// SOUTHERN LAW JOURNAL
OFFICIAL PUBLICATION OF THE SOUTHERN ACADEMY OF LEGAL STUDIES IN BUSINESS
WWW.SALSB.ORG

VOLUME XXXII **FALL 2023** **NUMBER 1**

ARTICLES:

DOES THE WAY WE COMMUNICATE THE ORDINARY CARE STANDARD TO JURORS IN NEGLIGENCE CASES REALLY AFFECT THEIR DECISIONS? A CALL FOR ADDITIONAL EMPIRICAL RESEARCH INTO THE EFFECT OF SCHEMAS ON JUROR DECISION MAKING (PP. 7 - 41) — **Judd Leach, Lesley F. Leach, Kyle Post, Liza P. Benedict, Faith Renfro**

ENTREPRENEURS TAKE HEED: IT'S NOT JUST ABOUT THE RESULTS: RE-EVALUATING THE RESULTS TESTS USED IN IDENTIFYING VALUABLE SUGGESTIVE TRADEMARKS (PP. 42 - 76) — **Paul W. Fulbright**

STUDENTS FOR FAIR ADMISSIONS V. PRESIDENT AND FELLOWS OF HARVARD COLLEGE: A PARADIGM SHIFT IN UNIVERSITY ADMISSIONS POLICIES OR MUCH ADO ABOUT NOTHING? (PP. 77 - 93) — **Robert K. Robinson, Dave L. Nichols, J. Riley Shaw**

LIKE, COMMENT, YOU MUST SUBSCRIBE: EVOLVING CONSUMER PROTECTION FOR THE SUBSCRIPTION ECONOMY (PP. 94 - 108) — **Nathan Kent Miller**

POLICE SHOOTINGS AFTER *TORRES V. MADRID*: SUSPECTS ELUDING CAPTURE ARE SEIZED UNDER FOURTH AMENDMENT (PP. 109 - 125) — **Travis Thickstun**

ASSERTION OF WORK PRODUCT PRIVILEGE, ATTORNEY-CLIENT PRIVILEGE, AND FEDERALLY AUTHORIZED TAX PRACTITIONER PRIVILEGE OVER TAX-ADVICE DOCUMENTS IN LIGHT OF *UNITED STATES V. MICROSOFT CORP.* (PP. 126 - 138) — **Ricardo Colón, Ángel Ortiz**

WHY STUDY LAW? (PP. 139 - 181) — **Lawrence J. Trautman *et al***

QUALIFYING FOR MEDICAID LONG-TERM CARE PROGRAMS (PP. 182 - 202) — **Darrell G. Ford, Marty Ludlum, Jennifer Barger Johnson**

PEDAGOGY:

THE PEPSI GENERATION GOES TO COURT: A TEACHING NOTE UTILIZING A NETFLIX DOCUMENTARY TO TEACH CONTRACTS AND ETHICS (PP. 202 - 218) — **Michael Conklin**

"THAT'S WHAT SHE SAID": USING "THE OFFICE" TO TEACH HOSTILE WORK ENVIRONMENT LAW (PP. 219 - 265) — **Wade S. Davis**

SOUTHERN LAW JOURNAL

EDITOR-IN-CHIEF

Diana M. Brown
Sam Houston State University

ASSOCIATE EDITOR

Laura L. Sullivan
Sam Houston State University

REVIEWERS

Susan R. Dana
Black Hills State University

Jennifer Barger Johnson
University of Central Oklahoma

Susan Park
Boise State University

Michelle Evans
Texas State University – San Marcos

Patricia Pattison
Texas State University – San Marcos

Marcia Staff
University of North Texas

Lee Usnick
University of Houston – Downtown

Tricia A. Wald
Southwestern Oklahoma State University

ONLINE JOURNAL EDITOR AND WEB MASTER

Ray Teske
University of Texas – San Antonio

The *Southern Law Journal* is an official publication of the Southern Academy of Legal Studies in Business
ISSN: 1056-2184
ISBN: 978-1-63498-892-6
Listed in *Ulrich's International Periodical Directory* and *Cabell's Directory*
***Available at* www.southernlawjournal.com and through EBSCO, an electronic university database**

Copyright to the contents of the articles published herein is retained by the respective authors. Copyright to the design, format, logo and other aspects of this publication is claimed by the Southern Academy of Legal Studies in Business. The views expressed herein are to be attributed to the authors and not to this publication, the Southern Academy of Legal Studies in Business, its officers, the editors, or any named college or university. The material appearing in this publication is for informational purposes only and should not be considered legal advice or be used as such. For a specific legal opinion readers must confer with their own legal counsel.

From the Editor’s Desk . . .

The ***SLJ* Style Sheet** may be found at our website: www.southernlawjounal.com. If you plan to submit, please follow the *SLJ* Style Sheet closely. Contributors should visit our website for recently revised ***SLJ* Submission Policies.** Although it is expected that most *SLJ* articles will be presented at the SALSB Annual Conference, conference presentation is not a prerequisite for publication.

Hard copies of back issues of the SLJ can be found in over two hundred regional libraries. Current issues can be obtained by contacting the editor at SLJSubmission@comcast.net. In addition, the full text of all *SLJ* articles may be accessed through EBSCO’s "Academic Research Complete" database, accessible through over 90% of the world's Electronic University holdings.

Thank you in advance for helping the *SLJ* team continue to advance the quality, exposure, and prominence of the *SLJ* for many decades to come.

Questions and submissions should be directed to SLJSubmission@comcast.net.

Kind regards,
Diana Brown,
Editor-in-Chief
Southern Law Journal

REPOSITORY LIBRARIES FOR THE SOUTHERN LAW JOURNAL (BACK ISSUES)

Abilene Christian University .... Brown Library
Amberton University .... Library Resources Center
Angelo State University .... Porter Henderson Library
Arkansas State University of Jonesboro .... Dean B. Ellis Library
Arkansas Tech University .... Pendergraft Library and Technology Center
Arlington Baptist College .... Earl K. Oldham Library
Austin College .... George T. and Gladys H. Abell Library Center
Baylor Law School .... Baylor Law Library
Baylor University .... Baylor Collections of Political Materials
Baylor University .... University Libraries
Cameron University .... Cameron University Library
Concordia University Austin .... Founders Library
Dallas Baptist University .... Vance Memorial Library
East Central University .... Linscheid Library
East Texas Baptist University .... Jarrett Library
Grambling State University .... A.C. Lewis Memorial Library
Harding University .... Brackett Library
Hardin-Simmons University .... Hardin-Simmons University Library
Henderson State University, Arkadelphia .... Huie Library
Hendrix College .... Olin C. Bailey Library
Howard Payne University .... Walker Memorial Library
Lamar University Beaumont .... Mary and John Gray Library
Langston University .... G. Lamar Harrison Library
Louisiana College .... Richard W. Norton Memorial Library
Louisiana State University in Shreveport .... Noel Memorial Library
Louisiana State University Law School .... Prescott Memorial Library
Louisiana Tech University .... Paul M. Herbert Law Center
Loyola University New Orleans Law Library .... The Law Library
Loyola University New Orleans .... J. Edgar and Louise S. Monroe Library
Lyon College .... Mabee-Simpson Library
McMurry University .... Jay-Rollins Library
McNeese State University Library .... Frazar Memorial Library
Midwestern State University .... Moffett Library
Nicholls State University .... Ellender Memorial Library
North Central Texas .... North Central Texas College Library
Northeastern Oklahoma State University .... John Vaughan Library
Northwestern State University .... Watson Memorial Library
Northwood University .... Hach Library
Ohio Northern University College of Law .... Taggart Law Library
Oklahoma City University .... Gold Star Library
Oklahoma Panhandle State University .... Marvin E. McKee Library
Oklahoma State University–Stillwater .... Edmond Low Library
Ouachita Baptist University, Arkadelphia .... Riley-Hickingbotham Library
Rice University .... Fondren Library
Rogers State University .... Stratton Taylor Library
Sam Houston State University .... Newton Gresham Library
Schreiner University .... William Logan Library
South Texas College of Law .... The Fred Parks Law Library
Southeastern Louisiana University .... Linus A. Sims Memorial Library
Southeastern Oklahoma State University .... Henry G. Bennett Memorial Library
Southern Arkansas University, Magnolia .... Magale Library
Southern Methodist University .... Bridwell Library
Southern Methodist University .... Underwood Law Library
Southern University Law Center .... Southern University Law Center Library
Southwestern Christian College .... Doris Johnson Library
Southwestern Oklahoma State University .... Al Harris Library
Southwestern University .... A. Frank Smith, Jr., Library Center
St. Mary's University–San Antonio .... Law Library
Stephen F. Austin State University .... Ralph W. Steen Library

Supreme Court of Oklahoma .... Supreme Court of Oklahoma Law Library
Tarleton State University .... Dick Smith Library
Texas A & M University at Commerce .... James G. Gee Library
Texas A & M University .... Texas A&M Libraries
Texas A&M International University .... Sue and Radcliffe Killam Library
Texas A&M University–Corpus Christi .... Mary and Jeff Bell Library
Texas Christian University .... Mary Courts Burnett Library
Texas Southern University .... Thurgood Marshall School of Law Library
Texas State University–San Marcos .... Texas Tech University Law Library
Texas Tech University at Lubbock .... Law Library
Texas Wesleyan University School of Law .... Elizabeth Huth Coates Library
Trinity University–San Antonio .... Law Library
Tulane Law School .... Tulane Law School Library
Tulane University .... Howard-Tilton Memorial Library
University of Arkansas (main campus), Fayetteville .... Young Law Library
University of Arkansas at Little Rock, Little Rock .... Ottenheimer Library
University of Central Arkansas .... Torreyson Library
University of Central Oklahoma .... Chambers Library
University of Dallas .... Blakley Library
University of Houston at Clear Lake in Houston .... Neumann Library
University of Houston at Downtown in Houston .... W.I. Dykes Library
University of Houston at Houston .... O'Quinn Law Library
University of Houston at Victoria .... University of Houston Library
University of Louisiana at Lafayette .... Edith Garland Dupre Library
University of Louisiana at Monroe .... University of Louisiana at Monroe Library
University of New Orleans .... Earl K. Long Library
University of North Texas .... University of North Texas Libraries
University of OK College of Law .... Donald E. Pray Law Library
University of Oklahoma .... Bizzell Memorial Library
University of Texas at Arlington .... Central Library
University of Texas at Austin .... Tarlton Law Library
University of Texas at Richardson .... McDermott Library
University of Texas at Tyler .... Robert R. Muntz Library
University of Texas– San Antonio .... University of Texas San Antonio Library
University of Texas– San Antonio Downtown .... University of Texas San Antonio Downtown Library
University of Texas–El Paso .... The Library
University of Texas–Pan American–Edinburg .... University Library
University of the Ozarks .... L.S. and Hazel C. Robson Library
University of Tulsa College of Law .... Mabee Legal Information Center
University of Tulsa–Tulsa, Oklahoma .... McFarlin Library
Wayland Baptist University .... Wayland Library
West Texas A&M University .... Cornette Library
Xavier University .... Library Resource Center

SALSB EXECUTIVE COMMITTEE
(2023)

Executive Director
Laura L. Sullivan
Sam Houston State University
Huntsville, Texas
laura@salsb.org

Past Webmaster
Joe Zavaleta
Loyola Center for Justice
Boise, Idaho
joe@salsb.org

President & Program Chair / Webmaster
Ray Teske
University of Texas – San Antonio
San Antonio, Texas

Secretary / Westlaw Liaison
Brian Elzweig
University of West Florida
brian@salsb.org

Vice-President
Joey Robertson
Sam Houston State University
Huntsville, Texas

Treasurer
Jennifer Barger Johnson
University of Central Oklahoma
Edmond, Oklahoma

Editor, Southern Law Journal
Diana Brown
Sam Houston State University
SLJSubmission@comcast.net

Editor, Southern Journal of Business & Ethics
Marty Ludlum
University of Central Oklahoma
marty@salsb.org

House of Delegates Representative
Henry Lowenstein
Coastal Carolina University
Conway, South Carolina

Director of Conference Special Events
Marcia Staff
University of North Texas
marcia@salsb.org

DOES THE WAY WE COMMUNICATE THE ORDINARY CARE STANDARD TO JURORS IN NEGLIGENCE CASES REALLY AFFECT THEIR DECISIONS? A CALL FOR ADDITIONAL EMPIRICAL RESEARCH INTO THE EFFECT OF SCHEMAS ON JUROR DECISION MAKING

JUDD LEACH*
LESLEY F. LEACH**
KYLE POST***
LIZA P. BENEDICT****
FAITH RENFRO*****

I. INTRODUCTION

Being sued for negligence is a major concern for businesses today, particularly small businesses. In 2020, the U.S. Chamber Institute for Legal Reform estimated the cost of commercial tort liability in the United States at approximately $343 billion.[1] Slightly over half of that amount is incurred by businesses reporting less than $10 million in annual revenue.[2] The smallest of small businesses—those reporting annual revenues of less than $1 million—bear even more of the impact of commercial tort liability, collectively absorbing 39% of the burden.[3]

Regardless of the ultimate outcome of a negligence case, the process is plagued with risks and expenses including the opportunity costs incurred while embroiled in lengthy litigation, negative publicity and damage to business reputation and goodwill, reduced employee morale, and many others. Insurance can mitigate some of these costs, but the litigants pay a price nonetheless. And, as the figures above indicate, that price can be staggering.

There are countless approaches to managing litigation costs, risks, and processes, but one aspect of the litigation management calculus that is easy to overlook, at least in the context of negligence claims, is this: Can a business be confident that a jury will comprehend and properly apply negligence concepts in a trial?

In an earlier paper, Judd Leach and Kyle Post suggested that providing more explicit and clear jury instructions would assist jurors in properly applying the law of negligence.[4] The results of our research in the present paper caution against putting too much faith in the average jury's ability to do so. Our research provides empirical support for the assertion that jurors are either unable or unwilling to properly analyze negligence cases. While the subject matter used to test

---

* J.D., Associate Professor, Tarleton State University
** Ph.D., Professor, Tarleton State University
*** J.D., LL.M., Associate Professor, Tarleton State University
**** Ed.D., Associate Professor, Tarleton State University
***** J.D., Saint Mary's University School of Law

[1] U.S. CHAMBER INST. FOR LEGAL REFORM, TORT LIABILITY COSTS FOR SMALL BUSINESSES 12 (2020).
[2] *Id.*at 12-13.
[3] *Id*.
[4] Judd L. Leach & Kyle C. Post, *Guns Are Dangerous, But Don't Tell the Jury: An Argument for "Enhanced" Language Jury Instructions in Firearm Negligence Cases*, XXVIII S. L.J., 117 (2018).

this theory is unconventional for a business article, the results of the study are relevant to any businessperson or lawyer whose job is to determine how best to proceed with a pending negligence case.

II. NEGLIGENCE

Negligence is a tort defined as "the failure to exercise the standard of care that a reasonably prudent person would have exercised in the same situation."[5] In turn, the standard of care expected of the reasonably prudent person is "ordinary care" under the circumstances in which she finds herself.[6] When a person fails to act with ordinary care and her behavior causes an injury to another, she is negligent and is liable for the resulting damages.[7]

In a jury trial, jurors are tasked with deciding questions of fact relevant to the case.[8] Jurors play that same role in negligence cases, too, but they don't stop there; in addition to deciding questions of fact, they must determine qualitatively whether a defendant has acted with ordinary care based on those facts.[9] While this may sound simple enough, it actually requires quite a bit of mental agility. Determining whether a person has acted with ordinary care under the circumstances in which he has found himself is not a binary proposition, but is instead circumstantial and elastic.[10] A person's behavior under one set of circumstances might be perfectly reasonable, while identical behavior under a different set of circumstances is not.[11] Deciding whether a person's behavior satisfies the standard of ordinary care requires jurors to consider on a case-by-case basis whether the quantum of care exercised by the defendant was commensurate with the risk of harm associated with the defendant's behavior under the circumstances.[12] Figure 1 depicts this relationship.

---

[5]BLACK'S LAW DICTIONARY 1191 (11th ed. 2019).

[6] RESTATEMENT (SECOND) OF TORTS § 283 (1979); *see also* Prather v. Brandt, 981 S.W.2d 801, 810-11 (Tex.App. 1998); Duran v. City of Maywood, 221 F.3d 1127 (9th Cir. 2001), Souleyrette v. Conaway, 8 F.Supp.2d 554 (W.D. Virginia 1998), Martin v. Central Ohio Transit Auth., 70 Ohio App.3d 83 (Ohio Ct. App. 10th Dist., 1990), Hendricks v. Broderick, 284 N.W.2d 209 (Iowa 1979), Edgar v. Brandvold, 515 P.2d 991 (Wash. App. 1973), Pundt v. McNeill, 500 S.W.2d 559 (Tex. App.—Corpus Christi 1973), Jones v. Redford, 449 P.2d 890 (Okla. 1969), Underwood v. U.S., 356 F.2d 92 (5th Cir. 1966), Mehall v. Baggett, 231 F.Supp. 462 (W.D. Ark. 1964), Tucker v. Lombardo, 47 Cal.2d 457 (Cal. 1956), Goodrich v. Morgan, 40 Tenn.App. 342 (Tenn. Ct. App. 1956).

[7] RESTATEMENT (SECOND) OF TORTS § 281 (1979).

[8] *See* Patrick J. Kelley & Laurel A. Wendt, *What Judges Tell Juries about Negligence: A Review of Pattern Jury Instructions*, 77 CHI.-KENT L. REV. 587, 595-97 (2002).

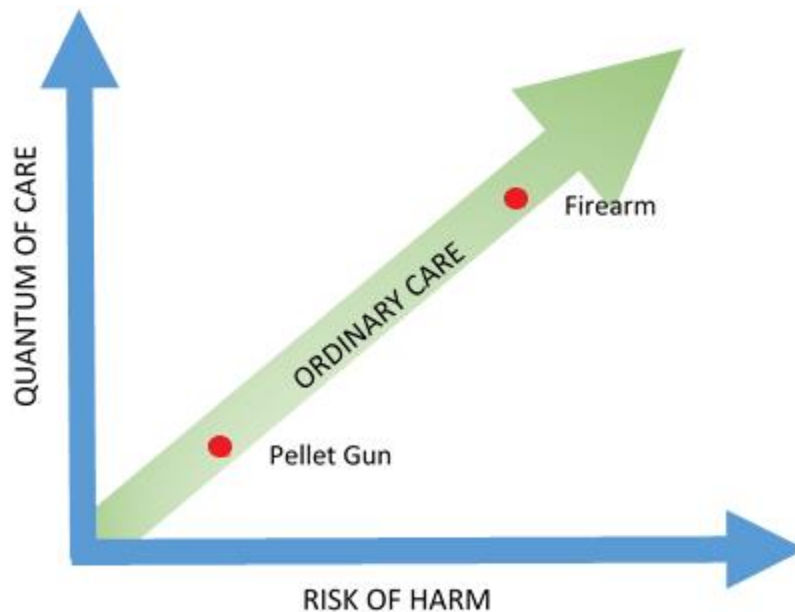
[9] *See id.* at 590

[10] *See* Wendell v. Central Power & Light Co., 677 S.W.2d 610, 620 (Tex. App. 1984) (meaning of ordinary care is elastic); Anderson v. Mkt. St. Developers, Ltd., 944 S.W.2d 776, 779 n. 1 (Tex. App. 1997) (ordinary care is elastic enough to meet all emergencies, and amount of care varies depending on circumstances).

[11] W. Tex. Utils. v. Renner*,* 53 S.W.2d 451, 453, 454 (Tex. Comm'n App.1932) ("[T]he meaning of the common-law rule of ordinary care is elastic enough to meet all emergencies; the amount of care depends upon the exigency confronted. It may require one thing to be done at one place, and something else at another place; the degree of care must be such as a person of ordinary prudence would exercise under like circumstances.").

[12] Hendricks v. Broderick, 284 N.W.2d 209, 214 (Iowa 1979) ("[In] common-law negligence…the jury must not only find the objective facts as to conduct but must also decide whether that conduct amounts to want of ordinary care."); Edgar v. Brandvold, 515 P.2d 991, 994 (Wash. Ct. App. 1973) (The reasonable care standard "allows the fact finder to determine that some factual circumstances reasonably require greater or lesser diligence than do other circumstances….").

Figure 1
Graphic Representation of the Risk of Harm—Quantum of Care Relationship



Jurors do not make these determinations unassisted. The court instructs jurors on the applicable legal standard for the case.[13] Jury instructions are sometimes crafted by the lawyers in the case, subject to the judge's approval.[14] More commonly, however, the form a jury instruction takes is dictated by pattern instructions mandated by statute or promulgated by a state bar association or a commission created for that purpose.[15]

In 2018, Judd Leach and Kyle Post examined the different ways courts nationwide instruct juries on the "ordinary care" standard in firearm negligence cases.[16] The authors categorized and ranked these instructions based upon the following criteria: First, did the instruction explicitly address the correlation between the risk of harm associated with firearms and the quantum of care necessary to reduce that risk? Second, did the instruction provide explicitly that firearms are dangerous instrumentalities?[17] Leach and Post identified three categories of instructions based on these criteria.[18]

[13] Deutscher Tennis Bund v ATP Tour, Inc., 610 F.3d 820, 833 (3rd Cir. 2010); *see, also* Kelly & Wendt, *supra* note 8, at 587-88.
[14] Nancy S. Marder, *Bringing Jury Instructions Into the Twenty-First Century*, 81 Notre Dame L. Rev. 449, 458-59 (2006).
[15] *See e.g.* Pattern Jury Instructions (Civil Cases) Prepared by the Committee on Civil Pattern Jury Instructions, District Judges Association, Fifth Circuit (2020). *See also* Peter Meijes Tiersma, *Reforming the Language of Jury Instructions*, 22 HOFSTRA L. REV., 38, 59-60 (1993).
[16] Leach & Post, *supra* note 4.
[17] *Id.* at 121.
[18] *Id.* at 121-24.

The first category was what Leach and Post called "traditional" instructions.[19] Traditional instructions on ordinary care are the most common type of instruction in negligence cases.[20] A common example of a traditional instruction reads: "'Ordinary care' means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances."[21] Traditional instructions address neither of the criteria Leach and Post identified.

Leach and Post called the second category "embellished" instructions.[22] The following pattern instruction from Utah exemplifies this category:

> The amount of care that is considered "reasonable" depends on the situation. Some situations require more caution because a person of ordinary prudence would understand that more danger is involved. In other situations, less care is expected, such as when the risk of danger is lower or when the situation happens so suddenly that a person of ordinary prudence would not appreciate the danger.[23]

While embellished instructions do a better job of addressing the risk of harm/quantum of care correlation criterion than traditional instructions, they are equally silent with respect to acknowledging that firearms are dangerous instrumentalities.

Leach and Post called the final category "enhanced" instructions.[24] These instructions addressed both of the criteria the authors identified in their paper and remedied what they considered to be deficiencies present in the other categories of instructions. Consider the following example of an enhanced instruction used in a Pennsylvania court:

---

[19] *Id.* at 122.

[20] Kelly & Wendt, *supra* note 8, at 595-97; *see also* Underwood v. United States, 356 F.2d 92, 99 (5th Cir. 1966) ("The law generally as to the handling of firearms requires reasonable or ordinary care, or a degree of care commensurate with the danger."); Duran v. City of Maywood, 221 F.3d 1127, 1132 (9th Cir. 2000) ("The standard of care for an individual handling a firearm is the same as it is for other negligence actions—ordinary care under the circumstances.") (internal quotations omitted); Harden v. U.S., 485 F.Supp. 380, 389 (S.D. Ga. 1980) ("In Georgia, negligence is defined generally as the absence of the exercise of ordinary diligence."); Mikula v. Duliba, 94 A.D.2d 503, 506 (NY 1983) (holding that the appropriate standard of care in a hunting negligence case is "that degree of care which a reasonable man of ordinary prudence would exercise under the circumstances, commensurate with the apparent risk involved."); Hendricks v. Broderick, 284 N.W.2d 209, 214 (Iowa 1979) ("The standard [in negligence cases] is always the care which an ordinarily prudent person would use under the circumstances."); Martin v. Central Ohio Transit Auth., 590 N.E.2d 411, 418 (Ohio Ct. App. 1965) ("[T]he degree of care required in the lawful handling of firearms is ordinary care commensurate with the gravity of the danger."); Jones v. Redford, 449 P.2d 890, 894 (Okla. 1969) ("[T]he law imposes upon persons handling dangerous instruments, or deadly weapons, the duty of exercising ordinary care, or such care as an ordinarily prudent and cautions person would exercise under similar circumstances."); Pundt v. McNeill, 500 S.W.2d 559, 563 (Tex. App. 1973) ("Reasonable or ordinary care commensurate with the danger is required in the handling or use of firearms."); Souleyrette v. Conaway, 8 F.Supp.2d 554, 558 (W.D. Va. 1998) ("[O]rdinary or reasonable care is that degree of care which an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury to another.") (internal quotations omitted); Edgar v. Brandvold, 515 P.2d 991, 993 (Wash. Ct. App. 1973) ("The degree of care required [in a hunting negligence case is] the care a reasonably prudent person would exercise under the circumstances and commensurate with the risks involved.").

[21] Prather v. Brandt, 981 S.W.2d 801, 810 (Tex. App. 1998).

[22] Leach & Post, *supra* note 4, at 123.

[23] Utah M.U.J.I. Civ. 3.6 (1993).

[24] Leach & Post, *supra* note 4, at 124.

> [N]egligence is the absence or want of that due care which a reasonable man would exercise under the circumstances…When dealing with any dangerous agency, a higher degree of care is required than in the ordinary affairs of life or business. Every reasonable precaution suggested by experience and the known danger ought to be taken. Any loaded firearm...is a highly dangerous instrumentality and, since its possession or use is attended by extraordinary danger, any person having it in possession or using it is bound to exercise extraordinary care. A person handling or carrying a loaded firearm in the immediate vicinity of others is liable for its discharge, even though the discharge is accidental or unintentional, provided it is not unavoidable.[25]

Leach and Post advocated for enhanced instructions, hypothesizing that such instructions would "orient jurors toward the uppermost reaches of the ordinary care spectrum when deciding the quantum of care required of the defendant to act reasonably under the circumstances."[26] This hypothesis was based on their belief that enhanced instructions simply do a better job of communicating the essence of ordinary care to jurors than traditional or embellished instructions. And if Leach and Post's hypothesis was correct, then enhanced instructions would help jurors better understand and apply the concept of ordinary care in firearm negligence cases.

Both common sense and experience dictate that clear communication is preferable to murky communication, especially when one is explaining complex legal concepts to a jury composed of laypersons. But despite Leach and Post's advocacy for enhanced instructions and the common sense that supports their advocacy, the question remains: does the way we communicate the ordinary care standard to jurors in negligence cases really affect their decisions? This paper attempts to answer that question empirically.

Empirical legal scholarship has become more common over the last few decades, but it still pales in comparison to the doctrinal scholarship produced by the legal academy.[27] The reasons for this disparity are many, but the arguments in favor of increased empirical scholarship are compelling.[28] Put simply, we cannot know the actual effect our legal theories, doctrines, and hypotheses will yield unless we test empirically the assumptions upon which they are based.[29]

Part II of this paper is an executive summary of our study. Details regarding the study methodology and analyses are found in the Appendix A to this paper. Part III describes the results of the study. Part IV contains our observations regarding the results and identifies areas of additional research.

III. THE STUDY

We utilized a mixed-method study to determine whether the three types of jury instructions identified by Leach and Post[30] impacted verdicts in a hypothetical firearm negligence case, and what factors, if any, influenced those verdicts. We followed a modified version of the 13-step

[25] Everett v. City of New Kensington, 396 A.2d 467, 473 (Pa. Super. Ct. 1978).
[26] Leach & Post, *supra* note 4, at 126.
[27] *See generally* Tracey E. George, *An Empirical Study of Empirical Legal Scholarship: The Top Law Schools*, 81 IND. L.J. 141 (2006).
[28] Carl E. Schneider & Lee E. Teitelbaum*, Life's Golden Tree: Empirical Scholarship and American Law*, Utah. L. Rev. 53, 56-60, no. 1 (2006); s*ee generally* Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323, Sept. 1989.
[29] See Schneider & Teitelbaum, *supra* note 28, at 62-66.
[30] *See generally* Leach & Post, *supra* note 4.

process identified by Collins, Onwuegbuzie, and Sutton to frame the mixed model study.[31] We developed the survey instrument found in Appendix B to this paper and administered it online to adult participants. We randomly assigned participants to one of three conditions: (a) control with traditional jury instructions, (b) treatment with embellished jury instructions, and (c) treatment with enhanced jury instructions. We provided participants a written scenario with the randomly assigned jury instruction for which they were asked to provide a determination of negligent or not negligent (quantitative) and respond to open-ended (qualitative) and demographic items (quantitative or qualitative). The experimental design offered a rigorous frame for the study, from which one would expect internally and externally valid results.[32] We used qualitative data embedded within the larger design to further explain the quantitative findings.

We recognized that identifying the participants' verdicts alone would be insufficient to determine the factors that influenced their verdicts. Instead, both verdict information (quantitative) and the reasoning that led to the verdicts (qualitative) would be needed to fully understand why participants arrived at their verdicts. The study was mixed at the data collection, analysis, and interpretation stages.

The survey instrument presented a fact scenario to each participant in which a hunter, Mr. X, fired his gun at a deer as it jumped the fence separating his property from that of his neighbor, Mr. Y. Mr. X's shot hit Mr. Y who was obscured from Mr. X's view.[33] Each participant then received a randomly assigned traditional, embellished, or enhanced[34] jury instruction. We asked participants to determine whether Mr. X was negligent or not negligent based on the jury instruction provided to them and to describe why they made the decision they did. We also asked participants several demographic questions, including whether they owned a gun (and if so, for what purpose), their general attitude toward guns, their age, and their primary ethnicity or race.

The survey yielded a sample size of 153 participants who were representative in composition of the population that might be selected for a jury in the area. Participants' median age was 22 years. Most of the participants (76%) identified themselves as White, not of Hispanic, Latino, or Spanish background. Fourteen percent of the participants identified themselves as White of Hispanic background. Seven percent of the participants identified themselves as Black or African American.[35]

---

[31] *See generally* Kathleen M. T. Collins et al, *A Model Incorporating the Rationale and Purpose for Conducting Mixed-Methods Research in Special Education and Beyond*, 4 LEARNING DISABILITIES: A CONTEMPORARY JOURNAL 67 (2006) (discussing generally the development and use of mixed-method research studies).

[32] *See generally* DONALD T. CAMPBELL & JULIAN C. STANLEY, EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR RESEARCH (1966) (outlining various social science research designs that control for variables and other threats to design validity)

[33] *See infra* Appendix B.

[34] *See generally* Leach & Post, *supra* note 4.

[35] The Texas Secretary of State provides each county with a list of individuals within the county who have registered to vote, or who hold a Texas driver's license or a Texas identification card. Counties randomly select individuals from these lists to summon for jury service. *See* https://www.txcourts.gov/about-texas-courts/juror-information/jury-service-in-texas/.

General qualifications for jury service are established by law and were addressed in the survey instrument provided to study participants. *See Texas Gov't Code* 62.102.

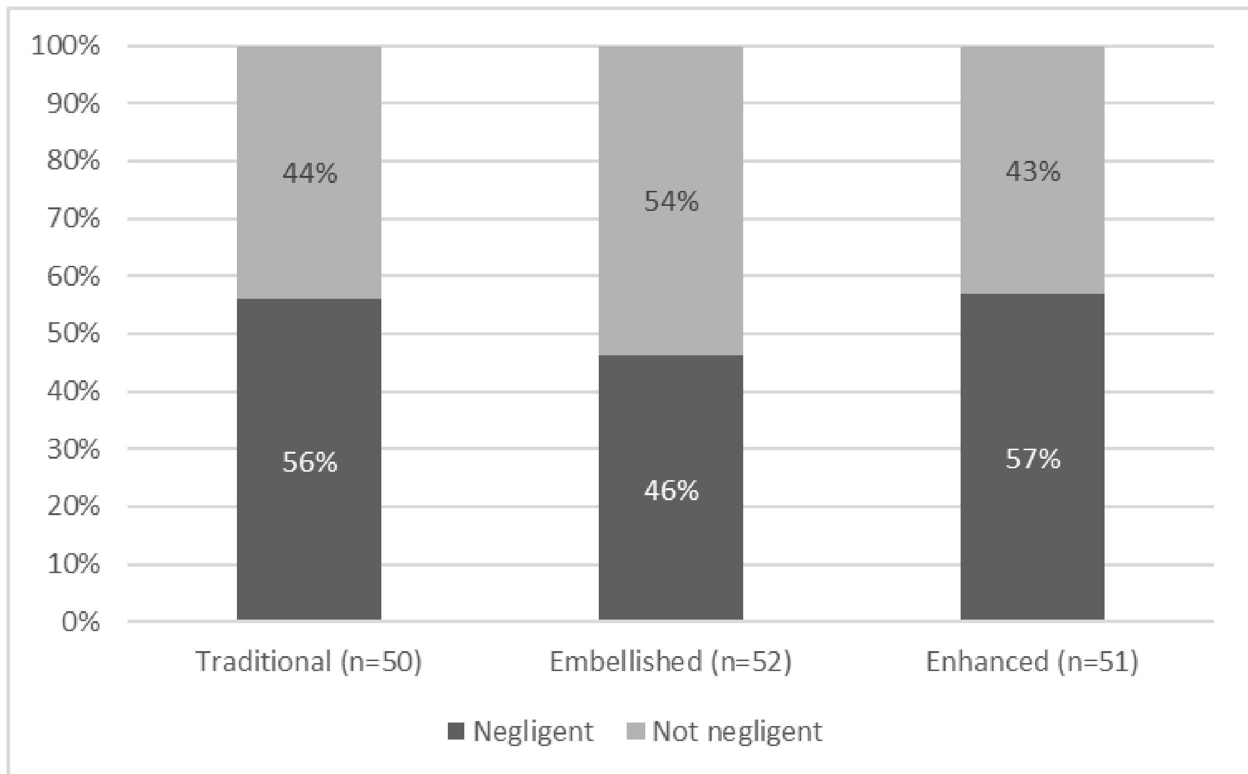
For a comparison of participants' self-reported race and ethnicity to the population of the county in which the study was conducted, see *infra*, Appendix A.

IV. RESULTS

The type of instruction our participants received did not appear to affect their determination of whether the behavior in the fact scenario they received was negligent or not negligent. We obtained approximately the same number of negligent verdicts from participants as non-negligent verdicts, regardless of instruction type, as illustrated in Figure 2 below. This contradicts Leach and Post's previous hypothesis regarding the reasons jurors fail to properly apply the law of negligence.[36]

Figure 2

*Frequency of Participants' Verdicts by Jury Instruction Type (*N*=153)*

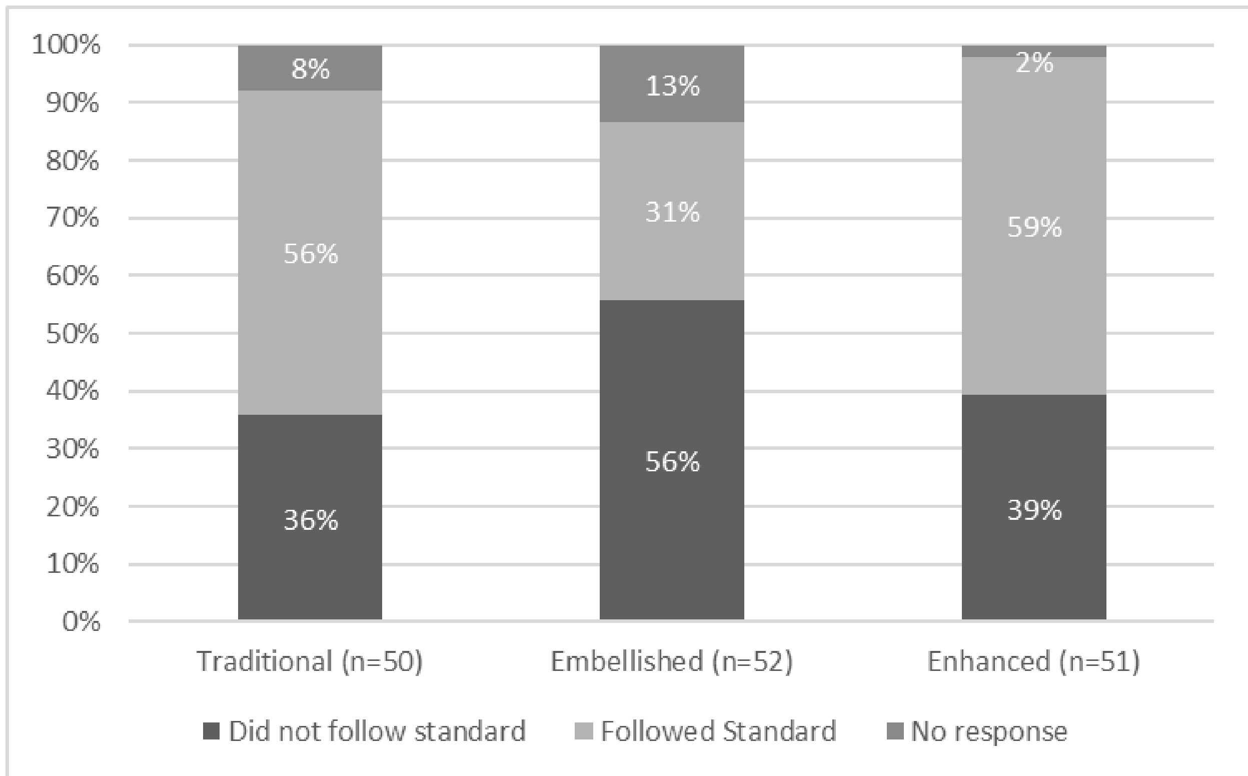


Similarly, the type of instruction our participants received did not appear to substantially affect their ability to correctly apply the ordinary care standard, although participants who received either traditional or enhanced jury instructions were slightly more likely to correctly apply the ordinary care standard than those who received the embellished instruction. (See Figure 3).

[36] *See infra* text accompanying note 43.

Figure 3

*Frequency of Participants' Verdict Reasoning Accuracy by Jury Instruction Type (*N*=153)*



One very troubling result of our study is that only about 50% of participants appeared to apply the ordinary care standard at all, regardless of the type of instruction they received. The remainder of participants applied standards appearing to have little to nothing to do with ordinary care. (See Figure 4).

Figure 4

*Frequency of Participants' Verdict Reasoning Following Standard (*N*=153)*

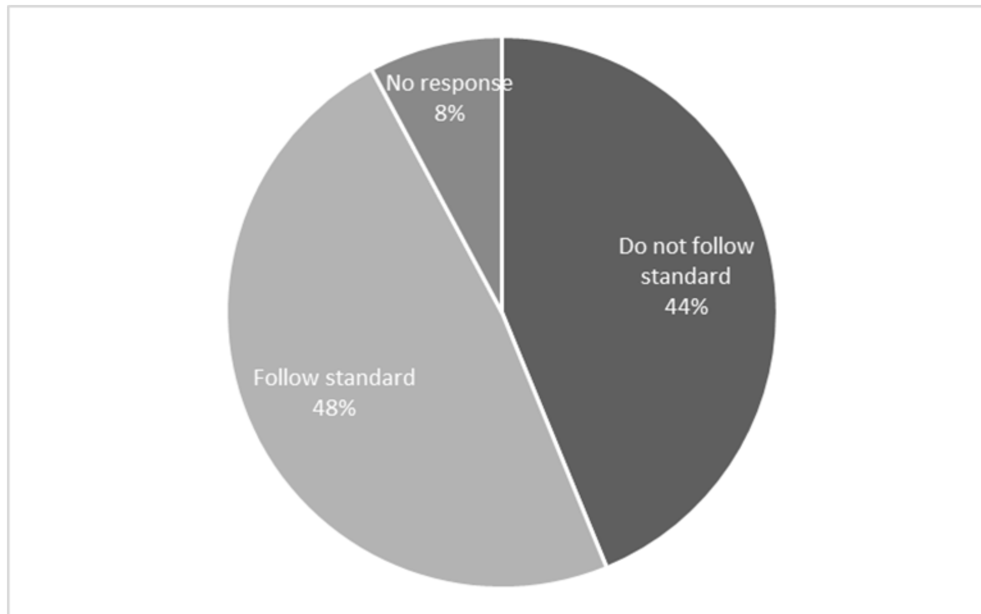


Table 1 presents categories of participants' reasoning for their verdicts (whether negligent or not negligent) ranked from most frequent to least frequent and oftentimes relating to multiple categories. The reasoning employed by participants, as illustrated by fairly representative quotes for each category, varies widely. Interestingly, a substantial number of participants who failed to apply the ordinary care standard applied a standard associated with torts other than negligence.

Table 1

*Participants' Reasoning for Verdicts Ranked from Most Frequent to Least Frequent Independent of the Participants' Verdicts (*N=67*)*

Verdict Reasoning	Count	Illustrative Quote
Did not know of risk	24 (36%)	Because he didn't know that Mr. Y was near where he was shooting
Property lines	19 (28%)	The bullet went off of his property.
Considered accident/intent	18 (27%)	Mr. X was not inteding [sic] to hurt his victim.
Blame the victim	16 (24%)	He was on his own property that uses [sic] specifically to hunt and blind was in open view so Mr. Y should be more careful when walking around on his property.
No foreseeable risk (could not know about risk)	9 (13%)	He wasn't able to see mr. Y [sic] with the obstacles in his way
Gun safety prior knowledge	9 (13%)	As a hunter, Mr. X should have known to take into consideration what lies behind the deer. That's one of the first rules of Hunter [sic] safety, know what is behind your target, or at least have a good idea of what's behind.
Strict liability	8 (12%)	The bullet went off of his property.
Bad shot	6 (9%)	Mr. X had no evidence to conclude that Mr. Y was around. Hunting is hunting and a missed shot is a missed shot.
Lack of care	5 (7%)	He did not inform Mr. Y that he was hunting in his yard, which was very close to Mr. Y's property.
Exercised ordinary care/acted reasonably	4 (6%)	The definition of negligent [sic] led me to determine that an experienced hunter such as Mr. X would have behaved and responded as responsibly as his knowledge would allow.
Unclear jury reasoning	4 (6%)	From my understanding of the judge's instructions and the description of the events, Mr. X's actions were not neglegent [sic].
Reasoning inconsistent with verdict	4 (6%)	I think Mr. X is negligent because Mr. Y should have been wearing an orange vest or something bright to be setting up the deer blind. Mr. Y's deer blind shouldn't be right there.

Note. Participant responses could include more than one category, so percentages add to greater than 100% as a result.

Tort law has three branches, all of which approach the question of liability differently.[37] One branch is negligence–the focus both here and in the Leach and Post paper–which imposes liability when a person's unreasonable or careless behavior results in injury.[38] Another branch consists of a variety of intentional torts like assault, battery, trespass, and defamation.[39] As the name of this branch suggests, intentional torts all require a showing of intent on behalf of the person accused of the tort for liability to arise.[40] The final branch on the tree of torts is strict liability.[41] This branch of torts is less common than the other branches and imposes liability without regard to fault.[42] In other words, a person may be held liable simply for engaging in certain types of behavior that result in injury, regardless of his intent or the quantum of care he used to avoid injury.[43] The applicability of strict liability varies by jurisdiction, but it is typically limited to injuries resulting from animals, abnormally dangerous activities, and defective products.[44]

Intent, or the lack of it, played a substantial role for many participants. Approximately 27% of participants (*n*=67) based their verdicts on the fact that Mr. X did not intend to shoot Mr. Y. While Mr. X's lack of intent is factually consistent with the scenario the participants analyzed, it is not a relevant consideration in this case because intent is not an element of negligence and was not included in the instructions provided to participants. Table 2 demonstrates the intent-based reasoning used by participants, which is often expressed through the colloquial use of the word "accident."

---

[37] *See* Kenneth J. Vandevelde, *A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort*, 19 Hofstra L. Rev. 447, 457-59).
[38] *Id.* at 458-59.
[39] *Id.* at *457, n. 77.*
[40] *Id.* at 458-62.
[41] *Id.* at 457.
[42] *Id.*
[43] *Id.*
[44] Not all states have adopted section 519 of the RESTATEMENT (SECOND) OF TORTS which provides that "[o]ne who carries on an abnormally dangerous activity is subject to liability for harm [caused by such activity, even if] he has exercised the utmost care to prevent the harm. For example, Texas courts have rejected the doctrine of strict liability based on the abnormally dangerous nature of an activity. *See, e.g.* Robertson v. Grogan Investment Co., 710 S.W.2d 678 (COA Texas, Dallas 1986) (rejecting strict liability for sale of handgun later used to commit suicide); Turner v. Big Lake Oil Co., 128 Tex. 155 (Tex. Sup. Ct. 1936) (rejecting strict liability for salt water contamination from oil well operation that killed neighboring vegetation and polluted livestock watering holes). However, Texas has recognized strict liability as it relates to injuries resulting from vicious or wild animals, see Marshall v. Ranne, 511 S.W.2d 255 (Tex. 1974) (applying strict liability for injuries resulting from defendant's vicious boar hog), and cases involving dangerously defective products, see Firestone Steel Products Co. v. Barajas, 927 S.W.2d 608 (Tex. 1996) (analyzing strict liability of tire manufacturer for injuries resulting from tire explosion).

Table 2

*Participants' Verdict Reasoning Related to Lack of Intent Independent of Verdict (*N*=16)*

- It was an accident[.]
- Mr. X was not inteding [sic] to hurt the victim.
- He never intended to hurt anyone. He was simply trying to shoot a deer on his property.
- …This was an accident, but not negligence.
- …he missed the deer on accident.
- Mr. Y wad [sic] not in the line of sight of Mr. X, him getting shot was an accident.
- …The incident was merely an unfortunate accident.
- … It is very unfortunate that [Mr. Y] was struck by the bullet, but it was purely an accident.
- He [Mr. X] never intended to hurt anyone. He was simply trying to shoot a deer on his property.
- Mr. X aimed his rifle carefully without intent to hit Mr. Y with the bullet.
- Mr. X didn't miss the deer on purpose, and had no idea Mr. Y was in the exact range of fire.
- It was not an act of intention and should not be charged.
- This was clearly an accident as Mr. X was unaware that Mr. Y was there.
- I believe it was just a freak accident.
- …Mr. X did not intentionally shoot his neigbor [sic] so he is not negligent.
- …The incident was merely an unfortunate accident.

Similarly, many participants believed that Mr. X was responsible for Mr. Y's injury simply because Mr. X's bullet caused it. Approximately 12% of participants (*n*=67) based their verdicts solely on the fact that the bullet from Mr. X's gun entered Mr. Y's property. Once again, this conclusion is factually consistent with the scenario the participants analyzed, but the mere fact that Mr. X's bullet entered into Mr. Y's property does not necessarily make Mr. X negligent. To suggest that it does indicates that these participants were holding Mr. X strictly liable for his behavior instead of measuring whether he acted with ordinary care as they were instructed. Table 3 demonstrates the strict liability-based reasoning used by participants.

Table 3

*Participants' Verdict Reasoning Related to Strict Liability Independent of Verdict (*N*=8)*

- Mr. X's bullet went off of his property and shot Mr. Y in the leg on Mr Y's property.
- I believe he was negligent because, he [sic] is responsible for the bullet discharged from his gun.
- The firing power of the rifle X owned had a firing power of 700 ft so he should have built the blind where no matter where he fired the gun it wouldn't have a chance of continuing on to Y's yard
- Mr. X is negligent because he is responsible for anything that happens after he shoots the gun even if he doesn't know someone was inline [sic] with him.
- He didn't make absolutely certain an event like this could occur, as unlikely as it was. Therefore, he at least is negligible to a degree.
- Even though Mr.X could not see Mr. Y, Mr. X is still responsible for the bullet he shot. A gun cannot shoot its self [sic] for whoever pulls the trigger is liable whether or not he was meaning to hit some one [sic] or something.
- He was still facing mr y property [sic]
- If Mr X did not have a clear view of 700 yards away, he should not shoot.
- Mr. X is responsible for the bullet, and should be aware of both his intended target, and what lies beyond it. If he was unsure, he should not have fired. He either knew and didn't care, or did not know and should have. Mr. X is at very least negligent.

These results certainly appear to discredit Leach and Post's hypothesis that the way we communicate the ordinary care standard to jurors meaningfully affects their decisions, at least within the context in which that hypothesis was tested. That is not necessarily the end of the story though, as these results have yielded additional research considerations and questions worth pursuing.

V. Observations

The data demonstrates that the language used to instruct participants on the ordinary care standard did not substantially impact their decisions or understanding of the standard; what the data doesn't explain is why. Leach and Post's hypothesis was built around the assumption that jurors' failure to adequately comprehend jury instructions was the root cause of their failure to understand and apply the nuances of the ordinary care standard in negligence cases. That assumption is widely shared in the legal community, as both lawyers and judges have long believed

that jurors struggle to understand jury instructions.[45] That belief may be well founded, but the results of our study suggest that more than simple miscomprehension is at play when a juror is asked to make a decision in a case. We believe the data at least suggests that some jurors in negligence cases may be predisposed to analyze cases using standards from other branches of torts, regardless of what instructions they receive.

Juror comprehension of jury instructions has been a topic of considerable scholarly interest for decades, and research in the area has identified a number of factors that contribute to the problem. The primary contributing factor appears to be the stubborn insistence that legal precision in instructions is paramount to all things, including a juror's ability to comprehend the instructions.[46] As a result, many judges are reluctant to risk reversal by straying from well-worn, "appellate-proof" instructions in favor of instructions that a jury might reasonably understand.[47] Fortunately, some courts and commissions tasked with creating pattern jury instructions are receptive to reform and have required jury instructions to be drafted in a way that is comprehensible to the average juror.[48] Psycholinguistic research has been a catalyst for this change.[49]

Psycholinguistics is the study of how psychological processes impact language comprehension.[50] Empirical studies applying psycholinguistic principles to jury instructions emerged in the 1970s and focused on how "plain-language" modifications to instructions—addressing syntax, vocabulary, and the like—improved comprehension.[51] The instructions utilized in this study were not modified using plain-language principles, although the results of psycholinguistic research suggests such modifications may have somewhat improved participants' comprehension.[52] Still, plain-language instructions are not perfect, and there is a developing line of research that suggests plain-language instructions alone will not substantially improve juror comprehension.[53]

Plain-language instructions are not a panacea for improving juror comprehension because jurors are not empty vessels who will follow instructions by rote. Consider, for example, a fan of American baseball witnessing his first cricket match. The history, traditions, and scoring metrics of the game of cricket are foreign to him, but he possesses some understanding of the dynamics and strategy of sports that utilize a bat and a ball, and he also has experience with how a crowd of

---

[45] "Time and money and lives are consumed in debating the precise words with which the judge may address to the jury, although everyone who stops to see and think knows that these words might as well be spoken in a foreign language--that, indeed, for all the jury's understanding of them, they are spoken in a foreign language." Judge Jerome Frank, Law and the Modern Mind 195 (6th prtg. 1970); *See also* Tiersma, *supra* note 15, at 40-41.

[46] *See e.g.* California Jury Instructions-Civil-Book of Approved Jury Instructions 44 (4th rev. ed. 1956) ("[T]he one thing an instruction must do above all else is to correctly state the law. This is true regardless of who is capable of understanding it.)".

[47] *See* Tiersma, *supra* note 15, at 52-53.

[48] See *Id.* at 53-59.

[49] Sara Gordon, *Through the Eyes of Jurors: The Use of Schemas in the Application of "Plain Language" Jury Instructions*, 64 HASTINGS L.J. 643, 645.

[50] Robert P. Charrow & Veda R. Charrow*, Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM L. REV. 1306, 1308 (1979); Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB. POL'Y & L. 589, 623–27 (1997).

[51] *See generally* Charrow, *supra* note 50 (discussing the results of a study that indicate jury instructions are often confusingly written and misunderstood by jurors); Phoebe Cl Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSHYCOL. PUB. POL'Y & L., 788 (2000) (discussing a study that showed jurors are confused by jury instructions).

[52] *Id.*

[53] Gordon, *supra* note 49, at 662-65.

fans will react if their team performs well or poorly. So, while the cricket experience is new to him, his baseball-related schemas allow him to more quickly and efficiently analyze and understand the new information he is receiving. Jurors are no different.

Each juror brings to the jury box her own cognitive framework that allows her to understand, organize, and interpret the information she is given.[54] These cognitive frameworks, or "schemas," are developed through personal experiences and allow us to shortcut the learning curve associated with new experiences by applying lessons and expectations learned from our old experiences.[55] When faced with new information in a trial setting, jurors will rely on their schemas to analyze that information.[56] Research shows, however, that the schemas jurors use are often not only inconsistent with the law they are asked to apply but are stubbornly persistent even in the face of the most clearly drafted instructions.[57]

The good news is that we do not need to abandon the plain-language approach to jury instructions altogether.[58] We do, however, need to supplement that approach by identifying and correcting improper juror schemas in order to improve the efficacy of plain-language instructions.[59] To this end, we believe our study may have uncovered a tendency of jurors to apply incorrect legal standards in negligence cases regardless of how they are instructed. In other words, we believe some jurors may be "schema-bound" to prefer intent-based and strict liability concepts over negligence concepts.

Our study was not specifically designed to identify our participants' schemas, so additional research is needed to determine why so many of our participants abandoned the ordinary care analysis central to negligence in favor of intent-based and strict liability analyses. Our current hypothesis is that many of them did so because these types of analyses are, perhaps, more intuitive than negligence concepts and therefore easier to apply. Concepts of intent-based fault and strict liability have ancient roots in the human psyche.[60] The notion that a person is responsible for injuries caused by intentional conduct is deeply rooted in law and society.[61] Similarly, the idea that a person can be held responsible even for injuries caused by "blameless" behavior dates back to the earliest written laws.[62] Negligence, by comparison, is a relative newcomer to the law and, perhaps as a result, has not imprinted itself on the human experience as indelibly as intentional torts and strict liability.[63]

Moreover, intent-based and strict liability analyses offer a binary simplicity that negligence-based analyses do not.[64] Did a person engage intentionally in behavior that resulted in injury, or did he not? Did a person engage in behavior for which fault is not a condition of liability, or did he not? But as our notions of fault have become more nuanced through the advent and

---

[54] *Id.* at 662.
[55] *See generally* DOROTHY G. SINGER & TRACEY A. REVENSON, A PIAGET PRIMER: HOW A CHILD THINKS 17 (1978) (describing how the development of schema beings in children); SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 180-81 (1984) (describing a schema as "a cognitive structure that represents organized knowledge about a given concept or type of stimulus.").
[56] Martha Augoustinos & Iain Walker, SOCIAL COGNITION: AN INTEGRATED INTRODUCTION, 32-33 (1995).
[57] Gordon, *supra* note 49, at 651-60.
[58] *See id.* at 670-72.
[59] *Id.* at 668-76.
[60] *See, e.g.*, ANTHONY GRAY, THE EVOLUTION FROM STRICT LIABILITY TO FAULT IN THE LAW OF TORTS 7 (2021).
[61] *See Id.* at 7-9; Vandevelde, *supra* note 37, at 447-50.
[62] *See* GRAY, supra note 60, at 8.
[63] GRAY, supra note 60, at 23 (citing Weaver v. Ward, Hob. 134; 80 ER 284 (1616) as one of the first cases in which the concept of fault was discussed in tort cases).
[64] *See* GRAY, supra note 60, at 11.

development of the concept of negligence, the analysis demanded of jurors has become considerably more complex. Now jurors must determine qualitatively and circumstantially whether the behavior at issue was reasonable, and many jurors struggle with this challenge.[65]

We might not ever be able to identify the specific source of an individual juror's schemas (and it might be very inefficient to attempt to do so), but if we can identify widely-shared, schema-based tendencies among jurors, it may be possible to formulate new approaches to jury instructions which help jurors develop appropriate schemas—or at least ignore inappropriate schemas—for negligence cases.[66] Our future research will focus on this effort.

