAW COURSE

As mentioned above, to the extent sustainability is defined broadly to include governance, the link to business law is more obvious and in many cases, existing law textbooks do provide coverage of some governance subjects.[19] However, sustainability is less likely to be included in business law textbooks.[20] As a result, instructors will need to provide supplemental reading, such as articles that describe sustainability in a corporate setting.[21] It is

[19] *See* CLARKSON ET AL. and CHEESEMAN, *supra* note 2; GORDON BROWN & PAUL SUKYS, BUSINESS LAW WITH UCC APPLICATIONS (13th ed. 2013).

[20] A small sample of business law textbooks that do not discuss sustainability includes CLARKSON ET AL., *supra* note 2, CHEESEMAN, *supra* note 2, and BROWN & SUYKS , *supra* note 19. MARIANNE M. JENNINGS, BUSINESS: ITS LEGAL, ETHICAL AND GLOBAL ENVIRONMENT (10th ed. 2015), has a chapter entitled "Environmental Regulation and Sustainability," but its focus is on laws regulating the environment and pollution. *Id*.at 336-366.

[21] *See, e.g.*, Sheila Bonini & Steven Swartz, *Profits with Purpose: How Organizing for Sustainability Can Benefit the Bottom Line* (2014), http://www.mckinsey.com/business-functions/sustainability-and-resource-productivity/our-insights/profits-with-purpose-how-organizing-for-sustainability-can-benefit-the-bottom-line. Textbook publishers also may offer supplemental pamphlets. *See, e.g.*,

important to supply one or more readings which expressly discuss the link between sustainability and governance.[22] Otherwise, students are unlikely to see how the topics are related or to understand why sustainability is being included in a business law setting, leading to a "disconnect" between student expectations for the course and its sustainability content.[23]

A. The Sustainability and Corporate Governance Project

At the University at Buffalo, we chose to incorporate sustainability into a graduate course that already included a significant corporate governance component.[24] This meant the task before us was to

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MAYER, STUDENT GUIDE TO SUSTAINABILITY, LAW AND ETHICS (2014).

[22] *See, e.g.*, GLOBAL CORPORATE GOVERNANCE FORUM & INT'L FINANCE CORP., CORPORATE GOVERNANCE: THE FOUNDATION FOR CORPORATE CITIZENSHIP AND SUSTAINABLE BUSINESSES (2009), http://www.ifc.org/wps/wcm/connect/a2b5ef8048a7e2db96cfd76060ad5911/IFC_UNGC_brochure.pdf?MOD=AJPERES. The recent scandal involving falsified emissions test results and Volkswagen is a good example of the close relationship between governance and sustainability. *See* Chris Bryant & Richard Milne, *Volkswagen's 'Uniquely Awful' Governance at Fault in Emissions Scandal*, CNBC (Oct. 4, 2015,7:48 AM), http://www.cnbc.com/2015/10/04/volkswagens-uniquely-awful-governance-at-fault-in-emissions-scandal.html.

[23] See discussion at text accompanying note 36, *infra*.

[24] The course already included a discussion of corporate formation, management, operation and liquidation in addition to governance topics such as executive compensation, director independence, and the Dodd-Frank legislation.

also incorporate other aspects of sustainability. Given that our environmental expertise is limited, we relied on a guest speaker who is the director of sustainability for a local manufacturer to discuss some of the benefits and challenges associated with sustainability practices. We also supplemented the text with readings,[25] but the heart of our effort was a sustainability and governance project. This project involved offering consulting services to non-profit organizations in the Western New York region which were facing sustainability issues.

The project was a good fit for the M.S. Accounting and graduate business students enrolled in the course, all of whom were in their final semester of graduate study and eager for experience akin to what they will encounter in their future roles as professionals.[26] In that regard, the project is similar to what accounting educators can offer through VITA, the Volunteer Income Tax Assistance program. VITA provides many benefits for the students who participate, including training in client confidentiality, learning the importance of documenting work, and being able to recognize when

[25] *See* Bonini & Swartz, *supra* note 21. We also used outside reading for a discussion of benefit corporations. *See Benefit Corporation: FAQ*, B LAB, http://benefitcorp.net/faq (last visited June 26, 2016).