VI. Conclusion

The findings of this research can have significant impact on individuals and businesses facing negligence lawsuits. Understanding that jurors often don't understand the legal terms or concepts they are asked to interpret may encourage businesses to avoid jury trials and settle lawsuits, even if they believe the law is on their side.

Courts communicate with jurors using jury instructions, but jurors frequently fail to understand or apply them correctly. We tested a number of different instructions relating to the ordinary care standard in firearm-related negligence cases. We anticipated that instructions that more clearly described the relationship between the risk of harm and the quantum of care necessary to avoid that harm would result in more predictable jury outcomes than instructions that ignored or only partially described the relationship. This assumption was not borne by the evidence.

Generally speaking, the type of instruction given to participants did not meaningfully affect their decisions. More concerningly, we discovered that a substantial number of participants applied legal standards altogether different from the ordinary care standard as they were instructed. We hypothesize that this is because many of our participants may have been "schema-bound" to prefer and apply concepts related to intentional torts and strict liability rather than negligence.

On the surface, these results may appear unrelated to business, but they have a practical impact on litigation strategy. The very real possibility that a jury will apply inapplicable standards to a negligence case creates a variable in the risk-management calculus that must be considered carefully. Even the best laid plans to manage a negligence case could be ruined by a jury that simply does not understand its assignment. Additional research is needed to further test our hypothesis and to determine how best to help jurors form appropriate schemas for negligence cases.

[65] Gordon, *supra* note 49, at 662.
[66] *See Id.* at 670-75.

Appendix A
Study Design, Analyses, and Results

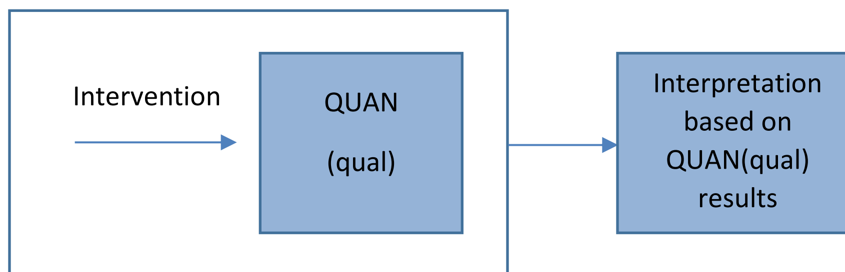
In this study we have investigated whether jury instruction types impact outcomes in negligence cases, and what factors, if any, influence those outcomes. The process is an allowed reformulation of components as the study was carried out and data were analyzed.[67] The first cluster of steps largely comprised the planning stage of the research - identifying the goal(s), research objective(s), purpose of the research as well as the rationale for mixing methods, sampling design, and research design.[68]

I. Planning Stage of Research Process

A. Research Design. We used a mixed model concurrent experimental embedded research design[69] as depicted in Figure 2. Participants were randomly assigned to one of three conditions: (a) control with traditional jury instructions, (b) treatment with embellished jury instructions, and (c) treatment with enhanced jury instructions. Participants were provided a written scenario with the randomly assigned jury instruction for which they were asked to provide a determination of negligent or not negligent (quantitative) and respond to open-ended (qualitative) and demographic items (quantitative or qualitative). The experimental design offered a rigorous frame for the study, from which one would expect internally and externally valid results.[70] Qualitative data embedded within the larger design were used to further explain the quantitative findings. The study was mixed at the data collection, analysis, and interpretation stages.

Figure A-1

Graphic Representation of the Mixed Model Concurrent Experimental Embedded Design



B. Rationale for Mixing Methods. We recognized that learning participants' verdict alone would be insufficient to determine the factors that influenced their verdict. Instead, both verdict information (quantitative) and reasoning that led to the verdicts (qualitative) would be needed to fully understand why participants arrived at their verdicts.

---

67 *See generally id.*
68 *See generally id.*
69 *See generally* Kathleen M. T. Collins et al, *supra* note 31.
70 *See generally* DONALD T. CAMPBELL & JULIAN C. STANLEY, EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR RESEARCH (1966) (outlining various social science research designs that control for variables and other threats to design validity)

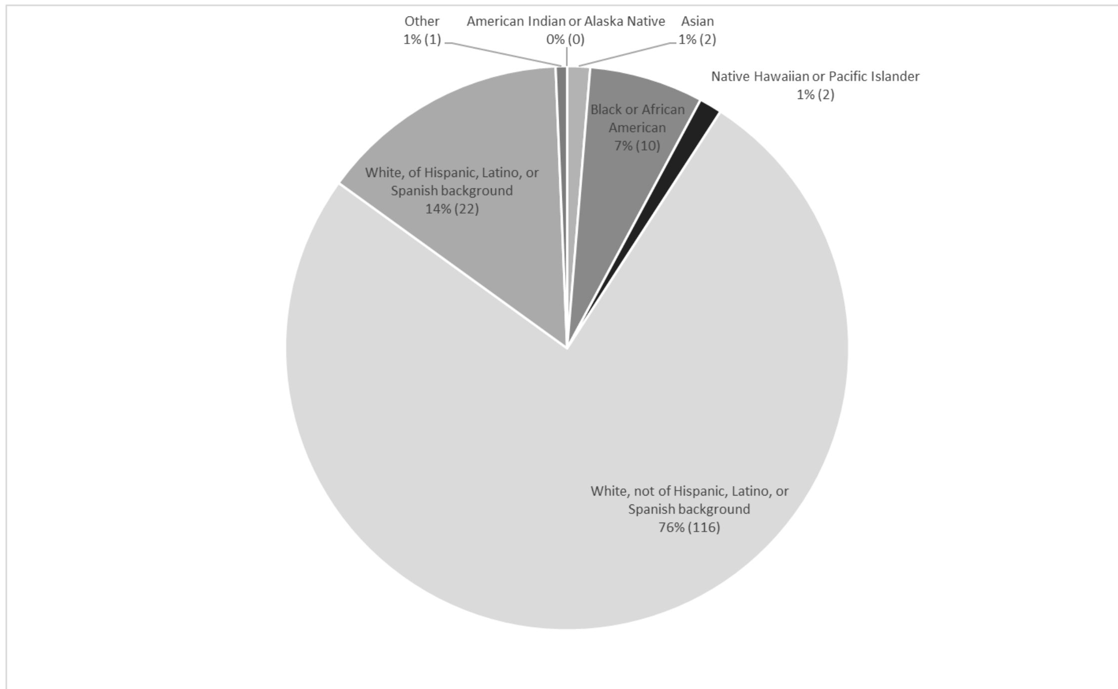
C. Sampling Design. The study was conducted at a mid-sized university in the southwestern United States. Initially, the sample was limited to undergraduate students aged 18 years or older because they offered a convenient, available pool of participants. After initial data collection, however, we realized that undergraduate students did not represent the larger population of potential jurors, and we chose to extend our sample to include all students, faculty, and staff from the university at large. Note that the sample is likely somewhat limited in its external validity, and thus generalizability, in that the university sample may not exactly match the demographics of the public at large. But given the demographics of faculty, staff, and students, it is likely close enough to provide informative results nonetheless.

D. Participants. Participants (N=153) comprised a sample that was similar in demographics to the town in which the sample was drawn with an estimated population of 19,561.[71] The median age of participants was 22 years as compared to the estimated median age of the town residents of 24.5 years.[72] The majority of participants (76% of n=153) reported their race/ethnicity as White, not of Hispanic, Latino, or Spanish background, which is similar to the 77% of town residents estimated to be of the same race/ethnicity.[73] Fourteen percent (N=153) of participants reported their race/ethnicity as White of Hispanic background as compared to an estimated 16.7% of the town residents.[74] Seven percent (N=153) of participants reported their race/ethnicity as Black or African American as compared to 3% of estimated town residents.[75] Due to the similarities in age and the distribution of race/ethnicity between the study sample and town demographics, we can be fairly confident that results will likely generalize to a jury that may be selected from the area. The generalizability of the results to juries in other areas is still tentative, however, as the demographics may vary from the participants in this study.

[71] U.S. CENSUS BUREAU, ACS DEMOGRAPHIC AND HOUSING ESTIMATES: 2019 ACS 5-YEAR ESTIMATES.
[72] U.S. CENSUS BUREAU, ACS DEMOGRAPHIC AND HOUSING ESTIMATES: 2019 ACS 5-YEAR ESTIMATES.
[73] *Id.*
[74] *Id.*
[75] *Id.*

Figure A-2

Distribution of Study Participants' Self-reported Race/ethnicities (N=153)



E. **Instrument.** We developed a survey (see Appendix B) that was administered to participants online through the Qualtrics survey platform. Participants were provided a fact scenario in which one party, Mr. X, fired his gun at a deer as it jumped the fence separating his property from that of his neighbor, Mr. Y. Mr. X's shot hit Mr. Y who was obscured from Mr. X's view. Each participant then received a randomly assigned jury instruction from one of three types: (a) traditional, (b) embellished, or (c) enhanced. Participants were asked to provide a verdict of negligent or not negligent as well as *why* they selected that particular verdict. Finally, participants were asked several demographic items including whether they own a gun and, if so, for what purpose; their general attitude toward guns; their age; and primary ethnicity/race.

II. Implementation Stage of Research Process

The next cluster of steps comprised the implementation stage of the research process and involved the collection, analysis, and validation of data; the interpretation of data and results; and the reevaluation of research questions.

A. **Data Collection.** Data were collected via an online survey (see Appendix B) over approximately one month following the sampling design previously described. Initial data (N=183) were then downloaded and cleaned to remove incomplete responses. Complete responses totaled N=153.

B. **Data Analysis.** The coding process was conducted by four members of the research team. Following our initial research questions, we coded the qualitative data regarding participants' verdict reasoning using the constant comparative method[76] using an open coding process and allowing themes to emerge throughout the process.[77] Note that 10 participants did not provide reasoning for their verdicts – five with negligence verdicts, five with verdicts of not negligent.

To establish interrater reliability among the team, we initially coded approximately 20 responses together to establish interrater reliability, 10 from participants that presented a negligent verdict and 10 with a verdict of not negligent. Codes were discussed until all team members were in agreement. Then, individual team members coded the remaining responses individually. Two members of the research team subsequently collected the individual codes and discussed them until both members agreed with a final code or set of codes for the verdict reasoning variable. Final codes, described in Table A-1, were approved by the entire research team.

[76] *See generally* BARNEY G. GLASER AND ANSELM L. STRAUSS, THE DISCOVERY OF GROUNDED THEORY: STRATEGIES FOR QUALITATIVE RESEARCH (1967) (discussing generally the constant comparative method of coding).
[77] *See generally* ANSELM STRAUSS & JULIET CORBIN, BASICS OF QUALITATIVE RESEARCH: GROUNDED THEORY PROCEDURES AND TECHNIQUES (1st ed. 1990) (discussing generally the open coding process).

Table A-1

Final Codes and Subcodes Regarding Participants' Verdict Reasoning

1. Lack of care
    a. Should have known about risk
    b. Knew and ignored risk
    c. Should have informed
    d. Lack of care (unspecified)
2. Gun safety prior knowledge (gun/hunting knowledge)
3. Juror considered intent
    a. Considered it an accident
    b. Considered it purposeful
4. Strict liability
5. Reasoning inconsistent with verdict
6. Blame the victim
7. No foreseeable risk (i.e., could not know about risk)
8. Did not know of risk
9. Exercised ordinary care/acted reasonably
10. Property Lines
11. Bad shot
12. Odds of damage
13. No evidence of misuse

Note. Subcodes are listed as indented items below main codes and considered to be more specific instances of particular codes.

Following initial coding and analyses, we noted that participants' verdict reasoning was not always consistent with the negligence standard, leading to questions of whether participants understood the negligence standard when applying it. This prompted two members of the research team to complete a second round of coding to determine whether the reasoning provided by the participant for the verdict (*N*=143) was either consistent with the negligence standard or not. We considered any deviation from the negligence standard as inconsistent; this occurred on a continuum of completely incorrect to only slightly incorrect (i.e., mostly correct).

C. **Results.** Figure 2 presents participants' verdicts by jury instruction type. We conducted a chi-square test of independence analysis of these data and found no statistically significant differences between the proportions (χ^2 (2, 153) =1.46, *p*=.48). In other words, differences between the proportions were not large enough to conclude that any

one type of jury instruction had a different effect on participants' verdicts than another.

As previously explained, participants' reasoning for their verdicts was not always consistent with the negligence standard, which led the research team to question participants' understanding of the standard and the subsequent pattern of responses. As a result, we revised the purpose of the study and subsequent research questions to include the question of whether the accuracy of the application of the negligence standard was influenced by the type of jury instruction. To answer the question, we investigated the proportion of participants that demonstrated understanding of the standard in their verdict reasoning. Then, we statistically analyzed differences in the proportions of participants who demonstrated knowledge of the standard by jury instruction type.

As presented in Figure 4, roughly half of participants' verdict reasoning demonstrated understanding of the negligence standard (48% of N=153) while approximately half did not (44% of N=153). Participants' verdict reasoning that did not follow the standard included those presented in Table 1.

Results of a chi-square test of independence revealed statistically significant differences in the proportions of participants' verdict reasoning by instruction type, χ^2 (2, 153) =1.46, p=.02. From the descriptive results presented in Figure 3, it is evident that a greater proportion of participants who randomly received the embellished jury instruction (56% of n=52) did not demonstrate understanding of the negligence standard when compared to participants who received the enhanced (n=51) and traditional instructions (n=50).

Appendix B

Survey Instrument

Impact of Jury Instructions on Negligence Verdicts

Q1 In this study, we will investigate the impact of specific types of jury instructions on jurors' negligence verdicts.

If you choose to participate in the study, you will be asked to complete a survey in which you will be asked to provide your verdict for several cases as a pretend juror and answer some demographic questions. The survey will take you approximately 20-35 minutes to complete.

To participate, you must meet the following criteria to serve as a juror:

- United States citizen
- At least 18 years of age
- Be adequately proficient in English
- Have no disqualifying mental or physical condition
- Not currently subject to felony charges punishable by imprisonment for 1+ years
- Never been convicted of a felony (unless your civil rights have been restored)

Potential benefits of the research will be greater knowledge about how different types of jury instructions impact verdicts in cases of alleged negligence.

Risks are minimal and no more than you might experience in everyday life, including potential breaches of privacy and confidentiality. Your written responses will remain anonymous as we do not ask for any identifying information on the survey. Your written data will be secured in a locked office, and your digital data will be secured on a password-protected electronic drive.

By completing the attached survey, you indicate your informed consent to participate in the study. Note that participation is completely voluntary, and you can withdraw from the study at any time by contacting Judd Leach (jleach@tarleton.edu; 254-968-1861). You may request a copy of this information by contacting Judd Leach (jleach@tarleton.edu; 254-968-1861).

Q2 Do you provide your informed consent to participate in the study?

○ Yes, I provide my informed consent to participate in the study. (1)

○ No, I do not provide my informed consent to participate in the study. (2)

Skip To: End of Survey If Do you provide your informed consent to participate in the study? = No, I do not provide my informed consent to participate in the study.

Do you meet the qualifications below to serve as a juror?
United States citizen
At least 18 years of age
Be adequately proficient in English
Have no disqualifying mental or physical condition
Not currently subject to felony charges punishable by imprisonment for 1+ years
Never been convicted of a felony (unless your civil rights have been restored)

◯ Yes

◯ No

Skip To: End of Survey If Do you meet the qualifications below to serve as a juror?United States citizen At least 18 years... = No

Q3 Place yourself in the role of a juror who must decide whether a defendant is liable or not liable for negligence. You will be asked to consider the facts of the case following the specific instructions from the judge. Please make sure to read both carefully. Note that there is no right or wrong answer.

Q4 **Facts of the case**

It is deer season in Brown County, Texas. Mr. X owns a 100 acre parcel in the country that he uses for camping and hunting.

Mr. X has a deer blind set up on his property approximately 100 yards from the wire fence that separates Mr. X's property from his neighbor Mr. Y's property. The location of the deer blind is shown on Figure 1.

At approximately 7:00 am on a Saturday morning during deer season, Mr. X is sitting in his deer blind when he spots a large deer approximately 150 yards in front of the deer blind and approximately 20 yards from the fence between his property and Mr. Y's property. The approximate location of the deer is shown on Figure 1.

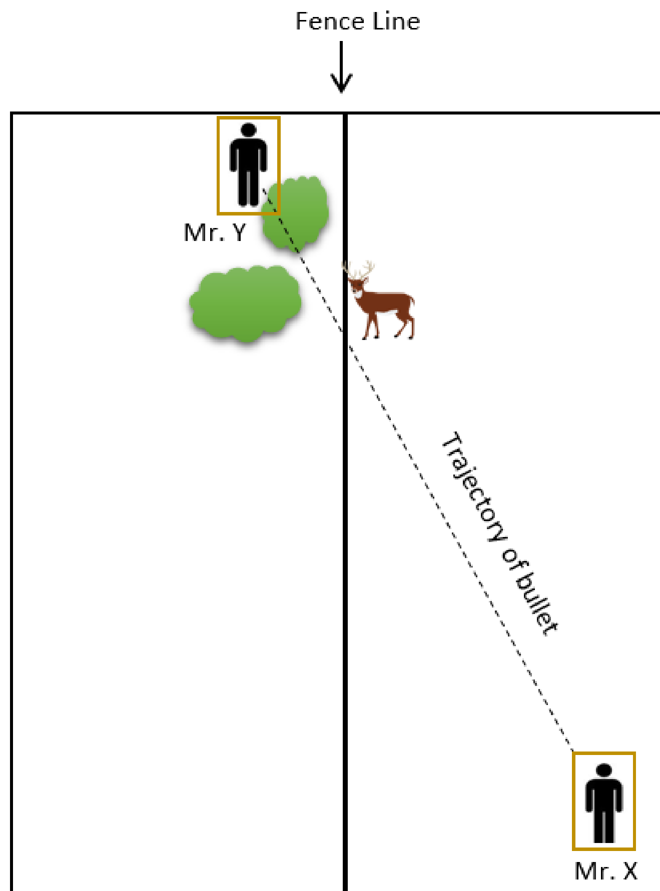
Mr. X wants to shoot the deer before it spooks and jumps the fence into Mr. Y's property. Mr. X takes careful aim at the deer and fires his gun. He misses the deer.

Unbeknownst to Mr. X, at the time he fired his gun at the deer, Mr. Y was busy setting up his own deer blind on his property directly in the line of fire of Mr. X's bullet. Mr. X couldn't see Mr. Y because Mr. Y was obscured by a grouping of trees and brush. Mr. Y's location and the trees and brush blocking Mr. X's view are shown on Figure 1.

When Mr. X's shot missed the deer, the bullet continued on its path and struck Mr. Y in the leg. The shot did not kill Mr. Y, but it did injure him enough that he had to seek medical treatment to have the bullet removed and his wound stitched up. The path of Mr. X's bullet is shown on Figure 1.

The gun Mr. X used was a Winchester 30.06. This is a commonly used hunting rifle capable of firing a bullet up to 700 yards. Mr. Y was located approximately 400 yards from Mr. X when he was shot.

Mr. Y has sued Mr. X to recover the costs of the medical care that Mr. Y needed as a result of being shot by Mr. X. Mr. Y claims that Mr. X was negligent when he shot at the deer. You must determine whether that is the case.



Randomly evenly present Q6, Q7, or Q8 below.

Start of Block: Jury instructions (traditional)

Q6
Judge's instructions to you and other jurors (jury instructions)
"Negligence" means failure to use ordinary care. Ordinary care is the care which a reasonably careful person would use under similar circumstances. Negligence is doing something a reasonably careful person would not do under similar circumstances, or failing to do something a reasonably careful person would do under similar circumstances.

End of Block: Jury instructions (traditional)

Start of Block: Jury instructions (embellished)

Q7
Judge's instructions to you and other jurors (jury instructions)
"Negligence" means failure to use ordinary care. Ordinary care is the care which a reasonably careful person would use under similar circumstances. Negligence is doing something a reasonably careful person would not do under similar circumstances, or failing to do something a reasonably careful person would do under similar circumstances.

The amount of care that is considered "reasonable" depends on the situation. Some situations require more caution because a person of ordinary prudence would understand that more danger is involved. In other situations, less care is expected, such as when the risk of danger is lower or when the situation happens so suddenly that a person of ordinary prudence would not appreciate the danger.

End of Block: Jury instructions (embellished)

Start of Block: Jury instructions (enhanced)

Q8
Judge's instructions to you and other jurors (jury instructions)
"Negligence" means failure to use ordinary care. Ordinary care is the care which a reasonably careful person would use under similar circumstances. Negligence is doing something a reasonably careful person would not do under similar circumstances, or failing to do something a reasonably careful person would do under similar circumstances.

Anyone who provides, supplies, or uses an inherently dangerous instrumentality, such as the gun used by the defendant in this case, is required by law to use the highest degree of care practicable to avoid injury to everyone who may be lawfully in the area of such activity.

End of Block: Jury instructions (enhanced)

Start of Block: Follow up and Demographic Items

Q9 As a juror, what would your verdict be based on the presented facts and jury instructions?

○ Mr. X was negligent.

○ Mr. X was not negligent.

Q10 What specific reasons led you to the verdict of "${Q9/ChoiceGroup/SelectedChoices}"?

____

____

____

____

____

Q17 Have you previously served in a jury in a **negligence** case?

○ Yes

○ No

Q11 Do you own a gun?

○ Yes

○ No

Display This Question:

If Do you own a gun? = Yes

Q12 For what purpose do you own a gun? (Check all that apply).

▢ Hunting

▢ Protection

▢ Use it in my job as a ____

▢ Other ____

Q13 What is your attitude toward guns?

○ Positive

○ Neutral

○ Negative

Q14 What is your age? (whole number) ____

Q15 What is your primary race/ethnicity?

○ White, not of Hispanic, Latino, or Spanish background

○ White, of Hispanic, Latino, or Spanish background

○ Black or African American

○ American Indian or Alaska Native

○ Asian

○ Native Hawaiian or Pacific Islander

○ Other ____

End of Block: Follow up and Demographic Items

ENTREPRENEURS TAKE HEED: IT'S NOT JUST ABOUT THE RESULTS: RE-EVALUATING THE RESULTS TESTS USED IN IDENTIFYING VALUABLE SUGGESTIVE TRADEMARKS

PAUL W. FULBRIGHT*

I. INTRODUCTION

A. The Purpose of this Article – Clearing our Path (Regarding Trademarks)

> Where I come from in Minnesota, there are many ways to get from my family's farm over to the lake. There is one path in particular that I have used ever since I was a young boy. I never gave much thought to how the path got there. I only knew that it suited my purposes, particularly if it was a hot day and I was in a hurry to get to that lake.
>
> Long before I was born, someone went to the trouble of creating that path. Each time someone used it, it seemed to define that path's existence against the wilderness of the countryside. As I grew older, I seemed to pick up this attitude of responsibility for the path. So, if a tree branch fell, blocking the way, you simply made it your business to move it, so that the next person who came along could get to where they were going.
>
> On a particularly beautiful day, the kind of day that lends itself to expansive thinking, you might get the feeling as you were walking that you were a part of a long procession, following in the footsteps of those who preceded you, leading the way for those yet to come. From where I stand here today, representing this proud group of men and women, I can see that we've been shown the way of another path.[1]

This article is devoted to clearing a branch from the part of our path devoted to trademarks. Although it is not widely understood, trademarks vary greatly in terms of distinctiveness and strength. Over the last century, the courts have begun categorizing the different kinds of marks encountered in commerce, and patterns have begun to emerge regarding the ease with which they are protected and enforced. Trademark practitioners have come to recognize that descriptive trademarks are generally weaker, less distinctive, and harder to enforce in the courts. Suggestive trademarks, by contrast, are stronger, more distinctive, and readily enforced in litigation.

---

* B.S.Ch.E., M.B.A., M.S.T., J.D., LL.M., Assistant Professor of Business Law, University of Houston – Downtown.

[1] Joe S. Landon, THE PAPER CHASE, GRADUATION (S.4, Ep.6, Aug. 9, 1986) (commencement speech of protagonist law student James T. Hart on the study and practice of law).

Determining whether a trademark will be treated by the courts as descriptive or suggestive is a delicate business, and numerous heuristics have been developed over the years for facilitating that call. The "Results or Effects of the Goods" test is used by practitioners for distinguishing between descriptive and suggestive trademarks. The rule has been used for many years, and has been quoted approvingly in the U.S. Patent and Trademark Office's (PTO's) own official manuals of procedure, despite the fact that the courts have implicitly rejected the rule on numerous occasions. However, the uncertainty created by the rule constitutes a tax on the business community generally and on entrepreneurial businesses particularly.

Part I of this article introduces the reader to several important foundational concepts regarding trademarks that are necessary to an understanding of the principal thesis of the paper. Specifically, it introduces the reader to a well-established categorization of four kinds of trademarks (generic, descriptive, suggestive, and arbitrary/fanciful) that practitioners and the courts have employed for a very long time.[2] It also highlights the critical practical importance of distinguishing between two of the categories: *descriptive* trademarks and *suggestive* trademarks.

Part II of this article is devoted to describing one of the many tests that have been developed over the years for distinguishing between these two categories of trademarks. The test of interest in this paper is known as the "Results or Effects of the Goods" test (the "REF" test), a test first described in the courts almost exactly 100 years ago (as of the date of this writing).[3] Sadly, it is a poor test. It is also one that has been described and cited with approval[4] in the lengthy public *Trademark Manual of Examining Procedure*[5] published by the U.S. Patent and Trademark Office,[6] so that, every day, trademark practitioners all across the country are encouraged to employ the test both in the courts and at the US PTO.

Part III of this article explains the problem. The REF test does an extremely poor job of distinguishing between descriptive trademarks and suggestive trademarks. It is logically flawed, and numerous court decisions over the last century have implicitly overruled it. A smaller number of court decisions have bravely and expressly rejected its reasoning. Yet, today, it still stands. It has never been expressly overruled.

Finally, Part IV of this article is a call to action. It encourages the courts to seize the next opportunity to expressly reject the REF test. It further invites the PTO to update the guidance it provides in its TMEP so that future practitioners, endeavoring to advance trademark applications through the Office, don't waste time and money needlessly revisiting and rehashing the contours of an improvident test.

---

[2] *See, e.g.*, Abercrombie & Fitch Co. v. Hunting World, 537 F.2d 4 (2d Cir. 1976) (the most famous appellate court decision, dated 1976, expressly articulating this specific four-part categorization for the very first time).

[3] *See* In re Irving Drew Co., 297 F. 889 (D.C. Cir. 1924) (the decision and test described in detail in Part II.D. hereinbelow).

[4] *See* TMEP § 1209.01(a) (as discussed in detail in Part II.D. hereinbelow).

[5] *See* Trademark Manual of Examining Procedure Forward (Jul. 2021) [hereinafter TMEP] ("The Manual is published to provide trademark examining attorneys in the USPTO, trademark applicants, and attorneys and representatives for trademark applicants with a reference work on the practices and procedures relative to prosecution of applications to register marks in the USPTO. The Manual contains guidelines for Examining Attorneys…").

[6] 35 U.S.C. § 2 [hereinafter US PTO or PTO or the Office] ("Powers and Duties: (a) In General. The United States Patent and Trademark Office, subject to the policy direction of the Secretary of Commerce — (1) shall be responsible for the granting and issuing of patents and the registration of trademarks; and (2) shall be responsible for disseminating to the public information with respect to patents and trademarks.").

For a century, judges and practitioners have been dealing with (some occasionally tripping over) a particular branch that needlessly blocks the path. This article endeavors to clear the path once and for all.

B. Background: Managing a Healthy Ecosystem of Trademarks

The grant of rights in trademarks has been an important part of federal and state law in the United States for a very long time.[7] And appropriately so. Our laws regarding trademarks enhance the quality of life in our society in many ways. To begin with, they have created a thriving ecosystem of symbols that help consumers to quickly spot and patronize unique sources of quality goods and services. Just as importantly, when trademarks are properly regulated in the courts (that is, when knock-offs are enjoined out of existence), consumers are less likely to be duped by unscrupulous vendors who hope to trade off of the goodwill of their more skilled competitors. Finally (though perhaps less widely appreciated), trademark law also serves to preserve free and fair competition in the marketplace. For example, the law ensures that descriptive or generic terms remain available to everyone – established competitors and entrepreneurial upstarts alike – for describing the goods and services they offer in the marketplace.

When the purposes described above are furthered, we all benefit. When they are undermined, we all suffer. And so the legislatures and the courts remain ever vigilant in monitoring the health of our trademark ecosystem. The legislatures define the frameworks and major standards for protecting and enforcing trademarks, and the courts apply and refine those works in adjudicating individual cases.

Specifically, in order to enhance the efficient adoption and use of trademarks in the U.S., the various states and the federal government have created trademark registration systems. The most prominent aspect of these systems (to the public) are the registries about which they operate. A good example of one of these registries is the largest one in widespread use in the United States today – the Principal Register[8] of the US PTO.

Registries such as the PTO's Principal Register provide the public a valuable and extremely convenient single "list" of trademarks, service marks, collective marks, and certification marks in which marketplace vendors have asserted proprietary rights. These highly visible and carefully maintained registries thus make it easier for businesses to make good decisions about the adoption of a new mark[9] for a good or service.

---

[7] Without belaboring this rather obvious point, it is noted that, in 1905, Congress passed the Trademark Act encompassing all interstate and foreign commerce, and, in 1947, Congress enacted the Lanham Act, the modern trademark registration scheme, which is still in force to this day. The Lanham Act appears in Title 15 of the United States Code. Lanham Act §1 appears at 15 U.S.C. §1051.

[8] 15 U.S.C. § 1051(a)(1) ("The owner of a trademark used in commerce may request registration of its trademark on the principal register hereby established by paying the prescribed fee and filing in the Patent and Trademark Office an application and a verified statement, in such form as may be prescribed by the Director…").

[9] It is commonplace for trademark practitioners to use the shorthand term "mark" to refer collectively to "trademarks" (for goods), "service marks" (for services), collective marks (of organizations), and certification marks (of certifiers), because most of the general legal principles applicable to one type of mark apply to the other kinds as well. *See generally, e.g.*, TMEP § 1300 ("The language of this Manual is generally directed to trademarks. Procedures for trademarks usually apply to other types of marks, unless otherwise stated."). The principal theses of this paper apply to all kinds of marks, and so the more precise terms will only be employed herein when circumstances require. Also, this paper is focused principally upon what trademark practitioners often call "word marks" (marks that would be presented as "standard character" alphanumeric marks in a trademark application), rather than "logo marks" (marks that would be presented in a "special form" drawing featuring a visual design in a

The most common concern that a well-run business will typically have when considering a potential new mark is that the mark is *already in use* by one of its competitors or that, while the mark is not identical to a preexisting mark, perhaps it is similar enough to a preexisting mark that it is *likely to cause confusion* in the marketplace if the new mark were adopted.[10] If a proposed new mark is likely to cause confusion among an appreciable number of consumers, then, under the law in the vast majority of states (and the federal government), its use may be enjoined.[11] The registry helps companies (guided by the advice they receive from their trademark attorneys) to avoid these unhappy and costly results by facilitating rapid, accurate, cost-effective searches of the registry as opposed to less-efficient, ad hoc canvassing of the marketplace of marks by other means.

The registries do more than just facilitate a company's selection and adoption of a new mark. They also help companies who need to assert their marks in litigation to establish a "prima facie" case for the validity of a mark that they have previously registered.[12] And, in the federal scheme, the registry also provides constructive notice that a registrant might, at any future time, expand his use of his mark to any region in the U.S.[13] Ask any trademark litigator, and (s)he will happily catalogue the many practical benefits of participating in the trademark registration process.

But the price of registration is examination. That is, the examiners at the PTO will only grant a federal registration *after* they have performed a comprehensive examination of the trademark application and concluded that the mark does indeed merit registration under the

---

trademark application). *Cf.* 37 C.F.R. §2.52(a) ("An applicant may submit a standard character drawing if: The mark does not include a design element; All letters and words in the mark are depicted in Latin characters; All numerals in the mark are depicted in Roman or Arabic numerals; The mark includes only common punctuation or diacritical marks; and No stylization of lettering and/or numbers is claimed in the mark."); TMEP § 807.03(a) ("An applicant who submits a standard character drawing must also submit the following standard character claim: The mark consists of standard characters without claim to any particular font style, size, or color.").

[10] 15 U.S.C. § 1125(a)(1) ("Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, … which – (A) is *likely to cause confusion*, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, … shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.") (emphasis added); *and see* Hyson USA v. Hyson 2U, 821 F.3d 935, 939 (7th Cir. 2016) (citing Sorenson v. WD-40, 792 F.3d 712, 726 (7th Cir. 2015): "The keystone of trademark infringement is likelihood of confusion as to source, affiliation, connection, or sponsorship of goods or services among the relevant class of customers and potential customers.").

[11] *See, e.g.*, Register.com Inc. v. Verio Inc., 356 F.3d 393, 441-42 (2d Cir. 2004) (finding that a likelihood of confusion is "defined as a likelihood that an appreciable number of ordinarily prudent purchasers are likely to be misled, or indeed simply confused, as to the source of the goods in question, or … confusion as to plaintiff's sponsorship or endorsement of the defendant's goods or services.") (internal quotes omitted).

[12] *See, e.g.*, 15 U.S.C. § 1057(b) ("A certificate of registration of a mark upon the principal register provided by this chapter shall be prima facie evidence of the validity of the registered mark and of the registration of the mark, of the owner's ownership of the mark, and of the owner's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate, subject to any conditions or limitations stated in the certificate.").

[13] 15 U.S.C. § 1072 ("Registration of a mark on the principal register… shall be constructive notice of the registrant's claim of ownership thereof."); *and see* Armand's Subway v. Doctor's Associates, 604 F.2d 849, 850 (4th Cir. 1979) ("After the Lanham Act, nationwide protection was extended to registered marks, regardless of the area in which the registrant actually used the mark, because … registration constituted constructive notice to competing users. … However, … the protection is only potential in areas where the registrant in fact does not do business. A competing user could use the mark there until the registrant extended its business to the area. Thereupon the registrant would be entitled to exclusive use of the mark and to injunctive relief against its continued use by prior users in that area.").

controlling legal tests.[14] For example, by closely examining a proposed new mark and the goods and services to which it relates, the examiner is in a position to make a judgment as to whether the mark is confusingly similar to one or more preexisting marks currently in commerce.[15] If it is, registration will be denied.

The courts similarly examine trademarks, but they do so only after a dispute has arisen. However, the substantive "likelihood of confusion" standard that they apply in adjudicating disputes is the functional equivalent to that applied by the PTO's examiners.[16] Thus, both the examiners and the courts have a healthy interest in the substantive standards of trademark law. If those standards are clear, examiners and jurists are able to make better decisions faster; if they are not clear, timeliness suffers.

C. "Descriptiveness" – A Key Basis for Refusing Registration or Defeating Claims

This article focuses upon the legal attributes of *descriptiveness* and *suggestiveness* in trademarks. Descriptiveness is one of the oldest and most important grounds for (a) refusing registration of a mark, (b) canceling registrations previously granted, and / or (c) defeating claims of infringement. The modern U.S. trademark statute, known as the Lanham Act,[17] succinctly describes in Section 2 this basis for rejecting an application for registration of a mark:

> *No trademark* by which the goods of the application may be distinguished from the goods of others *shall be refused registration* on the principal register on account of its nature *unless it* – … (e) *Consists of a mark which* (1) when used on or in connection with the goods of the applicant *is merely descriptive* … of them, …[18]

The §2e1 descriptiveness inquiry empowers the trademark examiner to make a judgment about whether the new mark is actually nothing more than a collection of terms that are so descriptive, and so commonly employed, in relation to the relevant goods and services, that granting the registration would actually give the applicant a proprietary command over a portion of the English language that we should all enjoy.

---

[14] The application provides a wealth of information to the examiners to facilitate their work. For example, it contains the details regarding the mark, the owner, the date upon which the mark was adopted and used in commerce, the goods and services to which the mark relates, and related matters. *See* 15 U.S.C. §1051(d)(1) ("Subject to examination…, the mark shall be registered in the Patent and Trademark Office…"); *and see generally* TMEP Ch. 800 ("Application Requirements").

[15] 15 U.S.C. § 1052(d) ("No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it --- (d) [c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be *likely, when used on or in connection with the goods of the applicant, to cause confusion*, or to cause mistake, or to deceive…") (emphasis added).

[16] *Cf.* Octocom Sys. v. Houston Comp., 918 F.2d 937, 942 (Fed. Cir. 1990) (finding that applicant's mark so resembled an opposer's previously registered mark as to be likely to cause confusion; when applicant argued the PTO erred by failing to consider evidence showing no likelihood of confusion *in the marketplace*, the court reminded the applicant that the likelihood of confusion test, as applied by the examiners *at the PTO*, is based on the potentially broader identification of goods specified (and sought) in the pending application for registration, and not on evidence of the mark's potentially narrower actual current use in the marketplace).

[17] The Lanham Act appears in Title 15 of the United States Code. Lanham Act §1 appears at 15 U.S.C. §1051.

[18] 15 U.S.C. § 1052(e)(1) (emphasis added).

Consider the following mark:

SPEEDY CLEANERS
for dry cleaning services

[a descriptive mark]

The presentation above demonstrates the way most experienced trademark practitioners think about trademarks. They think of them as "doublets" – a MARK *for a set of goods or services*[19] – so other examples would include the following marks for goods: LEVI'S *for blue jeans*; COCA-COLA *for soft drinks*; NIKE *for athletic shoes*; EXXON *for gasoline*; and MICROSOFT *for computer software*. And one could similarly consider the following marks for services: BANK OF AMERICA *for banking services*; McDONALD's *for restaurant services*; CENTURY 21 *for real estate services*; and UNITED AIRLINES *for flight services*.[20]

Reconsider SPEEDY CLEANERS for dry cleaning services above. If a business sought to *register* (establish a governmentally-sanctioned proprietary position in) this mark as a service mark for its dry-cleaning services, we would all object to the appropriation of this highly descriptive phrase (and appropriately so) even if the applicant was the first to think of registering it.[21] Dry cleaners everywhere should be free to describe themselves as "speedy" unless it has become quite clear that a specific exceptional circumstance applies, namely, that the public has come to know (over time) that "Speedy Cleaners" does in fact refer to just *one specific* business.[22]

The courts have been wrestling with the definition of descriptive marks and the problems they create for a very long time. "Descriptiveness" as an explicit ground for rejection of a trademark application has appeared – and been continued in almost identical form – in the U.S. federal trademark acts for almost 120 years. It was called out in the federal trademark statute of 1905,[23] again in the modernized federal trademark act (the Lanham Act) of 1946,[24] and it continues

---

[19] It is also commonplace for practitioners, when writing in a text, brief, or article, to use CAPITALIZED letters to refer to a word mark, and to use either plain text or *italicized* text when referring to the goods or services to which the mark relates.

[20] If the engaged reader (Rick Reader) takes his favorite trademark practitioner (Bill Brandt) to lunch, Rick will observe that, even in casual conversation, Bill will rarely (if ever) refer to "the EXXON mark". Rather, even when rushed, Bill will almost always refer to "EXXON for gasoline" or "the EXXON mark for petroleum".

[21] KP Permanent Make-Up v. Lasting Impression I, 543 U.S. 111, 122 (2004) (trademark law does not countenance someone obtaining "a complete monopoly on use of a descriptive term simply by grabbing it first") (citations omitted).

[22] Such a showing (that a descriptive mark has now (over time) acquired an *additional* meaning – a reference to a *single specific* business – in the eyes of the public) is known as a showing of "secondary meaning" or "acquired distinctiveness" under 15 U.S.C. § 1052(f). This carefully regulated exception to the general prohibition against registering descriptive marks is discussed in greater detail in the text accompanying note 49 below.

[23] 33 Stat. 724, 726 (1905) ("[N]o mark which consists… merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods, … shall be registered…")

[24] 15 U.S.C. § 1052(e)(1), 60 Stat. 427, 428-29 (1946) ("No trade-mark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it … (e) Consists of a mark which, (1) when applied to the goods of the applicant is merely descriptive … of them…"). The phrase "merely descriptive" (as distinguished from "descriptive") has been construed as meaning that the mark is "only" descriptive; that is, that it entirely lacks distinctiveness. For example, the court in *In re Colonial Stores*, 394 F.2d 549, 551-553 (C.C.P.A. 1968) held that the mark SUGAR & SPICE as applied to bakery goods had

in effect in the latest revision of the Lanham Act today.[25] Thus, when one considers the meaning of descriptiveness, one can helpfully consider court decisions both before and after 1946, as the policy considerations that affect defining what *is* and *isn't* descriptive are (for the most part) the same today as they were a hundred years ago.

D. "Descriptiveness" in Context - The Abercrombie Continuum of Trademark Distinctiveness.

Since 1976, a great many courts, including the U.S. Supreme Court,[26] have referred to the *Abercrombie* decision or the "Friendly continuum" when placing descriptive marks in context. In *Abercrombie & Fitch Co. v. Hunting World*,[27] Judge Friendly identified four different categories of marks, arrayed in increasing order as regards their intrinsic distinctiveness and degree of protection afforded: (1) generic; (2) descriptive; (3) suggestive; and (4) arbitrary or fanciful.[28] To be clear, category (1) "generic" terms are the weakest / least distinctive (in fact, they are not viewed as marks at all), and category (4) "fanciful" / "arbitrary" marks are the strongest / most distinctive.[29]

A presentation of these categories in tabular form helps the reader to fix their essential characteristics in mind. See the following table.

a separate, well-recognized, and paramount connotation (based on the nursery rhyme) that meant that the mark was NOT "merely descriptive".

[25] 15 U.S.C. § 1052(e)(1) ("No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it … (e) Consists of a mark which (1) when used on or in connection with the goods of the applicant is merely descriptive … of them…").

[26] *See, e.g.*, Two Pesos v. Taco Cabana, 505 U.S. 763, 768, 112 S.Ct. 2753, 2757 (1992) ("Marks are often classified in categories of generally increasing distinctiveness; following the classic formulation set out by Judge Friendly, they may be (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful."); USPTO v. Booking.com, 140 S.Ct. 2298, 2302-03 (2020).

[27] Abercrombie & Fitch Co. v. Hunting World, 537 F.2d 4 (2d Cir. 1976).

[28] *Id.* at 9.

[29] *See, e.g.*, *Id.*; Two Pesos, *supra* note 26, at 768; Booking.com, *supra* note 26, at 2302-03.

TYPE OF MARK	GENERIC TERMS	DESCRIPTIVE MARKS	SUGGESTIVE MARKS	ARBITRARY OR FANCIFUL MARKS
Legal STRENGTH	NO Legal Protection	Trademarks in these columns generally act as ADJECTIVES (telling us “Who Made This?”, “Which Brand is This?”). Legally Weak	Legally Strong	Legally Strong
NATURE of Mark	The mark is **<u>extremely</u> highly descriptive** name of a product. Generic Terms generally act as NOUNS (telling us “What is This?”). They are NOT Trademarks.	The mark **describes** the goods or service using ordinary, logically applicable words.	The mark is distinctive because it **suggests** perhaps via a pun. To understand the mark and its relationship to the product, imagination or creativity is required.	The mark is distinctive because it is **arbitrary** (it consists of an arbitrarily chosen word) or **fanciful** (it consists of a meaningless collection of letters).
WHEN Is Protection Acquired?	Never	Upon secondary meaning (acquired distinctiveness). The mark is protectable but only if secondary meaning can be shown by, for example, demonstrating constant exclusive use for 5 years, whereupon it is presumed that the public now connects the mark with this specific owner alone.	Upon use	Upon use
Examples	*Premium Unleaded* for gasoline *Whole Milk* for milk	*Speedy* for dry cleaners *Prompt & Dependable* for electrician services	*Chicken o' the Sea* for tuna fish *Roach Motel* for insect traps	*Shell* for gasoline (arbitrary words) *Exxon* for gasoline (fanciful letters)

It is critically important to understand that these categories are based on the intrinsic or acquired distinctiveness of the mark,[30] and intrinsic distinctiveness is almost invariably driven by the relationship of the mark to the goods or services to which it is applied.[31] In evaluating that relationship, the courts look at *the precise meaning of the mark* quite closely, and they evaluate that in relation to *the precise nature of the goods or services* to which it is applied. Although dictionary definitions are not necessarily controlling, they are often consulted.[32]

At the lowest end of the protectability continuum are generic terms, which aren't really marks at all. A generic term is the name of a product or product category ("product genus"),[33] and such terms cannot be validly registered at the PTO or validly asserted in the courts,[34] because the public is deemed to have an unfettered right to the use of such generic terms. Consider the following mark:

UNLEADED GASOLINE
for lead-free gasoline

[a generic mark]

The courts have long established that the public should be able to refer to "unleaded gasoline" (for lead-free gasoline) or "whole milk" (for fat-bearing milk) without fear of litigation. The long-established concept here is that a generic term is "the name of the thing". It is a noun such as SHOTGUN or AUTOMOBILE that answers the question "what is it?" for the public. Trademarks are usually adjectives, such as the word LEVI'S in the expression "Levi's bluejeans", that answer the question "who produced this?"[35] Generic terms are NOT valid trademarks.[36] If

---

[30] *See* McGregor-Doniger Inc. v. Drizzle Inc., 599 F.2d 1126, 1131-1132 (2d Cir. 1979) ("Thus, while these categories can be useful for analytical purposes, the strength of a mark depends ultimately on its distinctiveness, or its 'origin-indicating' quality, in the eyes of the purchasing public. Two familiar examples suffice to illustrate this principle. A coined term, initially suggestive or even fanciful, can lose its full trademark status if it comes to signify to the public the generic name of an article rather than the source of a particular brand of that article. In contrast, a descriptive mark that is not distinctive on its face may acquire secondary meaning so as to identify the source of the goods and thus claim status as a valid mark deserving of registration and protection against infringement. In Judge Lasker's words, 'strength may derive from the intrinsic quality of a mark or from its public history.'").

[31] Abercrombie, *supra* note 27, at 9 n.6 (providing an example of this: "To take a familiar example, IVORY would be *generic* when used to describe a product made from the tusks of elephants but *arbitrary* as applied to soap.") (emphasis added); *and cf.* In re Abcor Development, 588 F.2d 811, 814 (C.C.P.A. 1978) ("Appellant's proposed abstract test is deficient not only in denying consideration of evidence of the advertising materials directed to its goods, but in failing to require consideration of its mark 'when applied to the goods' as required by the statute.").

[32] *See, e.g.,* Vision Center v. Opticks, Inc., 596 F.2d 111, 116 (5th Cir. 1979) ("Webster's … Dictionary defines the word 'vision' as the act or power of seeing; visual sensation or the capacity for it. The word 'center' means a concentration of requisite facilities for an activity, pursuit, or interest along with various adjunct conveniences (e.g., shopping center, medical center, amusement center). Used in combination, the words [VISION CENTER] imply a place where there is a concentration of requisite facilities relating to the power of seeing or the capacity for it.")

[33] Abercrombie, *supra* note 27, at 9.

[34] *Id*.

[35] *See, e.g.*, Elliott v. Google, Inc., 860 F.3d 1151, 1155-56 (9th Cir. 2017) ("We have often described this as a 'who-are-you / what-are-you test. If the relevant public primarily understands a mark as describing 'who' a particular good or service is, or where it comes from, then the mark is still valid. But if the relevant public primarily understands a mark as describing 'what' the particular good or service is, then the mark has become generic.").

[36] *See, e.g.*, Creative Gifts v. UFO, 235 F.3d 540, 544 (10th Cir. 2000) ("When the relevant public ceases to identify a trademark with a particular source of a product or service but instead identifies the mark with a class of products or services regardless of source, that mark has become generic and is lost as an enforceable trademark.").

they are somehow registered, they are subject to a later cancelation at the PTO for genericness.[37] Similarly, if they are asserted in a trademark infringement lawsuit, the defendant may defend by invalidating the plaintiff's trademark rights on the basis of genericness.[38]

At the opposite (highest) end of the protectability spectrum are fanciful marks, which are viewed as the most powerful, most readily registrable, and most amply protected marks of all.[39] Consider the following example:

EXXON
for petroleum products

[a fanciful mark]

The word "Exxon" simply didn't exist in ordinary English usage until its owner invented the word to serve as its trademark. Because the mark is as unique as a fingerprint, it is registered easily (as the PTO Examiner will conclude that it is not confusingly similar to any prior marks of record). It is also protected amply in the courts as what effect could the adoption of such a unique mark (or one highly similar to it) by a second-comer have other than to cause confusion amongst customers?[40] These marks are so unique and so powerful that they are viewed as "inherently distinctive".[41]

Standing instantly beside fanciful marks, at only a slightly junior location on the generic-descriptive-suggestive-arbitrary-fanciful continuum, are arbitrary marks. In a very real sense, arbitrary marks are "fanciful" too. Consider:

APPLE
for personal computers

[an arbitrary mark]

That is, while fanciful marks feature an arbitrary collection of *letters*, arbitrary marks feature an arbitrary use of *words* as trademarks. That is, the words have no logical relationship to

---

[37] 15 U.S.C. § 1064 ("A petition to cancel a registration of a mark, stating the grounds relied upon, may, upon payment of the prescribed fee, be filed… (3) At any time if the registered mark becomes the generic name for the goods or services, or a portion thereof, for which it is registered…").

[38] *See, e.g.*, Papercutter v. Fay's Drug, 900 F.2d 558, 563 (2d Cir. 1990) ("[D] may petition for cancellation of [P's] registration under [Lanham Act] § 14…, 15. U.S.C. § 1064, 'either in a separate and independent action or as a counterclaim in an infringement suit,' by rebutting the presumption of a plaintiff's right to exclusive use of a registered mark by a preponderance of the evidence.")

[39] *See, e.g.*, Booking.com, *supra* note 26, at 2302-03 (Supreme Court: "Distinctiveness is often expressed on an *increasing* scale: Word marks may be (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful. *The more distinctive the mark, the more readily it qualifies for the principal register*. The most distinctive marks – those that are arbitrary (CAMEL cigarettes), fanciful (KODAK film), or suggestive (TIDE laundry detergent) – may be placed on the principal register because they are *inherently* distinctive.") (emphasis added).

[40] *See, e.g.*, Lambert Pharmacal Co. v. Bolton Chem., 219 F. 325, 330 (S.D.N.Y. 1915 (L. Hand: "In choosing an arbitrary trade-name, there was no reason whatever why they should have selected one which bore so much resemblance to the plaintiff's; and in such cases any possible doubt of the likelihood of damage should be resolved in favor of the plaintiff. … He has the right to insist that others in making up their arbitrary names should so certainly keep away from his customers as to raise no question.").

[41] *See* Booking.com, *supra* note 39.

the goods with which they are used. The marks DOMINO'S for pizza and BEEFEATER for alcohol are good examples. Like fanciful marks, arbitrary marks are so unique and so powerful that they are viewed as inherently distinctive.[42]

As indicated in the discussion of Lanham Act §2e1 above, descriptive marks are those marks which "merely describe" some characteristic of the goods or services with which they are used. The attentive reader will recall that (s)he has already been exposed to a fine example of a descriptive mark: SPEEDY (or SPEEDY CLEANERS) for dry cleaning services. Notice how each term in the mark uses ordinary vernacular to describe the nature of the relevant goods or services.

Given their placement on the lower end of the Friendly generic-descriptive-suggestive-arbitrary-fanciful continuum, it is no surprise that descriptive marks are viewed as being relatively weak. They are but one step removed from generic terms.

There is a critically important foundational reason for the widely-recognized weakness of descriptive marks. Descriptive marks are weak because the words they employ (in the context of the product or service at hand) are undeniably common. That is, descriptive marks use the same words any ordinary consumer might use to refer to the well-known ingredients, features, or characteristics of the goods. And, because these words are so commonly used in conjunction with the goods, marketers frequently employ them as well, and so it is often the case that there is a crowded field of businesses all using the same descriptive terms (or highly similar variations on them) for the same or similar goods. Thus, we see Speedy Cleaners, Speed Cleaning, Speedi Cleaners, Houston Speedy Dry Cleaning, etc.

Thus, one can now apprehend several distinct reasons to proscribe the use or registration of descriptive marks. First, there is a concern over *misappropriation from the public domain*. That is, because the use of descriptive terms is so commonplace, registering a descriptive mark is viewed as a misappropriation of a mark from one or more other prior users or even from the public at large.[43]

Second, from a raw statistical standpoint, if appropriation of descriptive terms continues unchecked, there is a concern about *mark depletion*. The capture of descriptive marks depletes the available pool of ordinary descriptive terms that should be available to the relevant merchant class at large for selling their wares.[44] Thus, the more unique and unusual a mark is, when considered in the context of the goods, the more likely it is to be considered suggestive (or even arbitrary),[45]

[42] *See* Booking.com, *supra* note 39.

[43] *See* Educational Development v. Economy Co., 562 F.2d 26, 28 (10th Cir. 1977) ("Merely descriptive terms may not be registered because they do not advise the buyer that the product comes from a single source and because trademark protection would infringe on common speech.") (citations omitted).

[44] *See* Telechron v. Telicon, 198 F.2d 903, 906 (3d Cir. 1952) ("The basic reason for refusing to allow the exclusive appropriation of descriptive words in trademarks is the danger of depleting the general vocabulary available to all for description and denomination of articles of commerce."); Devcon Corp. v. Woodhill Chem. Sales, 455 F.2d 830, 832 (1st Cir. 1972) ("We are deeply troubled to think that a party can seize upon one of the primary characteristics that make an unpatented commercial product marketable and preempt or limit competitor reference by registering it as a trademark.").

[45] *See, e.g.*, *Id.* at 905-06 (3d Cir. 1952) ("TELECHRON [for synchronous electric clocks] was formed by prefixing the Greek root 'chron' with 'tele'… Thus the etymology of the coined word yielded a connotation of 'time from a distance'. … We are dealing with… a coined word with a penumbra of suggestion. … But this idea was too imprecise for meaningful description of any article or object of commerce. … The devising and registration of 'Telechron' created no … danger of impoverishment of the language. 'Telechron' had no existence as a word before Warren devised it. … Thus analyzed, any suggestiveness in 'Telechron' does not amount to that descriptiveness which invalidates a trademark.").

and the more ordinary and common the mark is, when similarly considered, the more likely it is to be considered descriptive.

Third, descriptive marks make for *blurry intellectual property ("IP") lines* which lead to confusion in the marketplace[46] and harassing lawsuits.[47] In many lawsuits involving descriptive marks, both the plaintiff and defendant come to court with weak proprietary claims, and it is not uncommon for settlements in these cases to essentially involve both companies discovering their mutual weaknesses, and calling a ceasefire, with the main loser being the public which has lost a valuable opportunity to have the invalidity (and public availability) of the descriptive terms at issue acknowledged.

The concern over the evils catalogued above is nothing new. Indeed, the 1905 trademark act held that a finding of descriptiveness meant that the term could not be validly registered or asserted as a mark *at all*.[48] However, under the modernized approach of the Lanham Act of 1946, if an applicant could marshal evidence demonstrating that, over time, the public had come to identify a descriptive mark as referring to a *single* source, then the mark would be viewed as having "become distinctive" (or, as having "acquired distinctiveness") and thus be eligible for registration.[49]

Acquired distinctiveness, more frequently referred to as "secondary meaning,"[50] can theoretically be proven using any relevant evidence. It is typically demonstrated by showing sufficient marketing, sales, and exclusive usage in commerce over a substantial period of time.[51] In fact, the Lanham Act calls out that a prima facie case for acquired distinctiveness may be made

---

[46] *See* Beckwith v. Commissioner, 252 U.S. 538, 543 (U.S. 1920) ("It was settled long prior to the Trade-Mark Registration Act that the law would not secure to any person the exclusive use of a trade-mark consisting merely of words descriptive of the qualities, ingredients, or characteristics of an article of trade; this for the reason that *the function of a trade-mark is to point distinctively*, either by its own meaning or by association, to the origin or ownership of the wares to which it is applied, *and words merely descriptive of qualities, ingredients, or characteristics, when used alone, do not do this*.") (emphasis added).

[47] *See* In re Abcor Development, 588 F.2d 811, 813 (C.C.P.A. 1978) (stating that a major reason for not protecting descriptive marks is "to maintain freedom of the public to use the language involved, thus avoiding the possibility of harassing infringement suits by the registrant against others who use the mark when … describing their own products.") (citations omitted).

[48] 33 Stat. 724, 726 (1905) ("[N]o mark which consists… merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods, … shall be registered…")

[49] 15 U.S.C. § 1052(f) ("Except as expressly excluded…, nothing in this chapter shall prevent the registration of a mark used by the applicant which has *become distinctive* of the applicant's goods in commerce.") (emphasis added).

[50] The idea is that the "primary meaning" of a descriptive mark, such as SPEEDY CLEANERS OF HOUSTON for dry cleaning services, is the meaning one would ascribe to the mark *based solely on its descriptive contents*. The "secondary meaning" of a descriptive mark is the meaning *beyond* or *in addition to* that descriptive content, the meaning that SPEEDY CLEANERS OF HOUSTON has, over time, come to refer in the minds of the public to *one specific* dry cleaning establishment (perhaps located at 1000 Main Street, Houston, TX).

[51] *See, e.g.*, Department of Parks & Rec. v. Bazaar del Mundo Inc., 448 F.3d 1118, 1128 (9th Cir. 2006) ("To determine whether a descriptive mark has acquired secondary meaning, we consider: (1) whether actual purchasers of the product bearing the claimed trademark associate the trademark with the producer; (2) the degree and manner of advertising under the claimed trademark; (3) the length and manner of use of the claimed trademark; and (4) whether use of the claimed trademark has been exclusive."); BigStar Entm't v. Next Big Star, 105 F.Supp.2d 185, 196 (S.D.N.Y. 2000) ("While [Lanham Act] §2f (15 U.S.C. 1052(f)) permits registration of merely descriptive terms, the corresponding protection it accords demands, as a precondition, proof that the mark has acquired secondary meaning in its market. This test refers to demonstrable evidence that the mark, by means of sufficient marketing, sales, usage, and passage of time, has established distinctiveness in commerce, measured by the extent to which it has become identified in the public mind with the particular source of the goods.").

in the registration process by proof of substantially exclusive and continuous use for five years.[52] Thus, in brief, today, registration of a descriptive mark is indeed possible (and many such marks are registered each year), but this occurs *only after* the substantial showing of acquired distinctiveness / secondary meaning is made.

The final category of marks, **suggestive marks**, feature a designation deriving from the notion that these marks *merely suggest, rather than directly describe*, the goods or services to which they are applied. The idea here is that suggestive marks require a degree of imagination and / or creativity in order to appreciate the relationship that exists between the mark and the relevant good or services. Consider the following mark:

CHICKEN O' THE SEA
for tuna fish

[a suggestive mark]

Another example might be ROACH MOTEL for insect traps. These marks, like fanciful / arbitrary marks on the generic-descriptive-suggestive-arbitrary-fanciful continuum, are so unique that they are viewed as inherently distinctive. But notice that they are not devoid of meaning. Rather, these marks (which are often puns, word twists, or double entendres) are unique *precisely because* the means by which meaning is communicated is so unusual.

Suggestive marks are often popular with *both* marketers and lawyers (and the courts!),[53] and it's easy to see why. Fanciful EXXONs and arbitrary APPLEs are almost always extremely hard to remember after first contact unless they are backed up by multi-million-dollar advertising campaigns that repeat them to us so frequently that they become a part of our regular vocabulary. Ordinary entrepreneurs have far smaller budgets, and they'll never adopt BLUE TURTLE for dry cleaning no matter how legally strong their attorney says it is. But show them a mark like CHICKEN O' THE SEA for tuna fish, and their eyes light up. It's the kind of mark you can't get out of your head. Exactly what the marketers want.

E. The Practical Importance of Distinguishing Between "Descriptive" Marks and "Suggestive" Marks.

"Suggestive" marks are exactly what the lawyers want too. That is, recall that suggestive marks are viewed as *inherently* distinctive, and they are accorded *instant protectability* and usually a fairly *broad* ambit of protection.[54] Descriptive marks, by contrast, are viewed as unregistrable /

---

[52] 15 U.S.C. § 1052(f) ("The Director may accept as prima facie evidence that the mark has become distinctive, …, proof of substantially exclusive and continuous use thereof as a mark by the applicant in commerce for the five years before the date on which the claim of distinctiveness is made.").

[53] *See, e.g.*, Van Camp Sea Food v. Alexander B. Stewart Orgs., 50 F.2d 976, 979 (C.C.P.A. 1931) (stating, while holding that CHICKEN O' THE SEA for tuna fish is not descriptive, but, rather, is suggestive or greater: "It is well-settled in adjudicated cases that a valid trade-mark may be highly suggestive (in our opinion oftimes the best ones are), without being offensively descriptive.").

[54] *See, e.g.*, American Home Products v. Johnson Chemical, 589 F.2d 103, 106 (2d Cir. 1978) ("It appears to us most likely that an ordinary consumer having read or heard on television the words "ROACH MOTEL" would *remember the conception rather than the precise word*. He would be unlikely to differentiate between "Roach Motel" and "Roach Inn" in his recollection. We think it more likely that he would recall simply a fanciful abode for roaches in an establishment normally frequented by human travelers. Even the use of *different* words *with similar meaning* may

unprotectable unless and until they have acquired secondary meaning. And, even then, they are usually viewed as being weak, because, although they are valid, they still reside within a crowded field of similar marks which limits the scope of their enforcement.

Furthermore, due to their unusual nature, suggestive marks are frequently registered fairly quickly by the PTO, and their validity and presumed strength are also acknowledged quite readily by the courts. Descriptive marks, by contrast, are viewed with suspicion *ab initio*. PTO Examiners routinely initially reject trademark applications bearing descriptive marks, and the courts are careful to hold the trademark owners to proving up secondary meaning as a part of their prima facie case in litigation. In a nutshell, marks found to be descriptive are harder (and more expensive) to register and harder (and more expensive) to enforce than marks found to be suggestive.

With a distinction so consequential, the trademark bar and the courts have developed various heuristics for distinguishing suggestive trademarks from descriptive trademarks. Some are tried and true. Others have been proposed and discarded. Still others have been adopted but, despite numerous court decisions implicitly recognizing their inadequacy, still continue to be cited and asserted, resulting in an extraordinary amount of economic waste. (Entrepreneurs in particular suffer here, as they pay their legal bills from their scarcity and not their plenty.) It is to one of these failed rules – currently still actively promoted by the US PTO – that this paper is principally devoted.

II. THE PTO'S TRADITIONAL "RESULTS OR EFFECTS OF THE GOODS" TEST (THE "REF" TEST) FOR RECOGNIZING SUGGESTIVE TRADEMARKS

A. The Important Role of the TMEP

Although it is unknown to most members of the lay public, the U.S. Patent and Trademark Office's ("PTO's") own Trademark Manual of Examining Procedure ("TMEP") is one of the first, top-of-desk sources of guidance to which trademark practitioners[55] (and even, it seems, the courts[56]) will refer. Much of the TMEP is devoted to the procedures used by the PTO in examining trademark applications, of course, but it also documents the substantive standards (including the case law) to be applied by the Office's Examiners in evaluating whether a mark is suitable for registration.

The guidance and recommendations provided in the TMEP are important, as they provide touchstones to thousands of trademark practitioners all over the globe about the nature of, and the differences between, descriptive and suggestive marks (as those designations of origin are defined in the US courts and US PTO).

---

tend to confuse. One who adopts the mark of another for similar goods acts at his own peril and any doubt concerning the similarity of the marks must be resolved against him.") (emphasis added; citations omitted).

[55] *See* TMEP Forward (Jul. 2021) ("The Manual is published to provide trademark examining attorneys in the USPTO, trademark applicants, and attorneys and representatives for trademark applicants with a reference work on the practices and procedures relative to prosecution of applications to register marks in the USPTO. The Manual contains guidelines for Examining Attorneys…").

[56] A 06/20/2022 Westlaw search for references to the "Trademark Manual of Examining Procedure" or "TMEP" in the federal courts produced evidence that it had been cited 7 times by the U.S. Supreme Court, 121 times by the U.S. Courts of Appeal, and 327 times by the U.S. District Courts.

B. The TMEP's Plentiful Guidance regarding Descriptiveness.

The TMEP's guidance regarding descriptive marks is plentiful. As stated,[57] objections to the use and / or registration of descriptive marks have been around for a long time. Although there is no need to exhaustively catalog the nature and types of these disapprobations, it is still worthwhile to briefly canvas them, as the best way to appreciate the unique nature of suggestive marks is to consider them in context adjacent their descriptive brethren. The court decisions characterizing the various species of descriptiveness are legion. Were one to endeavor to list them all here, the margins would consume the paper.

However, the TMEP provides a helpful tour. It opens its discussion of refusals based on descriptiveness by stating: "A mark is considered merely descriptive if it describes an ingredient, quality, characteristic, function, feature, purpose, or use of the specified goods or services. Similarly, a mark is considered merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of an applicant's goods or services."[58]

The factors listed above account for a large portion of the descriptiveness rejections emanating from the PTO. However, as if those factors weren't enough, the TMEP then catalogs for its Examiners and the public a lengthy non-exhaustive example listing[59] of *additional* ways in which a mark may be found to be descriptive. For example, any of the following terms in a mark may be found to be merely descriptive: (a) terms which constitute a phonetic equivalent (for example, a slight misspelling) of a descriptive term;[60] (b) terms which identify the function or purpose of a product or service;[61] (c) terms which identify the source or provider of a product or service;[62] (d) terms which identify a target group to whom the applicant directs its goods or services;[63] (e) terms which identify the name of an historic figure or fictional character when the figure or character is in the public domain;[64] (f) terms like NATIONAL and INTERNATIONAL which merely indicate whether a service provided is national or international in scope;[65] (g) terms which are merely laudatory / merely attributing quality or excellence to goods or services;[66] and

---

[57] See the text accompanying note 23 *supra*.

[58] TMEP § 1209.01(b) (entitled "Merely Descriptive Marks") (citations omitted) (emphasis added).

[59] *Id.* ("The great variation in facts from case to case prevents the formulation of specific rules for specific fact situations. Each case must be decided on its own merits. See TMEP §§ 1209.03-1209.03(v) regarding factors that often arise in determining whether a mark is merely descriptive or generic.") (citations omitted).

[60] *Id.* at § 1209.03(p) (listing cases including, e.g., In re Calphalon Corp., 122 U.S.P.Q.2d 1153, 1164 (T.T.A.B. 2017) (finding SHARPIN, the phonetic equivalent of "sharpen", to be merely descriptive of knife blocks with built-in sharpeners)).

[61] *Id.* at § 1209.03(p) (listing cases including, e.g., In re Orleans Wines, Ltd., 196 U.S.P.Q. 516, 517, 1977 WL 22593, *2 (T.T.A.B. 1977) (finding BREADSPRED merely descriptive of jams and jellies)).

[62] *Id.* at § 1209.03(q) (listing cases including, e.g., In re Major League Umpires, 60 U.S.P.Q.2d 1059, 1061, 2001 WL 777067, *2 (T.T.A.B. 2001) (finding MAJOR LEAGUE UMPIRE to be merely descriptive of clothing, masks, chest protectors, and shin guards provided, designed, and used by major league umpires)).

[63] *Id.* at 1209.03(i) (listing cases including, e.g., In re Camel Mfg., 222 U.S.P.Q. 1031, 1034, 1984 WL 63080, *3 (T.T.A.B. 1984) (finding MOUNTAIN CAMPER to be merely descriptive of retail mail-order services in the field of outdoor equipment and apparel)).

[64] *Id.* at § 1209.03(x).

[65] *Id.* at § 1209.03(o) (listing cases including, e.g., In re Chamber of Commerce of the U.S., 675 F.3d 1297, 1302 (Fed. Cir. 2012) (finding NATIONAL CHAMBER to be merely descriptive of nationwide online directory services featuring information regarding local and state chambers of commerce and business and regulatory data analysis services for nationally promoting the interests of businesspersons or industry)).

[66] *Id.* at § 1209.03(k) (listing cases including, e.g., In re Nett Designs, 236 F.3d 1339, 1342 (Fed. Cir. 2001) (finding THE ULTIMATE BIKE RACK to be merely descriptive)).

(h) terms which are foreign words from common, modern languages (currently in use) which, when translated, produce a term which is merely descriptive of the goods or services.[67]

Relatedly, the TMEP also points out that: (a) the use of a common punctuation mark is not sufficient to negate the mere descriptiveness of a term;[68] (b) the mere repetition of a merely descriptive term generally does not negate the mere descriptiveness of the mark as a whole;[69] and (c) the combination of two or more descriptive terms, when each retains its descriptive significance in relation to the goods or services, is itself descriptive.[70]

C. The TMEP's More Limited Guidance regarding Suggestiveness.

In contrast to the abundant guidance the TMEP offers regarding descriptive marks, its guidance regarding suggestive marks, and the distinctions between descriptive and suggestive marks, is a bit abridged. As a result, practitioners naturally pay close heed to the rather succinct guidance the Office provides in its Manual.

To its credit, the TMEP directs the reader to (and summarizes) the *Abercrombie* continuum,[71] and this alerts the diligent practitioner to the fact that there is *a conceptual space to be comprehended between* descriptive marks on the one hand and arbitrary/fanciful marks on the other. That interstitial conceptual space is the field of suggestive marks. Distinguishing between suggestive marks (which invite creative thought as to the subtle nature of the relationship between the mark and the goods) and arbitrary/fanciful marks (which typically and instantly thwart such efforts) is easy. Not so for distinguishing between descriptive marks and suggestive marks.

The TMEP points the reader to a handful of touchstones for distinguishing between descriptive and suggestive marks.

D. A PTO Touchstone: The "Degree of Imagination" Test for Suggestiveness.

The TMEP initially and briefly distinguishes descriptive marks from suggestive marks using an oft-quoted passage of the courts:

> Suggestive marks are those that, when applied to the goods or services at issue, require imagination, thought, or perception to reach a conclusion as to the nature of those goods or services.

---

[67] *Id.* at § 1209.03(k) (listing cases including, e.g., In re Geo. A. Hormel & Co., 227 U.S.P.Q. 813, 813-14, 1985 WL 71942, *1-*2 (T.T.A.B. 1985) (finding SAPORITO, an Italian word meaning "tasty", to be merely descriptive, because it described a desirable characteristic of applicant's dry sausage)).

[68] *Id.* at § 1209.03(u).

[69] *Id.* at § 1209.03(t) ("The mere repetition of a merely descriptive term does not negate the mere descriptiveness of the mark as a whole, unless the combination is such as to create a new and different commercial impression from that which is engendered by the separate components.").

[70] *Id.* at § 1209.03(d) (listing cases including, e.g., In re Entenmann's Inc., 15 U.S.P.Q.2d 1750, 1752, 1990 WL 354520, *2 (T.T.A.B. 1990) (finding OATNUT to be merely descriptive of a bread containing both oats and hazelnuts)).

[71] *See Id.* at § 1209.01 (entitled "Distinctiveness / Descriptiveness Continuum").

> Thus, a suggestive term differs from a descriptive term, which immediately tells something about the goods or services.[72]

This longstanding test applies to prospective purchasers of the goods, not to the public in general,[73] and the decisions applying it are legion.[74] It's almost impossible to read any modern court decision regarding trademarks and not encounter a reference of some sort to the "degree of imagination" test for distinguishing descriptive from suggestive marks.

E. Another PTO Touchstone: The "Results or Effects" of the Goods Test ("The REF Test") for Suggestiveness.

But the degree-of-imagination test isn't the only heuristic employed by the PTO and the courts for distinguishing descriptiveness from suggestiveness. For example, as will be seen hereinbelow, over the years, a number of courts have asserted that one easy way to distinguish descriptive marks from suggestive marks is the following:

> A descriptive mark uses terms that describe one of the product's characteristics, features, purposes, or functions.
>
> However, if a mark merely connotes **a desired result or effect** of using the product, then the mark is viewed as suggestive.

This particular touchstone of suggestiveness is referred to herein as the traditional "Results or Effects of the Goods" test (or "REF" test or "REF" rule), and, despite its faults, and the many times it has been implicitly repudiated, it has never been expressly overruled. Hopefully, that sad streak ends now.

In *In re Irving Drew Co.*,[75] we have one of the earliest appellate court decisions stating and applying the REF rule that marks which speak to the results or effects that the goods produce are suggestive (and therefore protectable) whereas marks that speak to the ingredients, qualities, or characteristics of the goods are merely descriptive (and therefore unprotectable).

In *Irving Drew*, the applicant's mark ARCH REST for boots, shoes, and slippers was refused registration by the PTO Examiner on the basis of descriptiveness.[76] On appeal, the court

---

[72] *See Id.* at § 1209.01(a) (citations omitted); *see also* Abercrombie & Fitch Co. v. Hunting World, 537 F.2d 4, 11 (2d Cir. 1976) (citing Stix Products, Inc. v. United Merchants & Manufacturers Inc., 295 F.Supp. 479, 488 (S.D.N.Y.1968)).

[73] *See, e.g.*, Educational Development v. Economy Co., 562 F.2d 26, 29 (10th Cir. 1977) (citations omitted); In re Abcor Development, 588 F.2d 811, 814 (C.C.P.A. 1978) ("However, implicit in this test [for descriptiveness] is the requirement that descriptiveness of a mark, when applied to the goods or services involved, is to be determined from the standpoint of the average prospective purchaser.")

[74] *See, e.g.*, DuoProSS Meditech v. Inviro Med. Devices, 695 F.3d 1247, 1251-52 (Fed. Cir. 2012) ("The line between a mark that is merely descriptive and may not be registered absent secondary meaning, and one that is suggestive and may be registered, is that a suggestive mark requires imagination, thought, and perception to reach a conclusion as to the nature of the goods, while a merely descriptive mark forthwith conveys an immediate idea of the ingredients, qualities, or characteristics of the goods.") (citations omitted); Earnhardt v. Kerry Earnhardt, Inc., 864 F.3d 1374, 1378 (Fed. Cir. 2017); Uncommon LLC v. Spigen Inc., 926 F.3d 409, 420-21 (7th Cir. 2019).

[75] In re Irving Drew Co., 297 F. 889 (D.C. Cir. 1924).

[76] *Id.* at 890.

stated that that "'Rest' does mean, among other things, 'a support, … as a rest for a foot, a gun rest,' and when 'rest' is used in that sense, and is the designation or part of the designation by which an article or part of an article is commonly known [such as footrest, headrest], it must be regarded as descriptive. There is, however, no part of boots, shoes, or slippers which is commonly known as the arch rest, and from that it follows that 'arch rest' cannot be considered as descriptive of such articles."[77] The court then referred to cases wherein FLEXIBLE ARCH (referring to a part of a shoe) was found descriptive whereas ARCH BUILDER and HEEL LEVELER were found suggestive. The court summarized the unifying principle in the final line of the opinion: "The *description, the inherent qualities, the characteristics* of boots, shoes, and slippers is one thing, and the *effect* which the use of the articles may produce on the wearer is another."[78]

In *Allied Mills v. Kal Kan Foods*,[79] Kal Kan Foods petitioned the TTAB for cancellation of Allied Mills' mark TAIL WAGGER for dog food on the ground that the mark was merely descriptive of the goods.[80] It argued: "[Allied Mills] obviously chose to use the words TAIL WAGGER in its advertising slogan and eventually on its packaging material to imply and connote to the public the idea that its dog food tastes so good that dogs will be happy when they eat it. Since dogs cannot actually smile, the way in which they would express this happiness is by wagging their tails."[81] The TTAB's response invoked the traditional rule: "We reiterate that neither of [Allied Mills]'s registered marks is merely descriptive of dog food. [Allied Mills]'s marks, at worst, merely suggest one desirable result of feeding the product to a dog, that the dog will be happy and will signify its pleasure by wagging its tail. This is a far cry from mere descriptiveness of dog food."[82] Notice that the court did not find the mark suggestive through employment of the degree-of-imagination test; rather, it directly invoked the traditional REF rule.

The case *In re The Noble Co.*[83] takes us to the PTO's active promotion of the REF rule. In the case, The Noble Company ("Noble"), filed a trademark application for NOBURST for nontoxic liquid antifreeze / rust inhibitor solutions.[84] The application was rejected because the mark was viewed as merely descriptive.[85] The Board, however, studied the mark closely and concluded that it was suggestive: "In our view, the term NOBURST does not perform as a descriptive term would. It is a shorthand way of suggesting that the product [in its end use] reduces the likelihood that pipes of a water system in which it is used will burst *as a result* of adverse conditions. We do not believe this conclusion is readily arrived at by merely observing the mark on the goods but that it requires interpretation by the viewer."[86]

---

[77] *Id*. at 891.
[78] *Id*. at 891-92 (D.C. Cir. 1924) (citations omitted, emphasis added).
[79] Allied Mills v. Kal Kan Foods, 203 U.S.P.Q. 390 (T.T.A.B. 1979).
[80] *Id*. at 390.
[81] *Id*. at 395.
[82] *Id*. at 396.
[83] In re The Noble Co., 1985 WL 72017, 225 U.S.P.Q. 749 (T.T.A.B. 1985).
[84] *Id*. at *1.
[85] *Id*.
[86] *Id*. (emphasis added).

It is critically important to understand how *Noble* has been understood and used by the PTO since the decision was handed down. The TMEP to this day states the degree-of-imagination test and then cites *Noble* in support of the REF rule as follows:

> **Suggestive marks** are those that, when applied to the goods or services at issue, require imagination, thought, or perception to reach a conclusion as to the nature of those goods or services. Thus, a suggestive term differs from a descriptive term, which immediately tells something about the goods or services. … *In re The Noble Co*., 225 USPQ 749 (TTAB 1985) (NOBURST for liquid antifreeze and rust inhibitor for hot-water-heating systems found to suggest a desired result of using the product rather than immediately informing the purchasing public of a characteristic, feature, function, or attribute).[87]

As a result of this characterization of *Noble* in the PTO's own Trademark Manual of Examining Procedure, countless advocates have sought to establish the suggestiveness of their clients' marks through employment of the REF test.

III. THE PROBLEMS WITH THE REF TEST FOR RECOGNIZING SUGGESTIVENESS OF TRADEMARKS.

The problems with the REF test are relatively easy to understand. First, the simple truth is that, as a historic practical matter, many consumers naturally and regularly *describe* products by referring to the "results" or "effects" those goods produce. Second, because trademarking these results / effects labels would implicate the same concerns over public domain misappropriation, term depletion, and IP blurring that are encountered for descriptive marks, the courts should err on the side of protecting the public and characterize these kinds of marks as descriptive (not suggestive). Thus, whether the attributes are described variously as the "results", "effects", "purpose", "function", "end use", "intended use", etc., of the goods, it doesn't matter. In this context, these are all distinctions without a difference.[88] They all describe an important common attribute of the goods from the vantage point of the consumer, and they should all be presumptively viewed (at least upon initial examination) as species of descriptiveness.

Hereinbelow, the author reviews court and agency decisions that expressly recognized the folly of endeavoring to distinguish between "results" or "effects" on the one hand and "functions," "end uses," "purposes," etc. on the other. A close inspection of these decisions reveals that the REF test longs to be put forcefully to rest.

In *Walgreen Co. v. Godefroy Mfg*,[89] appellee Godefroy Mfg. had registered the mark PEAUDOUCE for skin cream, and appellant Walgreen Co. had sought to cancel the registration.[90] The court took great pains to clarify the two main points of disagreement of the parties. First, while

---

[87] *See* TMEP § 1209.01(a) (entitled "Fanciful, Arbitrary, and Suggestive Marks")
[88] *Cf.* Henry Fielding, THE HISTORY OF TOM JONES, A FOUNDLING, Book VI, Ch. 13 (Andrew Millar Publishers, 1749) ("distinction without a difference": one of the earliest uses of this turn of phrase, in one of the earliest English works to be characterized as a novel).
[89] Walgreen Co. v. Godefroy Mfg., 74 F.2d 127 (C.C.P.A. 1934).
[90] *Id*. at 127.

appellee agreed that the French word[91] "peau" means "skin", it disagreed that "douce" means "soft."[92] Rather, it contended that the latter term meant "sweet, pleasant, or agreeable" and possibly even "tranquil, easy, affable, or pliant", terms which would arguably be far less descriptive (and, arguably, far more suggestive).[93] Second, the court carefully noted appellee's central contention: "[T]here is a clear legal distinction between marks which describe the goods themselves and marks which are indicative of results following the use of the goods."[94]

With the stage now set, and the rule of decision clearly front and center, the reviewing court concluded that the mark was descriptive as it spoke to the intended "purpose and function" of the goods.[95] Thus, as referenced hereinabove, the court implicitly did two things. First, it implied that there is often *a factual and legal equivalency* between the "results" of use of the goods on the one hand and the "purpose and function" of the goods on the other. In sum, as a practical matter, to the consumer, these often mean the same thing. Second, because it viewed the "purpose and function" of the goods as being *clearly descriptive* of the qualities or characteristics of the goods, it implicitly overruled the REF rule. In essence, it concluded that the interests of the public come first, overruling a putative rule that elevates form and labels (based on "results" or "effects") over substance. This implicit two-step rejection of the REF rule appears time and again in the later cases closely analyzing the application of the rule.

In *Ex parte The Pennzoil Co.*,[96] the applicant, The Pennzoil Company ("Pennzoil"), applied to register TOUGH-FILM for lubricating oils, and the PTO rejected the application on the basis of descriptiveness.[97] The Examiner quoted technical reference works to the effect that it was known that satisfactory lubricants feature an inherent cohesion, surface tension, and / or viscosity that produces a film that resists a tearing apart or breaking in the context of frictionally moving parts that are slidably positioned in relation to one another.[98]

Pennzoil was not deterred. As noted by the court, it argued forcefully as follows:

> The appellant argues with considerable force that in view of the "Arch Rest" case, *In re The Irving Drew Co*., 54 App. D. C. 310, 297 Fed. 889, that the descriptiveness, if any, does not apply to the goods on which the trademark is used, but rather to an effect, and further urges that the word 'FILM' has a fixed meaning in the arts and that there is nothing in the oil as sold that can be called film. Appellant says that 'an article must be defined by what it is and not by what can be made out of it.' In short, the position of the applicant is that it is apparent that neither the word 'TOUGH' nor 'FILM" are

---

[91] The reader should note that the general rule of the U.S. Patent and Trademark Office (and the courts) in evaluating descriptiveness is that all foreign words and phrases are translated into English and then evaluated. The reason is simple. The people of the United States speak many languages, and many are bilingual. Thus, whether they encounter the mark SPEEDY CLEANERS or its Spanish equivalent LIMPIADORES RAPIDOS, the meaning of the mark and its relationship to the goods is the same. Terms from dead languages (such as Latin) that are not in actual current use in society often avoid this unhappy result.
[92] Walgreen Co., *supra* note 89, at 127.
[93] *Id*. at 128-29.
[94] *Id*. at 128.
[95] *Id*. at 129.
[96] Ex parte The Pennzoil Co., 36 U.S.P.Q. 109, 1937 WL 25849 (Com'r Pat. & Trademarks, 1937).
[97] *Id*. at *1.
[98] *Id*.

> descriptive of oil, but 'at most are merely suggestive of a desirable condition to be produced by use in connection with frictionally moving parts slidable with relation to each other.' Applying the *Irving Drew Co*. case, appellant says that it may be paraphrased to fit the present case as follows: 'The description, the inherent qualities, the characteristics of oil is one thing and the effect which the use of the oil may produce on working parts is another.'"[99]

The court was unimpressed. It stated:

> I cannot agree that this case nor the reasoning of the applicant is sufficient to overcome the impression I have that the words 'TOUGH-FILM' applied to motor oil are clearly descriptive within the meaning of the statute and must be refused registration. *In my opinion, descriptiveness may apply to use or results, as well as to the particular nature of the goods themselves*. … In the present case, the oil sold does form a film when used and *the toughness of this film as understood by the purchaser is a desirable quality* and is a natural and apt term to apply to such a film.[100]

Thus, in *Pennzoil*, one can argue that the court *expressly* adopted the two-step model (described above) for rejection of the REF rule. First, the court expressly called out the factual and legal equivalency (in the mind of the purchaser) between the "use" or "results" of the goods on the one hand and the "particular nature" of the goods on the other. It then noted that, to the purchaser, the resulting "toughness" of the film was indeed a "desirable quality" (a descriptive property) of the goods.

In *In re W.A. Sheaffer Pen Co.*,[101] the applicant, W.A. Sheaffer Pen Co. ("Sheaffer"), applied to register FINELINE for mechanical pencils, and the PTO rejected the application on the basis of descriptiveness.[102] As noted in the following passage, the court observed that Sheaffer's counsel did an admirable job of forcefully arguing for the application of the REF rule and a finding of suggestiveness:

> Appellant argues that its mechanical pencil, or the lead used therein, does not necessarily make a fine line, that FINELINE denotes an attribute which becomes apparent only when the article is used; and that a description of the goods does not by any stretch of the imagination include a line, fine or otherwise.
>
> Appellant argues further in its brief that… Appellant's pencils and leads may or may not make a line that could be described as "fine", depending on the manner in which the pencil is manipulated, the

[99] *Id*. at *1-*2.
[100] *Id*. at *2.
[101] In re W.A. Sheaffer Pen Co., 158 F.2d 390 (C.C.P.A. 1946).
[102] *Id*. at 390-91.

> texture and hardness of the lead employed, and the standards of comparison used.[103]

The court agreed in part: "It is true that appellant's mark *does not describe* a mechanical pencil."[104] However, the court then held:

> The *purpose* for which it is used, however, is to make a written line, and it is clear from the facts presented in the record that appellant's pencil, and the lead therein, *when used for its intended purpose*, does *produce* and include a line which by relative standards of comparison is properly described or characterized as 'fine'. Appellant's mark as correctly held by the Commissioner of Patents conveys the information that its pencil will produce that line.
>
> Words which are merely descriptive of the goods with which they are used, or the character or quality thereof, or the *purpose* for which they are used, shall not be registered…[105]

Thus, on the facts, the court simply rejected the applicant's arguments that its pencils might be used to make lines that are either fine or coarse. Instead, it appeared to assign a purpose to the goods from a capability inherent in the goods as a result of their design.

More fundamentally and importantly, however, as in the case of *Pennzoil*, the *Sheaffer* court implicitly applied the two-step model (described above) for rejection of the REF rule. It equated the "purpose" of the goods with the "result" produced (the line "produced") by the goods, and, because marks relating to the "purpose" of the goods are descriptive, it found FINELINE to be descriptive as well.

In *L'Erin Cosmetics v. Max Factor & Co.*,[106] L'Erin Cosmetics ("L'Erin") used the mark LIP RENEWAL CRÈME for a cream applied to the lips before the application of lipstick, so as to moisturize and condition the lips and to prevent lipstick from running and bleeding.[107] Max Factor & Co. ("Max Factor") later announced that it would be launching an identical product under the mark LIP RENEW.[108] During the litigation, L'Erin argued that LIP RENEWAL CRÈME was suggestive, while Max Factor argued that it was either descriptive or generic.[109] The court found a legal equivalency between the purpose or intended use of the product and the end result obtained: "When 'renew' is understood in this usual and normal sense, the mark Lip Renewal Creme provides an apt description of a product that, among other things, 'repairs lips,' 'reduces tiny wrinkles around the mouth,' 'conditions lips to be softer and smoother,' and 'improves the appearance and texture of the lips.' In short, Lip Renewal Creme conveys to consumers the *use* and qualities of the product. No imagination or thought is needed to understand that Lip Renewal

---

[103] *Id*. at 391.
[104] *Id*. (emphasis added).
[105] *Id*. (emphasis added).
[106] L'Erin Cosmetics v. Max Factor & Co., 1984 WL 63635, 223 U.S.P.Q. 1301 (D. Del. 1984).
[107] *Id*. at *1.
[108] *Id*.
[109] *Id*.

Crème is a product that revitalizes and restores the lips."[110] Thus, as stated, the court found L'Erin's mark to be descriptive.

In *In re Reynolds*,[111] the PTO had rejected applicant Reynolds' trademark application for the mark LOTSA SUDS for liquid dishwashing cleaner.[112] Reynolds pointed out on appeal to the TTAB that its goods were not suds, that suds are not useful in the washing of dishes, and that, as such, its mark is suggestive.[113] The TTAB concluded that, whether suds are actually useful or not in the cleaning of dishes is irrelevant, because Reynolds had represented that they were: "[A]ppellant's claim here… that the suds have no performance function at all in washing dishes appears to be inconsistent with its 'extra sudsing power' claim."[114] Thus, according to the TTAB, Reynolds had represented to its consumers that one function of dishwashing liquid is the production of suds, because that facilitates the cleaning of dishes. And, because the performance of this function is a characteristic – a descriptive characteristic – of the product, the mark is descriptive, not suggestive.[115] Here, the legal equivalency was focused on function (rather than purpose) as contrasted with result, but the ultimate legal conclusion was the same.

IV. CONCLUSION / CALL TO THE COURTS AND THE US PTO.

The conclusion to be drawn from the case law, taken as a whole, could not be more clear. Even if one can fashion an argument that a mark speaks to the "results or effects" produced by the goods or services to which it is applied, it is often also the case that such a mark is primarily descriptive in character. That is, the mark is just as descriptive as those marks (also commonly characterized as descriptive) that speak to the "purpose, function, or intended use" of the goods or services.

The failure of the courts and the U.S. Patent and Trademark Office to forcibly renounce the REF test results in two separate kinds of harm. First, many unwitting applicants and less-experienced trademark practitioners see the guidance provided by the PTO, and they rely upon it, only to encounter a forceful rejection by experienced PTO examiners who aren't fooled by the test (that is, examiners who ignore the guidance provided by the TMEP and issue a forceful descriptiveness rejection). If the guidance provided by the courts and PTO had been clearly, widely, and publicly corrected previously, the applicant would have saved a great deal of time, effort, and money. (This harm works perhaps its greatest injustice against our nation's entrepreneurs who finance their trademark registration activities through the use of scarce funds.) Second, the dockets of PTO examiners are needlessly clogged, and the pace of application examination retarded, by the repeated, regularized flow of applications filed in reliance upon this hopelessly outdated and erroneous test.

The steps to be taken by the courts and the U.S. Patent and Trademark Office are manifest. When courts are confronted with REF test – based arguments for a finding of suggestiveness of a mark at issue, they should: (a) expressly reject the REF test as an improvident / misleading one; and then (b) conduct a tailored analysis of the nature of the mark and its associated goods and services based on the specific circumstances of the case. The U.S. Patent and Trademark Office

---

110 *Id*. at *3.
111 In re Reynolds, 1986 WL 83683, 229 U.S.P.Q. 776 (T.T.A.B. 1986).
112 *Id*. at *1.
113 *Id*. at *2.
114 *Id*.
115 *Id*.

should revise its Trademark Manual of Examining Procedure by removing / deleting the reference to the REF test in §1209.01(a) and anywhere else it appears.

To be clear, this article should NOT be construed as establishing the contrary rule, namely, that marks speaking to results or effects produced should *automatically* be categorized as descriptive. Such a proposal would effect a cure no less pernicious than the disease.

Rather, the best result is to recognize that, in the case of the REF test, the courts experimented with drawing a distinction between “purpose or function” on the one hand and “results or effects” on the other for the purpose of providing another useful guideline for distinguishing between descriptive and suggestive marks. While experimentation is indeed quite often the mother of progress, it is also true that not every experiment is a success. The use of the results or effects of the goods as a consistent touchstone for suggestiveness in trademarks is an experiment that has failed. Today, almost exactly 100 years since *Irving Drew* was first handed down, it is high time that the decisions of the courts and the U.S. Patent and Trademark Office’s official guidance in the TMEP officially and forcefully recognize that.

The author respectfully submits that we have followed our path and beheld a branch impeding our progress. It is now incumbent upon us to clear that obstacle for those that follow.

STUDENTS FOR FAIR ADMISSIONS V. PRESIDENT AND FELLOWS OF HARVARD COLLEGE: A PARADIGM SHIFT IN UNIVERSITY ADMISSIONS POLICIES OR MUCH ADO ABOUT NOTHING?

ROBERT K. ROBINSON*
DAVE L. NICHOLS**
J. RILEY SHAW***

ABSTRACT

It has been 35 years since I began my academic career, the bulk of which was devoted to studying the impact of federal regulation on workplace practices. As my career has come to its inevitable finale, it seemed only fitting that my last manuscript should be dedicated to one of my first interests, affirmative action. As of this writing, affirmative action has been a fixture in America for 58 years. [1] Coincidentally, this summer the Supreme Court will rule on a case that has the potential of radically changing affirmative action in university admissions. [2] It may even alter the nature of affirmative action beyond its academic application.

To enhance the reader's understanding of the issues at hand, my co-authors and I will provide a brief history of the Civil Rights Act of 1964 with particular attention devoted to its Title VI. In this discussion, the two major viewpoints on the meaning of equal opportunity are examined, individual versus collective perspectives. Also, the impact that two Supreme Court decisions *Regents of University of California v. Bakke*[3] and *Grutter v. Bolinger*,[4] have had on affirmative action policies and programs are analyzed. Note that *Grutter* culminated in the proposition that the Equal Protection Clause of the Fourteenth Amendment did not prohibit a university's *narrowly tailored* use of race in admissions decisions. It had further concluded that diversity serves a compelling interest in obtaining educational benefits that flow from a diverse student body. This is the current state of the law as it relates to admissions in higher education, and what is being challenged.

The authors then present the arguments against the status quo as offered in *Students for Fair Admissions v. President and Fellows of Harvard College*,[5] the case which is currently before the Supreme Court. The authors then predict three possible outcomes of *Students for Fair Admissions*, and the impact that each plausible outcome would have on affirmative action policies in admissions, as well as in general.

---

* PhD, Professor Emeritus of Management, The University of Mississippi.
** PhD, CPA, Associate Professor of Accounting, The University of Mississippi.
*** PhD, CPA, Associate Professor of Accounting, The University of Mississippi

[1] Exec. Order No 11246; 30 Fed.Reg. 12319, 12935, (1965).
[2] Students for Fair Admissions v. Harvard College, 980 F.2d 157 (1st Cir. 2020).
[3] 438 U.S. 265 (1978).
[4] 539 U.S. 306 (2003).
[5] *Supra,* note 2.

I. INTRODUCTION

Affirmative action programs as they relate to college admissions is the sole focus of this paper. Special attention is given to the use of student body diversity as a means permitting the preferential admission of students because of their membership in underutilized groups. This has become particularly noteworthy due the emphasis in recent years on university programs focused on diversity, inclusion, and equity.

Note that as of the date of this writing, preferential treatment on the basis of race or ethnicity in employment, even at academic institutions of higher learning, is not an issue in this paper. Hiring is a matter for Title VII of the Civil Rights Act of 1964, nor does it recognize diversity as a justification for preferential treatment.[6]

II. THE HISTORY OF EQUAL OPPORTUNITY

The legislative pinnacle in the struggle for equal treatment is clearly Civil Rights Act of 1964. This federal statute is the most comprehensive ever to regulate employee–employer relations and educational opportunities. This legislation was enacted to ensure that the covered entities did not take any individual's race, color, religion, sex, or national origin into account when making a decision. As previously stated, Title VII is that portion of the Civil Rights Act of 1964 that governs discrimination in employment decisions. Title VI, the focus of this paper, governs unlawful discrimination in education.

It is stated in Title VI that "[n]o person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[7] The operative phrase is "no person" which implies an individual rather than a group right is being conveyed by the statute.

A. Individual Versus Collective Perspectives of Equal Opportunity

Since the beginning of the civil rights movement, the term *equal opportunity* has never meant the same construct to all of its advocates. Even as Congress debated the new civil rights law, three distinct factions formed: those who opposed the legislation, those who wanted it to protect individual rights, and those who desired it to protect group (i.e., collective) rights.[8] To avoid confusion, the authors will refer to group rights perspective as the collective rights perspective, as the latter term is currently in vogue.[9] The first group is of little consequence as those who opposed the Civil Rights Act were defeated and have largely faded to a footnote in

---

[6] Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 354 (D.C. Cir. 1998); Taxman v. Board of Education of Piscataway, 91 F.3d 1547, 1561 (3rd Cir. 1996); Alexander v. Estepp, 95 F.3d 312, 315 (4th Cir. 1996).

[7] 42 USC § 2000(d) (2022).

[8] HERMAN BELZ, EQUALITY TRANSFORMED: A QUARTER-CENTURY OF AFFIRMATIVE ACTION (1992); STEVEN F. LAWSON, CHARLES M. PAYNE, DEBATING THE CIVIL RIGHTS MOVEMENT, 1945-1968 (2006).

[9] Bruno Amable, *Morals and Politics in the Ideology of Neo-Liberalism*. 9 SOCIO-ECONOMIC REVIEW 3-30 (2011); Sabrins E. Vaught, Angelina E. Castagno, *"I Don't Think I'm a Racist": Critical Race Theory, Teacher Attitudes, and Structural Racism*, in CRITICAL RACE THEORY IN EDUCATION 114-136 (Laurence Parker, David Gillborn, eds., 2020); Niki Iman Saleh, *Title VI and Affirmative Action: The Danger of 'Color-Blind' Admissions for Immigrant Students of Color*, 31 AMERICAN UNIVERSITY JOURNAL OF GENDER, SOCIAL POLICY & THE LAW (https://jgspl.org/title-vi-and-affirmative-action-the-danger-of-color-blind-admissions-for-immigrant-students-of-color/).

history. However, the other two factions, which represent two very distinct views of what equal opportunity should be, are still very much with us to this current time. Many of the apparent contradictions which still persist in affirmative action case law and regulations trace their origins to these two polarized views. Since government regulation and judicial interpretation is the result of a political process, understanding these two competing political motivations may explain how and why we have arrived at this juncture.

The perspective that the authors call the *Individual Rights Approach* to equal opportunity, intended the new civil rights statute to safeguard individuals against the deprivation of educational opportunities based on membership in a particular group. The underlying proposition of the individual rights party was that it had been morally wrong to deny an individual the access to educational opportunities merely because he or she was the member of a particular group for which the decision maker harbored a bias. The damage suffered was by the affected individual. For example, an otherwise qualified individual, was denied consideration for admission in a particular university or program. It was this individual who needed protection, not one who was not qualified for admission. Therefore, new law and the protection that it afforded, should be prospective in nature,[10] that is to say, looking toward the future. The premise is basically that the past cannot be undone, however any further discrimination can be circumvented. Title VI purpose is to outlaw discrimination based on race, color, religion, sex, and national origin from a particular point in time forward. It is prospective in nature.[11]

Under this individual rights view of equal opportunity, college administrators would make all admissions decisions in a color-blind manner. The ultimate end was to guarantee that all applicants receive the same treatment.

The opposing view was sometimes referred to as the group rights approach to equal opportunity, in contemporary times this view is increasingly referred to has the *collective rights approach* and was the approach embraced by the collective rights faction in Congress during the debate on the language of the Civil Rights Act of 1964.[12]

Where the individual rights faction was prospective, the collective rights faction was retrospective. The underlying proposition of the collective rights faction was that certain groups had been historically wronged and that it was the government's responsibility to make them whole, to make up for past discrimination. This view was, therefore, remedial in nature. It attempted to compensate groups for past injuries.

Instead of being color-blind, the collective rights faction advocated employment practices that were class conscious, giving protection and a helping hand to historically oppressed classes.[13] Under this collectivist philosophy of EEO, the ultimate end is to create a workplace that guarantees equal results (proportional outcomes) among the different gender and ethnic groups in society.

---

[10] BELZ, *supra* note 8 at 29.

[11] ROBERT K. ROBINSON, GERALYN M. FRANKLIN, EMPLOYMENT REGULATION IN THE WORKPLACE: BASIC COMPLIANCE FOR MANAGERS (2015).

[12] TODD S. PURDUM, AN IDEA WHOSE TIME HAS COME: TWO PRESIDENTS, TWO PARTIES, AND THE BATTLE FOR THE CIVIL RIGHTS ACT OF 1964 117-124 (2014); CHARLES W. WHALEN, BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985); ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION (2010).

[13] BELZ, *supra* note 8 at 29.

Initially, the individual rights faction would prevail in Congress by getting its view enacted in the statute. We know this to be so because the language of Title VII of the Civil Rights Act of 1964 is replete with the phrases "any individual" and "such individuals."[14]

This success of the individual rights faction is also demonstrated by the language of Title VI, which explicitly states that "No *person* in the United States shall, on the grounds of *race, color, or national* origin [emphasis added by the authors], be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Note that the operative word is *person* and not *group*. However, the collective rights faction would advance their vision of equal opportunity in later innovations from the executive and judicial branches, particularly in the form of affirmative action.[15]

The group rights perspective would emerge in later innovations proffered by the executive and judicial branches, in such forms as affirmative action and disparate impact.

III. THE ADVENT OF AFFIRMATIVE ACTION

The term "affirmative action" can be traced to the earlier Executive Order 10925.[16] In this order, President John F. Kennedy urged federal contractors to take "affirmative action" to ensure individuals, during employment, were treated without regard to their race, color, religion, sex, or national origin.[17]

President Kennedy's successor, President Lydon B. Johnson, would later initiate Executive Order 11246, under which each federal contractors, subcontractors, recipients of federal grant and aid money, and depositories of federal funds were required to file an annual compliance report with the contracting federal agency or secretary of labor.[18] This executive order imposed the requirement for affected entities to monitor and report applications and selection outcomes. These compliance reports required covered employers to further provide information on practices, policies, programs, and employment statistics. By focusing attention on numeric outcomes of hiring decisions, this would eventually lead to race-conscious employment practices. Over time, these requirements would evolve into more elaborate reporting formats such as the EEO-1 through EEO-6 reports, and the very sophisticated formalized affirmative action programs delineated in *Revised Order No. 4*.[19] *Revised Order No. 4* contains the Office of Federal Contract Compliance Program's guidance for constructing programs that would meet its standards of review.

A. Wygant and Strict Scrutiny

Beginning in 1971, the Supreme Court embarked on a series of decisions that interpreted the Fourteenth Amendment in a manner that would allow the Equal Protection Clause to permit

---

[14] 42 U.S.C. § 2000e-2(a) (2022).

[15] Robert K. Robinson, Franklin, Geralyn M., & Karen Epermanis, *The Supreme Court rulings in Grutter v. Bollinger and Gratz v. Bollinger: The brave new world of affirmative action in the 21st century*. 36 PUBLIC PERSONNEL MANAGEMENT 33-49 (2007); BARBARA R. BERGMANN, IN DEFENSE OF AFFIRMATIVE ACTION (1996); RICHARD D. KAHLENBERG, THE REMEDY: RACE, CLASS AND AFFIRMATIVE ACTION (1997); SHIRLEY BETTER, INSTITUTIONAL RACISM: A PRIMER ON THEORY AND STRATEGIES FOR SOCIAL CHANGE (2007).

[16] 3 C.F.R. 448 (1959–1963).

[17] *Id.*

[18] *Supra* note 1.

[19] 41 C.F.R. § 60–2 *et seq.* (2022).

limited preferential treatment under specific circumstances—rejecting the notion that Congress must always act in a *color-blind fashion*. [20]

Under the Equal Protection Clause, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[21] From its inception, the Fourteenth Amendment's Equal Protection Clause clearly forbade states and their respective subunits from creating any law, regulation, or policy that treated a citizen differently because of race. The dilemma that this created for preferential treatment under an affirmative action plan is apparent.

First, only state and local governments and their agencies can violate the Equal Protection Clause. Private sector employers are not covered under the Fourteenth Amendment. Because the concept that making distinctions among citizens based on their ancestry is contradictory in a society that claims equality under the laws, the courts have been willing to permit government-initiated affirmative action only under extreme circumstances. In recent years, federal courts have become even stricter in their analysis of those circumstances. This is important to know because public universities are governed by both the Equal Protection Clause and Title VI of the Civil Rights Act of 1964.

Under the principle of strict scrutiny, any preferences pursued by a state or local government must pass a two-part test. The landmark case establishing this two-part test is the 1986 Supreme Court decision, *Wygant v. Jackson Board of Education*.[22] *Wygant* establishes the standard by which affirmative action plans are permissible under the Equal Protection Clause in the same manner that *Steelworkers v. Weber*[23] sets the standard under Title VII.

The first part of the strict scrutiny test is to establish that there exists a compelling government interest to be served by the affirmative action plan's use of preferential treatment.[24] Only when this criterion is satisfied, will the courts then examine the affirmative action plan to ascertain if it is sufficiently narrowly tailored to accomplish that compelling government interest. To meet this standard, the affirmative action plan must be justified. The state or local government must have a strong basis in evidence that its classification of citizens along racial, ethnic, or gender lines is absolutely necessary. For governments and their agencies, this is an even more difficult burden because, as previously presented, the expressed purpose of the Equal Protection Clause of the Fourteenth Amendment is to prohibit government decision making from using such irrelevant factors as a person's race.[25]

---

[20] Swan v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 18–21 (1971); McDaniel v. Barresi, 402 U.S. 39, 41 (1971); Franks v. Bowman Transportation, Co., 424 U.S. 747, 763 (1976); Bakke, 438 U.S. at 378–379.

[21] U.S. Const. amend. XIV, § 1.

[22] 476 U.S. 267 (1986).

[23] 443 U.S. 193 (1979).

[24] Palmore v. Sidoti, 466 U.S. 429, 432 (1984).

[25] City of Richmond v. Croson, 488 U.S. 469, 495 (1989); see also, Loving v. Virginia, 388 U.S. 1, 11 (1967); Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

1. Compelling Government Interest

Until *Grutter v. Bollinger*, the only government interest that is sufficiently compelling to justify preferential treatment of one group of citizens over another is the need to eliminate the present effects of the government entity's past discrimination.[26] In establishing this justification, the state or local government has two issues to prove. First, it must clearly identify present effects that can be traced to some previously discriminatory practices.

Next, it must show that it actually implemented the discriminatory policy or practice. Statistical imbalances (often referred to as underutilization) in given programs or categories are used as evidence of the present effects.[27] However, imbalances, in and of themselves, are not sufficient to justify the preferential treatment. There must be a direct link between the previous discriminatory practices and the current imbalance.

It should be noted that initially, until *Grutter,* diversity was not accepted as sufficient to establish a *compelling government interest*. Federal circuit courts explicitly declared that diversity did not establish a compelling interest that would justify preferences.[28] In one case, a circuit court indirectly overturned diversity justifications by holding that decisions based on retaining minorities strictly because of underrepresentation would not withstand a constitutional challenge.[29] The most interesting case of the time, *Taxman v. Board of Education of Piscataway*,[30] not only held that a goal of maintaining racial diversity could violate the Equal Protection Clause, but it could also violate Title VII. In this decision, the Court of Appeals for the Third Circuit was emphatic that it could not accept the premise that a "nonremedial diversity goal is a permissible basis for affirmative action under Title VII."[31] The goal of maintaining a racially diverse workforce, in the absence of any remedial justification, would unnecessarily trammel the interests of employees who were members of nonpreferred racial groups, and it would equally fail to be a temporary measure by maintaining a racial balance.[32]

2. Narrowly Tailored Programs

Once the government agency or department has justified its use of affirmative action through the demonstration that the program serves a compelling government interest, the program must then clear the second hurdle: show that it is narrowly tailored to achieve its ends. In other words, is the preferential treatment designed in such a way as to minimize the harm to innocent third parties? There appears to be an emerging consensus that in determining whether a plan is sufficiently narrowly tailored, the courts should consider five key factors:[33]

- The efficacy of alternative race-neutral practices
- The planned duration of the policy
- The relationship between the numerical goal and the percentage of preferred group members in the relevant population or relevant workforce
- The flexibility of the policy, including waivers if the goal cannot be met
- The burden that the program places on innocent third parties

[26] Bakke, 438 U.S. at 307; Wygant, 476 U.S. at 274; Croson, 488 U.S. at 486.
[27] 41 C.F.R. § 60–2.23 (2022).