[26] It was our strong wish to provide the participating non-profits with highly professional service. For that reason, we did not consider housing this project in an undergraduate course. We felt it was unlikely undergraduate students would have sufficient expertise to develop and effectively communicate recommendations of the type we hoped our teams would deliver.

information is missing.[27] These are important skills for the practice of accounting and, on a more basic level, for passing the CPA exam. Unlike previous versions, the Regulation section of the 2017 CPA exam will place far greater emphasis on analysis of material and application. Analysis involves examining and studying interrelationships in order to find causal relationships and make inferences. Application entails the use of knowledge, concepts or techniques.[28] A consulting project that requires students to meet with "clients," determine what problems exist, identify and gather necessary information, and then use their training to offer meaningful solutions is good practice of the higher order skills students will need to demonstrate in order to pass the Regulation section of the exam.

The project does require instructors to cover governance topics early in the semester, since it is necessary to discuss these subjects first in order to properly prepare the students for their work. This may require a reshuffling of the order in which material is covered. In our course, we also briefly discussed some of the legal and tax constraints

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[27] *See* Valrie Chambers et al., *The VITA Program: Vital to Communities, Campuses, Students, and Employers*, THE TAX ADVISER (May 1, 2015), http://www.thetaxadviser.com/issues/2015/may/c2c-may2015.html.

[28] AICPA, PRACTICE ANALYSIS FINAL REPORT: MAINTAINING THE RELEVANCE OF THE UNIFORM CPA EXAMINATION (April 4, 2016), http://www.aicpa.org/BecomeACPA/CPAExam/nextexam/DownloadableDocuments/2016-practice-analysis-final-report.pdf.

applicable to non-profits, so that the students would understand some of the special limitations applicable to these organizations.

B. Serving Not-for-Profit Organizations and How We Found Them

When incorporating an assignment of this nature into a class, an important operating principle for the instructor(s) is to begin early. We began well in advance of the January start date for the course by considering what kinds of consulting services our students could offer and trying to identify the organizations that might be in need of this assistance. Since our experience with a project of this nature was limited, we thought it was important to keep the students' work manageable, and therefore we reached out to smaller organizations. A larger entity also may have been workable, provided the task was of a limited and defined nature. Once the organizations have been identified, the instructor should remain in contact. Unexpected changes may affect an organization's ability or interest in participating, and it is important the instructor have as much time as possible to implement whatever steps are necessary to react to such developments.[29]

[29] In 2016, we met with one organization which enthusiastically sought the services of our students. The organization was responsive and remained in contact until approximately the third week of the semester, when its director, who was a volunteer, apparently was overwhelmed by responsibilities from his paid position. The organization withdrew and we were forced to reassign the students to other teams that were servicing different organizations.

When we first began to consider this project, we decided very early on to limit our focus to not-for-profit organizations. One of the reasons for this was our desire to lessen the possibility that we would be putting our students in competition with accounting or other firms, including our students' future employers, providing management advice to for-profits. We hoped that the project could make an impact where it might be needed most, and where there might be fewer resources to pay for this type of consultation. This goal apparently was met; on a post-project survey one of our participating organizations wrote: "This is a worthy project and one that is especially helpful for nonprofits that operate on a shoestring, or who have limited staff[.]" We also considered this an opportunity to encourage students to get involved with not-for-profits throughout their careers. With respect to this last goal, perhaps one of the student's comments about the project said it best:

> Beyond the actual work, I think my main takeaway from this project is the importance of using my unique skill set in a positive way to give back to the community. I plan to get more involved in nonprofits and hopefully one day join the board of a nonprofit organization.[30]

[30] Student's Sustainability Project Reflection Paper for MGT 641 (May 2014).

We found organizations in a variety of ways. Initially, we enlisted the help of the director of the internship program in our school's Career Resource Center, as well as the assistance of an intern with the program. For many years, our school's students have done credit bearing internships at not-for-profit (as well as for-profit) organizations. The internship program director has developed substantial contacts with not-for-profit managers in the Western New York area in which our school is located. The director and the program intern researched not-for-profits that might be interested in participating. They also developed an information sheet and contact form (to inform not-for-profits about the project and how to indicate their interest), and sent it to several organizations. As a result of their assistance, three not-for-profits indicated their interest in participating for the Spring 2014 semester. One of the organizations was not a good fit, but the other two fully participated in the project. We had not heard of one of the organizations before receiving assistance from our school's internship director in identifying not-for-profit participants, and would not have known that the other organization needed this type of help. By asking for and receiving assistance in identifying and communicating with organizations at the outset, our students were able to help organizations that truly needed it and were interested in participating. Relying on our colleagues' relationships and expertise saved us time and produced a better result.