B. Affirmative Action and Higher Education

In *Regents of the University of California v. Bakke*, the Supreme Court held that, "In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment."[34]

This was a very real obstacle to overcome as rights created by the first section of the "Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."[35] The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.[36] At the initial stage of the debate, an equally qualified, in some instances a better qualified Black applicant was denied equal education opportunity. By the time of *Bakke* in 1978, it was a white applicant with equal or better qualifications who claimed educational opportunities were being denied him because of his race.[37] When Bakke was denied admission to the medical school, it was noted that Black applicants with lower MCT scores were admitted. The Medical School of the University of California at Davis claimed this occurred to enhance the diversity of their professional program, though it was "only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body."[38]

In the end, the *Bakke* Court ordered that Bakke be admitted into the medical school, the universities and that the special admissions program be terminated because it was not the least intrusive means of integrating the medical profession and increasing minority doctors.[39] It did not bar the university from taking race into account as a factor in its future admissions decisions.[40] Race may be a contributing factor, but not the determining factor in such decision making, a so-called, a factor within a factor.[41]

C. Diversity and Grutter

In a 5-to-1 decision, *Grutter v. Bolinger*,[42] the Supreme Court made an exception to *Wygant's* strict scrutiny test by declaring that a diverse student body could serve as a compelling government interest.[43] However, this precedent is restricted only to university admissions. In doing

---

[28] Hunter v. The Regents of the University of California, 190 F.3d 1061, 1074 (9th Cir. 1999); Wessmann v. Gittens, 160 F.3d 790, 800 (1st Cir. 1998) (the concept of "diversity" implemented by BLS does not justify a race-based classification); Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 354 (D.C. Cir. 1998); Hopwood v. State of Texas, 78 F.3d 932, 944–945 (5th Cir. 1996).
[29] Cunico v. Pueblo School Dist. No. 60, 917 F.2d 431, 439 (10th Cir. 1990).
[30] 91 F.3d 1547.
[31] *Id.* at 1561.
[32] *Id.*
[33] U.S. v. Paradise, 480 U.S. 149, 171 (1987) (plurality opinion).
[34] *Supra* note 3 at 287.
[35]Shelley v. Kraemer, 334 U. S. 1, 22 (1948). *Accord,* Missouri ex rel. Gaines v. Canada, 305 U. S. 337, 351 (1938); McCabe v. Atchison, T. & S.F. R. Co., 235 U. S. 151, 235 U. S. 161-162 (1914).
[36] 438 U. S. at 290.
[37] *Id.* at 277.
[38] *Id*. at 314.
[39] *Id.* at 266.
[40] *Id.* at 267.
[41] Fisher v. University of Texas at Austin, 136 S.Ct. 2198, 2207 (2016).
[42] 539 U.S. 306 (2003).
[43] *Id.* at 328–329.

so, *Grutter* appears to have abandoned both the Equal Protection Clause and Title VI's prohibition on race-conscious admissions. Not surprisingly, university administrations have taken advantage of the latitude afforded them by *Grutter* to engage in the very activity which Title VI appeared to forbid. Again, it is important to note that diversity currently does not justify preferential treatment for employment and contract awards.

It is further worth noting that the acceptance of such race conscious justifications, potentially appear to undermine *Brown v. Topeka Board of Education's*[44] rejection of the use of race. The *Brown* court held that the Fourteenth Amendment prevents states from according different treatment to American children on the basis of their color or race.[45] A point further reiterated in *Parents Involved in Community Schools v. Seattle School District No. 1*.[46]

In *Grutter*, the University of Michigan's law school sought to enroll a "'critical mass' of minority students" through its holistic admissions process.[47] The Supreme Court held that an interest in "critical mass" was "not simply 'to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin'; such a specific number 'would amount to outright racial balancing which is patently unconstitutional.'"[48] Rather, the concept [critical mass]"is defined by reference to the educational benefits that diversity is designed to produce."[49] Enumerated among those benefits purported in *Grutter* were cross-racial understanding, breaking down stereotypes, improved classroom discussions, the promotion of learning outcomes, student preparation for postgraduate life, and the cultivation of strong leaders.[50]

IV. Students for Fair Admissions v. Harvard College

The principal issue in *SFFA v. Harvard* is that Harvard college is unlawfully penalizing Asian American students by engaging in race balancing admissions policies (attempting proportional representation) which emphasize race over workable race neutral alternatives.[51] In essence, the plaintiffs are asking the Supreme Court to overturn the 2003 decision, *Grutter v. Bollinger*,[52] by eliminating race as a factor in college admissions.[53]

Using a multiple regression, statistical evidence provided by SFFA indicates that Harvard's admissions process discriminates against Asian-American applicants in at least three criteria: First, Asian-American applicants score significantly stronger in academic performance than any other racial group. Second, Asian-Americans also perform very well in non-academic categories and have higher extracurricular scores than all other racial groups. Third, Asian-American applicants also receive higher overall scores from alumni interviewers than the other racial groups.[54]

Asian-American applicants also receive strong scores from teachers and guidance counselors. Though these were insignificantly lower than those of white applicants, they were

---

[44] 347 U.S. 483 (1954).
[45] 347 U.S. 483, 495 (1954).
[46] 551 U.S. 701, 747 (2007).
[47] 539 U.S. at 329.
[48] Grutter at 329–30 (quoting Regents of Univ. of Cal. v. Bakke , 438 U.S. 265, 307 (1978) (opinion of Powell, J.)).
[49] *Id.* at 330
[50] *Id.*
[51] Students for Fair Admissions v. President and Fellows of Harvard College, Oyez, https://www.oyez.org/cases/2022/20-1199 (last visited Feb 2, 2023).
[52] 539 U.S. 306 (2003).
[53] 397 F.Supp. 3d 126 (D. Mass. 2019) *affirmed,* 980 F.3d 157 (1st Cir. 2020).
[54] Plaintiff's Motion for Summary Judgement (Cas 1:14-cv-14176-ADB (06/15/2018) at 7.

higher than those of African American and Hispanic applicants in the aggregate. In sum, SFFA found that "Asian-American applicants as a whole are stronger on many objective measures than any other racial/ethnic group including test scores, academic achievement, and extracurricular activities."

A. *Lower Court Rulings in SFFA v. Harvard*

In November 2014 Students for Fair Admissions filed suit against Harvard college alleging that its race-conscious admission policies violated Title VI[55] by excluding qualified Asian American applicants from consideration because of their race.[56] Let it be noted that as a private college, Harvard is not a state actor under that Equal protection Clause of Amendment XIV, however, the University of North Carolina is.

B. *Students for Fair Admissions, Inc. v. University of North Carolina*[57]

Though there was no substantial evidence that the University of North Carolina's (hereafter, UNC) Admissions Office used the phrase "critical mass" regularly, there is significant evidence that it defined, discussed, and measured the concept behind the phrase. This is borne out by UNC's reference to the educational benefits that diversity is designed to produce. The Admissions Office stated that successful admission to UNC was based upon eight criteria : Academic program, academic performance, standardized testing. Extracurricular activity, special talent, essay background, and personal criteria. Each of the criterion are described below:[58]

- Academic program criteria : rigor, breadth, and pattern of courses taken, all viewed within the context of the entire applicant pool, and the student's high school and any previously attended post-secondary institutions.
- Academic performance criteria : grade point average, rank in class, individual grades, trends in grades, and patterns in grades, all viewed within the contexts of the entire applicant pool and the student's high school and any previously attended post-secondary institutions.
- Standardized testing criteria : results from the SAT or ACT, and available SAT Subject, Advanced Placement, and International Baccalaureate exams, as well as occasional results from state-mandated end-of-course exams, all viewed in light of the documented strengths and limitations of these tests, for all first year and sophomore transfer candidates.
- Extracurricular activity criteria : engagement outside the classroom; persistence of commitment; demonstrated capacity for leadership; contributions to family, school, and community; work history; unique or unusual interests.
- Special talent criteria : in music, drama, athletics, and in writing.
- Essay criteria : idea, organization, voice, vocabulary, sentence structure and

[55] 42 U.S.C. § 2000d *et seq.*
[56] 397 F.Supp. 3d 126 (D. Mass. 2019)
[57] 567 F.Supp. 3d 580, (M.D.N.C. 2021).
[58] Trial Findings of Fact and Conclusions of Law (Cas 1:14-cv-00954-LCB-JLW (10/18/2021) at 28-29.

grammar; evidence of self-knowledge and reflection; insightfulness; unique or unusual perspectives.
• Background criteria : relative advantage or disadvantage, as indicated by family income level, education history of family members, impact of parents/guardians in the home, or formal education environment; experience of growing up in rural or center-city locations; status as child or stepchild of Carolina alumni.
• Personal criteria : curiosity; kindness; creativity; honesty and integrity; motivation; character; impact on community; exceptional achievement in-or-out of the classroom; history of overcoming obstacles or setbacks; openness to new cultures and new or opposing ideas; talent for building bridges across divisions in school or community or among individuals from different backgrounds.

Statistical analysis again demonstrated that Asian-American students were at a disadvantage in the selection process.

The University of North Carolina contended that this policy was consistent with Supreme Court's decision in *Grutter v. Bollinger*, in that the "race or ethnicity of any student may—or may not —receive a 'plus' in the evaluation process depending on the individual circumstances revealed in the student's application." Additionally, while a hypothetical race-based "plus" may be significant in a particular individual's case, resulting in the admission of that student, it is not automatically awarded. Also, the "plus" is considered in terms of numeric points or as the defining feature of an application. Even in instances when a "plus" is awarded, it does not automatically result in an offer of admission, as the admissions process is not based on formulas or preset scoring requirements.[59]

That is to say the final admission decision appears, at least to the authors, to be subjective. In fact, Judge Loretta Biggs would hold that "non-statistical evidence does not demonstrate discrimination."[60]

C. Supreme Court Grants Certiorari

On February 25, 2021, The Supreme Court agreed to hear arguments in its 2022-2023 term.[61] *SFFA v. Harvard* was consolidated with *SFFA v. University of North Carolina and* would hear oral arguments on October 31, 2022.[62]

On July 22, 2022*, SFFA v. University of North Carolina* was no longer consolidated with *SFFA. v. Harvard*, as the Supreme Court chose to separate the two cases. This was likely due to the University of North Carolina being an entity under the Equal Protection Clause of the Fourteenth Amendment and Title VI, and Harvard being under Title VI only. A decision is expected in June 2023.[63]

---

[59] 567 F.Supp. 3d at 600.
[60] *Id.* at 659-660.
[61] SFFA v. Harvard *cert. granted*, 142 S. Ct. 895 (2022).
[62] *Id.*
[63] College Board, *U.S. Supreme Court Ruling on Race in Admissions: Prepare Now for the 2023 Ruling,* COLLEGE BOARD (https://professionals.collegeboard.org/2023-scotus-race-admissions)(last visited Feb 2, 2023).

V. Possible Outcomes and Consequences

The outcome of *SFFA v. Harvard* will not just affect university admissions but is likely to impact all race conscious decisions in such areas as employment, contract awards, and grant awards.

A. Status Quo

The Supreme Court affirms the decisions of the lower courts. *Grutter* remains intact. Nothing changes as far as the federal judiciary is concerned. One possible consequence which may result from the publicity that the decision may garner, state legislatures may initiate action on their own to limit racial/ethnic preferences within their jurisdictions. Currently, there are eight states that have already banned affirmative action in employment, contract awards, and university admissions.[64] Interestingly, the State of Michigan passed an amendment to their constitution, Proposition 2,[65] in response to the *Grutter v. Bollinger* decision. Though immediately challenged by pro-affirmative action activists, the constitutional amendment was upheld by the Supreme Court of the United States.[66] It should be noted that though states may enact statutes or pass [state] constitutional amendments prohibiting racial preferences, these measures have no effect on federally mandated affirmative action programs.[67]

B. Grutter is Overturned

In the event that *Grutter* was overturned, this would not be as draconian as the media is likely to make it seem. It merely changes university affirmative action programs back to their pre-*Grutter* days. That is to say, that preferential admissions programs will return to the strict scrutiny under *Bakke*. For admissions officers, this means more effort must be devoted to establishing a *compelling government interest*. This may not be an insurmountable task as many academic studies and journal articles support the contention that diversity produces great educational benefits and outcomes.[68] Though many such studies are from academic disciplines that may benefit from such findings.[69]

---

[64] Arizona, Florida, Idaho, Michigan, Nebraska, New Hampshire, Oklahoma, and Washington.

[65] Mich. Const. Art. I, §26.

[66] Schuette v. Coalition to Defend Affirmative Action, 572. U.S. 291 (2014).

[67] Robert Robinson, Dave Nichols, John Goodman, *The 2007 Revisions to the Employer Information Report and Their Potential Impact on Equal Employment Opportunity and Affirmative Action Compliance.* HR ADVISOR: LEGAL & PRACTICAL GUIDANCE, 24-29. (2008).

[68] Siddhartha P. Tiwarim, *Knowledge and Understanding of Diversity*, 30 TECHIUM SOCIAL SCIENCE JOURNAL 159-163 (2022); Channing J. Mathews, Myles Durkee, Elan C. Hope, *Critical Action and Ethnic–Racial Identity: Tools of Racial Resistance at the College Transition*, 32 JOURNAL OF RESEARCH ON ADOLESCENCE 1083-1097 (2022); Teniell L. Trolian, Eugene T. Parker, *Shaping Students' Attitudes Toward Diversity: Do Faculty Practices and Interactions with Students Matter*? 63 RESEARCH IN HIGHER EDUCATION 849-870 (2022).

[69] K. C. Culver, Rosemary Perez, Josephe A. Kitchen, Darnell G. Cole, *Fostering Equitable Engagement: A Mixed-Methods Exploration of the Engagement of Racially Diverse Students in a Comprehensive College Transition Program*. JOURNAL OF DIVERSITY IN HIGHER EDUCATION Advance online publication (https://doi.org/10.1037/dhe0000408 (2022); Chandra V. Reyna, *Pursuing Racial Justice on Predominantly White Campuses: Divergent Institutional Responses to Racially Palatable and Racially Conscious Students* in SYSTEMIC RACISM IN AMERICA: SOCIOLOGICAL THEORY, EDUCATION INEQUALITY, AND SOCIAL CHANGE

Grutter allowed admission staffs and officials to focus their energies on establishing that their preferential admissions programs were *narrowly tailored*. They only had to focus on the second part of strict scrutiny because the first part, *compelling government interest*, diversity of the student body, was taken for granted. If *Grutter* is overruled, universities may still have preferential admissions, they will just have to devote more effort and resources to demonstrating their justification for developing them.

C. Affirmative Action is Abolished

If the Court decides that the Constitution clearly forbids the preference of members of one group/class over another on the basis of race or ethnic origin, then such discrimination is clearly unlawful.[70] This would have the effect of eliminating the affirmative action in higher education admissions. It is likely that such a prohibition on affirmative action in higher education would also establish precedent for the abolition of affirmative action in hiring as well as contract and grant awards.

If such becomes the case, it will likely resolve the issue at the very forefront of the equal opportunity debate; is equal opportunity's nature individual or collective? If preferences, by their very nature become unconstitutional, then the individual rights faction clearly prevails as no individual could be denied access to educational opportunities merely because he or she was the member of a particular group.

The impact on higher education is projected to be a decline in black and Hispanic enrollments.[71] Most of this would result by the de facto raising of admissions standards for the underutilized groups through the elimination of preferences.[72]

The question remains, would such a decision mean that the collective vision of equal opportunity is eliminated forever? No, no more than it was the defeat of the collectivist vision when the individual rights faction triumphed in the enactment of the Civil Rights Act of 1964. The collective rights faction may react by yet packing the Supreme Court in order to overturn *SFFA v. Harvard*. The proponents of affirmative action could, conceivably, champion a constitutional amendment, though the court-packing option would be the easier to achieve.

141- 161 (Rashawn Ray, Hoda Mahmoudi, eds., 2022); Samuel D. Museus, Kiana Shiroma, *Understanding the Relationship between Culturally Engaging Campus Environments and College Students' Academic Motivation*, 12 EDUCATION SCIENCES 785 (https://www.mdpi.com/2227-7102/12/11/785) (2022).

[70] Loving, *supra* note 24 at 11-12; McLaughlin v. Florida, 379 U. S. 184, 198 (Stewart concurring) (1964); Brown, *supra* note 43 at 490.

[71] Huacong Liu, *How do Affirmative Action Bans Affect the Racial Composition for Postsecondary Students in Public Institutions?* 36 EDUCATION POLICY 1348-1372 (2020); V. Thandi Sule, Rachelle Winkle-Wagner, Dina Maramba, Abigail Sachs, *When Higher Education is Framed as a Privilege: Anti-Blackness and Affirmative Action during Tumultuous Times*, 45 THE REVIEW OF HIGHER EDUCATION 415-449 (2022); Crusto, Mitchell F., *A Plea for Affirmative Action* (September 12, 2022). Harvard Law Review Forum (Forthcoming 2023), Loyola University New Orleans College of Law Research Paper Forthcoming, (https://ssrn.com/abstract=).

[72] Xiaodan Hu, Kubra Say, Jeanette Baker, Brennan Carr, *The Influence of Affirmative Action Bans on Institutional Retention*, THE JOURNAL OF COLLEGE STUDENT RETENTION: RESEARCH, THEORY & PRACTICE 1-26 (DOI: 10.1177/15210251221108460) (2022); Dan P. Ly, Utibe R. Essien, Andrew R. Olenski, Anupam B. Jena, *Affirmative Action Bans and Enrollment of Students From Underrepresented Racial and Ethnic Groups in U.S. Public Medical Schools,* ANNALS OF INTERNAL MEDICINE (https://www.acpjournals.org/doi/10.7326/M21-4312) (June 2022). Grant Blume, Mark Long, *Changes in Levels of Affirmative Action in College Admissions in Response to Statewide Bans and Judicial Rulings*, 36 EDUCATION AND POLICY ANALYSIS 228-252 (2014).

LIKE, COMMENT, YOU MUST SUBSCRIBE: EVOLVING CONSUMER PROTECTION FOR THE SUBSCRIPTION ECONOMY

NATHAN KENT MILLER*

ABSTRACT

The global economy has transformed over the past two decades with the rise of electronic commerce. One trend that has increased at a rapid pace recently is subscriptions. The COVID-19 pandemic escalated the move to subscriptions even more in consumer products as wide-ranging as streaming television, cars, and video games. While the relationship between consumer protection and a subscription economy has been explored at some level before, the increased dependence on subscriptions apparent over the past four years – as well as new forms of the subscription model - warrants revisiting the topic.

I. INTRODUCTION

Americans are subscribers. The COVID-19 pandemic, with its emphasis on shelter-in-place and social distancing, encouraged American consumers to subscribe unlike ever before. One out of three consumers added some sort of online subscription in the early days of the pandemic for needs and wants alike: while many purchased access to view entertainment like TV shows, others subscribed to food delivery services and exercise programs.[1] This trend has increased over the past decade: the percentage of Americans over the age of 18 with a subscription of a video-on-demand service like Netflix or Hulu grew from 52% in 2015 to 78% in 2021.[2] Brand-specific subscriptions in particular have surged: if a consumer, for example, wants to watch certain TV programming offered by CBS, they will need to purchase a subscription to Paramount+; if someone wants instead to watch a sports program, they may need to buy access to the Disney bundle with Disney+, Hulu, and ESPN+.[3]

One recent controversy has emerged with vehicle manufacturer BMW regarding subscription plans for some features in their cars. BMW is well known as a luxury car brand, and one common feature found in luxury cars is heated seats. In some countries, the company has

---

* Assistant Professor of Business Law, Winthrop University, Rock Hill, SC 29733. J.D., College of William and Mary Law School, M.B.A., University of Florida. Contact via email at millernk@winthrop.edu.

[1] David Dykes, *Americans More Than Tripled Subscription Service Spending Amid Social Distancing*, GREENVILLEBUSINESSMAG.COM (May 14, 2020), https://www.greenvillebusinessmag.com/2020/05/14/308970/americans-more-than-tripled-subscription-service-spending-amid-social-distancing.

[2] Julia Stoll, *SVOD Service User Shares in the U.S. 2015-2021*, STATISTA (Oct. 22, 2021), https://www.statista.com/statistics/318778/subscription-based-video-streaming-services-usage-usa/.

[3] *See, e.g.*, DISNEYPLUS.COM. https://www.disneyplus.com/welcome/disney-hulu-espn-bundle. The animated comedy *South Park* parodied bundle names in its 2021 Post Covid Special: in the fictional future of the early 2060s, most goods and services included the word "Plus" at the end. The Post Covid Special incidentally was released on Paramount+. *See* Ryan Izay, *South Park: Every Easter Egg & Reference in Post Covid*, SCREENRANT.COM (Dec. 5, 2021), https://screenrant.com/south-park-post-covid-easter-eggs-references/.

moved to a subscription model for heated seats, causing complaints about sales similar to micro-transactions commonly used in other industries like video games.[4] Despite the backlash, it appears that subscriptions for features and even upgraded vehicle performance will likely become a permanent part of vehicle sales, raising questions about its suitability in the industry.[5]

Recent data suggests that the average adult American has 2-3 subscriptions, but a segment of consumers dubbed "power subscribers" have over ten, adding up to over $100 a month.[6] Given the general trend of subscriptions becoming increasingly more common even in areas of the economy where they traditionally do not exist in high numbers, it may be time to evaluate how best to both defend and educate consumers about this new economy.

Naturally, there are a few problems, ethical and financial, that are created with such a substantial increase in subscriptions. If subscriptions are unnecessarily bundled with other products at an increased price that a consumer is unlikely to use, that may generate economic waste. Negative option billing (discussed below), for example, requires consumers to actively intervene before a recurring charge is placed on their account. Product and service providers may even rely on consumers forgetting about those charges in order to realize higher profits.

It is important to form a distinction, however, between all forms of subscriptions and those that create legal and ethical questions. Access-based consumption, long a staple of marketing and other business disciplines, describes situations where there is definite and clear value in avoiding a purchase; for example, economic and environmental benefits take place when sharing a rarely used product or service, and consumers derive satisfaction from unique experiences and the variety that results without the disadvantages of ownership.[7] It is the subscription systems that create inefficiencies and consumer harm that need to be confronted.

There is a broader psychological basis for owning goods. Humans demand an "ownership understanding" even when sharing products.[8] This fundamental connection of law and psychology seriously impacts how people feel about subscriptions (particularly subscription fatigue) and lacking physical, exclusive ownership of a product. Microtransactions in particular could also lead to a feeling of missing the "ownership understanding". It may be the case that the initial feeling of ownership from purchasing a product deteriorates once one realizes that additional incremental purchases are needed to gain full access to whatever it is that they bought or to remain competitive.

---

[4] Stefan Nicola and Wilfried Eckl-Dorna, *BMW Bets the Fuss Over Its Heated-Seat Subscriptions Will Pass*, BLOOMBERG.COM (August 4, 2022), https://www.bloomberg.com/news/articles/2022-08-04/bmw-bets-the-fuss-over-its-heated-seat-subscriptions-will-pass.
[5] *Id.*
[6] Heather Long and Andrew Van Dam, *Everything's Becoming a Subscription, and the Pandemic is Partly to Blame*, WASHINGTON POST (June 1, 2021), https://www.washingtonpost.com/business/2021/06/01/subscription-boom-pandemic/.
[7] Stephanie J. Lawson et al., *Freedom From Ownership: An Exploration of Access-Based Consumption*, 69 J. BUS. RSCH. 2615, at 2616 (2016).
[8] *See* Donald J. Kochan, *I Share, Therefore It's Mine*, 51 U. RICH. L. REV. 909 (2016).

II. THE ETHICS OF A SUBSCRIPTION ECONOMY

A. Consumer Education

While American consumers are spending more on subscriptions, they are paying less attention to the fruits of that spending.[9] Many Americans spend a lot of money on negative options, a system of financial transactions where the customer must take some form of action to prevent a charge from happening on their account. One particular concern that causes consumers substantial harm is the conversion of free trials into negative options. This commonly takes place: consumers sign up for a product or service that they believe is free, only to discover charges on their account.[10]

A variety of negative options exist in modern commerce, including a payment that renews automatically, prenotification plans, and free-to-pay conversions.[11] If the customers fail to take an action (such as unsubscribing) or remain silent, the customer will have to pay the amount they agreed to when starting the service.[12] This stands in stark contrast to what laws generally require in terms of ensuring that consumers know what they are purchasing. Previous legal and policy research has provided an overview of the ethical concerns with negative options, but recent developments over the past five years merit an examination of the changes to the economy and potential solutions.[13]

There are also many marketing and design tactics that serve to confuse consumers. Dark patterns, for instance, rely on biases inherent in people to push them to make decisions that they may not otherwise make were it not for those efforts.[14] Some consumers, for example, may not even be actively aware that they have subscribed for a new product or service. In a 2017 survey, 35% of those asked reported that they been enrolled in a recurring payment without realizing it, and nearly half (48%) of those surveyed admitted that they had forgotten to cancel a free trial before its expiration.[15]

The Federal Trade Commission (FTC) plays a critical role in ensuring that Americans are aware of the risks involved with subscription transactions. The FTC provides consumer advice on its website, including suggestions on free trials, auto-renewals, and negative option subscriptions.[16] It has described the nature of consumer protection, and its part to play in it, as a pyramid: education and self-regulation serve as the base, while law enforcement mechanisms are at the top.[17] The enforcement component of consumer protection, the FTC explains, is for situations where the other two parts of the pyramid cannot fix the ethical concern.[18] Following that logic, it makes sense that solutions to problems encountered in subscription ethics should start from education and self-regulation, then move to enforcement when needed.

States additionally play an important part in educating citizens about the risks inherent in subscriptions. The attorney general's offices in various states are charged with providing useful

---

[9] *The State of Subscription Services Spending*, WEST MONROE CONSULTING (August 2021), https://www.westmonroe.com/perspectives/report/the-state-of-subscription-services-spending.

[10] *Safeguarding American Consumers: Fighting Fraud and Scams During the Pandemic: Virtual Hearing Before the Subcomm. on Consumer Prot. and Commerce of the Comm. on Energy and Commerce*, 117 Cong. 1, 34-35 (2021).

[11] FED. TRADE COMM'N., Notices: Enforcement Policy Statement Regarding Negative Option Marketing, 86 Fed. Reg. 60822 (Nov. 4, 2021).

[12] Sophia Wang, Note, *One Size Does Not Fit All: The Shortcomings of Current Negative Option Legislation*, 26 CORNELL J. LAW & PUB. POL. 197 (2016).

[13] *Id.*

[14] Jamie Luguri and Lior Jacob Strahilevitz*, Shining a Light on Dark Patterns,* 13 J. LEGAL ANALYSIS 43 (2021).

information about the ethical concerns present with subscriptions and, if needed, pursuing legal action against companies that are misusing subscriptions to deceive consumers. One such example took place in Washington in October 2022, where a survey of about 1,200 residents provided by the Washington State Office of the Attorney General found that 59% reported being unintentionally enrolled in a subscription plan when they thought it was a one-time purchase.[19] Additionally, 63% reported that they had accidentally enrolled in a subscription plan more than once.[20] In comments related to the results of the survey, the attorney general urged residents to contact his office if they had encountered unclear subscription policies.[21] Similar warnings sent out by the New York and Minnesota attorneys general show that negative options, auto-renewals, and other problematic practices have caught the attention of the states.[22]

The survey above highlights the dual roles at the state level: providing valuable information and enforcement. The Washington attorney general's office requested this survey so that they could collect more information about how serious of a problem auto-renewals and hidden fees are for Washington citizens. The enforcement element takes place when a complaint has been filed with the office so that the attorney general can pursue legal action against companies that repeatedly or severely confuse consumers. Yet given the nature of education in reducing these instances, the attorneys general of several states have wisely chosen to focus on that component by surveying residents and encouraging them to speak up if they have been affected.

B. Corporate Profit and Costs

Many companies offering subscription services have seen profits soar over the past few years. Exercise company Peloton, for example, saw its subscription revenue increase 144% from January to March 2021.[23] Objectively, this is positive from a corporate perspective: better profits encourage other businesses to adapt and change their business model to increase revenue. However, from a philosophical standpoint, the dark side of subscriptions (negative options and

---

[15] Brady Porche, *Poll: Recurring Charges Are Easy to Start, Hard to Get Out Of*, CREDITCARDS.COM (Aug. 22, 2017), https://www.creditcards.com/credit-card-news/autopay-poll/.
[16] *Getting In and Out of Free Trials, Auto-Renewals, and Negative Option Subscriptions*, FED. TRADE COMM'N. (May 2021), https://consumer.ftc.gov/articles/getting-out-free-trials-auto-renewals-negative-option-subscriptions.
[17] *FTC Pyramid*, FED. TRADE COMM'N (2022), https://www.ftc.gov/media/64831. Not to be confused with pyramid schemes, which the FTC is also tasked with preventing through education. *Multi-Level Marketing Businesses and Pyramid Schemes*, FED. TRADE COMM'N (2022), https://consumer.ftc.gov/articles/multi-level-marketing-businesses-pyramid-schemes.
[18] Roscoe B. Starek, *The Consumer Protection Pyramid: Education, Self-Regulation, and Law Enforcement*, FED TRADE COMM'N (Dec. 2, 1997), https://www.ftc.gov/news-events/news/speeches/consumer-protection-pyramid-education-self-regulation-law-enforcement.
[19] Elise Takahama, *Millions in WA May Have Enrolled in a Subscription Service by Accident*, SEATTLE TIMES (Oct. 12, 2022), https://www.seattletimes.com/seattle-news/millions-in-wa-may-have-enrolled-in-a-subscription-service-on-accident/, citing *Consumer Feedback Regarding Recurring Charges and Hidden Fees*, WASH. STATE OFF. OF THE ATT'Y. GEN. (July 30, 2022), https://agportal-s3bucket.s3.amazonaws.com/Hardwick%20Research%20Report%20Hidden%20Fees%207-30-22.pdf.
[20] *Id.*
[21] *Id.*
[22] *See, e.g., Consumer Alert: Attorney General James Issues Warning Against Marketing Schemes Aimed at Trapping Consumers into Recurring Payments*, N.Y. STATE OFF. OF THE ATT'Y GEN. (Nov. 17, 2021), https://ag.ny.gov/press-release/2021/consumer-alert-attorney-general-james-issues-warning-against-marketing-schemes; *Premature Magazine Renewal Notices*, MINN. OFF. OF THE ATT'Y GEN. (2022), https://www.ag.state.mn.us/consumer/Publications/EarlyMagazineRenewalNotices.asp.
[23] Long and Van Dam, *supra* note 6.

auto-renewals) runs counter to the proper role of the corporation in consideration of the larger society. It also allows for circumstances where for-profit corporations can seek out inflated prices without much in the way of constraint. Recent research shows that a lot of the price increases for consumer goods in the post-pandemic economy are because consumers are willing to pay the higher prices.[24] Consumers are becoming less price-sensitive for their favorite brands; one study noted that they are 30% less price-sensitive in 2019 as compared to 2006.[25] Although this research targeted grocery store shoppers, one can translate that concept to subscriptions. As a result, subscription services that are replete with favorite brands can charge higher rates; for example, if someone who grew up in the 1990s wanted to watch their favorite nostalgic shows from that era, they are less likely to be satisfied with something similar and more likely to be inelastic – willing to pay whatever (reasonable) price the streaming service charges.

Increasing prices at will runs against many corporate philosophies that seek to tie businesses to society. Stakeholder theory states that corporations need to be responsive to all of those impacted by its business practices, not just shareholders.[26] Contemporary research has demonstrated that companies often focus too narrowly on defining their customer base, leading to what some call a "new marketing myopia".[27] As conversations about the appropriate role of for-profit businesses and their obligations to society become more widespread, corporations and other forms of businesses that follow a subscription model should consider the effects of auto-renewals, dark patterns, microtransactions, and other methods on society and other stakeholders. Failing to do so could risk alienating customers and other key parties affected by their strategies.

Corporations also have a cost associated with the current landscape of differing laws. In the video game industry, later considered in this article as the home of problematic microtransactions[28], organizations like the Entertainment Software Association – the self-described "voice and advocate of the video game industry"[29] – are concerned about the costs of keeping up with the many distinct state laws and the distribution of its user base.[30] These expenses could lead to a lower-quality product due to the resources needed to comply with the various laws and regulations, or it could also lead to those companies passing along lower profits to consumers in the form of higher prices. An existing complex web of varying laws can also have damaging effects on markets; it largely benefits big companies that can better absorb the costs of compliance, provides yet another hurdle for entrants into markets, generates numerous loopholes, and makes it more challenging for government entities to enforce those regulations.[31]

---

[24] Rachel Layne, *Why Companies Raise Their Prices: Because They Can*, WORKING KNOWLEDGE: HARVARD BUS. SCH. (May 5, 2022), https://hbswk.hbs.edu/item/why-companies-raise-their-prices-because-they-can.
[25] *Id.*
[26] R. Edward Freeman and other scholars have firmly established stakeholder theory as a cornerstone of business ethics. See, *e.g.,* Anja Matwijkiw and Bronik Matwijkiw, *The Stakeholder Approach to Basic Economic and Social Rights: International Law and the Case of Milton Friedman versus R. Edward Freeman*, 14 INT'L STUD. J. 13 (2017).
[27] N. Craig Smith et al., *The New Marketing Myopia*, 29 J. PUB. POL'Y & MKTG. 4 (2010).
[28] Hardy, *infra* note 38.
[29] *About the ESA*. ENTERTAINMENT SOFTWARE ASSOC. (2022), https://www.theesa.com/about-esa/.
[30] Christian Genetski, *Brown v. EMA/ESA: U.S. Supreme Court Stops California from Playing Games with the First Amendment*, 15 SMU SCI. & TECH L. REV. 135 (2012), at 150.
[31] Rohit Chopra (June 17, 2022), *Rethinking the Approach to Regulations*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/about-us/blog/rethinking-the-approach-to-regulations/.

III. POTENTIAL SOLUTIONS TO SUBSCRIPTION CONCERNS

Setting the foundation for the types of ethical issues found in the subscription economy is a good theoretical exercise on its own; however, just talking about these concerns does not accomplish much in addressing them. There are manifold approaches to tackling the ethical problems that arise with subscriptions: federal legislation, state government action, administrative agencies, market-based solutions, and an examination of how other governments are making substantial changes to their subscription laws can all yield valuable information on comprehensive solutions.

A. Legislation

It is the responsibility of the U.S. Federal Trade Commission to protect customers from deceptive practices and from being taken advantage of in commerce.[32] The FTC has some tools at its disposal: Section 5 of the FTC Act, the Restore Online Shoppers' Confidence Act (or ROSCA), and the Telemarketing Sales Rule.[33] The most frequently used of these tools is Section 5 of the FTC Act.[34] This guidance, however, has been described as antiquated and ill-suited to challenge modern negative option tactics.[35] The FTC and individual states also do not have the resources to respond to the many complaints that they receive each year ranging from inadequate disclosure, lack of consent to enroll in payment, and cumbersome unsubscribing policies.[36] To pave over the gaps left by the FTC Act, legislators have made a few unsuccessful attempts thus far to increase consumer protection.

The Unsubscribe Act, first introduced by Rep. Mark Takano of California in 2017, sought to establish more definition respecting negative option agreements than earlier attempts.[37] Some attempt has been made to regulate predatory microtransactions in the United States, specifically those that use pay-to-win and loot box models in video games played frequently by minors, but relevant legislation has stalled for the time being.[38] One law that has been suggested to combat the effects of dark patterns in marketing is the Deceptive Experiences to Online Users Reduction Act, or the DETOUR Act.[39] The bipartisan group of co-sponsors note in their efforts to reach the public that dark patterns are reliant on lowering consumer information and interfering with consumer choice.[40]

However, there is some question as to whether additional legislation is the answer, as opposed to more careful enforcement of the laws that currently exist. Some in the legal community have claimed that the current patchwork of laws discussed above accomplish the goal of preventing

---

[32] For an overview of the FTC's efforts to address negative options and subscriptions, see Wang, *supra* note 12, at 202.
[33] FED. TRADE COMM'N., *supra* note 11, at 60823; 16 C.F.R. 425.1 (1998).
[34] FED. TRADE COMM'N., *supra* note 11, at 60823 (noting that "Section 5…is the core consumer protection statute enforced by the commission and…has served as the primary mechanism for addressing deceptive negative option claims.").
[35] *Id.* at 60825.
[36] FED. TRADE COMM'N., *supra* note 11, at 60823. The FTC notes the "…high volume of complaints demonstrate[s] there is prevalent unabated consumer harm" taking place. Id.
[37] Unsubscribe Act, H.R. 1097, 115th Cong. (2017).
[38] *See* Matt Hardy, *Predatory Microtransaction Regulations: An International Comparison*, 17 S.C. J. INT'L. L. & BUS. 109, 123 (2021).
[39] Deceptive Experiences to Online Users Reduction Act, S. 1084, 116th Cong. (2019).
[40] Scott A. Goodstein, Comment, *When The Cat's Away: Techlash, Loot Boxes, and Regulating "Dark Patterns" in the Video Game Industry's Monetization Strategies*, 92 U. COLO. L. REV. 285, 321 (2021).

customers from being taken advantage of by subscriptions but need to be refined and expanded so that they do so more efficiently. The guidance could be clarified considerably to better help both consumers and businesses, but interrupting that process with more rules and regulations could be counterproductive.[41]

The common trend for this federal legislation, though, is that these proposals are not becoming law. The last action in Congress for the bills and resolutions discussed above is referral to a subcommittee, mainly the Subcommittee on Consumer Protection and Commerce in the House of Representatives and the Committee on Commerce, Science, and Transportation in the Senate.[42] The subsequent inaction is fatal for these proposals, leaving the original sponsors to regroup and try to reintroduce the legislation with some changes, as seen with the trend of the Unsubscribe Act from its original version in 2017 to the updated version in 2021.

If the federal government does not act on the issue, does that leave legislative solutions to the states? Several states have taken the initiative to change their automatic renewal laws (ARLs) given that federal legislation has so far failed. For example, California, Colorado, and Illinois have all updated their ARLs in 2022[43]. Some of these acts result from personal experiences that state legislators have had with automatic renewals that motivated them to write legislation.[44]

There are limits to what individual states can achieve, though. The Washington survey cited above explained that the most frequent offenders were online retailers like Amazon, Hulu, and Netflix.[45] Large online retailers may be difficult for each state to regulate given their more universal presence. It may also generate a scenario where consumer rights are so significantly different from state to state that interstate commerce is seriously impacted, which naturally would lead to a call for uniformity in laws across boundaries.

B. Government Action

One valuable tool that a state government can use is the education of its residents. While the FTC is the main avenue to accomplish this task at the federal level, states are more diverse in their approach. This makes sense given that individual states hold the police power; they are closer in contact to crafting laws that affect the person, their behavior, and their morals. As they play such a substantial role over a person's behavior, they naturally have many options for how they make that happen.[46] Public outreach is an often-used method for ensuring that members of the public understand the risks of economic concerns like auto-renewals; for example, Colorado's

---

[41] *See, e.g.*, Commissioner Christine S. Wilson's dissent in whether the FTC should issue an additional policy statement regarding negative options while another rulemaking effort in the same sphere was already underway. FED. TRADE COMM'N., *supra* note 11, at 60826-27.

[42] See, *e.g.*, the current status of the Unsubscribe Act of 2021 as of September 21, 2022. CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/house-bill/6083?s=1&r=29.

[43] Cal. Bus. & Professions Code § 17602, https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=BPC&division=7.&title=&part=3.&chapter=1.&article=9 (2022); Colo. Rev. Stat. 6-1-731-32, https://leg.colorado.gov/sites/default/files/images/olls/crs2021-title-06.pdf (2022); Illinois Automatic Contract Renewal Act, 815 ILCS 601, https://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2363&ChapterID=67 (2022).

[44] Elaine S. Povich, *It Turns Out State Lawmakers Hate Auto-Renew Contracts Too*, STATELINE: THE PEW CHARITABLE TRUSTS (Mar. 4, 2022), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/03/04/it-turns-out-state-lawmakers-hate-auto-renew-contracts-too.

[45] WASH. STATE OFF. OF THE ATT'Y GEN, *supra* note 19.

[46] See Santiago Legarre, *The Historical Background of the Police Power*, 9 J. CONST. L. 745 (2007), for an overview of the federal and state interaction with the police power.

Office of the Attorney General uses a program called Stop Fraud Colorado to convey that information to its denizens.[47]

Administrative agencies can also use the power of notice-and-comment rulemaking to remedy the information gap between seller and consumer. Increasing the level of disclosure fits in neatly with contemporary approaches to federal issues. For example, in late September 2022, the U.S. Department of Transportation issued a proposed rule requiring airlines and third parties to disclose ancillary service fees when providing fee and ticketing information.[48] Notably, though, administrative priorities regarding regulation often change based on the objectives of the presidency; this rule was originally proposed during the Obama presidency but then removed during the Trump administration due to concerns of cost and whether it was necessary.[49] Political interest among Americans can even vary year to year: in a 2020 survey, 54% of those polled said that they wanted the government to do more regarding the nation's problems, while in 2021, 52% asserted that the government was too involved and should leave more to individual people.[50] A higher demand for more government regulation tends to follow in the wake of major national events like the economic recession of the early 1990s and the September 11, 2001 attacks.[51]

C. Market-Based Solutions

Educating consumers is not limited to a government function; using the private sector to teach people about the legal and ethical components of subscriptions is one attractive avenue to rectify the asymmetry between consumer and producer. Borrowing insights from the marketing discipline can be productive in narrowing down the types of consumers who may be at risk from the downsides of subscription management and then providing them with options that mitigate this risk.

Financial literacy remains at abysmal levels in the United States. Fewer than 20% of American high school students are required to take a course on personal finance.[52] There are a variety of products – free and otherwise – which try to remedy this gap and address a need that education has been unable to satisfy. Among those available are Savings Spree, FamZoo, Steps, Stash, and Greenlight.[53] Similarly, there is a place in the market for applications or products that keep consumers informed on their subscription services and the costs of using them; applications

---

[47] COLO. OFF. OF THE ATT'Y. GEN., *Auto-Renewal Contracts*, Colorado Stop Fraud (2022), https://www.stopfraudcolorado.gov/fraud-center/common-scams/auto-renewals.html.
[48] U.S. DEPT. OF TRANSP., *Enhancing Transparency of Airline Ancillary Service Fees* (Sept. 2022), https://www.transportation.gov/airconsumer/AirlineAncillaryFeeNPRM.
[49] Joan Lowy, *DOT Drops Proposal to Force Airlines to Disclose Bag Fees* (Dec. 7, 2017), ASSOC. PRESS, https://apnews.com/article/2b0d800ccd7641ea9f448fd93006c7be.
[50] Jeffrey M. Jones, *Americans Revert to Favoring Reduced Government Role*, GALLUP (Oct. 14, 2021), https://news.gallup.com/poll/355838/americans-revert-favoring-reduced-government-role.aspx.
[51] *Id.*
[52] *Financial Literacy Annual Report,* CONSUMER FIN. PROT. BUREAU (Mar. 2022), https://files.consumerfinance.gov/f/documents/cfpb_financial-literacy-fy-2021_annual-report_2022-03.pdf.
[53] *See, e.g.,* Ann Carrns, *Apps Try Putting Financial Literacy at Kids' Fingertips*, N.Y. TIMES (Aug. 27, 2021), https://www.nytimes.com/2021/08/27/business/kids-financial-literacy-apps.html; Jordan Rosenfeld, *The Top 6 Financial Apps to Help Teens Learn More About Money*, YAHOO.COM (Nov. 30, 2021), https://www.yahoo.com/now/top-6-financial-apps-help-220115526.html.

like Truebill, Bobby, and Trim let consumers know their current status on subscriptions and their finances.[54]

Trade associations are another method within the market for enforcing ethical norms. The FTC has noted the importance of industry in self-regulation, including via group advocacy.[55] Trade associations often create codes of conduct to manage ethics standards in their part of the economy.[56] Doing so gives businesses a variety of benefits, including lowering the costs of regulation for their members and potentially improving that industry's reputation for ethical conduct.[57] Yet codes of ethics can also lead to restrictions on competition, especially within the industry itself, such as discouraging price competition and the movement of customers or employees.[58] In general, if done improperly, a code of ethics can make it more difficult to enter these industries in the first place or change industry standards to something fairer or more efficient.[59]

Although trade association ethical norms for subscriptions may appear to be helpful in limiting unethical behavior by its members, the issue may not be limited to specific industries. Improper use of auto-renewals and other hidden fees could be more universal, which may mean that certain industries addressing the problems may not be a sufficient solution. The same survey in Washington discussed earlier in this paper found that consumers did not report running into these concerns with specific individual companies or with certain industries.[60] As a result, trade association codes of ethics governing subscriptions may be useful, but not the most effective route in fixing the issue.

Nonprofit organizations may also be helpful in providing information and offering advocacy to certain demographics that are frequently affected by misleading subscriptions and auto-renewals. For example, the American Association for Retired Persons, or AARP, often takes a central role in educating those above age 55 about consumer protection through their Public Policy Institute.[61]

D. International Solutions

Examining how other countries treat subscriptions, especially auto-renewals, can be informative for American policymakers. For example, the United Kingdom in 2022 undertook a substantial review of consumer rights.[62] In evaluating the role of companies in auto-renewal contracts, the Competition & Markets Authority (the British analog to the FTC)[63] focused on the idea of

---

[54] *See, e.g.,* Maryalene LaPonsie, *Track and Manage Subscriptions with These 7 Apps*, U.S. NEWS & WORLD REP. (May 18, 2022, 2:33PM), https://money.usnews.com/money/personal-finance/saving-and-budgeting/articles/track-and-manage-subscriptions-with-these-apps.
[55] Starek, *supra* note 18.
[56] *Id*.
[57] Mark Katz, *The Ethics of Trade Association Codes of Ethics*, WOLTERSKLUWER COMPETITION L. BLOG (Dec. 19, 2014), http://competitionlawblog.kluwercompetitionlaw.com/2014/12/19/the-ethics-of-trade-association-codes-of-ethics/.
[58] *Id.*
[59] *Id.*
[60] WASH. STATE OFF. OF THE ATT'Y GEN, *supra* note 19.
[61] *See AARP Public Policy Institute Issues: Consumer Protection*, AM. ASS'N OF RET. PERS. (2022), https://www.aarp.org/ppi/issues/consumer-protection/.
[62] COMPETITION & MKTS. AUTH., REFORMING COMPETITION AND CONSUMER POLICY: DRIVING GROWTH AND DELIVERING COMPETITIVE MARKETS THAT WORK FOR CONSUMERS, 2021, CMA149con, at 35 (UK).
[63] FED. TRADE COMM'N, *Competition and Consumer Protection Agencies Worldwide* (2021), https://www.ftc.gov/policy/international/competition-consumer-protection-agencies-worldwide#u.

informed choice: transparency, consent, and pre-contract details were key in its recommendations.[64] Similarly, the CMA's report in 2021 considered the importance of consumer satisfaction and the potential dangers of customer service problems and reputational harm to businesses that engage in often confusing practices like auto-renewal contracts that do not clarify consumer rights at an early point in the relationship.[65]

Before 2015, these general principles were put into operation in the UK by the Enterprise Act 2002.[66] This statute gave the Office of Fair Trading 90 days to respond to a complaint that "appears to be significantly harming the interests of consumers".[67] This law has since been replaced in part by the Consumer Rights Act 2015, which helped to better organize consumer protection laws that were pieced together from various statutes before its passage.[68] An innovative component of the Consumer Rights Act 2015 is the option for inexpensive access to alternative dispute resolution if a conflict arises between business and consumer.[69]

The CMA has made this more concrete, for example, by pursuing legal action in 2021 against antivirus software company Norton for its lack of information regarding auto-renewals as part of a larger effort in evaluating the practices of the antivirus software industry.[70] Norton has allegedly failed to provide critical data about the sufficiency of notice in both pre-contract and contractual periods, methods given to the customers to cancel their subscriptions, confusion about its sale prices, and attempts to increase the price through a lack of fairness within the substance of the contract itself.[71] The extent of the CMA's power in this situation was to request information, as it does not have the ability to declare a company's practice in violation of the law or to impose fines.[72]

The takeaway from considering the UK's example is that a national model is feasible, and it can even evolve over time. The information-requesting abilities of the CMA could help achieve a balance in the United States if such an approach were adopted here; the court system (either federal or state) could still be responsible for determining fault, but an analogous structure could substantially increase the flow of knowledge about industry and company practices. Doing so could also permit the American government to focus its efforts on specific industries that are problematic for not giving consumers enough information regarding auto-renewals.

Germany likewise has taken action to reform its subscription laws. In 2022, Germany revised its limits to auto-renewal of consumer contracts; among its changes include provisions that a consumer can give one month's notice to end an agreement.[73] An intriguing component of the new

---

[64] COMPETITION & MKTS. AUTH., *supra* note 62.
[65] *Id.*
[66] Enterprise Act 2002, c. 40, Part 1, § 11 (UK).
[67] *Id.*
[68] Consumer Rights Act 2015, c. 15 (UK).
[69] *See* The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015, No. 542 (UK).
[70] *CMA Takes Norton to Court for Withholding Information*, COMPETITION & MKTS. AUTH. (Mar. 23, 2021), https://www.gov.uk/government/news/cma-takes-norton-to-court-for-withholding-information.
[71] *Id.*
[72] *Id.*
[73] Bürgerliches Gesetzbuch [BGB] [Civil Code], § 309, https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0961 (Ger.).

laws is the requirement for a "termination button" that clearly shows where a consumer can cancel their contract.[74] This button must be clearly visible and accessible to the consumer.[75]

IV. WHAT IS THE BEST SOLUTION?

After examining each of these potential options for addressing ethical issues in the subscription economy, it becomes clear that some combination thereof is needed. Attempts at federal regulation should continue despite the lack of success in doing so at this point. The FTC can continue educating consumers about these risks, with the benefit being that more exposure to the problem (as seen with Colorado's state legislators) could result in more progress. Market-based solutions, like tools to help consumers monitor their subscriptions, can support this concept. What likely should not continue for a serious length of time is the current distance between state regulations of subscriptions. While within the power of the state governments, it causes confusion for both consumers and businesses alike. A federal solution that works in tandem with industry on preventing consumer harm resulting from subscriptions recognizes that this is a universal problem that exists regardless of one's state of residence. Doing so also fits neatly with the philosophical foundation of consumer protection: stakeholder theory asks that companies consider all of those individuals, businesses, and society in general that will be affected by unethical ways of obtaining profit. Similar to how the Uniform Commercial Code streamlined commerce between states, a common agreement on regulations could increase transparency and avoid pitfalls like negative options. The United Kingdom's example of a federal agency taking a more assertive role in information gathering while leaving enforcement to the courts could be useful in alleviating fears of yet another overly powerful federal agency dictating laws to individual states and businesses. As the subscription economy will likely strengthen over time, a modern and flexible approach is definitely needed.

[74] *Id.*
[75] *Id.*

POLICE SHOOTINGS AFTER *TORRES V. MADRID*: SUSPECTS ELUDING CAPTURE ARE SEIZED UNDER FOURTH AMENDMENT

TRAVIS THICKSTUN*

I. INTRODUCTION

Imagine two people are shot by police officers. One is immediately apprehended. But the other person flees and eludes capture for a full day. Until the Supreme Court's decision in *Torres v. Madrid*, only when someone shot by police was actually taken into custody could that person sue the police officers for excessive force in violation of the Fourth Amendment—at least in some circuits.[1] In *Torres*, the Court held that the application of physical force to the body of a person with intent to restrain was a seizure even if the person fled and eluded capture.[2] Now, everyone shot by police may pursue claims of excessive force in violation of the Fourth Amendment.[3]

The Court arrived at this result by separating the idea of seizures *by force* from seizures *by acquisition*, detaching its prior Fourth Amendment cases concerning acquisition from its new jurisprudence aimed at expanding the scope of seizures by force.[4] The impact of the Court's decision in *Torres* could be far reaching because it brings within the scope of the Fourth Amendment's protection even a mere touch of a person's body—however slight—if done with the intent to restrain.[5] And this is still true if the person touched does not submit and is not subdued.[6]

As a result, the Court's ruling in *Torres* will impact use of force by police, especially against the backdrop of increased focus on police use of force.[7] After numerous high-profile deaths of Black men during encounters with police officers, the Court has expanded liability against law

* J.D. Candidate, Loyola University Chicago School of Law, 2024; B.S., Liberty University, 2009; M.A., The Southern Baptist Theological Seminary, 2011; M.J., Indiana University Robert H. McKinney School of Law, 2016.