In the second year we added a different approach to identifying non-profit clients, in order to

broaden the range of possible participants beyond those groups with which our internship director was familiar. We reached out to the local United Way, which agreed to post a brief description of the services we were offering on its website. This method generated a substantial number of leads, including organizations located outside of the immediate metropolitan area where the University is located. In one case the link resulted in a project for a start-up non-profit that had just received tax exempt status and needed assistance in setting up accounting books and records and other work required before it could begin to offer services. Since this organization was in its infancy, we would not have heard of it based on personal contacts or word-of-mouth. The United Way listing actually generated more interest than our students could handle in the second year. In the third year, therefore, we contacted the organizations we had not been able to help previously and found a sufficient number of projects for our student teams without any further community outreach.[31]

C. The Non-Profit Organizations

In the spring 2014 semester we worked with two organizations. The first was a local chapter of a larger organization that provides housing-related services to financially eligible individuals and families. The needs raised by this organization

[31] Because of a scheduling issue, a smaller number of students enrolled in the class in 2016, which limited the number of projects that were required.

involved governance and succession. Its board of directors, although active, devoted very little time to strategic planning and long-term goals. There were also differences of opinion on the board about how much change was needed to continue the organization's viability.

The second organization was a local, stand-alone not-for-profit that offers various services, including providing classroom space for educational programs, medical and dental services offered with the assistance of volunteer doctors and dentists, and supplying low income families with clothing and other items for babies and young children. This organization also faced governance and succession issues. The non-profit's founders would soon need to lessen their involvement; the organization's board of directors met only twice a year and was largely disconnected to ongoing activities. In addition, the non-profit had serious financial concerns, including impending mortgage payments.

In the second year of this project, we tested a different structure, to see if the results would be better for the students and also for us. Rather than identify a small number of agencies to whom several teams were assigned, we worked with five different organizations, each of which received the services of one team. This required more faculty investigation and administration initially, as we conferenced with personnel from each of the organizations to ensure compatibility and to make certain the leadership of the charities had reasonable expectations of the work they would receive and understood what they would be required to do. However, it eliminated the need

to ensure coordination that arises when multiple teams are assigned to one agency. For example, some of the recommendations made by the succession teams in 2014 raised governance issues, as the students proposed amendments to bylaws or other documents to address expected or unanticipated leadership vacancies. This meant that the reports of the governance and succession teams for each organization had to be closely coordinated, to avoid duplicate or, worse, inconsistent recommendations.

The projects accepted in the 2015 semester varied. One of the non-profits needed assistance creating the organizational infrastructure that would enable it to begin operations. Another wanted advice on maximizing revenue. A third requested a general review of its operations, with the goal of eliminating waste and optimizing funding. The fourth wanted guidance on whether it should pursue an accreditation that was relevant but not required in its field. The last requested a review of its organizational documents. The team assigned to this last organization included a law student, although the accounting students were also fully immersed in this assignment.

In 2016, an unexpected scheduling conflict limited the enrollment in the course. For that reason, we reverted to our earlier structure, and ultimately assigned all student teams to work with the same organization. This organization had several projects for the students, all of which were relatively independent of the others. This meant the team which was modernizing the accounting system, for

example, did not need to coordinate extensively with the team that was providing governance recommendations.

D. Student Teams

Enrollment in MGT 641 typically ranges around 20 students.[32] We envisioned teams staffed by three to five students. Because of issues with student schedules, we were reluctant to go beyond five members per team. This means that if the class has greater enrollment in the future, we will need to identify more potential projects. As much as possible, we allowed students to choose the non-profit with which they wanted to work and the team on which they served. For this to work, we needed to provide background information about each organization and the various team sizes so students could make informed choices. Students wanted this information in advance so they could discuss outside of class with whom they would work. Although some compromising was required, the students seemed pleased with the ultimate assignments and appreciated having input on this part of the project.

The recommendations developed by the students varied depending on the nature of the assignment. Governance teams were tasked with reviewing organizational documents, including the certificate of incorporation and bylaws, and recommending changes. This was done by consulting model bylaws and similar materials. Changes recommended by the students included

[32] As noted earlier, 2016 was an exception.

more frequent board meetings, creation of an executive committee and other committees, more clearly defined duties for leadership positions, and an increase in board size.[33] Succession planning teams examined the existing organizational leadership and developed plans to be implemented in the event of anticipated or unexpected leadership vacancies. Teams that focused on finances and operations offered various recommendations for cost-cutting and revenue enhancement, including computerizing accounting records, increased electronic communication to reduce postage costs, improved website design, various fundraising strategies, and the use of student interns to achieve greater operational efficiency. Graduate accounting students are particularly well-prepared for this work; if this project were incorporated into a course with a more mixed population of students, the instructor should try to make certain that at least some members of a team of this nature have a background in accounting or finance.

In our three years of experience to date, we have not created a "green team" to focus solely on environmental recommendations. However, the teams which have given advice on finances, specifically cost-cutting, have explored environmentally responsible options organizations could use to reduce expenses. One of the recommendations that teams have made was to

[33] In 2016, many of the governance recommendations centered on the not-for-profit organization complying with the requirements of the N.Y. Nonprofit Revitalization Act of 2013, 2013 N.Y. Laws Chap. 549.

obtain an energy audit. In some situations, a free or reduced cost energy audit may be available to a non-profit.[34] An instructor considering a similar sustainability project should research the availability of a free or reduced-cost energy assessment for organizations in his or her state. If the audit is obtained in advance of the project start date, a team focusing on finances could study the audit conclusions and research funding sources for, and the financial implications of, the audit recommendations.

E. Interaction, Reports and Presentations

Students have reported extensive interaction with the organizations to which they are assigned. This included meeting with the leaders of the organization, attending board meetings, conducting surveys of board members, and site visits. One student's comment paper on this assignment cited "[b]eing able to meet with not only the board members but other members who are in managerial roles" as one of the benefits of the project; similar

[34] For example, a non-profit charitable organization may be eligible for a free energy audit in New Jersey or for a reduced cost energy audit in Delaware. *See Local Government Energy Audit*, N.J. BD. OF PUB. UTILS., http://www.njcleanenergy.com/commercial-industrial/programs/local-government-energy-audit/local-government-energy-audit (last visited July 13, 2016); *Energy Assessment Program for Non-profits and Government Agencies*, DELAWARE'S SUSTAINABLE ENERGY UTIL., http://www.energizedelaware.org/Industrial-Assessment-Program/ (last visited July 13, 2016).

feedback was received from others. The students seemed genuinely pleased about the opportunity to apply their knowledge in a real world setting.

In each year, teams were required to prepare written reports describing the issues they had identified and the proposals they were recommending. After instructor review, these reports were revised. The students developed presentations of their recommendations, which were delivered, with the written copies of the reports, to each organization's leadership. Students were graded on the initial report, the revised report, the oral presentation and a student reflection paper. Overall, the project was given a weight of twenty percent, with the remainder of the grade for the course based on homework, in-class tests, a final examination and class participation.

F. Coordination and Planning

In almost all cases, students enrolled in MGT 641 have full schedules, making team meetings difficult to arrange. For that reason, we did make class time available, to help students coordinate work on the projects. This is particularly important where multiple teams are assigned to the same organization. Only brief meeting time was required in the early stages of the project, but more time was needed as the students progressed in developing their recommendations. Much like CPAs working for the same firm, we encouraged the students to share work product freely to the extent it did not involve confidential information. However, we did stress

that the students were to view themselves as subject to all professional guidelines regarding the work they were doing, including rules of confidentiality as to information received from their organizations. This meant teams assigned to different non-profits could share helpful resources, like a checklist for developing a succession plan, but not actual documents containing "client" information.

Due to the time requirements involved in managing the various teams and interfacing with the non-profits, it was extremely helpful to have two instructors participate in this project. Although only one of us was responsible for actual grading, both of us were available to provide direction and feedback to the students. Because of resource constraints applicable in many universities, it may not be possible to team-teach the class which houses the sustainability project. In that case, the course instructor should make sure he or she has someone on the faculty with whom to consult. Because unexpected issues requiring careful thought can arise in projects of this nature, it is particularly valuable to be able to confer with a colleague who knows the project and the students working on each team.

It is important to maintain regular communication with each team. This can be done by requiring actual meetings with one or both instructors or detailed weekly updates, provided electronically or as a paper homework submission. Regular communication prompts teams to work more diligently and also helps the instructor uncover any problems, either within the team or with the organization, at an earlier stage.