1. *See, e.g.*, Torres v. Madrid, No. 18-2134, slip op. at 6 (10th Cir. May 2, 2019) (holding that even though she had been shot by police officer, the suspect did not stop or otherwise submit to the officers' authority); *Brooks v. Gaenzle,* 614 F.3d at 1220, 1221–22 ("[N]one of our holdings suggest the mere use of physical force or show of authority alone, without termination of movement or submission, constitutes a seizure."; no seizure occurred when police shot at and hit defendant who "continued to flee and elude authorities for days"); *United States v. Bradley,* 196 F.3d 762, 768 (7th Cir.1999) (to constitute a seizure, "the show of authority or use of force must have caused the fleeing individual to stop attempting to escape"); *United States v. Hernandez,* 27 F.3d 1403, 1407 (9th Cir.1994) ("A seizure does not occur if an officer applies physical force in an attempt to detain a suspect but such force is ineffective."). *See also*, *Henson v. United States*, 55 A.3d 859, 865 (D.C. 2012) (noting that "several courts have held that the critical question in determining whether a seizure occurred for purposes of the Fourth Amendment in both show of authority and physical force cases is whether the police officer actually succeeded in restraining the individual."). For a general discussion of the circuit split, see Alexis O'Connor, *Use of Force in Unsuccessful Arrests:* Torres v. Madrid *Tests Scope of Fourth Amendment Protections*, 26 PUB. INT. L. REP. 47, 51–52 (2020).
2. Torres v. Madrid, No. 19-292, slip op. at 17 (U.S. Mar. 25, 2021).
3. 42 U.S.C. § 1983. See also, Jazmine Langley, *Light in A Dark Tunnel? Torres v. Madrid: Recommitment to the Fourth Amendment and One Step Towards Justice for African-American Victims of Police Violence*, 44 N.C. CENT. L. REV. 81, 82 (2022) (noting that *Torres* was a 42 U.S.C. § 1983 action).
4. *Torres*, No. 19-292, at 15 (splitting off *Brower*'s requirement that officers achieve "actual control").
5. *Id.* at 17.
6. *Id.*
7. Jeffrey Belin, *Divided Court Issues Bright-Line Ruling on Fourth Amendment Seizures*, SCOTUS BLOG (Mar. 25, 2021), https://www.scotusblog.com/2021/03/divided-court-issues-bright-line-ruling-on-fourth-amendment-seizures/. For a general discussion of the case's impact, see J. Scott Key, *Criminal Law*, 73 MERCER L. REV. 75, 77 (2021). ("Time will tell whether this case represents a narrow expansion of Fourth Amendment law in the civil arena or a sweeping shift in the area of search and seizure in the criminal realm.").

enforcement officers.[8] The holding in *Torres* is broad enough to capture any touching at all of the body of a person, not just significant restraints on liberty.[9] As such, the ruling expands the parameters for claims against officers and gives police accountability advocates a favorable result for future cases.[10]

II. HISTORY OF THE DEVELOPMENT OF THE DOCTRINE OF SEIZURES OF PERSONS UNDER THE FOURTH AMENDMENT

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[11] While originally applicable only to the national government, it was made applicable to state and local governments through the Fourteenth Amendment in 1961.[12] As a threshold matter, the Supreme Court has said that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[13] A civil action for deprivation of rights against someone acting under color of law is available under federal law.[14]

A. Distinguishing Investigatory Stops from Full Arrests

Since 1975, the Fourth Amendment has applied to seizures of the person, even if "only a brief detention short of a traditional arrest."[15] But investigatory stops—which do not require probable cause—may be appropriate when officers have reasonable suspicion that criminal activity is afoot, and such stops may also involve a frisk of the person, but only "when an officer reasonably believes that 'his safety or that of others was in danger.'"[16]

While "[e]very arrest is a seizure,"[17] just what constitutes a seizure in situations involving less than a full arrest must be analyzed by considering the totality of all the circumstances surrounding the incident.[18] There are no bright-line rules for when there has been a seizure.[19] In fact, the Court has acknowledged that "it is not always clear just when minimal police interference becomes a seizure."[20]

---

8. David S. Savage, *Supreme Court Expands Meaning of 'Seizure' Under 4th Amendment* POLICE1 (Mar. 26, 2021), https://www.police1.com/legal/articles/supreme-court-expands-meaning-of-seizure-under-4th-amendment-HUtlW8Yio8zpwzDA/ (noting that the Court has been criticized in recent years for shielding police officers from lawsuits over the use of excessive force); see also Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 PROC. NAT'L ACAD. SCIS. 34, 1 (2019) (noting that people of color face a greater probability of being killed by law enforcement officers than do white men and women).
9. Belin, *supra* note 7.
10. Savage, *supra* note 8. *See also*, Langley, *supra* note 3, at 92 (calling *Torres* "one step towards justice for African-American victims of police violence").
11. U.S. CONST. amend. IV; *see also Torres*, No. 19-292 at 1 ("The Fourth Amendment prohibits unreasonable "seizures" to safeguard "[t]he right of the people to be secure in their persons.").
12. 2 William J. Rich, Modern Constitutional Law § 28:1 (3d ed. 2020) (citing Mapp v. Ohio, 367 U.S. 643 (1961)).
13. *Id.* (quoting Colorado v. Bannister, 449 U.S. 1, 2-3 (1980)).
14. 42 U.S.C. § 1983.
15. Rich, *supra* note 12 (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975)).
16. *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 27 (1989)).
17. *Id.* (citing Tennessee v. Garner, 471 U.S. 1, 7 (1985)).
18. *Id.* (citing Michigan v. Chesternut, 486 U.S. 567, 573 (1988)).
19. *Id.*
20. *Id.* (quoting *Garner*, 471 U.S. at 7).

B. Lack of Clarity Before **Torres** *Lead to Circuit Split*

Seizures of persons can be accomplished through physical force or by acquisition of control.[21] Seizures by control and those by force are analyzed separately.[22] But cases before *Torres* did not make clear that seizures by control and seizures by force were treated independently.[23] In *Brower v. County of Inyo*, the Supreme Court held that to find a seizure had occurred, a court must first determine that there had been "an intentional *acquisition* of physical control" by the police officer.[24] In either a seizure by physical force or show of authority, a person was seized when the government actor "terminate[d] or restrain[ed] his freedom of movement through means intentionally applied."[25] A seizure by a show of authority was established when it "in some way restrain[ed] the liberty" of the person.[26]

Thus, since *Brower*, and even after *Hodari D.*, some courts had required that the governmental agent actually acquire physical control over a person's body after intentionally acting to do so.[27] After *Hodari D.* though, some courts had begun to omit the requirement that the police officer actually acquire control over the person's body through the intentional application of force.[28] The circuits were split on whether a "mere touch" was a seizure—even where the suspect was never taken into the officers' custody either through physical force, or by submitting to their show of authority.[29] In fact, in the area of shots fired at or into moving vehicles, federal appellate courts demonstrated conflicting views among one another, and they regularly overturned lower courts.[30]

C. Distinguishing Seizures by Force and Seizures by Control

But *Torres* established two separate paths for analyzing whether a seizure occurred: those accomplished by *control* and those effected by *force*.[31] It seemingly abandoned *Brower*'s requirement that an acquisition occur and fully adopted *Hodari D.*'s suggestion that an arrest—and, thus, a seizure under the Fourth Amendment—was effected where a person was "actually touched" when the government agent was at least attempting to detain him, even if the person fled and was not actually detained.[32] The Court jettisoned the idea that the use of force translated into

---

21. *Torres*, slip op. at 15.
22. *Id.* at 14 (noting that "each type of seizure enjoys a separate common law pedigree that gives rise to a separate rule").
23. *Id.* ("In all fairness, we too have not always been attentive to this distinction when a case did not implicate the issue."); *see also* Sharon R. Fairley, *The Police Encounter with a Fleeing Motorist: Dilemma or Debacle?*, 52 U.C. DAVIS L. REV. ONLINE 155, 184 (2018) (noting that the Court's guidance concerning police officers shooting at moving vehicles "is not as robust as it could be").
24. Rich, *supra* note 12 (quoting Brower v. County of Inyo, 489 U.S. 593, 596 (1989) (emphasis added)); *see also Torres*, slip op. at 3 (citing *Brower* v. *County of Inyo*, 489 U. S. 593, 596 (1989)).
25. Orin S. Kerr, *What is a Fourth Amendment "Seizure" After* Torres v. Madrid*?* REASON BLOG (Mar. 26, 2021, 4:31 AM) (quoting Brendlin v. California, 551 U.S. 249, 254 (2007)).
26. *Torres*, slip op. at 3 (citing *Terry*, 392 U.S. at 19, n.19); *see also*, *United States v. Beamon*, 576 F. App'x 753, 758 (10th Cir. 2014) (attempted—but unsuccessful—seizure when federal agent grabbed someone who resisted and got away "did not implicate the Fourth Amendment"); *Farrell v. Montoya*, 878 F.3d 933, 937 (10th Cir. 2017) (no excessive-force claim allowed where subjects fled and had not submitted to officers when one fired his gun at them).
27. *See*, *e.g.*, *Torres*, slip op. at 6 (citing Brooks v. Gaenzle, 614 F.3d 1213, 1223-24 (10th Cir. 2010) (finding no seizure where a suspect's continued flight after being shot by police because the gunshot did not end the person's movement or cause the officers to have physical control over her); *see also Torres*, slip op. at 2-3 (Gorsuch, J., dissenting) (noting the "longstanding circuit precedent" in the 10th Circuit that a "'seizure' occurs only when the government obtains 'physical control' over a person").
28. *Torres*, slip op. at 3-4 (Gorsuch, J., dissenting).
29. *Id.*; *Cf.* Brief for Am. C.L. Union at al. as Amici Curiae Supporting Petitioner at 4-5, Torres v. Madrid, No. 19-292 (U.S. Mar. 25, 2021) (noting that the Tenth Circuit's rule was not followed by any other circuit).
30. Fairley, *supra* note 23, at 184-87 (noting that an "[a]nalysis of the federal circuit court cases shows that the Supreme Court's jurisprudence has resulted in a lack of clarity among the lower courts as almost four in ten appellate cases reverse district court findings").
31. *Torres*, slip op. at 14 (noting that "each type of seizure enjoys a separate common law pedigree that gives rise to a separate rule").
32. Kerr, *supra* note 25.

a seizure "only when there is a governmental termination of freedom of movement through means intentionally applied."[33] In its place, the Court adopted an approach wherein each type of seizure is analyzed separately, because "a separate common law pedigree that gives rise to a separate rule."[34]

III. TORRES V. MADRID

Shortly before sunrise on July 15, 2014, four New Mexico State Police troopers went to an apartment complex in Albuquerque to serve an arrest warrant for white collar crimes on someone suspected of involvement in drug trafficking, murder, and other violent crimes.[35] The troopers saw Roxanne Torres standing with someone near a Toyota FJ Cruiser in the parking lot.[36] One of the troopers decided that neither person was the subject of their arrest warrant.[37] Nonetheless, as the troopers walked toward the Cruiser, Torres's companion two took off on foot, while Torres got into the driver's seat of the Cruiser.[38] The troopers tried to talk with Torres, who was on withdrawal from methamphetamine, but she did not notice the officers, who were wearing tactical vests with police identification of them.[39] When Torres heard one of the troopers trying to open her door, she thought they were carjackers trying to steal her car, so she hit the gas pedal to escape.[40] Torres said she did not know the troopers were police officers, but saw they had guns.[41] Troopers Janice Madrid and Richard Williamson then fired their guns to stop her from running them over or pinning them between the Cruiser and the car next to it.[42] The two officers fired 13 rounds at Torres, hitting her twice in the back.[43]

Even though she had been shot twice and her left arm was temporarily paralyzed, Torres continued on for a short distance before stopping in a parking lot, where she told someone about the attempted carjacking.[44] She then stole a vehicle left idling and drove 75 miles to Grants, New Mexico, where she sought medical care.[45] But that hospital airlifted her to an Albuquerque hospital capable of caring for her injuries.[46] She was arrested the next day and later pleaded no contest to aggravated fleeing from a law enforcement officer, assault on a peace officer, and unlawfully taking a motor vehicle.[47]

Torres sued Troopers Madrid and Williamson under 42 U.S.C. § 1983, alleging that the troopers violated her Fourth Amendment right to be free from an unreasonable seizure.[48] The district court granted summary judgment for the troopers because Torres's continued flight after being seized negated her Fourth Amendment claim, and the Tenth Circuit affirmed.[49] If the

---

33. *Torres*, slip op. at 6 (noting that such an approach "improperly erases the distinction between seizures by *control* and seizures by *force*").
34. *Id.* at 14 (citing *Hodari D.*, 499 U. S., at 624–625).
35. *Torres*, slip op. at 1.
36. *Id.* at 2.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*; *see also id.* at 2 (Gorsuch, J., dissenting).
43. *Torres*, slip op. at 2.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 2-3.
49. *Id.* at 3. The district court and court of appeals relied on circuit precedent in *Brooks v. Gaenzle*, 614 F.3d 1213, 1223 (2010), which had held that "no seizure can occur unless there is physical touch or a show of authority," and that the requisite physical touch must result in the suspect's movement being terminated or somehow give the government agents "physical control over the suspect." Because Torres continued fleeing after being shot, the Fourth Amendment excessive-force claim was negated by the lack of a seizure under *Brooks*.

officers had managed to stop Torres, she would have been able to pursue her claim in the Tenth Circuit.[50] But her ability to flee and elude capture negated her Fourth Amendment claim under Tenth Circuit precedent.[51]

The Supreme Court reversed and held that "[t]he application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued."[52] The Court reasoned that a police officer seizes someone when the officer uses force in the apprehension.[53] A seizure of a person can be in the form of physical force or a show of authority that in some way restrains the person's liberty.[54] Because Torres continued fleeing and eluded capture by police for a full day after they shot her, the Court considered whether the bullets that entered Torres were themselves a seizure, even though the bullets failed to stop her flight.[55]

The Court found that *Hodari D.* controlled the outcome in this case.[56] Because the common law treated a mere touch as an application of physical force constituting an arrest even if the force failed to subdue the arrestee, the Court adopted *Hodari D.*'s approach.[57] In doing so, the Court divorced the concepts of seizures by physical force from seizures by acquisition of control.[58] And this separate analysis was critical to the Court's ability to find a seizure under the facts in *Torres*, since actual control was necessary in a seizure by acquisition of control.[59] But the *sine quo non* of control or submission in a seizure by acquisition of control did not extend to seizures by force.[60] Because the New Mexico troopers intended to restrain Torres when they shot her, she was seized at the moment the bullets entered her.[61] The Court held that "the application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued."[62]

In dissent, Justice Gorsuch, joined by Justices Thomas and Alito, argued that the Court's majority had to "conflate a seizure with its attempt and confuse an arrest with a battery" to reach its result.[63] *Hodari D.*'s statements concerning merely touching someone with intent to restrain were dicta, Justice Gorsuch wrote.[64] The very idea that a touch is a seizure even where the suspect flees and eludes capture by police was not only dicta in *Hodari D.*, but it was an improbable result before *Hodari D.*, as well.[65] A seizure, Justice Gorsuch wrote, requires actually taking possession of someone or something.[66]

50. Adam Liptak, *Sharp Divisions Surface on Police Violence Case*, N.Y. TIMES, Mar. 25, 2021, at A18.
51. *Id.*
52. *Torres*, slip op. at 17.
53. *Id.* at 1.
54. *Id.* at 3 (citing *Terry*, 392 U.S. at 19, n.16).
55. *Id.* at 3.
56. *Id. (citing California v. Hodari D.*, 499 U.S. 621 (1991)).
57. *Id.*
58. *Id.* at 15 ("Unlike a seizure by force, a seizure by acquisition of control involves either voluntary submission to a show of authority or the termination of freedom of movement.").
59. *Id.*
60. *Id.*
61. *Id.* at 10-11, 17.
62. *Id.* at 17.
63. *Torres*, slip op. at 1 (Gorsuch, J., dissenting) ("The majority holds that a criminal suspect can be simultaneously seized and roaming at large.").
64. *Id.* at 5.
65. *Id.* at 5-6.
66. *Id.* at 6 ("A mere touch may be a battery. It may even be part of an attempted seizure. But the Fourth Amendment's text, its history, and our precedent all confirm that "seizing" something doesn't mean touching it; it means taking possession.").

IV. CONSISTENCY OF THE COURT'S REASONING IN *TORRES* WITH PRECEDENT

By divorcing the theories behind seizures *by force* from seizures *by acquisition*, the Supreme Court detached its prior Fourth Amendment cases concerning acquisition from its new jurisprudence aimed at expanding the scope of seizures by force.[67] This division accommodates two distinct lines of analysis—one for each type of seizure of a person.[68] Viewed as the establishment of a new, separate analysis from the "intentional acquisition of physical control" required to trigger a Fourth Amendment seizure under *Brower*, the Court's opinion in *Torres* is consistent with prior decisions.[69] But if viewed as a single line of cases involving a single type of seizure of a person, *Torres* cannot be squared with precedent.[70] Thus, *Torres* can be read in a way that is either consistent or inconsistent with prior Supreme Court decisions on seizures of a person.

The genesis for the new mere-touch doctrine established in *Torres* reaches back only 30 years to a case involving a juvenile who fled at the sight of police officers, discarding evidence in the process.[71] In that case, the Court opened the door for the result in *Torres* by suggesting that the term *seizure* "readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful."[72] But that statement—and a few others in the opinion—could be seen as dicta because they were not directly necessary to the Court's reasoning in its holding in that case.[73] In fact, a significant part of oral argument was devoted to questions concerning whether *Hodari D.*'s statements that any application of physical force to restrain movement—even when when it is ultimately unsuccessful—was just dicta.[74]

The police officers and their amici argued that *Hodari D.*'s references to the common law mere-touch rule were not essential to the Court's holding on show of authority seizures and should not control the result in *Torres*.[75] Not only were *Hodari D.*'s statements about the mere-touch rule not central to its holding, they were also made without an adversarial briefing.[76] In fact, amici for the officers pointed to other decisions that specifically described seizures as having an element of physical control.[77]

IV. *TORRES* MERE-TOUCH DOCTRINE LIKELY TO HAVE SIGNIFICANT IMPACT ON USE-OF-FORCE CASES

In announcing its new mere-touch rule, the Supreme Court expanded the scope of Fourth Amendment protections for much more than incidents where police officers shoot at or into fleeing vehicles.[78] The impact of the Court's decision in *Torres* could be far reaching if lower courts use

67. *Torres*, slip op. at 15 (splitting off *Brower*'s requirement that officers achieve "actual control").
68. *See id.* at 14 (noting that the dissent's approach to seizures "improperly erases the distinction between seizures by *control* and seizures by *force*").
69. *Id.* at 14.
70. *See*, *e.g.*, *id.* at 1 (Gorsuch, J., dissenting) ("Until today, a Fourth Amendment 'seizure' has required taking possession of someone or something. To reach its contrary conclusion, the majority must conflate a seizure with its attempt and confuse an arrest with a battery.").
71. California v. Hodari D., 499 U.S. 621 (1991).
72. *Id.* at 626.
73. *Torres*, slip op. at 6 (Gorsuch, J., dissenting) (discussing dicta in *Hodari D.*).
74. *See*, *e.g.*, Transcript of Oral Argument at 15, 31-32, 46-47, 58, 60-63, 68 Torres v. Madrid, No. 19-292 (U.S. Mar. 25, 2021) (Justices Kagan, Sotomayor, Thomas, and Gorsuch asking whether *Hodari D.*'s statements about these types of seizures was just dicta).
75. Brief for Nat'l Ass'n of Cntys. at al. as Amici Curiae Supporting Petitioner at 22, Torres v. Madrid, No. 19-292 (U.S. Mar. 25, 2021).
76. *Id.* at 21-22.
77. *Id.* at 22 (citing *Brower*, 489 U.S., at 596; United States v. Mendenhall, 446 U.S. 553 (1980); *Terry*, 392 U.S. at 20).
78. *See*, *e.g.*, *Torres*, slip op. at 13 (discussing the mere-touch rule's applicability where the fleeing person's body is touched "for one moment").

its reasoning to bring more police encounters within the Fourth Amendment's grasp. Plaintiffs' attorneys may seek to grab ahold of the mere-touch rule *Torres* establishes when pursuing claims of excessive force by the police against their clients.[79] Just how far lower courts will allow even minor physical contact from police officers to come within the reach of *Torres* remains to be seen.[80]

A. Possible Impact in Use-of-Force Cases

Lower courts must now consider what constitutes physical force in varying real-world situations, whether force applied to an object within a suspect's control will come within *Torres*, and whether force directed to one person but instead applied to a third party qualifies as a *Torres* touch. First, *Torres* left open for lower courts to decide what constitutes physical force. Because *Torres* expanded Fourth Amendment protection to include situations where an officer applies any physical force to the body a person with intent to restrain—even if the force does not succeed in subduing the person—even the slightest contact may be a *Torres* touch.[81] At the extremes are suspects shot by police officers and those who may be so slightly contacted by a police officer attempting to stop them that they do not even feel or perceive the contact.[82] *Torres* answers the first, but leaves for lower courts to apply the *Torres* mere-touch rule to the other extreme.

Consider two police encounters. In one, Officer A sees a man struggling as he unloads heavy boxes from a moving van. In the second, Officer B responds to a 911 call from a store manager, who describes a man walking down the alley behind her store as having just stolen a couple boxes of merchandise. Each officer taps the men on the back, Officer A to offer help and Officer B to engage a shoplifting suspect in a *Terry*-type encounter based on reasonable suspicion the man was committing a crime.[83] Surely the tap on the shoulder to get the first man's attention would not be a seizure under the Fourth Amendment.[84] But is the second, where Officer B seeks the man's attention to investigate a shoplifting complaint? If a mere touch is enough to amount to a seizure under *Torres*, is a tap on the shoulder aimed at questioning a suspect enough to trigger a seizure? Some legal scholars have questioned whether the concept of arrest in *Torres* will impact *Terry* stops, in which an officer has reasonable suspicion that criminal activity is afoot, but may lack probable cause for an arrest without some additional investigation.[85] The common law lacked *Terry* stops; it was either an arrest or nothing.[86] After Torres, much remains to be seen of the interplay between the *Torres* touch and the *Terry* stop.

Now imagine a police officer working in front of a crowded downtown bar, when a bouncer at the door points at a young man standing with his back to the officer talking to a group of friends. The bouncer tells the officer that the young man is drunk and was denied entry when he tried to use a fake ID. Suppose now that this officer, who has reasonable suspicion that criminal activity

---

79. For a discussion of the "growing attention to police brutality, particularly in Black communities" and "[m]ore calls for police reform, or even abolition," see *Fourth Amendment-Search and Seizure-Police Misconduct- Torres v. Madrid*, 135 HARV. L. REV. 363 (2021).
80. *See Fourth Amendment-Search and Seizure-Police Misconduct- Torres v. Madrid*, 135 HARV. L. REV. 363 (2021) ("The majority's unusual interpretation of the word "seizure" could expand avenues for victims of police brutality to seek relief. However, whether that potential is realized in practice remains uncertain, as significant barriers persist that restrict victims' ability to seek redress in court.").
81. *Torres*, slip op. at 1. For a discussion of the "the problem of physical restraint" after *Torres*, especially for those with reformist and abolitionist agendas, see Steven Arrigg Koh, *Policing & the Problem of Physical Restraint*, 64 B.C. L. REV. 309, 310 (2023).
82. Perception of contact may be an area of litigation in some cases involving only slight contact—especially if the plaintiff was highly intoxicated at the time. If a police officer tries to grab onto a drunk suspect, who flees and evades arrest without realizing the officer touched his arm to restrain him, should the suspect's lack of perception of the contact play a role in the court's analysis?
83. *See*, *e.g.*, Rich, *supra* note 12, at § 28:2 (explaining investigatory stops on less than probable cause in *Terry*, 392 U.S. at 27).
84. *Torres*, slip op. at 10 ("A tap on the shoulder to get one's attention will rarely exhibit such an intent.").
85. The Legal Academy with Orin Kerr, *Bonus Ep. Torres v. Madrid with Andrew Crespo* (Mar. 26, 2021), https://anchor.fm/orin.kerr/episodes/Bonus-Ep--Torres-v--Madrid-with-Andrew-Crespo-etjhek ("There are many defense lawyers who will read [*Torres*] and see the equation to arrest and say, 'These are now arrests.'").
86. *Id.*

is afoot, taps the young man on the shoulder in an attempt to investigate these offenses. Is a tap on the shoulder by a police officer physical force?[87] What if the officer wants to get someone's attention for a minute?[88] What if the physical touch is an effort to restrain movement?[89] "While a mere touch can be enough for a seizure, the amount of force remains pertinent in assessing the objective intent to restrain."[90] Here, the officer at least intended to speak with the young man, and perhaps ask for his ID to determine his age, but did the officer intend to restrain his movement? What if the man turns around, and, as soon as he sees the police officer, flees? What if the officer manages to grab the young man's shirt for a fleeting second, but the young man quickly escapes into the crowd never to be seen again?

Moreover, suppose a police officer engages in a legitimate, qualified *Terry* stop with reasonable suspicion that criminal activity is afoot, and that situation quickly changes from a stop-without-frisk encounter to a stop-and-frisk encounter when the officer sees the suspect adjust his waistband and then sees the shape of a handgun. At what point in this situation does *Torres* come into play?[91] Suppose an officer in a jurisdiction allowing the carrying of handguns without permits places hands on this man with the sole purpose of removing the suspected gun—and nothing more. Is the touch aimed only at removing a firearm from the man's waistband during this investigatory stop a *Torres* touch—even if the officer does not intend to restrain the man? Some situations are so clear—like putting handcuffs on a suspect—that there is little question about the implications of *Torres* to liability under the Fourth Amendment. But many other tense, rapidly evolving law enforcement encounters will yield no easy answer as to whether a *Torres* mere-touch seizure occurred. The interplay of police encounters under *Terry* with *Torres* touches remains to be worked out by lower courts. It is entirely likely that more than a few *Terry* encounters may now be arrests under *Torres*.[92] Some scholars consider whether the Torres mere-touch rule will yield another way for protesters who encounter police resistance to pursue § 1983 claims, but one notes that "formidable barriers remain" to these claims.[93]

B. *Lower Court Cases After* Torres

Only a handful of cases have yet applied *Torres*. While most have considered whether a seizure occurred, one went on to consider the length of the seizure.

Courts have not found the *Torres* mere-touch rule to apply when officers pushed someone in a bar fight, tugged on someone's shirt to move him away, pushed someone out of a doorway, or pushed someone off his preferred path.[94] Critical in all these cases is that none of the officers intended to apprehend any of these people.

---

87. *Torres*, slip op. at 10 ("A tap on the shoulder to get one's attention will rarely exhibit such an intent.").
88. *Id.* at 23 (Gorsuch, J., dissenting).
89. Transcript of Oral Argument at 26, Torres v. Madrid, No. 19-292 (U.S. Mar. 25, 2021) (discussing whether tapping someone on the shoulder to request immigration paperwork is a seizure).
90. *Torres*, slip op. at 10 (citing See *INS* v. *Delgado*, 466 U. S. 210, 220 (1984); *Jones*, 35 N. C., at 448–49).
91. *Compare* Brief for Petitioner at 28, Torres v. Madrid, No. 19-292 (U.S. Mar. 25, 2021) (noting that "if even a brief frisk for weapons constitutes a 'serious intrusion upon the sanctity of the person,' surely shooting bullets into someone does, too.) *with* Brief for Respondents at 8, Torres v. Madrid, No. 19-292 (U.S. Mar. 25, 2021) (noting that not all personal intercourse between police officers and citizens involves 'seizures' of persons under Terry).
92. Kerr, *supra* note 83 ("A whole bunch of stuff in the *Terry* world is potentially—maybe accidentally or unintentionally—but explicitly now, I think, in the arrest world.").
93. Chun Hin Jeffrey Tsoi, *Seizing S 1983 After Your Protest Today: Fourth Amendment and Protest Policing Post-Torres*, 59 AM. CRIM. L. REV. ONLINE 98, 112 (2022).
94. *Pinto v. Collier Cnty.*, No. 21-13064, 2022 WL 2289171, at *6 (11th Cir. June 24, 2022); *United States v. Scott*, No. 21-51084, 2022 WL 17261790, at *2 (5th Cir. Nov. 29, 2022); *Martinez v. Sasse*, 37 F.4th 506, 508-09 (8th Cir. 2022); *Jones v. D.C.*, No. CV 21-836 (RC), 2021 WL 5206207, at *4 (D.D.C. Nov. 9, 2021).

In *Pinto v. Collier County*, the Eleventh Circuit held there was no *Torres* touch when a sheriff's deputy's pushed someone to separate two men fighting outside a crowded bar.[95] In *United States v. Scott*, the Fifth Circuit found there was no *Torres* seizure where a police officer "tugged on" someone's shirt sleeve to move him out of a doorway.[96] Similarly, in *Martinez v. Sasse*, the Eighth Circuit distinguished pushing someone back from a building entrance with the force officers used intending to apprehend a suspect in *Torres*.[97] "*Torres* involved force used to apprehend a suspect, and did not address whether force used only to repel constitutes a seizure."[98] In *Jones v. District of Columbia*, the District Court for the District of Columbia held that two pushes from a police officer in an outdoor public facility were not seizures under *Torres* because the officer did not "intended to restrain" the man with his pushes.[99]

But courts have found the *Torres* mere-touch rule to apply where a motorist fleeing police was shot and a bicyclist fleeing police was struck by a police car during the pursuit.[100] Critical in these cases is that the officers intended to apprehend both people.

In *Jefferson v. Lias*, the Third Circuit held that a motorist who fled from police was "undoubtedly" seized when a police officer shot him in the forearm—even though, just like in *Torres*—the motorist continue to flee and drove himself to a hospital.[101] The court said the "shooting undoubtedly constituted a seizure."[102] In *United States v. Daniels*, the District Court for the Northern District of California found that a bicyclist who fled from a police officer who had his emergency lights activated was "seized at the moment [the officer]'s vehicle collided with the bike."[103] The bicyclist was seized at the instant of the crash because the officer "applie[d] physical force" to the bicyclist "with the intent to restrain."[104]

Finally, courts not only consider where a *Torres* seizure has happened, but, even if so, courts must sometimes determine the length of the seizure.[105] In *United States v. Daniels*, a district court considered how long a seizure lasted after a police car collided with a bicyclist it was pursing.[106] Citing *Torres*, the court said that "a seizure by force—absent submission—lasts only

---

95. *Pinto v. Collier Cnty.*, No. 21-13064, 2022 WL 2289171, at *6 (11th Cir. June 24, 2022) ("[The deputy]'s initial push was not a seizure under the Fourth Amendment because it was not done with 'an intent to restrain,' but rather 'for some other purpose'—namely to separate two men engaged in an altercation outside of a crowded bar." (quoting *Torres*, 141 S.Ct. at 998)).
96. *United States v. Scott*, No. 21-51084, 2022 WL 17261790, at *2 (5th Cir. Nov. 29, 2022) ("Not 'every physical contact between' an officer and an individual is 'a Fourth Amendment seizure'; rather, '[a] seizure requires the use of force *with intent to restrain.*'" (quoting *Torres*, 141 S. Ct. at 998)).
97. *Martinez v. Sasse*, 37 F.4th 506, 508-09 (8th Cir. 2022). In Martinez, federal agents "purposefully backed into [someone] to prevent her from entering [a building]. [The agents] then allegedly pushed [her] back and locked the doors to the facility." *Id.* at 508.
98. *Id.* at 509.
99. *Jones v. D.C.*, No. CV 21-836 (RC), 2021 WL 5206207, at *4 (D.D.C. Nov. 9, 2021) ("To be sure, the first push caused [him] to stumble backwards and blocked him from proceeding along his preferred path; [the officer]'s second push also sent [the man] 'backwards.' These facts might well indicate an objective intent to prevent [the man] from entering the area behind [the officer] or to send him back in the direction he came from, but an intent to keep out or to redirect is not an intent to 'restrain' or to 'apprehend.'" (cleaned up)).
100. *Jefferson v. Lias*, 21 F.4th 74, 76-78 (3d Cir. 2021) (citing *Torres, 141* S. Ct. at 999); *United States v. Daniels*, No. 19-CR-00709-BLF-1, 2022 WL 1540035, at *6 (N.D. Cal. May 16, 2022). For a discussion of the impact of *Torres* in the context of high-speed pursuits, see Hayley Bork, *No Need for Speed: The Inherent Unreasonableness of High-Speed Police Chases and A New Approach to Excessive Force Litigation*, 88 BROOK. L. REV. 649, 675–79 (2023). "In high-speed chase scenarios, officers undoubtedly engage in conduct that objectively manifests an intent to restrain the fleeing motorist." *Id.* at 677.
101. *Jefferson v. Lias*, 21 F.4th 74, 76-78 (3d Cir. 2021) (citing *Torres, 141* S. Ct. at 999).
102. *Id.*
103. *United States v. Daniels*, No. 19-CR-00709-BLF-1, 2022 WL 1540035, at *6 (N.D. Cal. May 16, 2022).
104. *Id.* (citing *Torres*, 141 S. Ct. at 998).
105. *See, e.g.*, *United States v. Daniels*, No. 19-CR-00709-BLF-1, 2022 WL 1540035, at *8 (N.D. Cal. May 16, 2022).
106. *United States v. Daniels*, No. 19-CR-00709-BLF-1, 2022 WL 1540035, at *8 (N.D. Cal. May 16, 2022) ("Daniels discarded the contraband of his own volition as he ran down the driveway. This was after the seizure had terminated and Daniels was in a 'period of fugitivity' (citing *Hodari D.*, 499 U.S. at 625)). "If the vehicle–bike collision had, for example, resulted in the contraband flying from Daniels' body and scattering on the ground, this might be a different case. But that did not happen, and Daniels cast away the gun paraphernalia himself as he was running from officers." *Id.*

as long as the application of force."[107] Citing both *Hodari D.* and *Torres*, the court said the seizure concluded when the fleeing suspect got up and began running away again.[108] Considering the "fleeting nature of some seizures by force," the court held that the defendant was in a "period of fugitivity" when he got up and ran away after the collision.[109] Thus when he then discarded contraband, he was not seized.[110]

But regardless of the expansive reading of seizures by force that may result in additional litigation in future cases, Roxanne Torres still faces an uphill climb in her case against the New Mexico state troopers.[111] The Supreme Court's ruling merely revives her case and allows it to go forward in the lower courts.[112] Those courts will have to decide whether the seizure was reasonable, whether the troopers are entitled to qualified immunity, and—if Torres can get past those barriers—what damages she is entitled to.[113]

V. CONCLUSION

Torres v. Madrid is an appropriate extension of the Supreme Court's Fourth Amendment jurisprudence. The Court crafted a suitable divorce from a single line of analysis for all seizures of persons under the Fourth Amendment. No longer is a seizure by force interpretated the same as a seizure by acquisition of control, which had required a police officer to gain actual control over the person seized. Now, the application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued. Accordingly, someone who flees and eludes capture after bring shot by a police officer now has the ability to pursue a cause of action under 42 U.S.C. § 1983 for excessive force in violation of the Fourth Amendment.[114] Ultimately, though, if lower courts view the mere-touch rule in *Torres* too expansively, a wide variety of law enforcement encounters may come unnecessarily within the Court's newly articulated standard for seizure by force. Such a sweeping expansion would risk capturing even the slightest touches under the mere-touch rule and lead to unnecessary litigation. But for plaintiffs, like Roxanne Torres, who are shot by police officers and nonetheless flee and elude capture, their cases can now be pursued as excessive force claims under the Fourth Amendment.

107. *Daniels*, 2022 WL 1540035, at *8 (quoting *Torres*, 141 S. Ct. at 999).
108. *Id.*
109. *Id.*
110. *Id.*
111. Belin, *supra* note 7.
112. *Id.*; *see also* Steven S. Schwinn, *Court Says a Shooting by Police is a Seizure, Even if Target Gets Away*, CONST. LAW PROF BLOG (Mar. 27, 2021), https://lawprofessors.typepad.com/conlaw/2021/03/court-says-a-shooting-by-police-is-a-seizure-even-if-target-gets-away.html.
113. Belin, *supra* note 7.
114. For a discussion about the objective analysis used in Fourth Amendment cases, see Juval O. Scott, *The Myth of Objectivity in Fourth Amendment Jurisprudence*, CRIM. JUST., Spring 2021, at 13, 15 ("It is patently unfair to have a standard or test that focuses solely on the police officer's perspective and centers reasonableness through the lens of the affluent white male experience, while ignoring the perspective, experience, and history of the BIPOC community members subject to police power.").

ASSERTION OF WORK PRODUCT PRIVILEGE, ATTORNEY-CLIENT PRIVILEGE, AND FEDERALLY AUTHORIZED TAX PRACTITIONER PRIVILEGE OVER TAX-ADVICE DOCUMENTS IN LIGHT OF *UNITED STATES V. MICROSOFT CORP*.

RICARDO COLÓN*
ÁNGEL ORTIZ**

I. INTRODUCTION

Businesses face increasing scrutiny of their assertions of privilege in litigation. The decision in *United States v. Microsoft Corp.* addresses the court's interpretation of the work product privilege, attorney-client privilege, and the federally authorized tax practitioner privilege in litigation related to tax-advice documents.[1] This case drew the attention of national business organizations such as the U.S. Chamber of Commerce due to the government's arguments for denying tax practitioner privilege, attorney-client privilege, and work product protection to tax-advice documents.[2] It is common practice for businesses to seek the advice of accountants and consultants in structuring business transactions in order to minimize tax implications. While assertions of privilege in tax litigation is a frequent practice, court decisions interpreting the work product privilege, attorney-client privilege, and the authorized tax practitioner privilege over tax-advice documents are not too common.

This paper explains the fundamentals of the attorney-client privilege, the work product privilege, and the federally authorized tax practitioner privilege. Afterwards, it discusses *United States v. Microsoft Corp.* focusing on the overall facts of the case and the assertions of work product privilege, attorney-client privilege, and authorized tax practitioner privilege over tax-advice documents. Finally, this paper advises taxpayers how to protect possible assertions of work product privilege, attorney-client privilege, and authorized tax practitioner privilege.

II. THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is one of the oldest privileges of our jurisprudence.[3] Recognized under Federal Rule of Evidence 501, the attorney-client privilege refers to "the protection that applicable law provides for confidential attorney-client communications." The attorney-client privilege "protects confidential communications between a client seeking legal advice and an attorney providing such advice."[4] The privilege "recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."[5] The attorney-client privilege encourage clients to make "full and

*LL.M., J.D., Associate Professor of Accounting, Lamar University.
** DBA, J.D., MBA, Assistant Professor of Accounting, University of Puerto Rico at Cayey.
[1] United States v. Microsoft Corp., No. C15-102RSM (W.D. Wash. Jan. 17, 2020).
[2] Press Release, U.S. Chamber Files Motion for Leave to File on Significant Tax Privilege Issue (Oct. 27, 2016).
[3] *In re Napster, Inc. Copyright Litig.,* 479 F.3d 1078 (9th Cir. 2007).
[4] *In re Grand Jury Subpoena 92-1(SJ),* 31 F.3d 826, 829 (9th Cir. 1994).
[5] *Upjohn Co. v. United States,* 449 U.S. 383 (1981).

frank" discussions with their attorneys in order to get better advice and effective representation.[6]

The attorney-client privilege requires an attorney-client relationship.[7] Besides, the existence of the attorney-client privilege consists of four basic elements: "(1) a communication; (2) made between privileged persons; (3) in confidence; (4) for the purpose of seeking, obtaining or providing legal assistance to the client."[8] According to *United States v. Graf*, the attorney-client privilege also refers:

> "(1) Where legal advice of any kind is sought, (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived."[9]

In *United States v. United Shoe Mach. Corp.*, the court established the extension and application of the privilege:

> "The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client."[10]

The application of attorney-client privilege has some exceptions. The principal exceptions are (a) death of the client, (b) fiduciary duty, (c) crime or fraud exception, or (d) waived by the client. One exception of the privilege is the death of the client in matters related to testator-client litigation. The exception involves cases dealing with the interpretation of wills or testamentary-related disputes.[11] Another exception of the privilege is the communication between attorneys and fiduciaries for the discovery of third-party beneficiaries. According to *Garner v. Wolfinbarger*, third party beneficiaries may discover about communications between fiduciaries and attorneys about matters of their fiduciary duties for the discovering beneficiary.[12] A third exception to the privilege occurs when a client seeks advice to commit a crime or fraud. As stated in *United States v. United Shoe Mach. Corp.*, the attorney-client privilege does not apply for communications when a client seeks advice for committing a crime or fraud.[13] The fourth exception is when the client waives the privilege.[14]

---

[6] *Id*.
[7] *Id*.
[8] *Restatement of the Law Governing Lawyers* § 118 (Tentative Draft No. 1, 1988).
[9] *United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010).
[10] *United States v. United Shoe Mach. Corp.,* 89 F. Supp. 357, 358-59 (D. Mass. 1950).
[11] Charles McCormik, Evidence § 94, at 227 (3d ed. 1984).
[12] *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1968).
[13] *Id* at *10.
[14] *Id* at *10.

The attorney-client privilege provides the protection and confidentiality to communications. between clients and attorneys. The privilege is also related to other privileges such as the work product privilege (Fed. R. Civ. P. 26(b)(3)) and federally authorized tax practitioner privilege (I.R.C. Section 7525). The attorney-client privilege promotes better advice and effective representation to clients.

III. THE WORK PRODUCT PRIVILEGE

The work product privilege protects from discovery "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)."[15] Originally, the privilege was framed as a protection of lawyer's work product in *Hickman v. Taylor.*[16] However, the adoption of Fed. R. Civ. P. 26(b)(3) extended the privilege to materials prepared in anticipation of litigation by or for a party or its representative, not just by or for a lawyer.[17] The work product doctrine is intended to preserve a zone of privacy to develop legal theories and strategies toward a litigation, free from unnecessary intrusion by adversaries.[18]

Despite the work product protection, the adverse party may request the other party's documents and tangible things in some instances.[19] The work product privilege may be overcome if there is a substantial need of the materials for the case preparation and the opposing party cannot reasonably obtain their substantial equivalent by other means.[20] The court may evaluate that the adverse party demonstrate a 'substantial need for the materials' and 'undue hardship in obtaining the substantial equivalent of the materials by other means'.[21]

Dual-purpose documents in anticipation of litigation and for business purposes (ex. consulting, memorandums, legal strategies) are also entitled to work product protection.[22] As stated in *United States v. Adlman*, dual-purpose documents where litigation was anticipated are protected work product.[23] In *Adlman*, the court provided examples of dual-purpose documents that are protected work product.[24] One illustrative example is:

> "A company contemplating a transaction recognizes that the transaction will result in litigation; whether to undertake the transaction and, if so, how to proceed with the transaction, may well be influenced by the company's evaluation of the likelihood of success in litigation. Thus, a memorandum may be prepared in expectation of litigation with the primary purpose of helping the company decide whether to undertake the contemplated transaction."[25]

---

[15] Fed. R. Civ. P. 26(b)(3) (2022).
[16] *Hickman v. Taylor*, 329 U.S. 495 (1947).
[17] *Id.* at **15.*
[18] *Schaeffler v. United States*, 806 F.3d 34.
[19] *In re Grand Jury Subpoena (Mark Torf/Torf Env't Mgmt.),* 357 F.3d 900 (9th Cir. 2004).
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *United States v. Adlman,* 134 F.3d 1194 (2d Cir. 1998).
[24] *Id.*
[25] *Id.*

Work product doctrine applies to tax planning including to documents prepared before an event that give rise to a litigation.[26] As indicated in *United States v. Adlman*, "in many instances the expected litigation is quite concrete, notwithstanding that the events giving rise to it have not yet occurred." In *United States v. Roxworthy*, a document prepared in anticipation to deal with the IRS is protected by the work product privilege.[27] As stated in *Roxworthy*, "although not every audit is potentially the subject of a litigation, a document prepared in anticipation of dealing with the IRS may well have been prepared in anticipation of an administrative dispute and this may constitute litigation within the meaning of Rule 26."[28] Moreover, work product privilege applies to documents in anticipation of a litigation arising from an investigation of a government agency.[29] In *Abdallah v. Coca-Cola Co.,* "a document may be considered to have been prepared in anticipation of a litigation even if the litigation that caused its preparation was an investigation by a government agency and not a traditional civil suit."[30]

In tax planning, the work product doctrine applies to a taxpayer dealing with a complex transaction if it is reasonable to anticipate an IRS audit, administrative dispute, or litigation.[31]. In *Schaeffler v. United States*, a memorandum prepared by a tax practitioner to his client "was necessarily geared to anticipated audit and subsequent litigation, which was on this record highly likely."[32] Moreover, "the predicted litigation was virtually inevitable because of the size of the transaction and losses" (citing *United States v. Adlman*).[33] Among different court decisions, the circumstances considered in relevant tax cases are:

- Identifying a specific transaction that may result in a litigation[34]
- Identifying a specific legal controversy that may result in a litigation[35]
- Size of the company[36]
- Size of the transaction[37]
- Complexity of the tax treatment[38]
- IRS's investigation of all taxpayer return[39]
- IRS's previous investigation of similar transactions[40]
- Taxpayer and accounting firm prepares many documents because anticipate a "vigorous legal challenge by the IRS."[41]

---

[26] *Id.*
[27] *United States v. Roxworthy,* 457 F.3d 590,600 (6th Cir. 2006).
[28] *Id.*
[29] *Abdallah v. Coca-Cola Co*, CN Al:98CV3679RWS, 2000 WL 33249254 (N.D. Ga. Jan. 25, 2000)
[30] *Id.*
[31] *Id.* at **18.*
[32] *Id.*
[33] *Id.*
[34] *Id.* at **27.*
[35] *Id.*
[36] *Id.*
[37] *Id.* at **18.*
[38] *Id.*
[39] *United States v. ChevronTexaco, 241 F. Supp. 2d at 1082*
[40] *Id.*
[41] *Id.*

Based on Rule 26 and court decisions, the work product doctrine protects documents and tangible things in anticipation of litigation. The work product privilege also applies to another party or its representatives (ex. consultants, insurer, or agent) in expectation of a litigation.[42] In tax planning, different court decisions sustained that work product privilege applies to documents and memorandums prepared before an event or transaction in anticipation of litigation (*United States v. Adlman, United States v. Roxworthy, Schaeffler v. United States*). Different court decisions (*United States v. Roxworthy, United States v. ChevronTexaco, Schaeffler v. United States*) also found that predicted litigation is anticipated with the IRS for complex transactions considering the size of transactions, complexity, losses, and previous IRS's investigations of similar transactions.

IV. THE FEDERALLY AUTHORIZED TAX PRACTITIONER PRIVILEGE

The federally authorized tax practitioner privilege expands the protections of the client-attorney privilege to communications between "a taxpayer and any federally authorized tax practitioner."[43] The statute establishes:

> "With respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney."[44]

According to I.R.C. Section 7525, a "federally authorized tax practitioner" consists of "any individual who is authorized under Federal law to practice before the Internal Revenue Service if such practice is subject to Federal regulation under section 330 of title 31, United States Code."[45] Under 31 U.S.C. Section 330, the Internal Revenue Service (IRS) establishes the regulations allowing attorneys, certified public accountants (CPAs), and enrolled agents, among others, to practice before the IRS. Therefore, under I.R.C. Section 7525, these tax practitioners are covered by the protections of the federally authorized tax practitioner privilege when providing tax advice.

As stated in *Schaeffler v. United States*, the federally authorized tax practitioner privilege is "essential coterminous with the attorney-client privilege both in scope and in waiver."[46] The privilege covers international accounting firms that provide tax analysis and advice related to international tax field and regulations. According to *United States v. BDO Seidman*, federally authorized tax practitioners are doing "lawyer's work" when they are providing privilege advice.[47] The federally authorized tax practitioner privilege extend the client-attorney privilege to tax advice and communications between tax practitioners and taxpayers.[48]

Pursuant to I.R.C. Section 7525, "tax advice" consists of an "advice given by an individual with respect to a matter which is within the scope of the individual's authority to practice described in subparagraph (A)."[49] When tax advice is within the scope of federally authorized tax

[42] *Id.* at **15*.
[43] 26 U.S.C. § 7525 (2022).
[44] *Id.*
[45] *Id.*
[46] *Schaeffler v. United States*, 806 F.3d 34, 38 n.3 (2d Cir. 2015).
[47] *United States v. BDO Seidman,* 337 F.3d 802 (7th Cir. 2003).
[48] *Id.*
[49] *Id.*

practitioner, the individual's advice is considered as doing "lawyers' work."[50] However, the privilege does not apply to tax advice "in connection with the promotion of the direct or indirect participation of the person in any tax shelter."[51] According to I.R.C. Section 6662, a "tax shelter" occurs "if a significant purpose of a partnership, entity, plan, or arrangement is the avoidance or evasion of Federal income tax." Therefore, advice promoting a tax shelter is not protected under the federally authorized tax practitioner privilege.

Based on I.R.C. Section 7525(b), the federally authorized tax practitioner privilege does not apply in connection with the promotion of a tax shelter. According to *Countryside Limited Partnership. v. Commissioner*, the United States has the burden of proving the facts related to promoting a tax shelter to establish the exception of the privilege (citing *United States v. BDO Seidman*).[52] In *Countryside Limited Partnership. v. Commissioner*, the court found that the term "promotion" did not include an advisor's provision of routine tax advice: (1) in response to taxpayer's request; (2) fell within tax practitioner's area of expertise; (3) to a long-standing client; and (4) where he retained no stake in his advice beyond his employer's right to bill hourly for his time.[53] Under this criteria, routine tax advice does not constitute "promotion" of a tax shelter.

V. United States v. Microsoft Corp.

In *United States v. Microsoft Corp.*, the court conducted an *in camera* review of documents withheld by Microsoft Corporation ("Microsoft") in response to summonses issued by the government while conducting an examination of certain cost sharing arrangements transferring ownership of intellectual property between Microsoft's domestic subsidiaries and a foreign subsidiary in Puerto Rico.[54] The government believed that Microsoft's cost sharing arrangements impermissibly shifted revenue out of the United States, decreasing Microsoft's federal income tax liabilities and obtaining a more favorable foreign tax treatment.[55] Microsoft asserted that certain documents responsive to the government's summonses, including documents prepared by its accountants, KPMG LLP ("KPMG"), were privileged or protected from disclosure under the attorney-client privilege, work product privilege, and/or the federally authorized tax practitioner-client privilege under I.R.C. Section 7525.

Upon completing its *in camera* review, the court concluded that the documents at issue were not protected by the work product doctrine.[56] First, the court held that all the documents served dual business and litigation purposes.[57] Second, the court found a significant difference between planning to act in a legally defensible manner and in defending against an existing legal dispute.[58] The court determined that Microsoft was anticipating litigation because it elected to take an aggressive tax strategy that it knew was likely to be challenged by the government.[59] The record did not provide any indication that Microsoft would have faced its anticipated legal challenges if

[50] *Id.* at *47.
[51] *Id.*
[52] *Countryside Limited Partnership. v. Commissioner,* 132 T.C. 347 (2009).
[53] *Id.*
[54] No. C15-102RSM, at *1-2 (W.D. Wash. Jan. 17, 2020).
[55] *Id.* at *2.
[56] *Id*. at *5.
[57] *Id.* at *6.
[58] *Id.*
[59] *Id.*

Microsoft had not made the decision to pursue the transactions.[60] Moreover, the court observed that Microsoft had not provided any reason it could not have planned the transactions in such an unfavorable manner that it was effectively insulated from a tax challenge.[61] Microsoft's documents were not created in anticipation of litigation.[62] Instead, Microsoft anticipated litigation because of the documents it created.[63] The court also found that Microsoft's work product assertions were undercut by the relationships of the parties and the actions of the parties.[64] For instance, it was noted that Baker & Mckenzie, the law firm hired to provide tax advice on the transaction, did not direct KPMG to create any documents necessary to an eventual litigation defense or for use at trial.[65]

With respect to the attorney-client privilege, the court found that most of the documents were not protected by the privilege. The court reviewed eight documents that contained legal advice provided by Microsoft's in-house attorneys. The court noted that increased scrutiny is necessary when advice by in-house counsel is involved because they often act in both a legal and non-legal business capacity and this requires a clear showing that in-house attorney made the communication for the purpose of obtaining or providing legal advice.[66] The court's review of the eight documents and its conclusions are shown below:

---

[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.* at *7.
[66] *Id.* at *8.

Document ID	Description of Document	Court's conclusion regarding attorney-client privilege
Document Number 13	Emails	Partially privileged because some emails were primarily seeking, providing or relaying legal advice.
Document Number 25	Emails	Privileged because the emails discussed legal issues and primarily sought, provided, or relayed legal advice.
Document Number 43	Emails	Not privileged because the emails served primarily a business purpose and there was indication that the information was intended to be shared instead of maintained confidentially.
Document Number 607	Email attaching slides for a presentation	Not privileged because the documents primarily served a business purpose.
Document Number 736	Email attaching slides for a presentation	Not privileged because the documents primarily served a business purpose.
Document Number 870	Emails	Not privileged because the documents primarily served a business purpose and ther documents indicated that the information may have been shared with third parties or not maintained confidentially.
Document Number 881	Planning Documents	Partially privileged because some documents had a primary purpose of seeking legal advice while other documents primarily served a business purpose.
Document Number 882	Email attaching two draft agreements	Not privileged because the documents primarily served a business purpose. Also, the recipient of the email was an accountant (a non-attorney third party).

The court also found that the documents at issue were not protected from disclosure by the federally authorized tax practitioner privilege ("FATP") under I.R.C. Section 7525 because the privilege does not apply to written communications in connection with a tax shelter.[67] Based on its in camera review of the documents, the court concluded that a significant purpose, if not the only purpose, of Microsoft's transactions was to avoid or evade federal income tax.[68] Microsoft did not advance a business purpose for the transactions. To the contrary, Microsoft asserted that the transactions "should NOT have much impact on how we serve customers."[69] While operational expenses were expected to increase by "50 million over 10 years", the transactions would result in "tax savings of nearly 5 billion over 10 years."[70] It was evident that with no real impact on how customers were served, the tax savings drove the decision making process. Significantly, the court found that all of the documents prepared by KPMG were not protected from disclosure because

[67] *Id.* at *15.
[68] *Id.* at *16.
[69] *Id.*
[70] *Id.*

the firm participated in the promotion of a tax shelter to Microsoft, since the transactions did not appear necessary to satisfy Microsoft's operational needs.[71] Also, there was evidence that KPMG struggled internally to identify good faith legal arguments to support Microsoft's transactions.[72] The court summed up its conclusion stating that "[w]here, as here, a FATP's advice strays from compliance and consequences to promotions of tax shelters, the privilege falls away."[73]

VI. Taxpayers can Take Action to Heighten Their Assertions of Work Product Privilege, Attorney-Client Privilege, and the Federally Authorized Tax Practitioner Privilege

Taxpayers can take action to heighten their assertions of privilege and attempt to avoid an outcome such as the Microsoft decision. With respect to the work product privilege, a change in the relationship of the parties could have potentially prevented the disclosure of some of the documents prepared by KPMG. As the *Microsoft* court noted, Baker & Mckenzie, the law firm hired to provide tax advice on the transaction, did not direct KPMG to create any documents necessary to an eventual litigation defense or for use at trial. This situation could have been easily remedied through a *Kovel* type of arrangement where the law firm providing legal services related to the transactions, Baker & Mckenzie, engaged KPMG to provide tax advice in anticipation of litigation of the transactions, protecting the communications between KPMG and Backer & Mackenzie under the work product privilege.

With respect to the federally authorized tax practitioner privilege, Microsoft could have prevented the disclosure of documents prepared by KPMG had the firm not been found to have been engaged in promoting a tax shelter. To avoid this finding, tax practitioners should ensure that when providing tax advice, they can identify the business purpose of the transactions, beyond merely tax savings. Since the tax shelter exception turns on the purpose for the transaction, "[a] tax structure may be a permissible method to achieve a legitimate business purpose in one context and an impermissible tax shelter in another."[74] To the extent that practitioners can clearly identify the business purpose of a transaction, the likelihood of finding that their advice falls within the tax shelter exception to disclosure under the tax return practitioner privilege is diminished. When communicating with accountants, companies should not discuss tax benefits in a vacuum without assessing the business purpose of a transaction and its operational impact on the business.

VII. Conclusion

Time will tell whether other courts are inclined to follow the *Microsoft* court's narrow interpretation of the work product privilege, attorney-client privilege, and the federally authorized tax practitioner privilege, but the decision has major implications for tax practitioners. Commentators have already raised concerns about *Microsoft*.[75] First, the decision can be read as expanding the tax shelter exception to the federally authorized tax practitioner privilege to include

[71] *Id.* at *18-19.
[72] *Id.* at 19, n.9.
[73] *Id.* at 19.
[74] *Microsoft*, No. C15-102RSM, at *68.
[75] Kat Gregor, Elizabeth Smith, Monica Mleczko, *INSIGHT: Are Privilege Protections Shifting in the Tax Context?,* Bloomberg Tax (Apr. 13, 2020), https://news.bloombergtax.com/daily-tax-report/insight-are-privilege-protections-shifting-in-the-tax-context

otherwise legitimate business decisions to minimize taxes.[76] Second, "the Microsoft court ignored the broader business justification for Microsoft's cost-sharing arrangement: its business purpose for holding the intellectual property in the first place and the fact that it has a right to decide which subsidiary will own that property."[77] Third, "[Microsoft] may signal a change that is already underway globally, particularly in Europe: a shift in public perception to viewing tax optimization as impermissible."[78]

In this environment, it is important for companies, accountants and legal counsel to take actions that protect their assertions of work product privilege, attorney-client privilege, and federally authorized tax practitioner privilege. As previously discussed, when dealing with accountants, it may be necessary to engage the accountants through outside counsel through a *Kovel* type of arrangement. In this manner, it will be harder for the government to argue that the tax-advice documents prepared by the accountants are routine business documents. At the same time, by engaging outside counsel, it will be easier for the taxpayer to establish that the accountant's tax-advice documents were established in anticipation of litigation. Similarly, to protect the federally authorized practitioner privilege, it is important for the accountants to establish the business purpose of a transaction, beyond pure tax savings. To the extent that a transaction serves a legitimate business purpose, the work of the accountant should not be seen as promoting a tax shelter, which will help protect the assertion of the federally authorized tax practitioner privilege over tax-advice documents.

---

[76] *Id.*
[77] *Id.*
[78] *Id.*

WHY STUDY LAW?

LAWRENCE J. TRAUTMAN,[*] JUDITH BOHR,[**] RACHEL CHAMBERS,[***]
MICHAEL J. CONKLIN,[****] BRIAN ELZWEIG,[◊] LARRY D. FOSTER, II,[◊◊] ANGELICA GUEVARA,[◊◊◊]
CHRISTOPHER P. GUZELIAN,[◊◊◊◊] ELLA MCCOWN JONES,[✦] LORA J. KORETZ,[✦✦]
REBECCA NIEMAN,[✦✦✦] KURT M. SAUNDERS,[✦✦✦✦] & DESTYNIE SEWELL[¤]

ABSTRACT

Law is the way civilized societies provide for the conduct of citizens to enhance harmony and optimize achievement of personal liberties. Our laws are an attempt to deal with many of the most horrible ways humans treat each other. Laws are also divided into many sub-specialties, each requiring particular knowledge and experience on the part of the practitioner. Much like the practice of medicine, when you need a brain surgeon, you don't go to a foot doctor. The legal analogy might follow that when you need an intellectual property specialist--- you don't go to a family law practitioner.

Some of these distinct areas of law include: administrative law, admiralty, alternate dispute resolution, antitrust, appellate, business organizations, communications, constitutional, contract, corporations, corporate governance, criminal law, disability, employment, environmental, estates and

---

* BA, The American University; MBA, The George Washington University; J.D., Oklahoma City University School of Law. Mr. Trautman is Associate Professor of Business Law and Ethics at Prairie View A&M; Associate Professor, Texas A&M University School of Law (By Courtesy); External Affiliate, Indiana University Bloomington, Ostrom Workshops in Data Management & Information Governance, and Cybersecurity & Internet Governance.

** BA & MA (Philosophy), Texas A&M University; J.D., Wayne State University Law School. Professor Bohr teaches Legal Environment of Business at Prairie View A&M University.

*** BA/MA in Law, University of Oxford; LL.M, University of Kent; Ph.D. in Law, University of Essex. Dr. Chambers is Assistant Professor at the university of Connecticut.

**** B.B.A., University of Central Oklahoma; M.B.A., Oklahoma City University; J.D., Washburn University School of Law..

◊ BS, Florida State University; JD, California Western School of Law; LL.M., (securities and financial regulation) Georgetown University Law Center. Mr. Elzweig is Professor of Business Law and a Research Fellow of the Askew Institute for Multidisciplinary Studies at the University of West Florida.

◊◊ BS, Washington University in St. Louis; JD & MBA, Oklahoma City University School of Law. Mr. Foster teaches Legal Environment of Business and Ethics at Prairie View A&M University.

◊◊◊ BA, University of California, Los Angeles; MA, PhD, JD, University of California, Berkeley; LL.M., University of Wisconsin. Dr. Guevara is Assistant Professor at Indiana University, Bloomington.

◊◊◊◊ BA & MA (Economics), University of Colorado at Boulder; JD, Stanford University Law School. Mr. Guzelian is Assistant Professor at Texas State University and may be contacted at guzelian@txstate.edu.

✦ BBA, Ohio University; MBA, Morehead State University; JD, University of Dayton School of Law.

✦✦ BS, Western New England College; J.D., Suffolk University Law School; MBA, W.P. Carey School of Business at Arizona State University. Ms. Koretz is Clinical Associate Professor at W.P. Carey School of Business at Arizona State University.

✦✦✦ BS, University of Minnesota, Carlson School of Management, Minneapolis, JD, DePaul University College of Law, Ms. Nieman is Clinical Professor of Business Law & Ethics at the University of San Diego.

✦✦✦✦ BS, (Economics) Carnegie Mellon University; JD, University of Pittsburgh; LL.M. (Intellectual Property Law) George Washington University. Mr. Saunders is Chair and Professor of Business Law at California State University, Northridge.

¤ BS, BA, MBA, The University of Nebraska Omaha; J.D., Creighton University School of Law. Ms. Sewell is an Assistant Professor of Business Law and Ethics at the University of Nebraska Omaha College of Business.

trusts, immigration, insurance, intellectual property, international business law, international law, legislative, maritime, mergers and acquisitions, military, national security, oil and gas, privacy, property, real estate, securities law, small claims, social security, tax, technology, torts (the law of injury), tribal, and water. Some attend law school in the belief that highly-paid job prospects will follow. Others desire a career that provides numerous options and will likely enable them to have a constructive impact on the world in which they live. Your authors believe that the study of law is much more valuable than just completing a college course that may be required for graduation. Learning law provides all with lifelong skills that should enable protection of themselves, family, and loved ones.

I. INTRODUCTION

Law is the way civilized societies provide for the conduct of citizens to enhance harmony and optimize achievement of personal liberties. Our laws are an attempt to deal with many of the most horrible ways humans treat each other. Laws are also divided into many sub-specialties, each requiring particular knowledge and experience on the part of the practitioner. Much like the practice of medicine, when you need a brain surgeon, you don't go to a foot doctor. The legal analogy might follow that when you need an intellectual property specialist--- you don't go to a family law practitioner.

Some of these distinct areas of law include: administrative law, admiralty, alternate dispute resolution, antitrust, appellate, business organizations, communications, constitutional, contract, corporations, corporate governance, criminal law, disability, employment, environmental, estates and trusts, immigration, insurance, intellectual property, international business law, international law, legislative, maritime, mergers and acquisitions, military, national security, oil and gas, privacy, property, real estate, securities law, small claims, social security, tax, technology, torts (the law of injury), tribal, and water. Some attend law school in the belief that highly paid job prospects will follow. Others desire a career that provides numerous options and will likely enable them to have a constructive impact on the world in which they live. Your authors believe that the study of law is much more valuable than just completing a college course that may be required for graduation. Learning law provides all with lifelong skills that should enable protection of themselves, family, and loved ones.

In the next few pages, we present an overview of the various ways law impacts our everyday lives. The authors believe understanding the law deserves everyone's attention. Our legal system provides tools necessary to protect yourself and your family from harm. We hope you find this of interest.

II. CONSTITUTIONAL LAW

The foundation of United States national (federal) law is its Constitution. The average lifespan of modern nations' constitutions is a little over six years. But at 243 years old, the United States Constitution is the oldest constitution still in operation. Its unmatched longevity suggests that it is among the best practical legal codes ever written, rivaling the greatness of the Justinian Code of Imperial Rome (529 A.D.), which itself continues to serve as the inspiration for much European law.

The drafters of the Constitution (collectively called "the Founding Fathers" or "founders") met in 1789 in Philadelphia to form its original seven articles, which were later ratified (approved) by the 13 states in conventions. In 1791, the founders created an additional set of provisions called the "Bill of Rights," which were ten amendments to the Constitution designed to calm the fears of some state representatives that the 1789 articles of the Constitution did not guarantee individual or state rights.

Most governments in world history have been a *monarchy* – a king or queen who (1) makes laws, (2) holds court, and (3) carries out the operations of government. Monarchies are a "top-down," centralized government. But because the United States government was formed during and after a 1775-1783 military revolt against the British and colonial King George III, the United States Constitution fashioned a "bottom-up" federal government: *all* governmental power rests not with a king, emperor, court, or president, but with "*We the People*" (United States citizens). In turn, We the People *lend* power through elections to politicians who carry out routine government functions. Legal powers not expressly given by the Constitution or constitutional laws to the federal government remain those of We the People or the states. The Constitution therefore established and expects a *limited* federal government.

The Constitution broke up the routine functions of a monarchy into three co-equal branches of Federal government: an Executive (President, departments, and agencies), Legislative (Congress), and Judicial system (federal courts). Creating these separate branches was an intentional structural design called the "*separation of powers*" to ensure that no person or group of people could hijack concentrated government power from We the People as a king might do.

While the study of Constitutional law usually consumes at least a full year (two terms) at most law schools, ours will be only a brief overview. We will now look at the Legislative, Executive, and Judicial functions— why they are important – and highlight major functions and court issues, as well as briefly review significant Supreme Court litigation topics and amendments to the Constitution.

A. Legislative

The First Article of the U.S. Constitution establishes a "legislative power" and gives that power to the U.S. Congress, which consists of two deliberative bodies: the House of Representatives and Senate. The number of Representatives from a state are based on its population, but each State has two Senators, irrespective of the state's population. To pass a law, both the House and Senate must vote for a bill (a pending law) by a simple majority and it must also be signed by the U.S. President. The Senate also has authority to "confirm" into office executive branch secretaries, senior officers, ambassadors, special counsel, and federal judges after their nominations by the President.

A major aspect of Congress' legislative power are the *enumerated powers* given to it in the eighth section of the Constitution's first article. These are the acts that Congress specifically may do. There are many such powers, but some of them include: raising taxes, borrowing money for the United States, spending government money, regulating the value of money, regulating interstate commerce, declaring war, calling forth troops to prevent invasions and rebellions, regulating immigration, establishing post offices, and federal and bankruptcy courts, and passing laws "necessary and proper" to carrying out these Section 8 powers.

B. Executive

The Second Article of the U.S. Constitution establishes an Executive Power vested in a President. The President nominates ambassadors, federal judges and Supreme Court justices, and all superior officers and secretaries of the United States government's executive branch. Most significantly, the President and the Executive Branch of federal government ensure that constitutional laws and regulations are faithfully enforced. The President may also conduct international relations and is Commander in Chief of the military in times of both peace and war.

Judicial

The Third Article of the U.S. Constitution establishes a Judicial Power vested in a Supreme Court and any lower federal courts that Congress may establish. Currently, there are thirteen "circuits" of federal courts beneath the Supreme Court. Circuits contain both appellate and district courts. In federal district courts, there are both civil and criminal federal trials, as well as cases involving U.S. constitutional issues, and occasionally some state cases that qualify to be heard in federal court. Appeals courts hear cases usually appealed up by a party after decisions in the federal district courts. Congress has established federal rules of evidence and procedure to govern these trials and cases. In addition, Congress has established a court to hear intellectual property cases (Federal Circuit Court of Appeals), a court to hear claims for money damages against the United States government (United States Court of Federal Claims), a tax court at the Internal Revenue Service, a court to handle international trade issues (Court of International Trade), U.S. bankruptcy courts, a court to issue surveillance warrants against foreign spies (FISA Court), many administrative law judges (such as immigration courts), and others.

In an early Supreme Court case *Marbury v. Madison* (1803), the Supreme Court interpreted the vague constitutional expression "Judicial Power" to include "judicial review," by which the *Marbury* Court declared that whatever interpretation the Court gives to the Constitution in cases involving constitutional issues should be effectively the final word on the issue. This principle of judicial review largely has been honored ever since by both the federal and state governments.

C. Supreme Court

The Supreme Court under Article III of the Constitution can hear both new cases filed directly at the Court, and more commonly cases that have been *appealed* to the Court from lower federal courts or state courts. This happens when litigating parties believe they have not received justice and want the Supreme Court to overrule decisions made in state or lower federal courts. The Supreme Court does not have the constitutional power (or resources and time) to listen to an appeal of *every* American court case, but it has broad judicial power to listen to *many* cases. Congress sets the number of judges (called "justices") on the Supreme Court, which at times has been as few as six, but since 1869 has been nine.
Over its centuries of existence, the Supreme Court has decided many challenging constitutional and legal issues, including: religious liberties, family rights, the lawfulness of slavery and segregation, police oversight, presidential election disputes, federal election campaign contribution rules, government regulations of the media, gun rights, regulations of the U.S. dollar, limitations on corporations and monopolies, the taking of private property for government use, environmental pollution, abortion, treatment of foreign prisoners of war and Americans suspected of supporting enemy nations, prisoner rights, labor law, public health regulations, and numerous other hotly debated topics.

D. Bill of Rights and Other Constitutional Amendments

The Bill of Rights are the first 10 constitutional amendments added in 1791 to the original 1789 Constitution. Article V of the Constitution permits such amendments if two- thirds of both chambers of Congress or two-thirds of the states propose, and three- quarters of the states vote to ratify, an amendment.

The Bill of Rights contains many personal rights that Americans are familiar with, such as: freedom of speech, religion, press, petition, and assembly; the personal right to bear arms; a prohibition on the government's quartering of troops in private homes; a prohibition on government takings of private property for government use without just compensation; a requirement that citizens be offered due process during legal interactions with the government; speedy criminal jury trials and the defendant's right to confront witnesses at those trials and to avoid self-incrimination; a prohibition on police from conducting unreasonable searches and seizures; and a prohibition on cruel and unusual punishments for crimes. The 10th Amendment importantly notes that powers not specifically vested in the federal government by the constitution belong exclusively to states and (We the People) to ensure that the federal government remains a government of limited powers.

There have been a total of 27 formal constitutional amendments in American history. Some other notable ones besides the Bill of Rights include: a requirement that states treat residents with equal protection and due process of laws; the abolition of slavery; equal voting rights irrespective of voters' race or sex; a Prohibition on alcohol manufacture and sales (and a later 21st Amendment which undid that Prohibition), a lowering of the voting age to 18; limits on presidential office holding to two terms; a legalization of federal income tax; not permitting citizens to contest federal bonds and debts; and others.

III. ADMINISTRATIVE LAW

Federal legislators create administrative agencies to assist them in implementing and enforcing laws. Examples of these agencies include the Social Security Administration, Food and Drug Administration (FDA), Environmental Protection Agency (EPAP, the Federal Trade Commission (FTC), and the Securities and Exchange Commission (SEC). Administrative law refers to the vast body of law that governs these administrative agencies. How are these administrative agencies created, what powers do they possess, and what about the debate over their existence, limits to these powers, and how its actions are interpreted by the judiciary?

These administrative agencies have grown in number and in size over the course of U.S. history. Today, many administrative agencies have annual budgets of over $100 billion and over 10,000 employees. Administrative agencies implement more binding rules than Congress and the courts

combined. The administrative state has grown so powerful that it is often referred to as the fourth branch of government.

These agencies affect nearly every aspect of life from the food we eat, the roads we drive on, the automobiles we drive, the energy for our homes and automobiles, our investments, workplace safety and benefits, what you watch on television and hear on the radio, the medicines you take, the level of pollution you breathe, and your retirement.

Like many aspects of the law, administrative law involves tradeoffs that spark controversy and debate. Some view administrative agencies as providing beneficial protections for the public while others view them as imposing harmful restrictions on the efficient operation of businesses. Even the mere existence of the administrative state itself is controversial. Some claim that the Constitution confers only to Congress the power to enact legislation, and therefore allowing unelected bureaucrats to enact binding rules violates principles of limited government and democratic accountability and is therefore unconstitutional. But supporters claim that Congress has the ability to delegate its lawmaking authority under the Constitution. Furthermore, Congress maintains the power to override administrative agency rules and even abolish agencies. These supporters also point out that administrative agencies are necessary because no legislator could ever become knowledgeable about and vote on every nuanced rule that the over 400 agencies and sub-agencies enact.

A new administrative agency is created when Congress passes legislation defining the name, organizational structure, subject matter authority, and level of power to regulate that subject matter. This is referred to as enabling legislation. For example, the Securities Exchange Act of 1934 was the enabling legislation that created the Securities and Exchange Commission (SEC).[1] At over 300 pages long, it provides lengthy descriptions of the purposes for creating the SEC and relevant definitions such as exactly what an "exchange" is and a definition of "broker" that is over 2,000 words long. The enabling legislation also describes the power the SEC has to register, regulate, and oversee brokerage firms, transfer agents, and clearing agencies, identifies and prohibits certain behavior in the markets, and gives the SEC the power to punish people and entities that engage in prohibited behavior.

The SEC's enabling legislation helps illustrate a common issue with administrative law. Even a document over 300 pages long will be insufficient to cover every possible future scenario imaginable. Therefore, interpretations must be made regarding the language used and the intent of the legislators—now all dead—who drafted the enabling legislation. Additionally, the legislators who drafted the document in 1934 had no idea how twenty-first-century technologies would affect the regulation of financial markets.[2] They could not have foreseen things like cryptocurrency investing,[3] automated stock purchases, SPACs,[4] high-frequency trading, and day traders. Therefore, to determine the SEC's ability to regulate such novel behaviors, nuanced adjudications must be made.

In administrative hearings there are no juries and, unlike in criminal trials where the government must prove its case beyond a reasonable doubt, the agency need only prove their case based on the much lower burden of preponderance of the evidence. Also, protections present in criminal trials such as the right against self-incrimination, the presumption of innocence, right to appointed legal representation, right to confront witnesses, and the exclusionary rule are not afforded to those in an administrative hearing.

Administrative agencies are further limited by pieces of legislation such as the Administrative Procedure Act (APA) passed in 1946. The APA imposes notice and comment requirements agencies must adhere to, allowing people to voice concerns over proposed rule changes. The APA provides numerous

---

[1] Neal Newman & Lawrence J. Trautman, *Securities Law: Overview and Contemporary Issues*, 16 OHIO ST. BUS. L.J. 149 (2021), http://ssrn.com/abstract=3790804.

[2] Lawrence J. Trautman & George P. Michaely, Jr., *The SEC & The Internet: Regulating the Web of Deceit,* 68 CONSUMER FIN. L.Q. RPT. 262 (2014), http://www.ssrn.com/abstract=1951148; Lawrence J. Trautman, *Is Disruptive Blockchain Technology the Future of Financial Services?,* 69 CONSUMER FIN. L. Q. RPT. 232 (2016), http://ssrn.com/abstract=2786186.

[3] Michael J. Conklin, Brian Elzweig & Lawrence J. Trautman, Legal Recourse for Victims of Blockchain and Cyber Breach Attacks (with) 23 U.C. DAVIS BUS. L.J. (2022-2023), http://ssrn.com/abstract=4251666.

[4] Neal Newman & Lawrence J. Trautman, *Special Purpose Acquisition Companies (SPACs) and the SEC*, 24 U. PA. J. BUS. L. 639 (2022), http://ssrn.com/abstract=3905372.

protections for people who are affected by the administrative agency's adjudications. The APA attempts to foster independence between the agency's prosecutorial function and its administrative law judges by requiring internal separation between the two. The Freedom of Information Act (FOIA) passed in 1966 imposes further obligations on federal administrative agencies such as making available internal documents upon request. The Privacy Act of 1974 bars federal agencies from disclosing information about a person to another agency without that person's written consent. The Government Sunshine Act of 1976 requires that administrative agencies open their business meetings to the public.

IV. CIVIL RIGHTS

A. Civil Rights

The law has been used to address civil rights in America since the 13th and 14th Amendments to the U.S. Constitution. The Civil Rights Acts of 1866, 1870, and 1871 are generally referred to as the Reconstruction Civil Rights Acts and they were enacted to enforce the 13th, 14th Amendments in the post-Civil War era.[5] These provisions were codified at—and commonly referred to as—42 U.S.C.A. §§ 1981 ("Section 1981"), 1983 ("Section 1983"), and 1985(3) ("Section 1985"). Though dormant for several years, these Acts were resurrected in the 1960's during the Civil Rights Movement.[6] The 15th Amendment to the U.S. Constitution was also enacted in 1870 and gave black men the right to vote. Nevertheless, African-American voting rights and political power were still limited by obstacles to voting like poll taxes, literacy tests, and other restrictions like "grandfather clauses"—excluding from the right to vote to any black males whose ancestors had not voted in the 1860's.[7]

The law has been a primary mechanism used to protect and advance civil rights for black people, women, and other minority populations and marginalized people groups in the areas of freedom from slavery, discrimination, hate crimes, segregation, the "Jim Crow" laws of the South, and voting rights, among many others. On the federal level, the Civil Rights Movement in America resulted in laws like the Civil Rights Act of 1960, the Civil Rights Act of 1964, the Voting Rights of 1965, and the Civil Rights Act of 1968 (the "Fair Housing Act"). State constitutional and statutory provisions also were enacted to address civil rights issues. Under their "police power" to protect and address the health, welfare, and safety of their citizens, states also amended—and still amend—their state constitutions and enacted laws to address the civil rights of their citizens.

While there is a sentiment spreading that voting does not matter, Supreme Court rulings and statutory schemes addressing voting rights are at the forefront of American law and politics. For example, the U.S. Supreme Court held that Section 4 of the Voting Rights Act of 1965 was unconstitutional in *Shelby County, Alabama v. Holder*. The Brennan Center for Justice reports that the voter turnout gap between black and white voters has increased significantly as a result of the *Shelby County* ruling. In June 2022, the U.S. Supreme Court held in a 5-4 ruling that Alabama's congressional districts as drawn likely violated the Section 2 of the Voting Rights Act in *Allen v. Milligan*. On June 27, 2023, the U.S. Supreme Court also rejected the "independent state legislature" theory that the New York Times reports "would have radically reshaped how federal elections are conducted by giving state legislatures largely unchecked power to set rules for federal elections and to draw congressional maps warped by partisan gerrymandering." Likely, there will be more litigation on the ISL theory and voting rights and laws will continue to be an issue in American courts, politics, and society for the foreseeable future.[8]

---

[5] U.S. CONST. AMEND. XIII, XIV, and XV.

[6] Harold S. Lewis, Jr. & and Elizabeth J. Norman, CIVIL RIGHTS LAW AND PRACTICE, 2 (2004).

[7] https://www.archives.gov/milestone-documents/15th-amendment

[8] Richard Pildes, as quoted by Nina Totenburg, *Supreme Court Rejects Independent State Legislature Theory, But Leaves Door Ajar*, NPR (June 27, 2023), https://www.npr.org/2023/06/27/1181152636/independent-state-legislature-theory-supreme-court-decision. (internal citations omitted).

B. Innocence Projects and Equal Justice Initiative (EJI)

Here are two examples of using the law to address violations of civil rights: the Innocence Projects; and the Equal Justice Initiative (EJI). The Innocence Network describes itself as a "coalition of organizations dedicated to providing pro bono legal and investigative services to individuals seeking to prove innocence of crimes for which they have been convicted, working to redress the causes of wrongful convictions, and supporting the exonerated after they are freed."[9]

Perhaps the best example of using law to benefit humankind is that of attorney Bryan Stevenson, founder of The Equal Justice Initiative (EJI). Many will be aware of his efforts due to the best-selling book, *Just Mercy*[10] and film of the same name.[11] According to the EJI:

> Bryan Stevenson is the founder and Executive Director of the Equal Justice Initiative, a human rights organization in Montgomery, Alabama. Under his leadership, EJI has won major legal challenges eliminating excessive and unfair sentencing, exonerating innocent death row prisoners, confronting abuse of the incarcerated and the mentally ill, and aiding children prosecuted as adults.
>
> Mr. Stevenson has argued and won multiple cases at the United States Supreme Court, including a 2019 ruling protecting condemned prisoners who suffer from dementia and a landmark 2012 ruling that banned mandatory life-imprisonment-without-parole sentences for all children 17 or younger. Mr. Stevenson and his staff have won reversals, relief, or release from prison for over 135 wrongly condemned prisoners on death row and won relief for hundreds of others wrongly convicted or unfairly sentenced.
>
> Mr. Stevenson has initiated major new anti-poverty and anti-discrimination efforts that challenge inequality in America. He led the creation of two highly acclaimed cultural sites which opened in 2018: the Legacy Museum and the National Memorial for Peace and Justice. These new national landmark institutions chronicle the legacy of slavery, lynching, and racial segregation, and the connection to mass incarceration and contemporary issues of racial bias.[12]

V. COMMERCIAL TRANSACTIONS

Commercial law is governed by the Uniform Commercial Code of each individual state. According to the Uniform Law Commission, "The Uniform Commercial Code (UCC) is a comprehensive set of laws governing all commercial transactions in the United States. It is not a federal law, but a uniformly adopted state law."[13] Consider how:

> Uniformity of law is essential in this area for the interstate transaction of business. Because the UCC has been universally adopted, businesses can enter into contracts with confidence that the terms will be enforced in the same way by the courts of every American jurisdiction. The resulting certainty of business relationships allows businesses to grow and the American economy to thrive. For this reason, the UCC has been called 'the backbone of American commerce.[14]

---

[9] After Innocence, About Us, https://www.after-innocence.org/mission-team-updated.

[10] BRYAN STEVENSON, JUST MERCY (Random House, 2014), https://www.amazon.com/Just-Mercy-Story-Justice-Redemption/dp/081298496X/ref=sr_1_1?hvadid=356288751028&hvdev=c&hvlocphy=9026793&hvnetw=g&hvqmt=e&hvrand=16188933126253615713&hvtargid=kwd-785734635263&hydadcr=22538_9636739&keywords=just+mercy+the+book&qid=1687970067&sr=8-1.

[11] Just Mercy, IMDb, https://www.imdb.com/title/tt4916630/?ref_=nv_sr_srsg_0_tt_7_nm_1_q_Just%2520Mercy.

[12] Equal Justice Initiative, https://eji.org/bryan-stevenson/.

[13] The Uniform Commercial Code, Uniform Law Commission (n.d.), https://www.uniformlaws.org/acts/.

[14] The Uniform Commercial Code, Uniform Law Commission (n.d.), https://www.uniformlaws.org/acts/ucc.

These are the legal mechanisms designed to provide applicable transaction default rules and definitions for: the sale of goods; leases; negotiable instruments; bank deposits and collections; negotiable instruments; funds transfer; letters of credit; bulk sales; documents of title; investment securities; and secured transactions.[15] The broader topic of bankruptcy is also covered by this topic since secured transactions is such an integral part.[16]

VI. CONTRACTS

The study of law can help you to prepare for a career in which contract negotiation, drafting, and interpretation are essential skills such as a sports agent, purchasing agent or contract administrator – not to mention attorney. While multimillion-dollar contracts for elite athletes make the news, all businesses need to have employees who have studied contract law for much less glamorous transactions as well.

There are three steps in the contracting process: contract negotiation, contract drafting, and contract interpretation. Each of these areas requires an understanding of the law. The first part of the contracting process is contract negotiation. In commercial settings, the parties painstakingly negotiate the duties, allocate foreseeable risks and maximize rewards. The next step is to incorporate the negotiated terms into a written contract. This is no easy task because many of the laws and most of the terminology relating to contracts are derived from antiquated customs from Great Britain that are unfamiliar to most people. Finally, legal knowledge is required to interpret the contract. Contract disputes typically arise when there is a misunderstanding about what the contract means. If a dispute arises, the party who didn't get what they thought they had bargained for will file a lawsuit.

Many legal clients are now asking their lawyers to review contracts generated using "AI" or artificial intelligence, which is in its infancy stage. Some contracts created by popular AI programs seem to look convincing if you're doing a 30,000-foot view of the written document, but upon closer inspection, the definitions don't make sense and some of the nuances of the deal are missing or unintelligible and that will lead to litigation.

If you study law, you can become able to decipher consumer contracts that you or your loved ones are considering, such as the benefits and exclusions in a health insurance contract or the terms of service for a smartphone. Are you thinking of buying a car or a laptop and has the seller included a disclaimer of the implied warranty of merchantability? What does this "word salad" mean? If you studied law, you would know. This means that you have little or no recourse[17] against the seller of a defective product that you purchase. Consumers are typically given a contract on a "take it or leave it" basis with little power to negotiate with a better-equipped adversary. Wouldn't it help to understand what you or your loved ones are signing?

VII. BUSINESS ENTITIES

A. Business Organizations

The selection of appropriate business entity is motivated by: (1) a desire to limit personal liability from conducting business activities; and (2) optimization of tax treatment.

B. Corporate Governance

Corporations are creatures of state law and are governed by a board of directors who "play an important role in [oversight] of American business, in the capital formation process, and are key to the stewardship of economic growth… The duties and responsibilities of a corporate director include: the

---

[15] The Uniform Commercial Code, Uniform Law Commission (n.d.), https://www.uniformlaws.org/acts/ucc.
[16] *See* Robert C. Bird, *Business Law: Now More Than Ever,* 39 J. LEGAL STUD. EDU. 167 (2022).
[17] Many states have "Lemon Laws" that provide customers with recourse if a vehicle is defective under certain conditions.

duty of care; duty of loyalty; and duty of good faith."[18] Many corporate directors are present or former chief executive officers (CEOs), and tend to be experienced, influential, and affluent. Boards conduct their business through standing committees.[19] Among these standing committees are: audit (required for public companies);[20] compensation; executive; nominating and governance; and others as specific circumstances require.[21] Among the board's most difficult responsibilities is the governance of information technology and cybersecurity,[22] and the evolving issues of environmental regulation.[23] Consider that:

> During 2020 and 2021, global governments, their citizens, and businesses all encountered disruptive economic and political stress. Particularly in such challenging times, effective corporate governance is essential for: business formation, the creation and growth of jobs, and maintenance of the economic engine that powers economies and allows for an environment fostering healthy populations and world peace. During stressful tragedies like the 2020-21 global pandemic, instances of corporate cyberbreach, and other times of crisis, it is the responsibility of corporate directors to provide the governance oversight to business enterprises as they navigate the struggle to preserve jobs and provide for corporate survival.[24]

---

[18] Lawrence J. Trautman, *Who Sits on Texas Corporate Boards? Texas Corporate Directors: Who They Are and What They Do,* 16 HOUSTON BUS. & TAX LAW J. 44 (2016), http://ssrn.com/abstract=2493569.

[19] Lawrence J. Trautman, *The Matrix: The Board's Responsibility for Director Selection and Recruitment,* 11 FLA. ST. U. BUS. REV. 75 (2012), http://www.ssrn.com/abstract=1998489; Lawrence J. Trautman & Janet Ford, *Nonprofit Governance: The Basic*, 52 AKRON L. REV. 971 (2018), https://ssrn.com/abstract=3133818; Lawrence J. Trautman, *Corporate Boardroom Diversity: Why Are We Still Talking About This?*, 17 THE SCHOLAR: ST. MARY'S LAW REVIEW ON RACE AND SOCIAL JUSTICE 219 (2015), http://www.ssrn.com/abstract=2047750.

[20] Bernice Donald, Brian Elzweig, Neal F. Newman & H. Justin Pace Crisis at the Audit Committee: Challenges of a Post-Pandemic World, REV. BANKING & FIN. L. [Boston University] (forthcoming), http://ssrn.com/abstract=4240080; Lawrence J. Trautman, *Who Qualifies as an Audit Committee Financial Expert Under SEC Regulations and NYSE Rules?,* 11 DEPAUL BUS. & COMM. L.J. 205 (2013), http://www.ssrn.com/abstract=2137747; Lawrence J. Trautman, *Present at the Creation: Reflections on the Early Years of the National Association of Corporate Directors,* 17 DUQ. BUS. L.J. 1 (2015), http://ssrn.com/abstract=2296427.

[21] Lawrence J. Trautman, Seletha Butler, Frederick R. Chang, Michele Hooper, Ron McCray & Ruth Simmons, *Corporate Directors: Who They Are, What They Do, Cyber and Other Contemporary Challenges*, 70 BUFF. L. REV. 459 (2022), http://ssrn.com/abstract=3792382.

[22] Michael J. Conklin, Brian Elzweig & Lawrence J. Trautman, Legal Recourse for Victims of Blockchain and Cyber Breach Attacks, 23(2) U.C. DAVIS BUS. L.J. 135 (2022-2023), http://ssrn.com/abstract=4251666; David D. Schein & Lawrence J. Trautman, *The Dark Web and Employer Liability*, 18(1) COL. TECH. L.J. 49 (2020), http://ssrn.com/abstract=3251479; Lawrence J. Trautman, *Managing Cyberthreat,* 33 SANTA CLARA HIGH TECH. L.J. 230 (2016), http://ssrn.com/abstract=2534119; Lawrence J. Trautman & Kara Altenbaumer-Price, *The Board's Responsibility for Information Technology Governance*, 28 J. MARSHALL J. COMP. & INFO. L. 313 (2011), http://www.ssrn.com/abstract=1947283; Lawrence J. Trautman & Peter C. Ormerod, *Corporate Directors' and Officers' Cybersecurity Standard of Care: The Yahoo Data Breach,* 66 AM. U. L. REV. 1231 (2017), http://ssrn.com/abstract=2883607; Lawrence J. Trautman & Peter C. Ormerod, *Industrial Cyber Vulnerabilities: Lessons from Stuxnet and the Internet of Things,* 72 U. MIAMI L. REV. 761 (2018), http://ssrn.com/abstract=2982629; Lawrence J. Trautman & Peter C. Ormerod, *WannaCry, Ransomware, and the Emerging Threat to Corporations*, 86(2) TENN. L. REV. 503 (2019), http://ssrn.com/abstract=3238293; Lawrence J. Trautman, Scott Shackelford, Brian Elzweig & Peter C. Ormerod, Cyber Threats to Business: Identifying and Responding to Digital Attacks, https://ssrn.com/abstract=4262971; Lawrence J. Trautman, *Corporate Information Technology Governance Under Fire*, 8 J. STRAT. & INT'L STUD. 105 (2013), http://ssrn.com/abstract=2314119.

[23] H. Justin Pace & Lawrence J. Trautman, Climate Change and *Caremark* Doctrine, Imperfect Together, __ U. PA. J. BUS. L. (forthcoming), http://ssrn.com/abstract=4202412
Lawrence J. Trautman & Neal Newman, The Environmental, Social and Governance (ESG) Debate Emerges from the Soil of Climate Denial, 53 U. MEMPHIS L. REV. 67 (2022), http://ssrn.com/abstract=3939898.

[24] *Id. See also* Lawrence J. Trautman, *The Board's Responsibility for Crisis Governance,* 13 HASTINGS BUS. L.J. 275 (2017), http://ssrn.com/abstract=2623219.

C. Securities Law

Every business enterprise needs capital, whether at start-up, during economic downturn, or to finance growth. All of these stages require an understanding of securities law and compliance with SEC regulations.[25]

VIII. CRIMINAL LAW

A fundamental understanding of criminal law and procedure is important for any student or business professional. Criminal laws are not only applicable to robberies, murders, and illegal drug offenses. Criminal law and penalties apply to wide range of business and other activities such as copyright infringement, abortion, and many others.

A. Copyright Infringement

As to copyright infringement, Section 2319 of the Copyright Act provides for criminal penalties, including fines and imprisonment, for certain levels of willful infringement under Section 506 "if the infringement was committed—

> (A) for purposes of commercial advantage or private financial gain;
> (B) by the reproduction or distribution, including by electronic means, during any 180–day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than $1,000; or
> (C) by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution." [26]

B. Cannabis Laws

Also, numerous states have legalized recreational and/or medicinal marijuana use and possession to some extent, but not all states have followed. Reuters reports that as of June 1, 2023, adult-use of cannabis is legal in 23 states, the District of Columbia, Guam, and the Northern Mariana Islands.[27] Nevertheless, as of June 29, 2023, marijuana possession, sale, and distribution remain a federal offense.

---

[25] Brian Elzweig & Lawrence J. Trautman, When Does A Nonfungible Token (NFT) Become A Security?, 39 GA. ST. U. L. REV. 295 (2023), http://ssrn.com/abstract=4055585; Neal Newman, GameStopped: How Robinhood's GameStop Trading Halt Reveals the Complexities of Retail Investor Protection, 28 FORDHAM J. CORP. & FIN. L. (2023), https://ssrn.com/abstract=4459285; Neal Newman & Lawrence J. Trautman, *Special Purpose Acquisition Companies (SPACs) and the SEC*, 24 U. PA. J. BUS. L. 639 (2022), http://ssrn.com/abstract=3905372; H. Justin Pace & Lawrence J. Trautman, Mission Critical: *Caremark. Blue Bell,* and Director Responsibility for Cybersecurity Governance 2022 WISC. L. REV. 887 (2022), http://ssrn.com/abstract=3938128.
Lawrence J. Trautman 7 George P. Michaely, *The SEC & The Internet: Regulating the Web of Deceit*, 68 CONSUMER FIN. L. Q. RPT. 262 (2014), http://www.ssrn.com/abstract=1951148; Lawrence J. Trautman & Neal Newman, *A Proposed SEC Cyber Data Disclosure Advisory Commission*, 50 SEC. REG. L.J. 199 (2022), http://ssrn.com/abstract=4097138.

[26] 17 U.S.C. §§ 506 and 2319. *See also* Timothy Hsieh, Robert W. Emerson, Larry D. Foster II, Brian A. Link, Cherie A. Sherman & Lawrence J. Trautman, Intellectual Property in the Era of AI, Blockchain, and Web 3.0, http://ssrn.com/abstract=4392895.

[27] Sourasis Bose, Factbox: U.S. states where recreational marijuana is legal, REUTERS (June 1, 2023), https://www.reuters.com/world/us/us-states-where-recreational-marijuana-is-legal-2023-05-31/. *See also* Lawrence J. Trautman, Donald Mayer, Paul Seaborn, Adam Sulkowski & Robert T. Luttrell, *Cannabis At the Crossroads: Regulation, A Transdisciplinary Analysis and Policy Prescription,* 46 OKLA. CITY U. L. REV. 125 (2021), http://ssrn.com/abstract=3541229.

It is still unlawful at the federal level as Schedule I controlled substance under the Controlled Substance Act.[28]

C. Abortion Laws

Abortion is another issue that has criminal implications, especially in the wake of the *Dobbs v. Jackson Women's Health Organization* ruling by the U.S. Supreme Court.[29] In *Dobbs*, the Court overturned precedential rulings in *Roe v. Wade*[30] and *Planned Parenthood v. Casey*,[31] and held that the U.S. Constitution does not confer a right to abortion and that the authority to regulate abortion is relegated to the states. *The New York Times* reports that since *Dobbs*, most abortions are currently banned in fourteen (14) states—as of June 26, 2023.[32] Nevertheless, the battle over abortion access rages on in the courts where abortion rights advocates are suing to block enforcement of laws and restrictions.[33]

The landscape post-*Dobbs* presents nuanced legal issues such as whether a state that has banned abortions can prosecute a resident of its state who had an abortion in another state that has not banned abortions. Also, *Dobbs* invokes the issue of whether a state that has banned abortions can prosecute a student who was confirmed to be pregnant by a physician in that state, but had an abortion that was legal in the state in which she attends college. There are certainly more issues and questions presented by *Dobbs*, but hopefully these considerations serve as examples of why it is important to study and understand criminal law.

IX. EMPLOYMENT

Regardless of an individual's career choice, studying law is beneficial in the private and public spheres of daily living. For example, a basic understanding of employment law provides negotiating power for the employer and the employee when forming an employment contract.[34] In particular, learning about disability law helps an individual with or without disabilities maximize human potential by allowing an individual or a team to create an inclusive workplace accommodating different abilities starting in the hiring phase. This reality became all the more relevant for employees and employers after the 2008 amendment to the Americans with Disabilities Act (ADA), which broadened who is covered under the legal definition of disability.[35]

After the 2020 Census, the Centers for Disease Control (CDC) reported that twenty-six percent of Americans live with some disability, with the highest reported in the South.[36] The recent pandemic forced many to learn about employment law as the landscape of the workspace and workforce changed.[37] Anyone fortunate enough to reach age forty would benefit from learning about disability law because they will need to know their rights as their bodies begin to change and require reasonable accommodations in the employment sector. Needless to say, a basic comprehension of employment law will always come in

---

[28] 21 U.S.C. § 801 *et seq*.

[29] *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022)

[30] *Roe v. Wade*, 410 U.S. 113 (1973)

[31] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)

[32] Allison McCann, Amy Schoenfeld Walker, Ava Sasani, Taylor Johnston, Larry Buchanan & Jon Huang, *Tracking the States Where Abortion Is Now Banned* (June 26, 2023), https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html.

[33] *Id.*

[34] Lawrence J. Trautman, Thomas J. Freeman, Lora J. Koretz, Anthony L. McMullen, H. Justin Pace, Lester C. Reams & David. D. Schein), Employment Law: The Basics, http://ssrn.com/abstract=3765016.

[35] ADA Amendments Act of 2008, PL 110-325 (ADAAA).

[36] *Disability Impacts All of Us*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html; Robert Gebelhoff, *The South has Greatest Prevalence of Disabled Adults, New Government Data Show*, WASH. POST (July 30, 2015, 5:52 PM), https://www-washingtonpost-com.proxyiub.uits.iu.edu/news/to-your-health/wp/2015/07/30/the-south-has-greatest-prevalence-of-disabled-adults-new-government-data-show/.

[37] Eddie Bernice Johnson & Lawrence J. Trautman, *The Demographics of Death: An Early Look at Covid-19, Cultural and Racial Bias in America*, 48 HASTINGS CONST. L.Q. 357 (2021), http://ssrn.com/abstract=3677607.

handy when an individual may require additional resources to continue participating in the workforce after an accident or a recent change in health. Knowledge of the law can help anyone help their loved ones spot a legal issue to decipher whether they need further legal assistance. Ultimately, studying the law is a wise investment because employers tend to place more trust in individuals who know and understand the law. After all, it is a reasonable assumption that they are quick learners and worthy of entrusting with more challenging tasks.

X. ENTREPRENEURSHIP

In the United States," small businesses are responsible for creation of 60 to 80 percent of net new employment since the mid-1990s."[38] Many business school students indicate they want to consider owning their own business at some point. For many, this may be a franchise.[39] Experience indicates that: The endeavors of a typical start-up in the United States will likely implicate many of the following areas of law: intellectual property; business organizations; tax laws; employment and labor laws; securities regulation; contracts and licensing agreements; commercial sales; debtor-creditor relations; real estate law; health and safety laws/codes; permits and licenses; environmental protection; industry specific regulatory laws and approval processes; tort/personal injury, products liability, and insurance laws; antitrust and other unfair competition laws; import/export laws; immigration laws; laws related to the internet, privacy and e-commerce; and possibly many other federal, state and/or local laws, and, for many businesses these days, international laws. Company founders need to develop familiarity with the effects of such laws and need to access qualified legal talent to address legal issues in the planning and implementation of their venture.[40]

XI. ENVIRONMENTAL LAW

Environmental law is an area that has an extensive impact on all levels of society. While not every law course addresses the topic of environmental law specifically, the effect of organizational environmental-related decision making is intertwined within other areas of law. Gaining a better understanding of laws designed to protect the environment can create positive long-term quality-of-life outcomes. Awareness of ongoing issues facing individuals and organizations can prepare future leaders to participate in finding solutions to current and future environmental challenges. Students who learn about environmental law will be better prepared to navigate future discussions that can lead to more responsible decision making in both private and public settings.

The governmental agency that focuses on environmental concerns involving the air, land, and water is the Environmental Protection Agency (EPA). The EPA was created as an independent federal agency in 1970 under President Richard Nixon "to protect human health and the environment."[41] The EPA's website provides information on a multitude of environmental topics, laws and regulations, and how to report violations.[42] For instance, an environmental topic impacting all areas of society is the use of landfills. Landfills are used for non-hazardous and hazardous waste disposal. EPA data indicate that food waste makes up approximately 24 percent of the municipal solid waste disposed in landfills.[43] The rise in

---

[38] Lawrence J. Trautman, Anthony "Tony" Luppino & Malika S. Simmons, *Some Key Things U.S. Entrepreneurs Need to Know About The Law and Lawyers,* 46 TEX. J. BUS. L. 155 (2016), http://ssrn.com/abstract=2606808, *citing* Vivek Wadhwa, Raj Aggarwal, Krisztina Holly & Alex Salkever, *Making of A Successful Entrepreneur: Anatomy of an Entrepreneur Part II* 4 (2009). Kauffman Foundation Small Research Projects Research Paper No. 2., http://ssrn.com/abstract=1507384.

[39] Robert W. Emerson & Lawrence J. Trautman, *Lessons About Franchise Risk From YUM! Brands and Schlotzsky's,* 24 LEWIS & CLARK L. REV. 997 (2020) http://ssrn.com/abstract=3442905; Lawrence J. Trautman, *Rapid Technological Change and U.S. Entrepreneurial Risk in International Markets: Focus on Data Security, Information Privacy, Bribery and Corruption,* 49 CAPITAL U. L. REV. 67 (2021), https://ssrn.com/abstract=2912072.

[40] *See* Trautman, Luppino & Simmons, *supra* note 56.

[41] *EPA History*, U.S. Environmental Protection Agency, https://www.epa.gov/history.

[42] *U.S. Environmental Protection Agency*, U.S. Environmental Protection Agency, https://www.epa.gov/.

[43] *Food Waste and its Links to Greenhouse Gases and Climate Change*, U.S. Department of Agriculture,

food waste and its connection to greenhouse gases create an environmental issue that will require thoughtful decision making that will result in viable options.

Learning about environmental laws can open opportunities for a future career that can help shape positive outcomes for society. Films and books about legal cases resulting from detrimental management decisions involving hazardous materials can help with understanding the consequences on the environment. For example, films such as *Erin Brockovich* and *Dark Waters* (based on Environmental Attorney Robert Bilott's book *Exposure*) can serve to further inform students of the types of disastrous outcomes that can result from poor environmental management decision making.[44] Gaining knowledge to make informed, responsible decisions on environmental matters is necessary to safeguard the best interests of society as well as organizations.

XII. ETHICS AND FRAUD

Studying law is important because it directly intertwines with ethics on a daily basis, not only in the business world, but also on a personal level. Laws provide a solid foundation from which to operate, wherein ethics serve as guideposts that a business or person use to function within as they run a business or navigate their lives. Ethics focuses more specifically on right and wrong behavior but are deemed more subjective; whereas the law is governing principles that are set by governments and enforced.[45] However, there are areas between the two that overlap, such as: justice and fairness.[46]

One regularly sees instances where businesses not only violate ethical guidelines but laws as well. Recently, Elizabeth Holmes was sent to prison for violating laws relating to defrauding investors[47], but equally alarming were the multiple ethical violations that occurred during her tenure as CEO that involved overpromising on a product, deciding when or if to "come clean" when potential problems began to arise, creating unrealistic expectations, as well as creating a toxic work culture.[48] Because of these ethical lapses, whistleblowers (of which there are laws that protect them[49]) started raising red flags to regulators about these potential legal violations. This is a classic case of law and ethics intersecting and each causing the other to create a case for accountability. If you look at some of the more famous criminal business cases covered by the FBI, you'll notice the main crimes involved have to do with fraud.[50] Then, if you look more deeply into those same cases, you'll notice many of those crimes all

---

https://www.usda.gov/media/blog/2022/01/24/food-waste-and-its-links-greenhouse-gases-and-climate-change#. See also *Food Loss and Waste*, U.S. Food and Drug Administration, https://www.fda.gov/food/consumers/food-loss-and-waste#.

[44] Soderbergh, Steven. 2000. *Erin Brockovich*, United States: Universal Pictures. See also Haynes, Todd. 2019. *Dark Waters*. United States: Focus Features. See also Robert Bilott, *Exposure*: *Poisoned Water, Corporate Greed, and One Lawyer's Twenty-Year Battle against DuPont* (New York: Atria Books/Simon & Schuster, 2019).

[45] Author unknown, *A Framework for Making Ethical Decisions,* Brown University Science and Technology Studies, Date unknown, https://www.brown.edu/academics/science-and-technology-studies/framework-making-ethical-decisions.

[46] *Id.*

[47] Nopalitano, Elizabeth, *Former Theranos CEO Reports to Prison to Serve her 11 Year Sentence for Fraud*, CBS News, May 30, 2023, https://www.cbsnews.com/news/theranos-ceo-elizabeth-holmes-prison-sentence-trial/#:~:text=Former%20Theranos%20CEO%20Elizabeth%20Holmes%20was%20taken%20into%20custody%20Tuesday,biotech%20company's%20blood%2Dtesting%20technology. *See also* Lawrence J. Trautman, Larry D. Foster, II., Lora J. Koretz, Clyde McNeil, Eric Yordy & Ashley Salinas, Ethical Failure at Theranos, http://ssrn.com/abstract=4040181.

[48] Ramsdell, Tiffany, *Theranos: A Cautionary Tale of Ethics and Entrepreneurship*, Colorado University Denver Business School Newsroom, May 24, 2019, https://business-news.ucdenver.edu/2019/05/24/theranos-a-cautionary-tale-of-ethics-and-entrepreneurship/.

[49] Occupational Safety and Health Administration, Directorate of Whistleblower Protection Programs Whistleblower Statutes Summary Chart, June 7, 2021, https://www.whistleblowers.gov/sites/wb/files/2021-06/Whistleblower_Statutes_Summary_Chart_FINAL_6-7-21.pdf.

[50] Federal Bureau of Investigation, no date, What We Investigate, Major Cases, Major white-collar crime cases over the years, https://www.fbi.gov/investigate/white-collar-crime/major-cases.

started with ethical lapses, much like the Theranos case mentioned above. Thus, what may start out as a case of an ethical decision gone wrong, slowly evolves into a larger more complex legal situation.

The interrelationship of ethics and fraud is a tale as old as time. Some claim the first instance of fraud in the business world occurred in 300 B.C. when a Greek merchant took out a large insurance policy to protect his cargo (corn) that was being shipped. The merchant planned to not put the corn on the ship, sink the ship and attempt to claim the insurance policy. However, his plan failed, and he even drowned when trying to execute his plan![51] Studying the law can help students be more cognizant of these ethical issues and able to recognize them before they arise. Therefore, when an ethical problem does present itself in the business world, students are not "new" to such an issue and can address it in a meaningful way, using tools in their toolbox they learned in a business law class.

XIII. HEALTHCARE

The field of healthcare law plays a critical role in shaping the ethical, legal, and social landscape of the healthcare industry. As advancements in technology and medicine continue to accelerate, understanding and studying healthcare law become increasingly important. Healthcare law professionals play a pivotal role in shaping policies and guidelines that promote responsible and ethical use of biometric technology, enhancing patient trust and confidence in the healthcare system. This section examines four key areas where healthcare law has a significant impact: biometric technology, institutional review boards, diversity and inclusion, and reproductive rights.

A. Biometric Data

The integration of advanced biometrics into healthcare, such as accessing a person's medical records merely by scanning their finger, offers tremendous potential for personalized healthcare and disease prevention. Thus, stakeholders of biometric technology use must strike a delicate balance between medical innovation, data collection, and patient privacy. As biometric technologies become more prevalent in healthcare, understanding the legal implications ensures that patients' sensitive data is collected ethically and is adequately protected from unauthorized access or misuse.[52]

B. Institutional Review Boards

To avoid repeating the atrocities of research projects, such as the 40-year Tuskegee Syphilis Experiment, or the deceptive removal of Henrietta Lack's cells, researchers have used Institutional Review Boards (IRB) when conducting research involving human since 1974.[53] Compliant with FDA guidelines, an IRB holds the power to grant approval, request alterations for approval, or reject research proposals.[54] Thus, healthcare law is paramount in ensuring ethical research practices and protecting the rights of human subjects. While well-meaning, critics within the research complain the process s overwrought with bureaucratic requirements consuming significant time and money, without adding any tangible benefits to protecting human subjects and may ultimately hinder the research project's

---

[51] Johnstone, P. Serious White Collar Fraud: Historical and Contemporary Perspectives. *Crime, Law and Social Change* 30, 107–130, 107 (1998). https://doi-org.sandiego.idm.oclc.org/10.1023/A:1008349831811.

[52] Ariella M. Meadows, *Legal and Policy Aspects of the Intersection Between Cloud Computing and the U.S. Healthcare Industry*, HARV. J.L. & TECH. (2015), http://jolt.law.harvard.edu/digest/legal-and-policy-aspects-of-the-intersection-between-cloud-computing-and-the-u-s-healthcare-industry.

[53] *The Syphilis Study at Tuskegee Timeline*. CDC Control and Prevention. (Dec. 20, 2022), https://www.cdc.gov/tuskegee/timeline.htm; Laura M. Beskow. *Lessons from HeLa Cells: The Ethics and Policy of Biospecimens*, 17 ANN. REV. GENOMICS & HUM. GENET. 395, https://doi.org/10.1146/annurev-genom-083115-022536; *Institutional Review Board Overview*. Fred Hutchinson Cancer Center. https://extranet.fredhutch.org/en/u/irb/institutional-review-board-overview.html.

[54] *Institutional Review Boards Frequently Asked Questions.* US FDA. (Apr. 18, 2019), https://www.fda.gov/regulatory-information/search-fda-guidance-documents/institutional-review-boards-frequently-asked-questions

outcome.[55] Practitioners in this field are charged with maintaining compliance with regulations, fostering trust between researchers and participants while upholding the integrity of scientific inquiry.

C. Diversity and Inclusion

Inclusion is of utmost importance when implementing healthcare law as it ensures equitable access to quality healthcare services for diverse populations. Health disparities remain a prominent subject of discussions in both scientific research and policy-making arena.[56] Understanding and respecting the cultural backgrounds, beliefs, values, and abilities of patients and healthcare providers is crucial in overcoming language barriers, addressing disparities, and promoting positive health outcomes. For example, with the stroke of a pen, groups of people may gain health insurance or may no longer qualify for coverage.[57] When implementing new legislation, it is important for stakeholders to not only consider that improvements in areas of the healthcare system might not benefit all segments of the population but also to identify how different stakeholders are impacted and consider alternatives to reduce disparities.[58] By incorporating cultural competence into healthcare law, policymakers and practitioners can foster trust and collaboration within diverse communities, thereby enhancing the overall effectiveness and fairness of healthcare delivery and legal frameworks.