IV. RECOMMENDATIONS FOR IMPLEMENTING A SUSTAINABILITY PROJECT

We sought student feedback each year as the project and spring semester drew to a close. Students were asked to write a short one to two page reflection paper. A table summarizing the comments we received appears at the end of this article. We also got useful information by surveying or otherwise getting feedback from the not-for-profit organizations to see if the work had met their expectations and whether they had suggestions for how we could improve the project. Many of the recommendations offered in this part of the article are based on that input, as well as our own observations and experiences with the course and project. Hoping to receive candid responses, we had the students turn in their papers to another professor who merely crossed off students' names from a list as the papers were submitted. Almost all students provided this anonymous written feedback. The feedback paper was one percent of the overall project grade, and all students whose names were crossed off the list received full credit for it.

A. A "Real World" Consulting Experience

Instructors considering a sustainability project should attempt, as much as possible, to structure an assignment that closely resembles the experiences students are likely to encounter as

accounting practitioners or business professionals. The most common positive student comment about the project we received involved their appreciation of having a "real world" experience in the course. Some noted that unlike other classes and many projects, there was not a particular right or wrong answer. Similarly, students appreciated having the ability and freedom to be creative and do some critical thinking. Part of this "real world" experience included dealing with their "client" as it actually is, or as one might say "warts and all," as opposed to a hypothetical set of facts. For example, an interesting and unanticipated change in one organization's leadership occurred at the end of the spring 2014 semester. This surprised the students and us and, in hindsight, made the work of the succession planning team even more important.

It is also important to ensure that students are tasked with providing an achievable goal that is likely to be implemented by the organization with which they are working. The comment papers showed that students who felt they had generated a useful deliverable found the project to be far more valuable. This observation underscores the importance of the instructor meeting with the organization in advance of the project, to try to make sure, as much as possible, that a non-profit considering participating has specific goals and that those goals align with the objectives of the instructor and the project.

On this point, instructors should consider the learning objectives of the course in which the project is to be embedded. For MGT 641, those objectives

include obtaining a thorough understanding of the legal and institutional frameworks that impact governance and refining students' communication and critical thinking skills. This means, for example, that working with an organization that is casual about governance practices or that is led by personnel who will not devote the time required to meaningfully interact with our students would be counterproductive. In some cases, the instructor may need to prod the not-for-profit agency to clarify its plans; in the survey we sent out after the project was complete one organization felt that in hindsight it had not given sufficient thought to how best to use the students' services before the team began its work.

Students enjoyed getting a chance to present results to the "client" as opposed to just in class. Students were taken out of their comfort zones and many enjoyed interacting with professionals at the organizations. Some of our advice to students related to how to communicate with the organizations' management, including about sensitive topics such as succession planning.

B. Exposure to the Not-for-Profit World

Many students also voiced an appreciation for learning much about not-for-profits and some wrote about their anticipated future service on a not-for-profit organization board of directors. It was particularly rewarding for us that the students saw the project as relevant to their futures. Some students also noted enjoying the feeling that they made an impact or difference and gave to the community and

helped. Moreover, students were exposed to the idea that sustainability involves more than environmental concerns. As one student noted, "I also developed a broader sense of sustainability involving corporations [rather] than just the green aspect of it."[35]

C. Project Design

We also received positive student feedback about some aspects of the structure of the project, including the team size. None of the members of the classes involved thought that the teams should be larger than four or five students, but some students in a three-person team would have liked a fourth member and we have concluded that for our purposes four-person teams worked best. Students wrote favorably regarding the instructors' feedback on their draft reports and also appreciated the availability of the instructors for questions and informal consultation. Several of the comment papers made clear that the students preferred to receive this assignment early in the course, before the crush of final exams and other end-of-semester work limited their ability to provide the level of service the project required.

The amount of guidance to provide for the actual report structure and content is a difficult issue. Some students expressed a desire for clearer guidelines regarding what was expected of them in terms of project deliverables. Students felt that a

[35] Student's Sustainability Project Reflection Paper for MGT 641 (May 2014).

"model" report, posted after the first draft had been submitted, should have been provided earlier. However, we were concerned that students would rely too heavily on the content of any sample document we provided, meaning the experience would lose its real-world authenticity. The members of at least one team described themselves as "lost" until a first meeting with the instructors, although another student appreciated the freedom to seek help when needed and not be "micromanaged," finding that to be more appropriate at the graduate level. We suspect that the amount of monitoring and reporting by the teams that should be required will vary based on the students in the class.

Depending on the nature of the task for which a non-profit requests assistance, the instructor may need to be vigilant in reminding both the students and the organization that the project does not involve providing legal services. For example, one of the governance teams in 2014 initially thought they were to rewrite the organization's bylaws and later found out that they were only to suggest changes and additions. We did not want the students to draft bylaws so as not to involve them in the unauthorized practice of law, and made that clearer to the teams in subsequent years. Also, teams in all cases were required to include a disclaimer at the beginning of their written reports, noting that the documents had been prepared by students, not licensed professionals, and urging the participating non-profits to consult with their professional advisers before implementing any recommendations. We felt this was an important safeguard not only for our

students but also for the organizations to ensure that any recommendations implemented were consistent with short- and long-term plans a non-profit's advisers might be considering.

A number of students felt that there was some disconnect between the time spent on sustainability in class and the scope and weight of the project. We think students who voiced this opinion failed to recognize that topics such as corporate governance (as well as the organization's financial viability) are also part of sustainability and will work to make that clearer in future semesters. In this regard, calling the project a sustainability and governance project and assigning an additional reading more closely focusing on governance aspects of sustainability also may be useful.[36]

Instructors implementing a sustainability project should devise some method by which to obtain feedback from the non-profit organizations that receive services. We failed to do this in 2014 and some of the students particularly wanted to know whether and how the organizations would incorporate their advice. While this was very encouraging feedback for the instructors, as it indicated the students' engagement in the project and desire to make a real difference, it also underscored the need to solicit comments from the organizations.

[36] See note 22 and accompanying text. For a discussion of corporate board oversight of sustainability efforts, see Lynn S. Paine, *Sustainability in the Boardroom*, https://hbr.org/2014/07/sustainability-in-the-boardroom (last visited July 13, 2016)(from Lynn S. Paine, *Sustainability in the Boardroom: Lessons from Nike's Playbook*, 92 HARV. BUS. REV. 87, 87–94 (2014)).

In 2015 we devised a brief email survey which attempted to gauge the organization's satisfaction with the work received; this yielded useful responses.[37] Information can also be gathered through routine interactions with a non-profit's leadership and a careful reading of emails received from the organization, although this may be less likely to formally address all points instructors might wish to measure in order to assess the success of a team's work. We did not include organizational feedback when calculating student grades for the sustainability project. We felt it was likely that the input we received would not necessarily reflect similar expectations across the various non-profits with which we worked and that grades should not be

[37] The survey instrument asked the following questions:

a. How did you hear about our program?

b. Did this project take more of YOUR time than you expected?

c. Were the students professional in their contact with you and your organization? Were they knowledgeable?

d. Did the final product you received meet your expectations?

e. Was the final product helpful? Is it likely you will implement some or all of the recommendations you received?

f. Do you have any advice or suggestions for faculty administering this program?

The survey ended with a request for any other input the organization wished to offer. We also thanked the non-profits for working with our students and stressed the important role of real world experience with working professionals in any sound business education program.

affected by how generous or demanding an organization's leadership was.

It is extremely important to encourage regular communication between the student teams and the non-profit organizations. One approach, suggested in student feedback, may be to give the not-for-profit's management an opportunity to review and comment on the draft report(s) before the presentations, or for teams to hold a mid-semester meeting with the organization's management to ensure the relevance of the advice being provided. Again, this underscores the importance of the instructor meeting with the organization in advance of the project to be certain its management is willing to work with the students and provide feedback.

D. Additional Changes to Consider

We made it clear to the organizations at the outset that the students were available only during the semester. However, instructors should consider providing some mechanism for continued communication (if desired by the students and the not-for-profit's management) and post-course volunteering.

To date, we have not had students prepare a peer review for the project, because MGT 641 is populated with graduate students who are about to enter the business world or a profession. However, we would likely do so in the future. We have encountered situations where competent and hardworking students apparently failed to make sufficient contributions to their teams for reasons of

workload. The groups seemed to be able ultimately to address the issue and certainly this is good preparation for a problem they will encounter in the course of their professional careers. Still, we feel that posting a peer review on the course website at the start of the sustainability project might help discourage free riders, resulting in a fairer academic experience.