D. Reproductive Rights

The study of healthcare law is indispensable in the ongoing debate on reproductive rights, especially following the overturning of *Roe v. Wade* with *Dobbs v. Jackson Women's Health Organization in 2022*.[59] This has led to battles among patients, medical practitioners, legislators, and legal scholars to understand the implications of *Dobbs* on patient care, particularly access to abortion medication and services at the state level.[60]

Of course, access to abortions is not the only reproductive rights of concern. Reproductive rights encompass a wide spectrum of healthcare laws, from access to forced or voluntary sterilization to advanced techniques like In Vitro Fertilization (IVF) used in assisted reproduction.[61] Access not only involves legal availability of these services but also ensuring patients can afford these costly procedures through laws that mandate health insurance coverage, similar to other medical issues. Additionally, some states legally recognize gestational surrogacy contracts and allow insurers to subsidize associated costs, while others deem such contracts illegal. [62]

---

[55] *See* Sandra V. Kotsis & Kevin C. Chung, *Institutional Review Boards: What's Old, What's New, What Needs to Change*, 133 J. AM. SOC. PLAST. SURG. 439 (2014).

[56] Dorothy Roberts. *The Most Shocking and Inhuman Inequality: Thinking Structurally About Poverty, Racism, and Health Inequalities*. 49 U. MEM. L. REV. 167, 168 (2018).

[57] Haley H. Moss. *I'm Tired of Waiting": Diagnosing Accessibility Issues and Inequality for Patients with Disabilities Within the American Healthcare System.* 51 U. MEM. L. REV. 1011, 1016-1025 (2021).

[58] Robin M. Weinick & Romana Hasnaian-Wynia. Quality Improvement Efforts Under Health Reform: How to Ensure They Help Reduce Disparities- Not Increase Them, 30(10) HEALTH AFFAIRS, 1837, 1839 (2011).

[59] 410 U.S. 113 (1973); 597 US _ (2022); *Roe v. Wade and Supreme Court Abortion Cases*, Brennan Center for Justice. (Sep. 28, 2022). https://www.brennancenter.org/our-work/research-reports/roe-v-wade-and-supreme-court-abortion-cases#:~:text=In%20Roe%20v.,on%20the%20stage%20of%20pregnancy.

[60] *Roe v. Wade and Supreme Court Abortion Cases.*

[61] *See Buck v. Bell*, 274 U.S. 200 (1927); Minton v. Dignity Health 39 Cal. App. 5th 1155 (2019); Elizabeth Hintz, *What is Voluntary Sterilization? A Health Communication Expert Unpacks How a Legacy of Forced Sterilization Shapes Doctor-patient Conversations Today,* The Conversation. (Dec. 09, 2022), https://theconversation.com/what-is-voluntary-sterilization-a-health-communication-expert-unpacks-how-a-legacy-of-forced-sterilization-shapes-doctor-patient-conversations-today-194796#:~:text=In%20this%20form%20of%20permanent,although%20success%20rates%20vary%20widely.

[62] *Surrogacy by State: Get the Facts*, Circle Surrogacy, https://www.circlesurrogacy.com/surrogacy/surrogacy-by-state-surrogacy-laws.

XIV. HUMAN RIGHTS

Unlike most of the other areas of law discussed in this article, human rights law forms part of international law, but as will be seen, human rights receive protection in different ways domestically in the United States.

Human rights law at its heart is about the protection of rights that are inherent to all human beings, regardless of race, sex, religion, nationality, political opinion, age, or any other status. Following the devastating events of World War II and the Holocaust, human rights were recognized internationally in 1948 when the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR)[63] as an international document to enshrine the rights and freedoms of all human beings. Some of the rights from the UDHR include the right to live free from discrimination, the right to a fair trial, freedom of opinion and expression, the right to education, and the right to a standard of healthy living which includes access to adequate food, water, and shelter. The adoption of the UDHR was a key moment in the history of human rights because it was the first time that human rights were formally organized and documented to promote the universality of such rights.[64] While the UDHR itself is not binding law, its principles and human rights standards are enshrined in other binding international instruments, in particular the two key human rights covenants,[65] and even domestic instruments, such as in constitutions or statutes.

Human rights law exists at both the international and domestic levels. For example, at the international level, courts like the European Court of Human Rights[66] hears cases and makes determinations about possible human rights violations within European countries that have ratified the European Convention on Human Rights. The United States has been hesitant to accept international human rights obligations, not having ratified many of the major human rights treaties,[67] and not having legislated to make certain ratified treaties are judicially enforceable.[68]

At the domestic level, the Constitution affords some legal protection for civil rights.[69] There is also legal protection of human rights in state constitutions[70] and legislation enacted by Congress[71] and state legislatures.[72] In addition, the Department of Justice (DOJ) has the ability to investigate and prosecute individuals who violate federal crimes including torture, war crimes, and

---

[63] *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.

[64] Liu Jie, *On the Making and Significance of the Universal Declaration of Human Rights*, 17 J. HUMAN RTS., 480, 480 (2018). *See also* Lawrence J. Trautman & Maia McFarlin, Putin, Russia and Ukraine: International Human Rights Violations, War Crimes, & Future Implications, http://ssrn.com/abstract=4393282.

[65] The two covenants are the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966). Together the UDHR and these two Covenants are known as the International Bill of Human Rights.

[66] *European Court of Human Rights*, COUNCIL OF EUROPE, https://www.echr.coe.int/Pages/home.aspx?p=home.

[67] See United Nations Human Rights Office of the High Commissioner, *Status of Ratification*, https://indicators.ohchr.org/, discussed in Rachel Chambers and Jena Martin, *United States: Potential Paths Forward after the Demise of the Alien Tort Statute* in Civil Remedies and CIVIL REMEDIES AND HUMAN RIGHTS IN FLUX: KEY LEGAL DEVELOPMENTS IN SELECTED JURISDICTIONS (Ekaterina Aristova and Uglješa Grušić eds, 2022) 351.

[68] For instance, the United States has not signed any optional protocol that would subject it to the individual complaint mechanisms for human rights violations under international law. See Human Rights Watch (HRW), *United States Ratification of International Human Rights Treaties*, July 24, 2009, www.hrw.org/news/2009/07/24/united-states-ratification-international-human-rights-treaties

[69] For example, in the Bill of Rights. See Part 1, *supra*, Constitutional Law.

[70] Discussed in Emily Zackin, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS (2013).

[71] For example, the Torture Victims Protection Act provides U.S. citizens and non-citizens with a right to sue individuals who carry out torture or extrajudicial killings, acting 'under the actual or apparent authority, or color of law, of a foreign nation.' Torture Victim Protection Act of 1991, Pub L No 102-256, 106 Stat 73 (1992) (codified at 28 U.S.C. § 1350 (2012)).

[72] For example, 2022 Connecticut General Statutes, Title 46a* - Human Rights, https://law.justia.com/codes/connecticut/2022/title-46a/.

genocide, which correspond with human rights violations.[73] These types of cases are tried in federal district courts by Assistant U.S. Attorneys with the support of other specialized DOJ attorneys. However, not all lawsuits involving the violation of human rights are tried on behalf of the federal government. Public interest firms and nonprofit organizations, such as the American Civil Liberties Union (ACLU) play a major role in filing lawsuits on behalf of individuals who have experienced human rights violations. The ACLU's cases seeking justice for a variety of human rights violations including for individuals who have experienced inhumane detention conditions, human trafficking, and police brutality.[74] Human rights commissions in certain states enforce human rights law, for example the mission of the Connecticut Commission on Human Rights and Opportunities is to eliminate discrimination through civil and human rights law enforcement.[75]

In addition to litigation, human rights law appears in advocacy efforts, particularly through the work of intergovernmental organizations (IGOs), such as the United Nations, and non-governmental organizations (NGOs). Some examples of NGOs in the United States include the Human Rights Defense Center,[76] Human Rights First,[77] and Human Rights Watch.[78]

Human rights create the basis of our shared humanity. Therefore, the practice of human rights law works to protect and defend these rights to ensure that all human beings, regardless of their status, are able to live protected and free.

XV. INTELLECTUAL PROPERTY

The law of intellectual property affords protection for the inventive and creative products of the human mind.[79] Intellectual property rights serve as a reward for the time and effort devoted to inventive and creative activity, and incentivize further such activity.[80] There are four main categories of intellectual property: trade secrets, patents, copyrights, and trademarks.

A. Trade Secrets

Almost all businesses own trade secrets. A trade secret is any form of information, which is kept secret and which is economically valuable because it is not known or easily discoverable by competitors.[81] The trade secret can be any type of information, including formulas, patterns, compilations, programs, devices, methods, techniques, and processes.[82] The Coca-Cola formula and Google's search algorithms are examples.[83] The customer lists and marketing plans of many small businesses may qualify as trade secrets. These trade secrets have economic value because they are unknown to competitors and therefore provide a competitive advantage.[84]

---

[73] *Human Rights and Special Prosecutions Section (HRSP)*, JUSTICE GOV., https://www.justice.gov/criminal-hrsp.
[74] *Court Cases: Human Rights*, ACLU, https://www.aclu.org/court-cases?issue=human-rights.
[75] CONNECTICUT COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES, https://portal.ct.gov/CHRO/Commission/Commission/Our-Purpose.
[76] *About the Human Rights Defense Center*, HUMAN RIGHTS DEFENSE CENTER, https://www.humanrightsdefensecenter.org/about/.
[77] About Us: Righting Human Wrongs, HUMAN RIGHTS FIRST, https://humanrightsfirst.org/about-us/.
[78] History, HUMAN RIGHTS WATCH, https://www.hrw.org/about/about-us/history.
[79] *See* KURT M. SAUNDERS, INTELLECTUAL PROPERTY LAW: LEGAL ASPECTS OF INNOVATION AND COMPETITION 1 (2d. ed. 2022).
[80] *See id.* 11-14. *See also* Timothy T. Hsieh, Robert W. Emerson, Larry D. Foster II, Brian A. Link, Cherie A. Sherman & Lawrence J. Trautman, Intellectual Property in the Era of AI, Blockchain, and Web 3.0, http://ssrn.com/abstract=4392895.
[81] *See* UNIF. TRADE SECRETS ACT § 1(4) (amended 1985), 14 U.L.A. 538 (2005) [hereinafter UTSA].
[82] *Id*.
[83] In addition, a trade secret can be know-how as well as "negative" information that results from research blind alleys, failed designs, and methods that do not work. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 cmt. e (Am. L. Inst. 1995) [hereinafter Restatement].
[84] *See id.* Restatement § 39.

A trade secret owner must take reasonable precautions to keep it a secret. Absolute secrecy is not required; only those steps that are reasonable under the circumstances to maintain the confidentiality of the information.[85] Such measures might include advising employees about the secret's secrecy, limiting access to the secret on a need-to-know basis, requiring those given access to the information to sign a confidentiality agreement, and controlling and monitoring access to the information. The measures taken by a neighborhood bakery shop to protect its secret donut recipe are likely to be less costly and elaborate compared to those precautions taken by a major corporation like KFC to protect its secret recipe for chicken.

Trade secret protection is governed by state and federal law, and lasts as long as the information remains a secret. However, once the information is disclosed or becomes publicly available, trade secret protection is lost. Misappropriation occurs when another uses or reveals a trade secret without permission, or improperly acquires it through theft, bribery, misrepresentation, or espionage.[86] In addition, misappropriation results when someone under a duty of confidentiality discloses confidential information without authorization.[87] Such a duty may arise from an employment relationship or through a nondisclosure agreement.

B. Patents

Patents protect new and useful technological inventions. There are two types of patents. A utility patent applies to useful, functional inventions, such as a "process, machine, manufacture, or composition of matter or any new and useful improvement thereof."[88] A design patent protects the appearance and ornamental features of a manufactured article, unrelated to its function.[89] A patent grants an inventor the right to exclude all others from making, using, selling, or importing the invention protected by the patent.[90] The source of patent law is the federal Patent Act.[91] In order to obtain a patent, the inventor must file an application with the U.S. Patent & Trademark Office, where it will be examined to determine whether the invention qualifies for a patent.[92]

To qualify for a utility patent, the invention must fulfill four distinct requirements: it must be of the type of subject matter that may be patented, and it must be useful, novel, and nonobvious.[93] Patentable subject matter is any product or process created by humans, rather than an abstract idea, mathematical principle, or something that is naturally occurring.[94] The invention must also be useful in that it must be operable and have a practical purpose.[95] Further, the invention must be novel because no one else has publicly made, sold, or used before, or patented or described in a printed publication anywhere in the world before the filing date of the patent application.[96] Finally, the invention must be nonobvious to a person who understands the technical field of the invention in the sense that it represents a significant step beyond the current state of the technology.[97] If the examination process reveals that the invention meets the requirements for patentability, the inventor will be granted a patent.

The term of protection for a utility patent is 20 years from the date the patent application was filed, and for design patents,[98] the term is 15 years from the date the patent was issued.[99] A patentee may

[85] UTSA § 1(4)(ii).
[86] *Id*. § 1(1) & (2).
[87] *See id.* § 1(2)(ii)(B).
[88] 35 U.S.C. § 101.
[89] *Id*. § 171.
[90] *Id*. § 271(a).
[91] *Id*. §§ 100-390.
[92] *See id.* §§ 21-28.
[93] *Id*. §§ 101, 102(a), 103.
[94] *See* Diamond v. Diehr, 450 U.S. 175, 185 (1981).
[95] *See* Brenner v. Manson, 383 U.S. 519, 534-35 (1966).
[96] *See* 35 U.S.C. § 102(a)(1).
[97] *See id.* § 103.
[98] *See id.* § 154(a)(2).

transfer ownership of the patent by making a written assignment of it to another, or retain ownership and license others to use the patent.[100] Patent infringement occurs when anyone else who, without the patentee's permission, makes, uses, sells, or imports the patented invention during the term of the patent.[101] However, as with all forms of intellectual property, when a patent expires, the invention becomes part of the public domain, and others are free to use it without limitation.

C. Copyright

Copyright law protects creative works of authorship and grants a set of exclusive rights to authors as to the ownership and use of their works. The law of copyright in the United States is governed by the federal Copyright Act.[102] The kinds of works that may be copyrighted are: literary works, musical works; dramatic works; pantomimes and choreography; pictorial, graphic, and sculptural works; motion pictures and other creative works having both a visual and audio component; sound recordings of music; and architectural designs.[103] Copyright protection extends only to the original expression found in works of authorship.[104] Ideas, facts, principles, methods, procedures, and purely utilitarian items are not eligible for copyright protection.[105] Additionally, the work must be fixed in a tangible medium, meaning that it was recorded or preserved in some stable, physical form.[106]

An author may register his or her copyright with the U.S. Copyright Office; however, registration is not required for the copyright to exist.[107] Rather, copyright protection is automatic as soon as an original work is fixed. The term of copyright protection for most works is the author's lifetime, plus 70 additional years.[108] During the copyright term, a copyright owner has the exclusive rights to: reproduce the copyrighted work; adapt the work into derivative works based on the original; publicly distribute copies of the work; and publicly display or perform the work.[109] The copyright owner may transfer by license or assignment any or all of these rights to another.[110]

Anyone who exercises any of the author's exclusive rights without permission is liable for copyright infringement.[111] For example, a songwriter who owns a copyright in a musical composition could sue for infringement if the song was publicly performed without permission or if the notes and lyrics of the song were reproduced. Even if the song was not literally copied by the defendant, there would be infringement if the defendant's musical work was substantially similar to that of the songwriter.[112]

The Copyright Act provides that a fair use of a copyrighted work is a defense to infringement.[113] Fair use includes use or copying for "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[114] Determining fair use requires the court to consider four factors: (1) the purpose and character of the defendant's use, (2) the nature of the

---

[99] *See id.* § 173.
[100] *See id.* § 261.
[101] *See id.* §§ 271(a) & (g).
[102] 17 U.S.C. §§ 101-1332.
[103] *Id*. § 102(a). Computer software is protected as well. *See* Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 702 (2d Cir. 1992).
[104] *See* 17 U.S.C. § 102(a).
[105] *See id.* § 102(b).
[106] *See id.* §§ 101 & 102(a).
[107] *See id.* § 408.
[108] *See id*. § 302(a). However, when the work is authored by an employee within the scope of his or her employment, the employer owns the copyright and the term is the lesser of ninety-five years from the date on which the work was published, or 120 years from the date on which it was created. Id. § 302(c).
[109] *See id.* § 106.
[110] *See id.* § 201(d).
[111] *See id.* § 501(a).
[112] *See* Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946).
[113] *See id.* § 107.
[114] *Id*.

copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) the effect of the defendant's use on the potential market for the copyrighted work or on its value.[115]

D. Trademarks

Trademarks identify the source of goods or services sold in commerce.[116] Trademarks also protect consumers from being confused or deceived as to the source of goods or services, and protect the goodwill associated with the mark.[117] A trademark can be a word, phrase, symbol, design, or a combination of words, phrases, symbols or designs. The name "Exxon," the Nike "swoosh" symbol, and the "Don't leave home without it" slogan of American Express are all examples of trademarks. Also, trade dress in the form of a product's design or packaging can be protected.[118] Examples of trade dress include the shape of the Coca-Cola bottle and the color red for the undersoles of Louboutin shoes.

A business can obtain trademark protection through actual use under state common law or by registration under the federal Lanham Act.[119] Both federal and common law protection of trademarks depend on priority of use of the mark in commerce. The first user of a mark on goods or services gains rights in that mark against all later users of the same mark in the same market.[120] Moreover, a trademark must be distinctive. Distinctiveness means that the mark is capable of allowing consumers to distinguish between the goods or services of one business from those of another.[121]

Common law protection for a trademark lasts as long as the mark is being used. The term of a registered trademark is 10 years, renewable as long as the mark remains in actual use.[122] The trademark owner may use the mark or license the use of the mark or assign it for use by another, such as a franchisee. Liability for trademark infringement occurs when another uses the same or a similar mark in connection with the sale of goods or services and this use is likely to cause consumer confusion as to their source or whether there is a sponsorship, endorsement, or other affiliation between the trademark owner and the defendant.[123]

Another type of liability arises for trademark dilution which occurs when someone has made unauthorized commercial use of a nationally famous mark and the use is likely to "dilute" the mark by weakening its distinctiveness or tarnishing its goodwill and reputation.[124] Nevertheless, not all uses of another's trademark will lead to liability for infringement or dilution. References to a trademark in news reporting and commentary, in truthful comparative advertising, or when reselling genuine goods, are considered to be fair uses of a mark.[125]

---

[115] *Id.*
[116] *See* 15 U.S.C. §§ 1051(a)(3), 1127.
[117] *See* Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 163–64 (1995).
[118] *See* Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 764 n.1 (1992).
[119] 15 U.S.C. §§ 1051–1128.
[120] *See* Dawn Donut Co. v. Hart's Food Stores, Inc., 267 F.2d 358, 365 (2d Cir. 1959).
[121] 15 U.S.C. §§ 1052 & 1091(a). Marks can be inherently distinctive or acquire distinctiveness over tine through continuous use. *See* Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 9–11 (2d Cir. 1976).
[122] 15 U.S.C. §§ 1058–1059.
[123] 15 U.S.C. §§ 1114 & 1125(a).
[124] *See id.* § 1125(c).
[125] *See id.* §§ 1115(b)(4) & 1125(c)(5).

XVI. INTERNATIONAL LAW AND ORGANIZATIONS

A. International Business Law

International law and US federal law are two distinct legal systems that play vital roles in governing global affairs. Article 38 of the International Court of Justice explains that international law stems from sources like treaties, customs, generally accepted principles of law recognized by "civilized nations", and judicial decisions and writings from "highly qualified publicists."[126] As the world becomes more interconnected, the comparison between these legal frameworks becomes crucial, as anyone who buys or sells commercial goods or service is impacted by international law. This summary delves into the key differences and similarities while exploring the commercial implications for laws surrounding international trade, immigration, and space exploration.

B. CISG

Similar to Article 2 of the United States' Uniform Commercial Code (UCC), which provides a uniform framework for commercial goods sold in the U.S., the United Nations Convention on Contracts for the International Sale of Goods (CISG) offers a uniform framework for international commerce involving the sale of tangible goods.[127] Also known as the Vienna Convention, the CISG is a multilateral treaty signed by 95 member states and currently governs nearly 80% of international transactions.[128] While the CISG shares similarities with Article 2 of the UCC in function, it is important law scholars and practitioners recognize important nuances. For instance, the CISG does not include a writing requirement, i.e., the Statute of Frauds, permits parol evidence, and more closely follows the mirror image rule.[129]

C. Immigration

Immigration law addresses the entry, status, and rights of foreign nationals within a country's borders.[130] It plays a vital role in shaping US trade, particularly in regard to the supply of goods and services. Immigrant workers contribute to various sectors of the economy, boosting production and meeting labor demands, which influences the availability and competitiveness of goods and services in the market.[131] The Immigration and Nationality Act (INA) governs most immigration-related issues,

---

[126] Statute of the International Court of Justice, art. 38, ¶ 1. https://www.icj-cij.org/statute.

[127] *CISG vs. UCC: Three Noteworthy Differences*, WOODS FULLER, https://www.woodsfuller.com/latest/cisg-v-ucc-three-noteworthy-differences.

[128] Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG) | United Nations Commission On International Trade Law, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status.

[129] Section 2-201 of the UCC require all contracts for the sale of goods valued at over $500 be in writing, whereas article 11 of the CISG explicitly states contracts are not required to be in writing to be enforceable .; Absent a few exceptions, UCC Section 2-202 prohibits the presentation of evidence regarding supplementary terms that might have been mutually accepted external to the formal contract, particularly if these added terms are in conflict with the terms specified within the contract itself. Conversely, Article 8 of the CISG allows for the inclusion of such evidence in this context. While UCC Section 2-207 allows for the creation of a contract even if the acceptance terms from the offeree do not exactly match those of the offeror, Article 19 of the CISG necessitates that the acceptance replicates the offer; any additional terms will be deemed a rejection and a counteroffer by the offeree. *See CISG vs. UCC: Three Noteworthy Differences*, supra note 2

[130] Immigration, LII LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/immigration.

[131] Andri Chassamboulli & Giovanni Peri, *The Labor Market Effects of Reducing the Number of Illegal Immigrants*, 18 REV. OF ECON. DYNAMICS 792 (2015), https://www.sciencedirect.com/science/article/pii/S1094202515000514.

including visa issuance, admission criteria, and deportation procedures.[132] Recent legal immigration measures can impact US trade by creating shifts in production capacities and service sectors.[133]

Additionally, recipients of immigration programs such as Deferred Action for Childhood Arrivals (DACA) and Dream Act of 2023 (DREAMers) continue to play a critical role in the American economy. They experience higher wages, buy cars and houses, and start businesses, benefiting the entire nation.[134] Balancing national security concerns with humanitarian considerations and the overall impact on the stream of US commerce presents a persistent challenge in immigration policy.

D. Space Exploration

Space law governs the use and exploration of outer space, addressing issues like satellite communication, space debris, and liability for space activities.[135] As space activities increasingly involve both state and private actors, international cooperation and regulation have become crucial. While international law seeks to promote peaceful and cooperative space exploration, US federal law focuses on national interests, technological advancements, and the growing commercial space industry. Treaties like the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty) and the Convention on International Liability for Damage Caused by Space Objects (Liability Convention) provide the foundation for international space law.[136]

In the United States, space law is integrated into domestic law through federal statutes and regulations prescribed by various federal agencies, including the Federal Aviation Administration (FAA), Federal Communications Commission (FCC), and Department of Defense (DOD), and the Department of Transportation (DOT), under acts like the Commercial Space Launch Act of 1984.[137]

While it is generally understood that applicable actors must abided by the terms included in multilateral treaties, such as the Outer Space Treaty, some scholars argue the Treaty's wording only restrains official government actions of the 113 member states, not the actions of private citizens from those member states.[138] Thus, they argue U.S. private companies are only bound to federal regulations, which may be silent in the vast issued covered under the Outer Space Treaty. This contentious topic creates opportunities for private companies to test the waters. From 1989 through 2023, the FAA reports over 500 licensed commercial launches into space, with almost half of those occurring between 2021-2023, and many more planned for the near future.[139] The uncharted territory of space law excites scholars and practitioners as much as the exploration of space itself.

---

[132] Immigration and Nationality Act, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (2019), https://www.uscis.gov/laws-and-policy/legislation/immigration-and-nationality-act.

[133] Brian C. Cadena & Brian K. Kovak, *Immigrants Equilibrate Local Labor Markets: Evidence from the Great Recession*, 8 AM. ECON. J.: APPLIED ECON. 257 (2016), https://pubs.aeaweb.org/doi/10.1257/app.20140095).

[134] Tom K. Wong, Greisa Martinez Tosas & Adam Luna, *DACA Recipients' Economic and Educational Gains Continue to Grow*, CENTER FOR AMERICAN PROGRESS (Aug. 28, 2017), https://www.americanprogress.org/article/daca-recipients-economic-educational-gains-continue-grow/

[135] Space Law, UNITED NATIONS OFFICE FOR OUTER SPACE AFFAIRS, https://www.unoosa.org/oosa/en/ourwork/spacelaw/index.html.

[136] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, UNITED NATIONS OFFICE FOR OUTER SPACE AFFAIRS, https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introouterspacetreaty.html; Convention on International Liability for Damage Caused by Space Objects, UNITED NATIONS OFFICE FOR OUTER SPACE AFFAIRS, https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introliability-convention.htm.

[137] U.S. Space Regulations, SPACE FOUNDATION, https://www.spacefoundation.org/space_brief/us-space-regulations/.

[138] Sude Capoglu et al., *Loopholes and Lacune in International Space Law*, OXJOURNAL (2022), https://www.oxjournal.org/loopholes-lacunae-space-law/

[139] Commercial Space Data, FEDERAL AVIATION ADMINISTRATION (2022), https://www.faa.gov/data_research/commercial_space_data/; Rob Howell, *FAA Milestone: 400 Licensed Commercial Space Launches and Counting*, CANSO (May 27, 2021), https://canso.org/faa-milestone-400-licensed-commercial-space-launches-and-counting/

XVII. NATIONAL SECURITY

The Constitution itself expects that the federal and state governments act to ensure the safety and security of United States citizens against enemies, both foreign and domestic. Two of the Constitution's six purposes are to "insure domestic Tranquility, [and] provide for the common defence…" of the nation. Congress has the express powers to declare war and fund the armed services. The United States federal government also has a constitutional obligation to protect each U.S. state against invasion or, if a state requests assistance, domestic rebellions.

The last war formally declared by Congress was World War II. That is because in 1973, Congress delegated some of its war declaration authority to the U.S. President in the War Powers Resolution. That Resolution allows the President (whom the Constitution identifies as the military's "Commander in Chief") to direct troops or military equipment for rapidly developing military situations, as long as the President routinely seeks Congress's continued authorization to do so.

Informally, President George Washington and others have emphasized that the United States should avoid "entangling alliances" with other nations that might make the United States too cozy a friend of any foreign nation(s) and thereby jeopardize national security.

A. Military

Under the Constitution, Congress has the authority "to make Rules for the Government and Regulation of the land and naval Forces." Congress starting in 1806, enacted various laws governing military conduct. Military culture and law have subsequently evolved to reflect uniquely American values regarding war and conflict.

One notable 1873 federal law, the Posse Comitatus Act, prohibits federal troops from participating in civilian law enforcement. However, numerous loopholes and gaps exist. Particularly after the September 11, 2001 terror attacks, the federal government committed military troops to "homeland defense" in ways that some legal experts believe violate the spirit, if not the text, of the Act.

Current military policy includes the Uniform Code of Military Justice (UCMJ), which defines and governs military crimes. This justice system is staffed by Judge Advocate General (JAG) lawyers, who are military officers. The UCMJ established a high court of military criminal appeals, called the United States Court of Appeals for the Armed Forces (USCAAF or C.A.A.F.), whose five civilian judges with 15-year terms have worldwide jurisdiction over U.S military criminal appeals. The military also has its own civil codes, including a complete civil code of supply chain and logistics management for the military and its contractors, overseen by the Defense Logistics Agency (DLA), which is the largest Department of Defense agency.

Finally, the United States has committed itself to certain international treaties regarding humanitarian treatment by militaries. Most famously, this includes the Geneva Conventions in 1949 and anti-nuclear weapon treaties like S.A.L.T. I and II in the 1970s.

B. National Security Agencies and the Intelligence Community

The United States has an intelligence community (IC) currently totaling 18 organizations.[140] Federal laws and Congressional, judicial, and executive oversight apply to the conduct and missions of these agencies, and many lawyers support the IC intelligence missions. There is also a United States Foreign Intelligence Surveillance Court (FISC, or FISA Court) that handles IC requests for surveillance warrants against foreign spies inside the United States.

[140] Office of the Director of National Intelligence, Members of the IC, https://www.dni.gov/index.php/what-we-do/members-of-the-ic

XVIII. TORTS (THE LAW OF INJURY)

A tort is defined as a "civil wrong not arising out of contract."[141] This is the law that allows for a person or a business who is injured by another to be recompensed for the damages that they suffered.[142] Torts are not criminal, so except in the most extreme cases, there is not punishment for torts. Instead the idea is to allow for the injured party to be put into the legal position that they were in prior to what led to the person's damages. Unlike criminal law, which requires a governmental body to bring an action, torts are a self-help remedy. The injured party must personally sue the person or business that caused their injury. Sometimes the same action by a person or business will lead to both criminal and tort liability. For instance, if a person was driving while intoxicated and ran into another person's car, there would be criminal liability for the intoxicated driving. The major underlying principle of criminal law is to punish a person committing a criminal violation. Punishing the drunk driver, however does not help the person who was hit and was caused injury. Tort law allows the person who was injured to be reimbursed for any losses that were caused by the person liable for the tort. For a person who was injured by a drunk driver, this allows them to get a court order to force the defendant to pay for things such as the damage to the car, any personal injury including any pain and suffering, and secondary losses such as missing work.

Torts arise both from intentional and unintentional actions. Intentional torts allow compensation for damages created by intentional actions. So if a person were to punch another person and cause them injury, the intentional tort of battery has occurred. The person who was injured would be able to recover for any damages suffered by being punched. Unintentional torts are primarily comprised of negligence actions, where a person causes another to be injured because of a failure to abide by a required duty of care. A common example of negligence is an automobile accident caused by a driver not paying adequate attention. They owe all other drivers a duty to drive safely, and if that duty is breached, causing an accident and another's injury, they would be liable for the injuries they caused. Additionally, sometimes people and businesses undertake actions that are so inherently dangerous, that they can become strictly liable for any injuries cased, regardless of fault or intent. For example, if a business is imploding buildings in a city, they will become liable for any injuries cause by the ultrahazardous activity, even if they did not negligently implode the building.

Unlike criminal law which must be based in statute, tort law arises from the common law. This means that the definitions of what is a tort are generally judicially created and may vary widely from state to state. This leads many legislative bodies to enact what is known as tort reform. Tort reform allows Congress or a state legislature to limit the definition of a tort, limit what is considered damages, or limit the amount of damages allowed in certain actions. Tort reform is a hot political topic because many people think that high attorney fees cause an expense to society and that damage awards have gotten too high under the principle that they should be no more than allowing only compensation for a person's injury.

XIX. TECHNOLOGY AND PRIVACY

In just a few brief decades, the evolution of the Internet has resulted in major changes in the way human beings interact, treat each other, and conduct business. Rapid technological change creates jobs[143] but outpaces the ability of our laws and regulations to keep up.[144] While space prohibits a lengthy discussion, major productivity gains and regulatory problems have resulted from such technological

[141] Kenneth S. Abraham, *What Is A Tort Claim? An Interpretation of Contemporary Tort Reform*, 51 MD. L. REV. 172 (1992).
[142] Lawrence J. Trautman, Larry D. Foster, II., Thomas J. Freeman, Vanessa L. Johnson & Lora J. Koretz Customer Injuries: An Introduction to Tort Law (unpub. ms.), https://ssrn.com/abstract=3795841.
[143] Mohammed T. Hussein, Lawrence J. Trautman & Reginald Holloway Technology Employment, Information and Communications in the Digital Age, 103 J. U.S. PATENT & TRADEMARK OFF. SOC. 101 (Jan. 2023), http://ssrn.com/abstract=3762273.
[144] Lawrence J. Trautman, *Bitcoin, Virtual Currencies and the Struggle of Law and Regulation to Keep Pace,* 102 MARQ. L. REV. 447 (2018), https://ssrn.com/abstract=3182867.

advancements as: artificial intelligence (AI);[145] blockchain;[146] crowdfunding;[147] the Internet of things (IoT);[148] mobile devices;[149] non-fungible tokens (NFTs);[150] and virtual currencies (a money laundering threat).[151]

A. Cybersecurity

With daily reports of cyberhacks, ransomware attacks, both nation-state sponsored[152] and some the result of multinational criminal organizations, cybersecurity remains a major concern brought about by technological advancement.[153]

B. Privacy

Privacy breaches and vulnerability exploits continue to plague many Internet platforms[154] and payment systems.[155]

XX. VARIOUS

We have just scratched the surface of discussing the various types of careers and issues relevant to the study of law. Some of the specific areas of legal practice not mentioned thus far include:

---

[145] Scott Shackelford, W. Gregory Voss & Lawrence J. Trautman, The Evolution of Machine Learning, Artificial Intelligence, and Generative Pre-Trained Transformer (GPT) and Why Should You Care?, (unpublished manuscript)
[146] Lawrence J. Trautman & Mason J. Molesky, *A Primer for Blockchain*, 88(2) UMKC L. REV. 239 (2019), arXiv:1904.03254, https://ssrn.com/abstract=3324660.
[147] Lawrence J. Trautman & Oliver W. Aho, *Crowdfunding, Entrepreneurship, and Start-Up Finance*, ENTREPRENEUR & INNOVATION EXCHANGE (EiX.org) (2019) http://ssrn.com/abstract=3251538.
[148] Mohammed T. Hussein & Lawrence J. Trautman, The Internet of Things (IoT) in a Post-Pandemic World, 9 J. L. & CYBER WARFARE (forthcoming), http://ssrn.com/abstract=4149477. Lawrence J. Trautman, Mohammed T. Hussein, Louis Ngamassi & Mason Molesky, *Governance of The Internet of Things (IoT)*, 60 JURIMETRICS 315 (Spring 2020), http://ssrn.com/abstract=3443973.
[149] Peter C. Ormerod & Lawrence J. Trautman, *A Descriptive Analysis of the Fourth Amendment and the Third-Party Doctrine in the Digital Age!*, 28 ALBANY L.J. SCI. & TECH. 73 (2018), https://ssrn.com/abstract=3005714.
[150] Lawrence J. Trautman, *Virtual Art and Non-fungible Tokens,* 50 HOFSTRA L. REV. 361 (2022), http://ssrn.com/abstract=3814087.
[151] Lawrence J. Trautman & Alvin C. Harrell, *Bitcoin Versus Regulated Payment Systems: What Gives?*, 38 CARDOZO L. REV. 1041 (2017), http://ssrn.com/abstract=2730983; Lawrence J. Trautman, *Virtual Currencies: Bitcoin & What Now After Liberty Reserve, Silk Road, and Mt. Gox?,* 20 RICH. J. L. & TECH. 13 (2014), http://www.ssrn.com/abstract=2393537; Lawrence J. Trautman, The FTX Crypto Debacle: Largest Fraud Since Madoff?, __ U. MEMPHIS L. REV. (forthcoming), http://ssrn.com/abstract=4290093; Lawrence J. Trautman, *Following the Money: Lessons from the "Panama Papers," Part 1: Tip of the Iceberg*, 121 PENN ST. L. REV. 807 (2017), http://ssrn.com/abstract=2783503.
[152] Lawrence J. Trautman, *Is Cyberattack The Next Pearl Harbor?,* 18 N.C. J. L. & TECH. 232 (2016), http://ssrn.com/abstract=2711059.
[153] Lawrence J. Trautman, *Cybersecurity: What About U.S. Policy?,* 2015 U. ILL. J. L. TECH. & POL'Y 341 (2015), http://ssrn.com/abstract=2548561; Lawrence J. Trautman, Mohammed T. Hussein, Emmanuel U. Opara, Mason J. Molesky & Shahedur Rahman, *Posted: No Phishing,* 8 EMORY CORP. GOV. & ACCT. REV. 39 (2021), http://ssrn.com/abstract=3549992; Lawrence J. Trautman, *Congressional Cybersecurity Oversight: Who's Who & How It Works,* 5 J. L. & CYBER WARFARE 147 (2016), http://ssrn.com/abstract=2638448.
[154] Lawrence J. Trautman, *How Google Perceives Customer Privacy, Cyber, E-Commerce, Political and Regulatory Compliance Risks,* 10 WM. & MARY BUS. L. REV. 1 (2018), https://ssrn.com/abstract=3067298; Lawrence J. Trautman, *Governance of the Facebook Privacy Crisis,* 20(1) PITT.J. TECH. L. & POL'Y 41 (2020), http://ssrn.com/abstract=3363002; Lawrence J. Trautman, Tik Tok! TikTok: Escalating Tension Between U.S. Privacy Rights and National Security Vulnerabilities, http://ssrn.com/abstract=4163203.
[155] Lawrence J. Trautman, *E-Commerce, Cyber and Electronic Payment System Risks: Lessons from PayPal,* 16 U.C. DAVIS BUS. L.J. 261 (Spring 2016), http://www.ssrn.com/abstract=2314119; Lawrence J. Trautman, *Is Disruptive Blockchain Technology the Future of Financial Services?,* 69 CONSUMER FIN. L. Q. RPT. 232 (2016), http://ssrn.com/abstract=2786186.

admiralty (maritime, deals with the law of the sea and primarily defines the duties and responsibilities of parties engaged in shipping endeavors); Alternate Dispute Resolution (ADR);[156] antitrust; bankruptcy; community law; disability; education; employment; entertainment; estates and trusts; franchise; insurance; mergers and acquisitions (M&A); oil and gas; Property; real estate; social security; sports law; tax; tribal; venture capital (VC); and water rights. Lengthy text books cover many, if not most, of these topics in law schools and we have, no doubt, overlooked some significant practice areas.

XXI. CONCLUSION

The law is inescapable. Eventually, we all interact with the legal system in some significant way. It seems impossible to avoid contracts, for example, regardless of our professions. A working knowledge of contract law not only prepares us for success in business, it enables us to interpret boilerplate language and fine print that has become ubiquitous in the era of clicking "Agree" in order to move on with other pressing matters.

Beyond protecting our individual interests, the study of law empowers us to strengthen our communities. Many lawyers provide indispensable public services to the community by offering legal counsel to those who would be otherwise unable to afford it. Only a small fraction of the need for financially-accessible civil legal services is being met, and until we have more attorneys doing this work, "justice for all" will remain an ideal, not a reality.

Attorneys do more than pontificate on the prerequisites for equality and liberty. They have a concrete, observable impact on the society they seek to understand and improve. Lawyers make the Constitution a living document. Through the practice of law, they breathe life into it, transforming those enduring words into an observable reality. It is thanks to those lawyers that the Constitution is not merely political poetry but a meaningful check on the government's power.

Dr. Martin Luther King, Jr. said "the arc of the moral universe is long, but it bends toward justice." That is only true if we make it so. Laws like the Civil Rights Act of 1964 pushed our nation to increase its capacity for justice and unmistakably altered our society's trajectory. Landmark legal decisions like the passing of the 13th Amendment and *Brown v Board of Education* were reactions to progress in the nation as much as they were catalysts for it. We need lawyers in the justice system who are committed to propelling history in the direction of justice by protecting our nation from injustice and oppression, no matter the setbacks. Unrelenting lawyers who, to borrow Dr. King's timeless words, "refuse to believe that the bank of justice is bankrupt."

The study of law makes us more informed and principled citizens. It requires a deep-dive into our nation's history and into the political philosophy behind what John Adams called "a government of laws, and not of men." It inspires us as citizens to vote more thoughtfully, to seek justice, and to read the fine print.

Because the law permeates nearly every aspect of our lives, it is important to have a working understanding of the legal system. The primary benefit of non-lawyers understanding the law is not the ability to win cases at trial, but rather to spot legal red flags in advance and avoid having to go to trial in the first place. This Article primarily focuses on the letter of the law. However, it is important to note that the law is not an objective, exact science. Legal outcomes frequently hinge on subjective interpretations of the language of the law and how that applies to behaviors that may not have even been contemplated by the drafters of the legislation.

The drafting and interpretation of laws involves complex tradeoffs that should be taken into account. For example, consider the balance between the interest in a safe society and the rights of those accused of crimes. The laws could be altered to focus more on keeping society safe, but this would come at the cost of those accused of crimes. Conversely, laws could be altered to focus more on protecting the rights of the accused, but this would come at the cost of keeping society safe. Another common tradeoff involves the balance between protecting consumers and allowing businesses to run efficiently. To put it succinctly, in law there are very few "solutions," only tradeoffs.

---

[156] Larry D. Foster, II, David Orozco, Carrie Shu Shang & Lawrence J. Trautman, Alternative Dispute Resolution (ADR) in Brief, http://ssrn.com/abstract=4383603.

While our twenty-first century legal system is far from perfect, it is a vast improvement over the courts of the eighteenth century. However, there is no guarantee that this trajectory toward a more equitable legal system will continue. The future of the U.S. legal system is contingent upon an educated populace holding legislators accountable.

QUALIFYING FOR MEDICAID LONG-TERM CARE PROGRAMS

DARRELL G. FORD*
MARTY LUDLUM**
JENNIFER BARGER JOHNSON***

The United States economy is based on a free-market system where no limits are placed on the extent to which individuals may succeed or fail. As a result, some individuals will become very wealthy and some individuals will become, or remain, very poor. To ensure that basic human needs are met, various safety nets have been created to provide basic support for poor individuals. One such safety net is the federal Medical Assistance Program, commonly referred to as Medicaid. Medicaid is provided for under Title XIX of the Social Security Act of 1935.[1]

Total Medicaid spending in 2020 was $597.6 billion.[2] Over 30% of Medicaid spending was for long-term care services.[3]

Although Medicaid is a federal program governed by federal law, each state administers the program for its own residents. Each state has its own requirements. The program is designed to provide medical assistance for poor individuals. In Oklahoma, the Medicaid program is called SoonerCare and is administered by the Oklahoma Health Care Authority. Eligibility for Medicaid is determined by the Oklahoma Department of Human Services. In Texas, the Medicaid program is administered by the Texas Department of Health and Human Services. Eligibility for Medicaid is determined by the Texas Health and Human Services Commission.

One facet of Medicaid provides medical care for the long-term needs of elderly, blind and disabled people. Long-term care typically refers to nursing home care, but there are other options as well. If the individual qualifies, they may receive help from Medicaid to pay for a nursing home level of care ("NFLOC"), either in a nursing home or in their own home. The U. S. Department of Health and Human Services estimates that approximately 70% of people turning 65 can expect to use some form of long-term care.[4]

Determining whether an individual qualifies for long-term Medicaid benefits is often a daunting task for the individual, their family and even many attorneys. Using Oklahoma and Texas as points of reference, this paper examines the law pertaining to Medicaid long-term care eligibility. The hope is that this paper will assist and guide those trying to determine whether an individual qualifies for Medicaid long-term benefits.

* J. D., Professor, University of Central Oklahoma
** J. D., Professor, University of Central Oklahoma
*** J.D., Professor, University of Central Oklahoma
[1] 42 U.S.C. § 1396a (1935).
[2] https://www.medicaid.gov, February 7, 2024.
[3] *Id*.
[4] https://www.hhs.gov., February 7, 2024.

I. Overview Of The Medicaid Program

The Medicaid program is a complex arrangement of interrelated statutes, rules and regulations. Adopted and amended over many years, these provisions are very complicated and convoluted. As one court has noted, a practitioner would be very foolish to attempt to attribute meaning to any single provision without considering the entire body of law.[5] The Medicaid rules contain numerous definitions and exceptions. In addition, the rules are constantly changing as statutes are amended and new regulations are adopted.

To further complicate matters, each state is allowed to select various options contained in the Medicaid program. Therefore, Medicaid rules will differ from state to state. An individual may qualify for medical assistance in one state when an individual in a different state with the same income and resources will not qualify. Texas, where 78% of people qualify for Medicaid on entering a nursing home and 96% need it within six months, is one of only seven states which does not supplement the federal Medicaid benefit.[6] For purposes of this paper, the Medicaid rules as they currently exist in Oklahoma and Texas will be used to describe Medicaid eligibility.

In addition, the Secretary of Health and Human Services is authorized to grant waivers of Medicaid provisions.[7] As a result, the operative Medicaid rules in a state may actually conflict with federal law. For example, both Oklahoma and Texas have waiver programs that allows individuals to receive in-home services if they meet the medical requirements for nursing home services but are able to live at home.[8]

The complexity of the Medicaid program affects not only the poor individuals who attempt to qualify for medical services, but also the administrative agencies and courts that are called upon to interpret the Medicaid rules. The assistant general counsel for the Oklahoma Department of Human Services has stated that the Medicaid rules within Oklahoma are subject to different interpretations by local county agencies.[9] The complexity and poor draftsmanship of the Medicaid rules have been recognized by the courts as well.[10]

II. Medicaid Long-Term Care Programs

Medicaid services are divided into those services that are short-term in nature and those services that involve long-term medical care. Although this paper focuses on qualifying for long-term Medicaid programs, the eligibility rules overlap. Basically, to qualify for services and benefits, an individual must be within the class of individuals designated to receive benefits and must meet certain financial requirements.

The most recognized form of long-term medical care provided by Medicaid is nursing home care. This involves services furnished pursuant to a physician's order by licensed and professional nursing home employees. Care is also provided to individuals whose assets and income are limited but are able to remain at home, individuals who are 65 years of age and older,

---

[5] Cleary v. Waldman, 959 F. Supp. 222 (D. N. J. 1997).
[6] Texas Medicaid Eligibility: Income and Assets, The Garrett Law Firm, PLLC. February 7, 2024.
[7] 42 U.S.C. §§ 1396a(10)(A)(ii)(IV), 1396n(b)-(e).
[8] Oklahoma Administrative Code 317:35-17-3; Texas Administrative Code, Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.
[9] Statement of Travis Smith at professional development seminar Resolving Legal and Financial Issues in Elder Care, Oklahoma City, Oklahoma, December 20, 2007.
[10] Friedman v. Berger, 409 F.Supp. 1225 (S. D. N. Y. 1976); Matarazzo v. Rowe, 623 A.2d 470 (Conn. 1993).

individuals reside in mental health hospitals,[11] mentally retarded individuals who reside in an intermediate care facility,[12] and certain mentally retarded individuals who are able to live safely at home.[13]

Individuals may receive Medicaid benefits while residing in an assisted living center if they require the long-term medical care that a nursing home provides but prefer to receive such care in a Medicaid-approved assisted living center.[14] This includes "memory care", a type of specialized assisted living for individuals with Alzheimer's disease and related dementias. Medicaid will pay for care costs but will not pay for the room and board costs of assisted living.

Oklahoma Medicaid ("SoonerCare") long-term care for seniors will pay for care in a nursing home, a beneficiary's home and other settings through one of three programs – Nursing Home Medicaid, Home and Community Based Services (HCBS) Waivers, or Aged, Blind, and Disabled ("ABD") Medicaid.[15] These programs differ from regular Medicaid which is for financially limited people of all ages.

The Texas Health and Human Services department also provides long-term care for seniors in a nursing home, a beneficiary's home and other settings through one of three programs – Nursing Home Medicaid, Home and Community Based Services (HCBS) Waivers, or Medicaid for the Elderly and People with Disabilities ("MEPD").[16]

For nursing home beneficiaries, both the Oklahoma and the Texas programs will cover the cost of long-term care in a nursing home for financially limited seniors who require a "Nursing Facility Level of Care." Coverage includes payment for room and board, as well as all necessary medical and non-medical goods and services, including personal care assistance with the activities of daily living (mobility, bathing, dressing, eating, toileting), skilled nursing care, physician's visits, prescription medication, medication management, mental health counseling, and social activities.[17] Neither the Oklahoma program nor the Texas program will provide for a private room, specialized food, comfort items like tobacco and cosmetics, and any care services not considered medically necessary.

Nursing home beneficiaries are required to give most of their income to the State to help cover care expenses. They are only allowed to keep a "personal needs allowance" of $75.00 per month, which can be used for personal items such as clothes, books, haircuts, etc.[18] They can also keep enough of their income to make Medicare premium payments if they are "dual eligible" and enough of their income to make Medicaid-approved spousal income allowance payments to financially needy spouse who are not Medicaid applicants or recipients.

Nursing Home Medicaid in Oklahoma and Texas is an entitlement, meaning that qualified applicants are guaranteed by law to receive benefits without any wait. However, not all nursing homes accept Medicaid and those that do may not have a space available. So, while nursing home coverage is guaranteed, coverage may not be available in the closest or best facility available.

Oklahoma has approximately 300 nursing homes that accept Medicaid, which ranks 22nd on the list of states with the most nursing homes.[19] There are approximately 50 nursing homes in

---

[11] Oklahoma Administrative Code 317:35-9-7.
[12] Oklahoma Administrative Code 317:35-9-4.
[13] Oklahoma Administrative Code 317:40-1-1(d)(1).
[14] https://www.medicaidplanningassistance.org., February 7, 2024.
[15] *Id*.
[16] https://www.medicaidlongtermcare.org; February 7, 2024.
[17] *Id*.
[18] https://www.medicaidlongtermcare.org; February 7, 2024.
[19] https://www.medicaidlongtermcare.org; February 7, 2024.

the Oklahoma City area and 41 in the Tulsa area, with the rest being evenly distributed across the state. Also, Medicaid coverage approved in one state cannot be used to pay for care and support in another state. For example, an individual living in Guyman, Oklahoma would not be covered by SoonerCare for a stay in a nursing home in Amarillo, Texas.

Texas has approximately 1,200 nursing homes that accept Medicaid, the majority of which are clustered around the state's biggest cities.[20] There are approximately 100 nursing facilities in and around Dallas and another 75 in the Fort Worth area. There are 115 nursing facilities in the Houston area and about 50 in the San Antonio area. There are 20 nursing facilities in El Paso, 15 in Lubbock, 14 in Corpus Christi, 12 in Amarillo, and six in Odessa.

The Oklahoma HCBS Waivers program, known as the ADvantage Waiver Program, and the Texas HCBS Waivers program, known as STAR+Plus, pay for long-term care services and supports to financially limited seniors who require a Nursing Facility Level of Care but can remain in their home instead of living in a nursing home.[21] Qualified beneficiaries can also receive support if they live in the home of a loved one or in a Medicaid-approved assisted living residence. The ADvantage Waiver program and the STAR+Plus Waiver program will not pay for room and board costs such as mortgage payments, rent, facility fees, utility bills and food expenses.

HCBS program benefits include adult day care, skilled nursing care, case management, meal delivery, home modifications, personal care assistance with activities of daily living, and Instrumental Activities of Daily Living (shopping, cooking, cleaning, scheduling, transportation, etc.)[22] Benefits can be provided through licensed caregivers. In Texas benefits are provided through a single Medicaid plan by a managed care organization ("MCO") which has a network of healthcare providers. In both states, beneficiaries may also be able to self-direct certain benefits. This allows the beneficiaries to use select friends and family members to provide certain benefits, like care assistance and the Instrumental Activities of Daily Living.[23]

Unlike Nursing Home Medicaid, the ADvantage Waiver program and the STAR+Plus Waiver program are not an entitlement. The number of beneficiaries is limited. Once that limit is reached, applicants are put on a waiting list. The maximum number in Oklahoma for 2023 was 24,375.[24] The maximum number in Texas as of 2022 was approximately 24,000.[25]

The Oklahoma ABD Medicaid program provides healthcare coverage and long-term care services and support to financially limited Oklahoma residents who are age 65 or over, blind, or disabled and live in their home. ABD Medicaid is sometimes referred to as regular Medicaid for seniors. Like Nursing Home Medicaid, ABD Medicaid is an entitlement. However, since the beneficiaries are home-based, the availability of benefits and services will depend on the availability of funds, programs and caregivers in the area where the beneficiary lives.

The Texas MEPD Medicaid program also provides healthcare coverage and long-term care services and support to financially limited Texas residents who are age 65 or over, blind, or disabled and live in their home. MEPD beneficiaries who show a medical need for long-term care services and supports can receive those benefits through the following programs[26]:

---

[20] *Id*.
[21] https://www.medicaidlongtermcare.org; February 7, 2024.
[22] https://www.medicaidlongtermcare.org., February 7, 2024.
[23] *Id.*
[24] https://www.medicaidlongtermcare.org., February 7, 2024.
[25] *Id*.
[26] https://www.medicaidlongtermcare.org., February 7, 2024.

1. Community First Choice – covers long-term care services for MEPD beneficiaries who require a Nursing Home Level of Care.

2. Primary Home Care ("PHC") – covers long-term care services for MEPD beneficiaries who show a need for the services but do not require a Nursing Home Level of Care. Program beneficiaries can receive up to 50 hours of care per week through the PHC program. This can include housekeeping, laundry, shopping, cooking, companion services to appointments and personal care assistance with the Activities of Daily Living.

3. Day Activity and Health Services ("DAHS") – offers weekday daytime supervision and care at health centers around the state for MEPD beneficiaries with chronic health problems. This can include conditions like Alzheimer's disease, arthritis, diabetes, and vascular disease. DAHS applicants must have a physician's order stating their condition and their need for DAHS services, but they are not required to need a Nursing Home Level of Care.

4. Program of All-Inclusive Care for the Elderly ("PACE") – coordinates all medical and personal care services for dual-eligible MEPD beneficiaries. PACE program participants are required to need a Nursing Home Leve of Care but must live in the community. PACE programs can be used by people who are "dual-eligible" for Medicaid and Medicare. PACE also administers vision and dental care, and PACE centers provide meals, social activities, exercise programs and regular health checkups and services to program participants. Texas' PACE programs are located in El Paso, Lubbock, and Amarillo.

The terms aged, blind and disabled are given the same meaning for Medicaid purposes as for Supplemental Security Income ("SSI"). Aged means individuals who are 65 or older. Blind means an individual whose vision is 20/200 or less, even with corrective lenses. Disabled means an individual who is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death, or which has lasted or can be expected to last for a continuous period of not less than 12 months.[27] An individual will be deemed disabled if the individual has been determined to be disabled by the Social Security Administration.

III. DETERMINING MEDICAID ELIGIBILITY

To be eligible for Medicaid benefits, beneficiaries must meet certain financial requirements and certain medical or functional requirements. Therefore, for those individuals who have significant resources and, or income, Medicaid benefits are not available. Likewise, for those individuals who do not require a certain level of medical care, Medicaid benefits are not available. To further complicate matters, the eligibility requirements will vary depending on the individuals' marital status, whether their spouse is also applying for Medicaid benefits, and the Medicaid program for which they are applying.