As discussed above, we solicited interested non-profit organizations through our school's internship program director and a program intern, as well as the local United Way. However, student comments have identified another avenue for procuring participating organizations. Specifically, it was suggested that the incoming class could be notified by email before the course starts and asked if anyone has a relationship with a not-for-profit organization that could benefit from participating in the project, and to provide the relevant contact information and details. This is a realistic possibility as many of the graduate students at our school developed such relationships through community service activities as members of accounting and other student clubs affiliated with our school and other colleges and universities in Western New York. For example, the University at Buffalo's chapter of *Beta Alpha Psi* and the U.B. Accounting Association each provide opportunities and require their members to participate in community service activities. Instructors considering this approach, however, need to be careful of timing. It is important to identify the participating organizations well in advance of the course's start date, to allow time for the instructor to

meet with the organization's management before the semester and determine the appropriateness of including it in the project. Using student suggestions may not be possible if registration occurs too close to the beginning of classes.

Student involvement in selection of the not-for-profit organizations could also counter another comment we received regarding students' unfamiliarity with an organization, which made it more difficult for them to pick which one to work on for the project. Another student suggestion related to unfamiliarity would be to have representatives of each organization come to class and talk about the organization's needs and goals so students can make a more educated choice. Generally, students indicated that the more interaction with the organization, including on campus if possible, the better. We can only echo that student feedback. As noted above, a major key to the success of the project lies in the selection of the participating not-for-profit organizations. It is truly essential to the project's success to find organizations that not only need and want sustainability assistance, but that are also excited to work with students and are engaged in the project. An organization's reaction to an invitation to make an introductory in-class presentation or to meet with students on campus may demonstrate its management's level of commitment to the project and to sustainability.

V. CONCLUSION

Overall, our inclusion of a sustainability and corporate governance project in a graduate-level business law course produced positive results. As noted above, these included giving students the opportunity to gain a broader understanding of sustainability, do some "real world" consulting, and contribute to the success of a not-for-profit organization. Our experience in offering this project has also led us to some important guiding principles. These include early in-class involvement of the organizations, ample in-class team meeting time, clarified guidelines for project deliverables, and making ourselves freely available to the students for questions and guidance. Much of the success of this project has been due to our good fortune in finding the non-profits that participated. For instructors considering a similar project, we cannot stress enough the importance of carefully vetting the organizations involved and ensuring their leaders' commitment to the project well in advance of the team selections.

Summary of Feedback and Suggestions for Improvement from Students' Sustainability Project Reflection Papers

Feedback	**Suggestions for Improvement**
Many students reported appreciating the opportunity to do work for a "real" entity, as opposed to a project for a fictitious entity involving hypothetical "facts." Students considered this to be more like work in the "real world" and noted that this took them out of their comfort zone and helped them recognize that was not necessarily one fixed solution.	Students wanted more structure in the selection process. This would include more information about the organizations and more time to consider choices in advance of the class period when selections were made. They also would like to know group sizes in advance of choosing the organization with which they would work.
Students felt the group size (between two and five) was appropriate.	Use peer evaluations. Even in a graduate class, students whose schedules are too full may not contribute fully to the team effort.

Students appreciated the opportunity to use the skills learned in school and liked the "client contact." Meeting at the organization's location enhanced the experience as it gave students the opportunity to see, first-hand, the work their organizations were doing.	In some cases, students wanted the projects to be more accounting-focused. Given the broad range of service CPAs provide, however, this probably should be handled by discussing the role of the profession, vis-à-vis clients, when the project is introduced. Remind students that sustainability, besides referring to environmental concerns, also includes steps to ensure organizational viability.
Students enjoyed contact with managers and board members on a professional level. They also liked submitting the final product directly to the organization's leadership team; they viewed the presentation as rewarding.	Some students asked for more guidance regarding making a presentation to the non-profits (i.e. outside of the classroom context).

Having discussed corporate governance concepts in class, the students felt they benefitted from the opportunity to see how an organization's board and management team really function.	The instructor needs to link the project to the course material as clearly as possible. Students don't always see that improving corporate governance and other measures taken to strengthen the long-term viability of an organization are part of sustainability.
Students liked working with non-profits, for many reasons. They felt it was valuable to have some exposure to the rules applicable to not-for-profit organizations and also felt good that they were making a contribution to the community.	Students wanted to feel their work was valued and would be implemented. Instructors should be careful to ensure the organizations being considered are a good "fit." In other words, the organizations should have feasible and tangible projects where students can see the importance of their work and will be able to gauge their progress.

Some students appreciated the professors' more "hands off" approach and not being micromanaged on the project.	In the first year of the project, some students indicated that more guidance would be helpful, including the possibility of mid-semester progress reports or other required "check-ins." Some students felt it would be useful for each team to meet with the instructor before the initial meeting with the organization. This would help ensure the teams understood what would be expected of them and, if more than one team was working on a non-profit, make clear the teams' separate responsibilities.
Students generally felt that the difficulty of the project and time necessary to complete it were reasonable.	Assign the project early. It takes several weeks for teams to fully immerse themselves in their work, and it's important to build in time to receive and review drafts. Students don't want to focus on

	this project while also dealing with finals and other end-of-semester work. Use class time periodically for group meetings. This is important both because busy students often have trouble scheduling meetings and because it allows the professor to circulate among the teams to answer questions and assess progress being made.

- END OF ARTICLES -

Manuscripts submitted to the *Atlantic Law Journal* that scrupulously conform to the following formatting and style rules, including the quick tips below, will be strongly preferred. These revisions are effective for Volume 17 of the *Atlantic Law Journal* and subsequent volumes. In order to simplify the submissions process for authors we have conformed the *Atlantic Law Journal* style sheet to the standards of the *Southern Law Journal* with the permission of its editors. We extend our thanks to the *Southern Law Journal* for their gracious permissions.

MARGINS, INDENTS, & TABS:

- Top and bottom margins - one inch (all pages).
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- Set all "indents" to zero. In WORD 2007, use Paragraph drop box from Home tab. Use a zero indent throughout the manuscript (this is very important!). The only time you should use the indent feature is to set off long quotes (1/2 inch each side).
- Set tab to 1/2 inch. In WORD 2007, use the ruler, or use the Paragraph drop box from Home tab to set "tab stop position" at .5 inch. (1/2 inch is probably your tab set already!).

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- First Level Headings (I.): Preceded and followed by one skipped line, Centered,

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- All footnotes must conform to the Harvard Blue Book Uniform System of Citation (currently in the 19th Edition).
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- Footnotes are to be placed at the bottom of each page in 10 point Times Roman font.
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A DOZEN QUICK TIPS for successful publication in the *ATLANTIC LAW JOURNAL*:

1. Use Microsoft WORD only (Word 2007 or later strongly preferred).

2. Use the BLUEBOOK! The QUICK REFERENCE: LAW REVIEW FOOTNOTES on the flip-side of the Bluebook Front Cover and the INDEX are much easier to use than the Table of Contents. Use both the QUICK REFERENCE and the INDEX! (The Index is particularly well done). If you don't have the latest version of the Bluebook, buy one!

3. Case Names. Abbreviate case names in footnote citations in accordance with Table 6 (and Table 10) in the BLUEBOOK. Abbreviate case names in textual sentences in accordance with BB Rule 10.2. Note that there are only eight words abbreviated in case names in textual sentences (10.2.1(c)), but more than two hundred words in abbreviated in case names is citations (Table 6 & Table 10). Please pay close attention to case name abbreviations.

4. Statutes: 22 U.S.C. § 2541 (1972). See QUICK REFERENCE (and BB Rule 12) for examples.

5. Constitutions: N.M. CONST. art. IV, § 7. See QUICK REFERENCE (and BB Rule 11) for examples.

6. Books: See QUICK REFERENCE (and BB Rule 15) for examples. Pay particular attention to how to cite works in collection. (UPPER AND LOWER CASE CAPITALS can be accomplished in WORD 2007 with a "control/shift K" keystroke.).

7. Journals (e.g. law reviews). See QUICK REFERENCE (and BB Rule 16.3) for examples. Abbreviate Journal names using Table 13.

8. Newspapers: See QUICK REFERENCE (and BB Rule 16.5) for examples.

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Example: Kristen Hays & Tom Fowler, Some Shocked at Sentence, HOUSTON CHRON., Sept. 28, 2006, available at http://www.chron.com/enron/4220305.html.

Example: American Civil Liberties Union, Hate in America, http://www.aclu.org/hate.thml (last visited Aug. 10, 2010).

10. Please remove the "link" formatting from the URL (the URL should not be underlined or blue).

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- END-