A. *Nursing Home Medicaid and HCBS Waivers Financial Eligibility Criteria*

The financial requirements for Nursing Home Medicaid and the HCBS Waivers programs, known as the ADvantage Waiver program in Oklahoma and the STAR+Plus program in Texas, correspond with the requirements for Supplemental Security Income ("SSI"). An applicant must satisfy both a resource test and an income test. With respect to the resource test, for a single

[27] Oklahoma Administrative Code 317:35-5-2 – 35-5-5; Texas Administrative Code, Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.

applicant in 2024, the applicant's assets cannot exceed a cumulative value of $2,000.00.[28] All assets are counted unless they are specifically exempted under the Medicaid rules.[29] Assets that are exempted and do not count toward the $2,000.00 limit include the following:

1. Under most circumstances, the individual's home plus all adjoining land and minerals interests[30], if any, so long as the individual or their spouse continues to reside in the home, or have an intent to return to the home (a more detailed discussion of the treatment of the home is discussed later in this paper).

2. The individual's car, regardless of value, if it is used for medical purposes at least four times a year. In Texas an additional vehicle may be exempted if a family member requires it for work, or a family member requires disability accessible transportation.[31]

3. Clothing, furniture and household goods.

4. Burial plots.

5. The face value of life insurance up to $1,500.00.

6. Irrevocable burial contracts up to $7,500.00.

7. Property used in a trade or business.

8. Income producing property such as cattle or equipment valued at $6,000.00 or less which produces income at the rate of at least 6%.[32]

If an individual's countable assets exceed the $2,000.00 limit, the individual must spend down assets in order to qualify. One common strategy is to use resources to purchase any of the exempt assets listed above. For example, an individual could put money into their home, purchase a burial contract, or purchase a new car. Even if the individual cannot drive, as long as the car is used at least four times a year to assist the individual with his or her medical care, the car will be exempt. This could include driving the individual to a doctor or picking up medicine from a pharmacy.

When the applicant is married, the combined resources of the couple are considered regardless of whose name is on the title. With respect to the resource test for married applicants who are both applying for Medicaid benefits, the combined resource limit is $4,000.00 in Oklahoma and $3,000.00 in Texas. For a married applicant whose spouse is not applying for Medicaid, in both states the applicant's resource limit in 2024 is $2,000.00 and the non-applicant spouse's resource limit is $154,140.00.[33] As discussed later in this paper, a resource and income reallocation is permitted when one spouse resides in the nursing home and one spouse remains at home.

The second financial requirement for Medicaid eligibility is that the applicant must satisfy an income test. Income includes any money or benefit received on a regular basis.[34] Examples would include wages, dividends, rental income, interest, and retirement benefits. Food stamps,

---

[28] Oklahoma Administrative Code 317:35-7-38; Texas Administrative Code, Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.

[29] 20 CFR §416.1202.; Texas Administrative Code Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.324.

[30] Texas Administrative Code, Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.351.

[31] Texas Administrative Code, Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.354; Appendix XXXIII, Medicaid for the Elderly and People with Disabilities Information, Revision 21-2, March 1, 2021.

[32] Oklahoma Administrative Code 317:35-5-41; Texas Administrative Code, Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.

[33] https://www.medicaidlongtermcare.org., February 7, 2024.

[34] Oklahoma Administrative Code 317:35-5-42(a); Texas Administrative Code, Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.381.

loans, benefits received from certain government programs, the Veteran's Aid & Attendance Allowance, and certain Indian payments are excluded.[35]

Under the Nursing Home Medicaid program and the HCBS Waivers program, the income limit for a single applicant in 2024 in both Oklahoma and Texas is $2,829.00 per month.[36] This amount is known as the Categorically Needy Standard and is adjusted over time to equal 300% of the Federal Benefit Rate ($943.00 in 2024). The Federal Benefit Rate is the maximum dollar amount paid to an aged, blind, or disabled person who receives Social Security Disability benefits under Supplemental Security Income ("SSI"). Adjustments are linked to the consumer price index.[37]

As stated above, except with respect to a personal needs allowance of $75.00 per month, and funds necessary to pay for Medicare premiums and the needs of an at-home nonMedicaid recipient spouse, Nursing Home Medicaid beneficiaries are required to give their income to the State to help cover care expenses.

When the Medicaid applicant is married, the combined income limit in 2024 in both Oklahoma and Texas is $5,658.00 if both spouses are applying for Medicaid benefits. For a married applicant whose spouse is not applying for Medicaid, the applicant's income limit in 2024 is $2,829.00 per month and the non-applicant spouse's income is not counted. Therefore, income of the non-applicant has no impact on the eligibility of their spouse. Furthermore, some of the applicant's income may be re-allocated to the non-applicant community spouse to prevent spousal impoverishment, as discussed below.

If an individual's income exceeds $2,829.00 per month, but is less than $6,833.00 per month (supposedly representing the average cost of nursing home care per month), the individual may become eligible to receive Medicaid benefits by establishing a Medicaid Income Pension Trust.[38] Also known as Miller Trusts, these trusts accumulate income to the extent that it exceeds the income allowance amount. Trust funds may only be used to pay medically necessary items not covered by Medicaid, the reasonable costs of administering the trust, and a trustee fee not to exceed 3%.[39] When the individual dies, the money remaining in the trust is used to reimburse the Medicaid program for money paid on behalf of the individual after the trust was established.[40] The trust must be irrevocable and include only income. Resources cannot be included in the trust.

B. *ABD and MEPD Medicaid Financial Eligibility Criteria*

The financial requirements for the Aged, Blind, and Disabled ("ABD") Medicaid program and the Medicaid for the Elderly and People with Disabilities ("MEPD") program also include satisfaction of both a resource test and an income test.[41] In Texas, if the Social Security

[35] Oklahoma Administrative Code 317:35-5-41(b); Texas Administrative Code, Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.387.
[36] https://www.medicaidlongtermcare.org., February 7, 2024.
[37] *Id.*
[38] Oklahoma Administrative Code 317:35; Texas Administrative Code, Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.
[39] Oklahoma Administrative Code 317:35-5-41(d)(9)(F).
[40] *Id.*
[41] Oklahoma Administrative Code 317:35; Texas Administrative Code Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.

Administration determines that an applicant is eligible for SSI, the applicant will also be eligible for Medicaid.[42]

With respect to the resource test, for a single applicant as of 2023, in Oklahoma, the applicant's assets cannot exceed a cumulative value of $9,430.00.[43] For a married applicant, the combined resource limit is $14,130.00 through March 2024. This limit applies whether only one spouse is applying for Medicaid benefits or both spouses are applying for benefits.[44] In Texas, for a single applicant in 2024, the resource test limit is $2,000.00.[45] For a married applicant in Texas, the combined resource limit is $3,000.00.[46]

For the regular Medicaid for seniors, the income limit in most states for an individual is equal to 100% of the Federal Benefit Rate for an individual, or 100% of the Federal Poverty Level for a household of one. In Oklahoma, the limit for ABD Medicaid is $1,215.00 per month through March 2024.[47] In Texas, the limit for MEPD Medicaid is $943.00 per month.[48]

For couples, the income limit is typically 100% of the Federal Benefit Rate for a couple, or 100% of the Federal Poverty Level for a household of two. In Oklahoma, the combined income limit for a couple is $1,643.00 per month through March, 2024.[49] In Texas, the combined income limit for a couple is $1,415.00 per month.[50] Again, the limit applies whether only one spouse is applying for Medicaid benefits or both spouses are applying for benefits.[51] This means that the income of the non-applicant spouse impacts the income eligibility of their spouse.

C. *Nursing Home Medicaid and HCBS Waivers Medical Eligibility Criteria*

To receive Nursing Home Medicaid and HCBS Waivers Medicaid long-term medical care benefits, an individual must be medically eligible. The medical, or functional criteria is used to determine whether the applicant needs a Nursing Facility Level of Care ("NFLOC"). An NFLOC is the kind of full-time care that is normally associated with a nursing home. Each state agency makes this determination using an assessment tool which considers the applicant's ability to complete the Activities of Daily Living as well as their cognitive abilities. The medical requirements are as follows:

1. The individual must require treatment prescribed by a physician involving the services of licensed technical or professional providers.
2. The individual must have a physical impairment or a combination of physical and mental impairments.
3. The individual must require professional nursing supervision.
4. The individual must lack the ability to care for themselves or communicate their needs to others.

---

[42] Appendix XXXIII, Medicaid for the Elderly and People with Disabilities Information, Revision 21-2, March 1, 2021.
[43] Oklahoma Administrative Code 317:35-5-41(d)(9)(F).
[44] https://www.medicaidlongtermcare.org., February 7, 2024.
[45] *Id*.
[46] https://www.medicaidlongtermcare.org., February 7, 2024
[47] *Id*.
[48] Texas Administrative Code Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.323.
[49] https://www.medicaidplanningassistance.org, February 7, 2024.
[50] *Id*.
[51] https://www.medicaidlongtermcare.org., February 7, 2024.

5. The individual must require medical care and treatment in a nursing home to minimize physical health regression and deterioration.[52]

Under the ADvantage Waiver program and the STAR+Plus Waiver program, exceptions to the medical requirements exist for individuals who otherwise meet the requirements for nursing home services but have the cognitive ability to remain at home. These programs allow frail elderly and adults with physical disabilities to receive in-home services necessary for the individual to live safely at home. The in-home services must cost no more than it would cost for the individual to live in a nursing home.[53] The monthly income that would otherwise be paid to a nursing home is retained by the individual. At present, more Oklahoma residents are receiving in-home long-term medical care under the ADvantage Waiver program than are receiving long-term medical care in nursing homes.[54]

D. *ABD and MEPD Medicaid Medical Eligibility Criteria*

The only functional requirement to receive basic healthcare coverage through the Oklahoma ABD Medicaid program is that the individual be 65 years of age or older, blind or disabled. For ABD Medicaid applicants and beneficiaries who require long-term care services and supports, the state will administer an assessment of their ability to perform Activities of Daily Living and Instrumental Activities of Daily Living to determine the kind of long-term care benefits the state will provide.

Likewise, the only functional requirement to receive basic healthcare coverage through the Texas MEPD Medicaid program is that the individual be 65 years of age or older, blind or disabled.[55] Applicants must need care for thirty (30) consecutive days. To determine if applicants meet that level of care requirement, Texas uses a Medical Necessity and Level of Care (”MN/LOC”) Assessment. This tool takes into account an applicant’s ability to complete the Activities of Daily Living (mobility, bathing dressing, eating, toileting), and well as behavioral and cognitive issues.[56]

IV. SPECIAL ISSUES AFFECTING MEDICAID ELIGIBILITY

In the complex morass that is the Medicaid program, there are several ancillary factors that will affect an applicant’s ability to qualify for Medicaid programs. The most pertinent topics that warrant further discussion involve the treatment of assets held in trust, the treatment of the applicant’s home, the ability of an applicant to reallocate resources and income when one spouse goes into a nursing home and one spouse remains in the home, and the treatment of asset transfers.

---

[52] Oklahoma Administrative Code 317:35-19-3; Texas Administrative Code, Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.

[53] Oklahoma Administrative Code 317:35-17-3; Texas Administrative Code, Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.

[54] Statement of Travis Smith at professional development seminar Resolving Legal and Financial Issues in Elder Care, Oklahoma City, Oklahoma, December 20, 2007.

[55] Texas Administrative Code, Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.211, September 1, 2009.

[56] https://www.medicaidlongtermcare.org., February 7, 2024.

A. ***Treatment of Assets Held in Trusts***

When applying the resource test to determine eligibility, special rules apply to trusts.[57] If a trust was established prior to August 11, 1993, the corpus and income of the trust are counted toward the resource limit if the trust was established by a grantor for his or her own benefit and the grantor as trustee has discretion to use the corpus or income of the trust for the grantor beneficiary's benefit.[58] Known as support trusts, these trust often contain language such as "to provide for the support, maintenance, medical expenses, care, comfort and general welfare."[59] Most grantor trusts or living trusts would be within this category.

Assets in a Medicaid Qualifying Trust are also counted toward the resource test.[60] These are trusts established by an individual or his or her spouse that give the trustee discretion to make distributions to the individual. The assets are counted even if the trust is irrevocable and even if the trust is established for a purpose other than enabling the individual to qualify for benefits.[61] It also makes no difference whether assets are actually distributed.

Corpus and income will not be counted for some trusts if the trust is a special needs trust that requires the trustee to consider the availability of public benefits before distributing trust corpus or income.[62] Obviously, the presence of a trust created more than 30 years ago will be rare.

For trusts created after August 10, 1993, the provisions of the Omnibus Budget Reconciliation Act of 1993 apply.[63] This Act expands the types of trusts that will disqualify an individual from receiving benefits. No longer are special needs trusts exempt. Essentially, if a trust is established and assets of the individual were used to form all or part of the principal of the trust, such assets will still be counted as available resources of the individual.[64] Payments or distributions from the trust to the individual or for the individuals' benefits are regarded as income of the individual and counted toward the income limitations.

The only way an individual can establish a trust and avoid inclusion of the trust assets is to establish an irrevocable trust, appoint a disinterested trustee, and include a provision that prevents the trustee from making distributions to the individual grantor of the trust under any circumstances.[65] Even then, the assets used to fund the trust are subject to the sixty (60) month look-back period provision, which includes as available resources assets transferred without consideration within sixty (60) months of an application for Medicaid benefits.[66]

Under law, three types of trusts are exempt. The assets of these trusts are not included as available recourses of the Medicaid applicant. The first exempt trust is one containing assets of a

---

[57] Texas Administrative Code, Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.336.
[58] 42 U.S.C. § 1396a(k); Oklahoma Administrative Code 317:35-5-41(d)(9)(D); Texas Administrative Code, Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.
[59] Oklahoma Administrative Code 317:35-5-41.6(4)(A).
[60] Oklahoma Administrative Code 317:35-5-41.6(4)(B); Texas Administrative Code, Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.337.
[61] Oklahoma Administrative Code 317:35-5-41.6(4)(B); Texas Administrative Code, Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.337.
[62] Trust Company of Oklahoma v. Oklahoma Department of Human Services, 825 P.2d 1295 (Okl. 1991).
[63] P. L. 103-66; 42 U.S.C. § 1396p(d).
[64] Oklahoma Administrative Code 317:35-5-41.6(5); Texas Administrative Code, Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.339.
[65] Oklahoma Administrative Code 317:35-5-41.6(5); Texas Administrative Code, Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.
[66] *Id*.

disabled individual under the age of 65.[67] A Supplemental Need Trust would be an example of this type of trust. There are numerous requirements for this type of trust, including the requirements that it be irrevocable, that it only contains assets of the individual, and that it cannot be amended without the State approval. The exemption continues after the individual reaches the age of 65 but does not apply to any additions to the trust after the age of 65.

The second exemption applies to Medicaid Income Pension Trusts.[68] These trusts are established when an individual is in need of long-term care and has countable income above the categorically needy standard for long-term care, but less than the average cost of nursing home care per month. The trust must be irrevocable and include only income. Resources cannot be included in the trust.

The third exemption also applies to trusts established individuals with disabilities. These are irrevocable trusts established and managed by non-profit associations for a disabled individual and approved by the State.[69] These trusts are referred to as Medicaid Disability Trusts and are additionally restricted as follows:

1. The trust must be for the sole benefit of a disabled person.
2. The trust must be approved by the State.
3. The trust must be established by the beneficiary, the beneficiary's parent, grandparent, guardian, or a court.
4. The trust must contain only the beneficiary's money.
5. Trust funds must be maintained in a separate account.
6. The beneficiary must not be permitted to invade the trust.
7. The trust must provide that upon the beneficiary's death and to the extent of available trust assets, the trust will use a portion of the trust assets (not less than 70%) to re-pay the State for Medicaid benefits received by the beneficiary after the trust was established.[70]

If a trust is created by someone other than the recipient of Medicaid funds and the trust is funded with income or assets from a third party, the trust is not subject to the trust Medicaid rules and the corpus and income of the trust are not counted toward the recipient's resource limit. To benefit from the exclusion, the trust must also not grant the beneficiary the authority to direct payment of corpus or income to the beneficiary. An example of this type of trust would be a trust established by a parent that contains none of the disabled person's money and gives the trustee sole discretion with respect to distribution of corpus and income. Establishing this type of trust may be one way to preserve family assets.

B. *Treatment of the Applicant's Home*

As noted above, an applicant's home is generally excluded as a resource for purposes of determining the applicant's available resources and applying the resource limitation test.[71] In Oklahoma and Texas, if the applicant lives in their home and the equity interest in the home is less

[67] Oklahoma Administrative Code 317:35-5-41.6(6)(A); Texas Administrative Code, Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.
[68] Oklahoma Administrative Code 317:35-5-41.6(6)(B); Texas Administrative Code, Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.
[69] Oklahoma Administrative Code 317:35-5-41.6(6)(C); Texas Administrative Code, Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.
[70] Oklahoma Administrative Code 317:35-5-41(d)(9)(F)(i); Texas Administrative Code, Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.
[71] Texas Administrative Code, Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.348.

than $713,000.00 (as of 2024), the home is exempt.[72] The value limitation was first introduced in the Deficit Reduction Act of 2005.[73] If the home is occupied by the individual's spouse, a minor child or a relative who is aged, blind or disabled, the home is exempt regardless of its value and regardless of where the applicant lives.[74]

If the home is not occupied by the applicant, their spouse, a minor child or a relative who is aged, blind or disabled, the home may still be exempt for a period of time if the applicant files an “Intent to Return Home” statement and the equity interest in the home is at or below $713,000.00. The period of time during which the home remains exempt varies by state. In addition, some states require a physician statement stating that there is a possibility the applicant could return home.

An Intent to Return Home is a documented assertion that even though an individual intends to enter a nursing home, assisted living center or the home of a family member, the individual still regards their home as their primary residence and intends to return to their home if their health permits.[75] The statement applies to homes, condominiums, mobile homes and even house boats as long as the applicant’s primary residence.[76]

In Oklahoma, if the individual is moved to a nursing home, the home remains exempt for 12 months. After an individual has resided in a nursing home for 12 months, medical evidence must be provided to show the feasibility of returning to the home within 90 days. Otherwise, the individual must undertake good faith efforts to sell the home, or the home will be counted as a resource. Once the home is sold, the person is ineligible to receive benefits until the proceeds are spent and the individual is reduced back to the $2,000.00 resource limit.

In Texas, there is no length limit and no physician statement or statement indicating a probability of return to the home is required.[77] Therefore, if an Intent to Return Home is filed and the equity interest in the home is at or below $713,000.00, the home remains exempt indefinitely.

C. *Special Eligibility Rules for Spouses*

The Medicaid eligibility rules discussed above differ when an individual applying for Medicaid benefits enters a nursing home and the individual's spouse remains in the home. Since the passage of the Medicare Catastrophic Coverage Act in 1988, the Medicaid rules include spousal impoverishment rules aimed at preserving sufficient resources and income for the community spouse. Such rules have been codified as amendments to the Social Security Act.[78] The most recent amendments are contained in modifications of Section 2404 of the Patient Protection and Affordable Care Act enacted December 29, 2022 which extend the spousal impoverishment rules for Home and Community Based Services through 2027.[79] The spousal

[72] https://www.medicaidlongtermcare.org., February 7, 2024.
[73] P. L. 109-171.
[74] Oklahoma Administrative Code 317:35-5-41(c)(6)(F); Texas Administrative Code, Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.
[75] https://www.medicaidlongtermcare.org., February 7, 2024.
[76] *Id*.
[77] https://www.medicaidlongtermcare.org., February 7, 2024.
[78] 42 U.S.C. § 1396r-5.
[79] Department of Health and Human Services, CMCS Informational Bulletin, August 15, 2023; Consolidated Appropriations Act, 2023 (P.L. 117-328).

impoverishment rules were discussed by the United States Supreme Court in a case involving the proper allocation of income between institutionalized and community spouses.[80]

For Nursing Home Medicaid and the HCBS Waivers programs, under the resource test the institutionalized spouse is still limited to resources of $2,000.00 or less. The allocation process begins by determining the value of all countable assets owned by both spouses at the time the institutionalized spouse entered the nursing home. Separate property and assets that are the subject of a prenuptial agreement are also counted. The total value of all assets is then divided in half.

Under the spousal impoverishment rules, the community spouse is allowed to keep resources of between $30,828.00 and $154,140.[81] If the value of half of the total countable assets is less than $30,828.00, countable resources may be re-allocated from the institutionalized spouse to the community spouse, thereby reducing the resources of the institutionalized spouse. Known as the Community Spouse Resource Allowance ("CSRA"), this ensures that the community spouse will not be destitute if their spouse enters a nursing home. If the value of half of the total countable assets is greater than $154,140.00, countable resources will be re-allocated from the community spouse to the institutionalized spouse, thereby increasing the resources of the institutionalized spouse.

Once resources have been allocated, if the resources of the institutionalized spouse exceed $2,000.00, the institutionalized must spend down resources to get below the $2,000.00 limit. Resources may be spent for the benefit of either spouse but may not be gifted to third parties. Acceptable spending would include buying exempt assets, paying debts, and spending resources on the home. If resources are acquired after the institutionalized spouse enters the nursing home, such resources are allocated to the institutionalized spouse and must be spent down.

With respect to ABD Medicaid and MEPD Medicaid, since both spouses continue to reside at home, there is no Community Spouse Resource Allowance. For a married applicant, the combined resource limit in Oklahoma is $14,130.00 through March 2024. For a married applicant in Texas, the combined resource limit is $3,000.00.[82]

For Nursing Home Medicaid and the HCBS Waivers programs, under the income test, the institutionalized spouse must count all of his or her income and one half of all joint income. The recipient of income is basically determined by whose name is on the check. The income limit is the same as for an unmarried individual, $2,829.00 per month. Under the spousal impoverishment rules the community spouse is assured a Minimum Monthly Maintenance Nees Allowance ("MMMNA") of $3,853.50 per month.[83] Therefore, if the income allocated to the community spouse is less than $3,853.50 per month, income up to that amount, known as the Spousal Income Allowance, may be re-allocated from the institutionalized spouse to the community spouse to achieve such level. The net income of the community spouse combined with the Spousal Income Allowance cannot exceed $3,853.50 per month.

For ABD Medicaid and MEPD Medicaid, the income of both spouses is considered, with a combined income limit is $1,643.00 per month in Oklahoma[84] and $1,415.00 per month in

---

[80] Wisconsin Department of Health and Family Services v. Blumer, 534 U.S. 473, 122 S.Ct. 962, 151 L.Ed.2d 935 (2002).
[81] 42 U.S.C. § 1396r-5.
[82] https://www.medicaidlongtermcare.org., February 7, 2024
[83] Oklahoma Administrative Code 317:35-19-21(3)(C); Texas Administrative Code, Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.420.
[84] *Id.*

Texas.[85] The limit applies whether only one spouse is applying for Medicaid benefits or both spouses are applying for benefits.[86] There is no Minimum Monthly Maintenance Needs Allowance for non-applicant souse of ABD Medicaid and MEPD Medicaid beneficiaries.[87]

If after income is allocated between the institutionalized spouse and the community spouse, the institutionalized spouse's income exceeds $2,829.00 but is less than $6,833.00, the institutionalized spouse may nevertheless qualify for Medicaid benefits by establishing a Medicaid Income Pension Trust as described above.[88]

D. *Treatment of Asset Transfers*

As noted above, Medicaid programs contain a resource test to determine eligibility. To prevent abuses, rules were implemented to prevent individuals from transferring assets in order to qualify for Medicaid. Current rules provide that an individual may not give assets away in order to qualify for Nursing Home Medicaid and the HCBS Waivers programs. With respect to the Oklahoma ABD Medicaid program and the Texas MEPD program, there are no restrictions or penalties for transfers of assets (i.e. no look-back period).[89]

Prior to the passage of the Deficit Reduction Act of 2005, an agency charged with determining Medicaid eligibility would look back three years to determine whether an asset was disposed of for less than fair market value in order to qualify for Medicaid benefits.[90] For transfers made after the effective date of the Deficit Reduction Act, February 8, 2006, the look-back period is five years.[91]

Under prior law, if a transfer was made for less than fair market value within the three-year look-back period, the individual would be ineligible for a period of months measured from the date of the transfer. The number of months of ineligibility would be calculated by taking the difference between the fair market value of the asset transferred and the amount received by the individual, if any, and dividing by $2,000.00.[92] Therefore, gifts or transfers of less than $2,000.00 per month would not affect eligibility. A five-year look-back period was applied for transfers made to trusts of which the individual is not a beneficiary, and transfers from a grantor living trust to a third party.

For transfer made after February 8, 2006, current law provides that if a transfer was made for less than fair market value within the five year look-back period, the individual will be ineligible for a period of days measured from the later of (1) the date of the transfer, or (2) the date on which the person has been found to be eligible for Medicaid payment for nursing home care absent the transfer.[93] The number of days of ineligibility is calculated by taking the difference

---

[85] Oklahoma Administrative Code 317:35-19-21(3)(C); Texas Administrative Code, Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.420.
[86] https://www.medicaidlongtermcare.org., February 7, 2024.
[87] https://www.medicaidplanningassistance.org., February 7, 2024.
[88] Oklahoma Administrative Code 317:35; Texas Administrative Code, Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.
[89] https://www.mediaidplanningassistance.org., February 7, 2024.
[90] Oklahoma Administrative Code 317:35-9-67(4).
[91] P.L. 109-171, § 6011(a), 42 U.S.C. § 1396p(c)(1)(B), Oklahoma Administrative Code 317:35-19-20(5)(A); Texas Administrative Code, Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.348.401.
[92] Oklahoma Administrative Code 317:35-9-67(4), Oklahoma Administrative Code 317:35-17-10(3); Oklahoma Administrative Code 317:35-19-20(4); Texas Administrative Code, Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.348.
[93] P.L. 109-171, § 6011(b), 42 U.S.C. § 1396p(c)(1)(D)(ii), Oklahoma Administrative Code 317:35-19-20(5)(C).

between the fair market value of the asset transferred and the amount received by the individual, if any, and dividing by $224.64, representing the average per day nursing home private pay rate.[94]

The significance of the change in the law is that individuals are now penalized from the date they enter the nursing home and otherwise qualify for Medicaid benefits rather than the date of the transfer. Therefore, the ability to make significant transfers prior to entering the nursing home, but within the look-back period, is now removed. With the look-back period now five years and the penalty period being measured in days rather than months, individuals desiring to preserve family assets will be forced to undertake long-term planning if they intend to transfer assets for less than fair market value in order to qualify for Medicaid benefits. The penalty imposed under the Medicaid rules is a period of ineligibility. Individuals are not forced to recover assets.

Certain transfers for less than fair market consideration are not penalized under Medicaid rules.[95] An individual will not be penalized if he or she can show any of the following:

1. The transfer was of the individual's home and was made to the individual's spouse, a child under 21 or disabled, a sibling with an equity interest in the home who resided in the home for at least one year prior to the individual entering the nursing home, or the individual's son or daughter who resided in the home and provided care for at least two years prior to the individual entering the nursing home.

2. The individual can show that the intent was to transfer the asset for fair market value.

3. The individual can show that the transfer was exclusively for a purpose other than Medicaid eligibility.

4. The transfer was to a trust established for the sole benefit of a disabled person under the age of 65.

5. The penalty would result in a hardship, defined to mean a loss of medical care that would endanger the individual's life or health, or deprive the individual of food, clothing, shelter, or other.[96]

Prior to the institutionalized spouse becoming eligible for Medicaid, transfers made by either spouse for less than fair market value are subject to the same penalty provisions as transfers made by an individual. Transfers made by the institutionalized spouse after he or she becomes eligible for Medicaid are penalized in the same way. The one exception to the normal rules is that after resources are allocated between the spouses, the institutionalized spouse must transfer all of his or her interest in the resources allocated to the community spouse within 12 months of becoming eligible for Medicaid.[97] Transfers made by the community spouse after the institutionalized spouse is determined to be eligible for Medicaid benefits do not result in penalties for the institutionalized spouse.

V. CONCLUSION

Qualifying for Medicaid long-term care programs is a very complicated process. The rules are convoluted and vary among different jurisdictions. A complete understanding of the Medicaid rules is perhaps an unattainable goal. Nevertheless, attorneys that advise clients in this area should

---

[94] P.L. 109-171, § 6016(a), 42 U.S.C. § 1396p(c)(1)(E)(iv), Oklahoma Administrative Code 317:35-19-20(5)(E).
[95] Oklahoma Administrative Code 317:35-19-20(4)(F).
[96] P.L. 109-171, § 6011(e), 42 U.S.C. § 1396p(c)(2)(D), Oklahoma Administrative Code 317:35-19-20(5)(H)(vii); Texas Administrative Code, Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.348.401.
[97] Oklahoma Administrative Code 317:35-19-20; Texas Administrative Code, Title 1, Part 15, Chapter 358, Subchapter B, Rule §358.348.401.

achieve some level of competence in order to make proper recommendations. Attorneys play an important role in this process because the individuals who are in most need of Medicaid services are arguably the individuals who are least likely to understand the Medicaid rules.

THE PEPSI GENERATION GOES TO COURT: A TEACHING NOTE UTILIZING A NETFLIX DOCUMENTARY TO TEACH CONTRACTS AND ETHICS

MICHAEL CONKLIN*

I. INTRODUCTION

This teaching note provides everything needed to utilize a recent Netflix documentary to illustrate various aspects of contract formation and legal ethics. This can be performed as an in-class discussion, as an optional extra credit assignment, or as a take-home assignment with in-class discussion. The documentary is an excellent catalyst for igniting discussion and demonstrating the real-world application of legal principles such as advertisements as offers, the objective theory of contract formation, the statute of frauds, inadmissibility of mitigation efforts, and contracts for an illegal purpose. It also demonstrates some of the more practical aspects of litigation that are often overlooked in legal education. Examples include power disparities between plaintiff and defendant, venue selection, delaying tactics, the discomfort incurred from legal uncertainties, the difference between "winning" a lawsuit and avoiding a lawsuit altogether, and the long-term costs of unethical behavior. Students find the ambitious college student plaintiff and his relentless pursuit of one of the largest corporations to be highly engaging. The documentary is also highly entertaining, as it accurately portrays extravagant 1990s pop culture, provides a behind-the-scenes perspective from those involved in the case, and has a surprise twist in how Leonard's attorney was the brazen and now disgraced Michael Avenatti. This teaching note includes discussion questions with instructor notes and multiple-choice, attention check questions.

II. THE NETFLIX DOCUMENTARY

Pepsi, Where's My Jet? is a compelling documentary released on Netflix in 2022.[1] It covers the background, litigation, and aftermath of the famous *John Leonard v. PepsiCo, Inc.* case.[2] The case involved an ambitious, 21-year-old college student who saw a Pepsi Points commercial that depicted a Harrier jet accompanied by the text "Harrier Fighter 7,000,000 Pepsi Points."[3] Leonard quickly realized that such a jet would be worth about $32 million and, because Pepsi allowed for the purchase of Pepsi Points at $0.10 each with no stated limit, this could be a very lucrative deal. Leonard acquired $700,000 (7,000,000 × $0.10) from financial backers and sent a cashier's check to the Pepsi fulfillment center requesting his Harrier jet. Pepsi returned the check with a note explaining that the Harrier jet in the commercial "is fanciful and is simply included to create a

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

[1] *Pepsi, Where's My Jet?* (Netflix 2022).

[2] Leonard v. PepsiCo, Inc., 88 F. Supp. 2d 116 (S.D.N.Y. 1999).

[3] *Pepsi Commercial*, YOUTUBE (2022), https://youtu.be/z9_4e4WUXr4.

humorous and entertaining ad."[4] Litigation then ensued, largely around whether the commercial constituted an offer for the Harrier jet that Leonard then accepted.

The Netflix documentary provides a highly entertaining look at 1990s pop culture. It truly captures the feel of a unique decade. Students will no doubt find the fashion, music, slang, and commercials to be highly amusing when compared to modern standards. The documentary also provides insightful backstory regarding Leonard; one of his eccentric financial backers; the Pepsi marketing team; Pepsi executives; and Leonard's attorney, who was none other than the now disbarred and imprisoned Michael Avenatti.[5] The documentary also brings to light aspects of the incident that were previously unknown.

By showing the viewer a behind-the-scenes look at the evolution of the case, students will gain valuable experience about the real-world implications and costs of litigation. This is something that is sadly often overlooked in legal education; reading one-page case summaries in a textbook provides a dangerously overly simplistic perception of the legal process. For example, Leonard describes how much of the litigation process was just waiting.[6] He also talks about the mental hardship from the inherent uncertainty of not knowing what the outcome will be.[7] This frustration is exacerbated when settlement offers are involved, which is also discussed in the documentary. Another aspect of litigation often overlooked in legal education is how trial outcomes are frequently contingent upon extra-legal occurrences. Issues of venue selection, litigation gamesmanship, jury makeup, delaying tactics, financial-resource disparities between plaintiff and defendant, and presiding judge assigned are all illuminated in the documentary and explained by the people who went through the process.

III. THE ACTIVITY

The primary issue at hand in the *Leonard* case is whether the Pepsi commercial constituted an offer that Leonard then accepted, forming a contract for the Harrier jet. The documentary provides in-depth background regarding Leonard, his financial backers, his attorneys, the marketing firm, Pepsi executives, and even U.S. Pentagon officials that weighed in on the matter. This allows students the ability to parse out the relevant facts and determine the likely outcome at trial. This background regarding the case also provides details that may initially appear to be relevant but upon closer consideration of the legal standards are not. This affords students the opportunity to practice identifying relevant legal factors.

This activity can be conducted in a variety of ways depending on the class's modality, length of the semester, and professor's preference. It can be given as an extra credit assignment, a graded homework assignment, or just an in-class activity for class participation credit. The heart of the assignment is to identify the factors of the case that favor each side to the litigation and be able to explain why each factor strengthens that side's position. This can either be written up and submitted, discussed in a class activity, or first written up and submitted for an assignment and then discussed in class.

---

[4] *Leonard*, 88 F. Supp. 2d at 120.
[5] *Lawyer Michael Avenatti Sentenced to 14 Years in Federal Prison for Stealing Millions of Dollars from Clients and Tax Fraud*, U.S. ATT'Y OFF., CENT. DIST. CAL. (Dec. 5, 2022), https://www.justice.gov/usao-cdca/pr/lawyer-michael-avenatti-sentenced-14-years-federal-prison-stealing-millions-dollars.
[6] *Pepsi, Where's My Jet?: Let's Make a Deal* (Netflix 2022), at 26:00.
[7] *Id.*

Access to Netflix is required to watch the documentary. The vast majority of students will have access to Netflix from a personal account or through a friend or family member's account. In the unlikely event a student does not know anyone else with an account, it will cost $8.99 for a one-month subscription. Netflix functionality allows playback to be increased to 1.25 or 1.5 times normal speed for students in a hurry. The documentary does contain some profanity, roughly on par with a PG-13 movie. There is no sexually suggestive material or any otherwise problematic material.

This is a convenient, standalone activity that can be conducted at the beginning, middle, or end of the semester. It may seem counterintuitive to conduct such a class activity at the beginning of the semester before the relevant material has been taught. However, this sequencing allows the professor to show the need for learning the material that will later be covered throughout the semester. This sparks interest in students by demonstrating the practical value of the class and how the study of law can be interesting. This practice of showing the need for the information first and only then providing the information is consistent with the pedagogical practice of the inductive teaching method.[8] Unfortunately, business education frequently uses the direct instruction method, which involves first providing instruction followed by a corresponding problem.[9] This is not practical, as it is unlikely to be the case in real-world business settings where business leaders generally are confronted with a problem first and then must seek out a solution through a process of discovery.[10]

This activity is also an excellent fit for a "down day" in the semester, such as the Tuesday before Thanksgiving when the professor does not want to start a new section. It is also a great cumulative event after covering contracts or for a final's week activity if a traditional, in-class final exam is not administered. Additionally, this activity is a great review for a contracts exam.

A modified version of this activity would also be great for a Marketing class. It provides insight into the "Cola Wars" of the 1990s; a behind-the-scenes look at the collaborative process of creating advertisements; legal implications of advertisements; target demographics; the use of celebrity endorsements; and numerous ethical issues, such as Pepsi's marketing fiasco in the Philippines.

IV. LEGAL ANALYSIS TEACHING NOTES

The basic legal issue presented in the case is whether or not Pepsi made an offer to Leonard such that his acceptance led to a valid contract. Generally, a valid offer requires that the offeror manifest a willingness to enter into a bargain in a manner that would justify another person believing that his or her assent will conclude the bargain.[11] This means that the words and/or conduct of the offeror must show that the offeror intends to make a commitment to be bound by

---

[8] Torsor Kotee & Casey Nguyen, *How Can Business Educators Best Prepare Learners with Both the Foundational Knowledge and Self-Direction Needed for Career Success?*, AACSB (Jan. 20, 2023), https://www.aacsb.edu/insights/articles/2021/07/instruction-vs-discovery-learning-in-the-business-classroom.
[9] *Id.*
[10] *Id.*
[11] *See* RESTATEMENT (SECOND) OF CONTS. § 24 (AM. L. INST. 1981).

the offer.[12] This intent is measured by an objective, reasonable person standard.[13] That is to say, whether or not an offeror's actions manifested an intention to be bound is determined by whether a reasonable person in the position of the offeree would believe he or she did, not what the offeror or offeree subjectively believed.[14] Thus, students should be able to identify that the key issue in this case is whether or not a reasonable person would believe that Pepsi actually manifested a serious intention to be bound to the bargain of exchanging a Harrier jet for $700,000 worth of Pepsi Points.

A. Evidence for Leonard

Generally, Leonard has the weaker case—he ultimately lost on summary judgment—but there is evidence that students can offer to support his side. In the commercial, the point total for the Harrier jet is presented in the exact same manner as the other items, which, it could be argued, implies that they are to be treated as equally valid. There is no disclaimer in the advertisement to inform the viewer that the Harrier jet is unavailable. Such a disclaimer would have been easy to add and is common practice in television advertisements.[15]

The advertising executive who developed the commercial said he came up with the idea for putting the Harrier jet in the advertisement from the old Neiman Marcus Christmas Catalogue fantasy present.[16] This fantasy present was an extravagant item listed for sale in the back of the catalogue, such as a his and hers mini submarine for $18,700 in 1963.[17] The fact that these were actual items available for purchase at the stated price lends some support for the notion that the Harrier jet was available.

The commercial was the result of a deliberate process involving the approval of multiple people at multiple stages of creation. This, it could be argued, supports the claim that it is to be taken seriously, as compared to something mentioned extemporaneously in a casual conversation.[18] The unaired first draft of the commercial listed 700,000,000 points for the Harrier jet, which Pepsi changed to 7,000,000 before running the initial version of the commercial.[19] While Pepsi explains that the change was simply to provide more aesthetically pleasing text, it could be argued that Pepsi was intentionally trying to make the Harrier jet appear obtainable.

Finally, the botched Pepsi marketing contest in the Philippines (discussed in Part VII) could perhaps be used to argue that Pepsi intentionally made "mistakes" in order to sell more product and therefore was not acting in good faith.

---

[12] *Id.* at § 2 (defining a "promise," the underlying basis of a contract, as a "manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made").

[13] *See* Wayne Barnes, *The Objective Theory of Contracts*, 76 U. CIN. L. REV. 1119, 1125 (2008) (discussing the objective theory of contracts).

[14] *Id.*

[15] Here, students often recount absurd examples they have seen, such as "do not attempt to drive car upside down," or "product does not actually allow user to fly." The *Leonard* case helps illustrate why such disclaimers are necessary—not because such a frivolous lawsuit regarding these issues would ultimately be successful but to avoid them in the first place.

[16] *Pepsi, Where's My Jet?: Let's Make a Deal*, *supra* note 6, at 16:00.

[17] *Id.*

[18] *See* RESTATEMENT (SECOND) OF CONTS. § 22 (AM. L. INST. 1981) (requiring that an offer manifest a serious intention to be bound by its terms).

[19] *Pepsi, Where's My Jet?: Landing the Plane* (Netflix 2022), at 24:45.

B. Evidence for Pepsi

As explained by the judge in granting summary judgment, Pepsi had numerous grounds for why its commercial did not create a binding contract. The strongest is likely the general rule that advertisements do not constitute offers; rather, they function as invitations for offers.[20] The reason why can be easily illustrated by considering what would happen if Pepsi received $700,000 from 3,000 people each demanding a Harrier jet. Since less than 1,000 Harrier jets were ever made,[21] such an open invitation to anyone is not practical. There does exist a narrow exception to the general rule that advertisements are not offers. When the advertisement is "clear, definite, and explicit, and leaves nothing open for negotiation,"[22] it may be treated as an offer. But this is not the case in the Pepsi Points commercial, as the commercial did not contain any limiting words such as "first come, first served."[23]

As previously discussed, under the objective theory of contract formation, it is largely irrelevant whether Pepsi actually intended to offer the Harrier jet or not; rather, what matters is whether a reasonable viewer of the commercial would believe that it did. Here, a reasonable person would likely comprehend the absurd nature of a business offering to give out $32 million items to anyone who gave the company $700,000. The depiction of the Harrier jet in the commercial is unrealistic and clearly intended for comedic purposes. It is flown by a teenager wearing no ear protection and holding a Pepsi in one hand and is landed on the front lawn of a high school, causing structural damage to the building and comically ripping off the clothes of a teacher. This is in contrast to how the other, legitimate items available in the catalogue are depicted in ordinary use.

Additionally, millions saw the advertisement, and only one person attempted to accept the offer. This is evidence that the average, objective, reasonable person understood that the commercial did not make an offer. There are numerous people who would have gladly paid $700,000 for a $32 million item if they believed that was what Pepsi was seriously offering. A final piece of evidence on this point is that the commercial directs viewers to the catalogue for full details on the Pepsi Points campaign. In the catalogue, all the other items from the commercial are depicted and have a checkbox to request in the order form, but there is no mention of the Harrier jet.[24]

There is another potential contract formation issue related to the lack of a valid writing. The execution of this alleged agreement would constitute the "sale" of a good over $500 and therefore invoke the statute of frauds and require a writing to be enforceable.[25] Here, there is no writing because neither the commercial nor the order form submitted satisfies the writing requirement.[26] Leonard alleged that there were various writings that, when considered together, met the statute of frauds requirement.[27] While the court noted that a combination of different signed and unsigned writings could satisfy the statute of frauds, there must be at least one signed writing that establishes the contractual relationship, and the additional unsigned writing(s) must on their

---

[20] 67 AM. JUR. 2D *Sales* § 114 (2021).
[21] *Harrier II Plus (AV-8B) VSTOL Fighter and Attack Aircraft*, AIRFORCE TECH. (Nov. 7, 2000), https://www.airforce-technology.com/projects/harrier/.
[22] Lefkowitz v. Great Minneapolis Surplus Store, 86 N.W.2d 689, 691 (Minn. 1957).
[23] *Leonard*, 88 F. Supp. 2d at 124.
[24] *Pepsi, Where's My Jet?: Let's Make a Deal*, *supra* note 6, at 2:30.
[25] *Leonard*, 88 F. Supp. 2d at 131.
[26] *Id.*
[27] *Id.*

face clearly refer to the same transaction.[28] In this case, the order form that Leonard alleges formed the contract was not signed by Pepsi, the party to be charged.[29] Leonard sought to obtain additional contracts between Pepsi and its advertisers, but the court noted that Leonard would be nothing more than a third party to such contracts.[30] Thus, Pepsi's signature on those documents would be irrelevant to the formation of any contract with Leonard. This case thus provides students with an excellent example of how the statute of frauds allows parties to be quite creative in using business documents to satisfy the writing requirement, but those documents still must meet certain basic requirements.

In addition to the basic issue of whether or not Pepsi made a valid offer, there are other potential enforceability issues related to consideration and unconscionability. Normally, courts do not evaluate the adequacy of consideration in a contract.[31] However, a contract can be considered "unconscionable"[32] and rendered voidable when disparities in consideration are so great to constitute "such an agreement as no sane man not acting under a delusion would make, and that no honest man would take advantage of."[33] It would be a highly peculiar business decision for a company that is not in the business of distributing $32 million Harrier jets to agree to procure and distribute them to anyone who wrote a cashier's check for $700,000. As the judge in *Leonard* described, such an extreme, 41:1 disparity is simply "a deal too good to be true."[34]

A final legal issue that can be raised with students is the required contractual element of legality. To be enforceable, contracts must be for a legal purpose.[35] It is potentially illegal for a U.S. citizen to own a flight-capable Harrier jet. [36] The commercial that Leonard relies upon as creating an offer features a flight-capable jet, and thus this must be the subject matter that Leonard asserts is the basis of the contract. Demilitarizing a Harrier jet would likely render it incapable of flight.[37] Thus, the contract proposed by Leonard would either be illegal or for a different subject matter than what he alleges Pepsi offered.

Some of the evidence indicates that Leonard was not acting in good faith. He could have easily reached out to Pepsi to ask if it was serious about the Harrier jet before seeking out lawyers and acquiring $700,000 from financial backers. He never obtained a location to store the Harrier jet he allegedly believed he would receive. Before moving forward with his scheme, Leonard learned that Harrier jets are sold in a minimum quantity of six,[38] which is an indication that Pepsi was not serious about the Harrier jet. Finally, the $10 he included for shipping and handling would be vastly insufficient to cover the transportation of a Harrier jet.

---

[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] 17 C.J.S. *Contracts* § 175 (2021) ("In the absence of fraud, the law generally will not weigh the adequacy of the consideration for a contract; so long as it is something of real value, it is sufficient.").
[32] 17 C.J.S. *Contracts* § 178 (2021).
[33] R. L. Kimsey Cotton Co., Inc. v. Ferguson, 233 Ga. 962, 966 (1975).
[34] Leonard v. PepsiCo, Inc., 88 F. Supp. 2d 116, 130 (S.D.N.Y. 1999).
[35] 17 C.J.S. *Contracts* § 4 (2023) (discussing the requirement that a contract must be for a legal purpose).
[36] Susanne M. Schafer, *Pentagon: Pepsi Ad Not 'The Real Thing'*, AP NEWS (Aug. 9, 1996), https://apnews.com/article/d4233cd81d28106f9b417931beb06479.
[37] *Id.*
[38] *Pepsi, Where's My Jet?: The Kid from Seattle* (Netflix 2022), at 27:00.

C. Irrelevant Evidence

There are several pieces of evidence from the documentary that students might raise but that are irrelevant to resolving the legal issues affecting the formation of a contract. Thus, this exercise serves as an effective tool for helping students learn how to focus on the material facts given the applicable legal standard.

After Leonard attempted to acquire the Harrier jet, Pepsi changed the advertisement from 7,000,000 Pepsi Points to 700,000,000.[39] Students often view this as relevant evidence that serves as an admission of guilt by Pepsi. In the documentary, this behavior leads to the accusation that "they were admitting it's an offer."[40] The court in *Leonard* explained that this alteration was not "probative of the seriousness of the offer."[41] It was prompted "less by the fear that reasonable people would demand Harrier jets and more by the concern that unreasonable people would threaten frivolous litigation."[42] This is similar to the public policy grounds behind Federal Rule of Evidence 407 for allowing a business to correct the circumstances that caused an injury without having the correction used against it in court.[43]

Leonard explains that he was concerned that if he planned on selling the Harrier jet immediately after acquisition, "that certainly would look like we were just trying to get Pepsi."[44] So they came up with a plan to take the Harrier jet to airshows.[45] This plan would have been unlikely to recoup the initial $700,000 investment plus attorney's fees. What little they would be paid to perform at airshows would largely be offset by expenses, such as storage, jet fuel, insurance, pilot salary, transportation costs, maintenance, etc. Regardless, this is largely a moot point, as there is little relevance to what a party to a contract plans to do with the item after the contract is executed.

V. ETHICAL ANALYSIS TEACHING NOTES

The details surrounding this case provide colorful illustrations of various ethical principles. Regardless of legality, was it ethical to demand Pepsi acquire a $32 million item in exchange for $700,000? Here, providing the class an example in which the tables are turned may cause the students to change their minds. If a student mistakenly created an online advertisement to sell a $3,200 baseball card for $70, would it be ethical for someone to deliver the $70 and demand the student acquire and deliver the $3,200 baseball card?[46]

Was it ethical for Pepsi to be the first to initiate a lawsuit, thus ensuring that the case would be litigated in New York, a venue that was both geographically convenient to Pepsi and likely a sympathetic jurisdiction to a corporate interest?[47] While this may initially strike students as unfair,

---

[39] *Pepsi, Where's My Jet?: Let's Make a Deal*, *supra* note 6, at 31:00.
[40] *Pepsi, Where's My Jet?: Let's Make a Deal*, *supra* note 6, at 31:30.
[41] *Leonard*, 88 F. Supp. 2d at 130.
[42] *Id.*
[43] FED. R. EVID. 407 ("When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product or its design, or a need for a warning or instruction.").
[44] *Pepsi, Where's My Jet?: The Kid from Seattle*, *supra* note 38, at 27:30.
[45] *Id.*
[46] Note that this is an intentionally generous analogy, as Pepsi did not make a mistake; rather, it made a fanciful commercial.
[47] *Pepsi, Where's My Jet?: Let's Make a Deal*, *supra* note 6, at 27:00.

this type of a tactic is perfectly legal. For example, in 2018 MGM sued the Mandalay Bay shooting victims for similar reasons.[48] In our adversarial legal system, attorneys are to do what is best for their clients, not what is best for the opposition. But how far is it appropriate to take this principle? What if Pepsi had the ability to control the times of the depositions and went out of its way to schedule them at dates and times that were the most inconvenient to the out-of-state plaintiff? What if Pepsi intentionally delayed the process solely so that Leonard would be more likely to take the settlement offer rather than continue with the hassle of litigation?

The documentary recounts a little-known aspect of the Leonard litigation. Michael Avenatti admitted that Leonard was "highly unlikely to win this case in a court of law. [Therefore,] we are going to have to bring public pressure to bear."[49] Avenatti went digging for dirt on Pepsi to use against it to pressure it into a favorable settlement.[50] He eventually found out about a botched promotional campaign Pepsi ran in the Philippines in 1992 called "Pepsi Number Fever."[51] In this campaign, bottle tops of Pepsi had numbers printed on them, and one number was selected for recipients of bottles with that number to become millionaires.[52] Due to a printing error, instead of only a few winning numbers printed, 600,000 were printed, and hundreds of Filipinos believed they had won.[53] Pepsi offered to pay these people only 1/2,000th of the promised payout, which led to riots, arson, and even the death of five people.[54] Avenatti's plan was to threaten to run provocative advertisements referencing the "Pepsi Number Fever" contest if Pepsi did not agree to a favorable settlement offer.

This controversial scheme elicits various ethical considerations. First, ignoring the printing error, was it even ethical for Pepsi to run such a campaign in an impoverished country such as the Philippines? Manny Pacquiao, a Filipino boxer, politician, and advocate, implies that due to the poverty in the Philippines, advertising campaigns that offer the chance at a large reward are particularly suspect.[55] Pacquiao explains, "Because of the suffering of our people, when promotions like this happen, the people will try very hard."[56] Does the fact that the Pepsi product leads to poor health outcomes—which require more money to be spent on health care—further affect the ethics of such a campaign?[57]

This Philippines contest debacle and Avenatti's attempt to exploit it for financial gain is illustrative of how unethical behavior catches up to people in the long run. Avenatti continued the practice of trying to extort large corporations, which, over twenty-five years later, led to a 2.5-year prison sentence and disbarment after attempting to extort Nike.[58] Unethical behavior may lead to

---

[48] Elliott Mest, *MGM Sues Mandalay Bay Shooting Victims*, HOTEL MGMT. (July 17, 2018), https://www.hotelmanagement.net/legal/mgm-sues-mandalay-bay-shooting-victims.
[49] *Pepsi, Where's My Jet?: The Bad News Bears* (Netflix 2022), at 8:20.
[50] *Id.* at 31:40.
[51] *Id.* at 33:15.
[52] *Pepsi, Where's My Jet?: Landing the Plane*, *supra* note 19, at 2:30. A million Philippine pesos was worth roughly $40,000 in 1992. *Id.*
[53] Darian Woods & Stacey Vaneck Smith, *Pepsi's Number Fever*, NPR (May 6, 2021, 2:47 PM), https://www.npr.org/2021/05/06/994388441/pepsis-number-fever.
[54] *Id.*
[55] *Pepsi, Where's My Jet?: Landing the Plane*, *supra* note 19, at 3:00.
[56] *Pepsi, Where's My Jet?: Landing the Plane*, *supra* note 19, at 3:00.
[57] Joe Leech, *13 Ways That Sugary Soda Is Bad for Your Health*, HEALTHLINE (Feb. 8, 2019), https://www.healthline.com/nutrition/13-ways-sugary-soda-is-bad-for-you.
[58] *Michael Avenatti Sentenced to Over Two Years in Prison for Attempting to Extort Nike and for Defrauding His Client*, U.S. DEPT. OF JUSTICE (July 8, 2021), https://www.justice.gov/usao-sdny/pr/michael-avenatti-sentenced-over-two-years-prison-attempting-extort-nike-and-defrauding.

short-term gains but almost always catches up to the person in the long run.[59] Additionally, even when unethical behavior is advantageous in the short run, it imposes a heavy toll in the form of guilt, the burden of maintaining lies, and the psychological cost of living with the fear of being caught.[60] As Tom Hoffman describes in the documentary, his ethical behavior resulted in a happy, guilt-free lifestyle, and Avenatti's behavior landed him in prison.[61]

VI. Discussion Questions

Because of the number of contractual and ethical issues brought up in this activity, there is no shortage of discussion questions that can be posed either as take-home essay questions or in-class discussion questions. The following are just a few options, with accompanying information for the professor. Note that the footnotes in these questions are for instructor reference and should be deleted before assigning to students.

1. With the hindsight of knowing that Leonard lost his case, what advice would you give Pepsi in 1996 about running the advertisement?

> Note: While Pepsi ultimately "won" the lawsuit, in litigation there is often no real winner, just varying degrees of losers. In order to "win," Pepsi had to invest time and money throughout the three-year litigation process. This is an excellent illustration of this principle, as many students dismissively respond to the question by explaining that, since Pepsi won, there was no problem with running the advertisement. Such a response demonstrates as much of an understanding of the law as a misunderstanding of the costs of defending lawsuits. Additionally, this case focused on contract law, and there are other areas of law that could potentially be applicable, such as a state consumer protection act and the federal truth-in-advertising regulations.

2. Imagine Pepsi had a history of offering—and following through with—one extravagant prize in each of its previous promotional campaigns, how would that fact affect Leonard's case?

> Note: This would certainly be a fact in favor of Leonard and might have gotten him past the summary judgment phase, but ultimately, the principle that advertisements are not offers would still be dispositive.[62] As long as Pepsi did not include "clear, definite, and explicit [language that] leaves nothing open for negotiation,"[63] the rule that advertisements are not offers would be controlling.

3. Does the commercial constitute an offer for the other items, such as the sunglasses and jacket?

> Note: Likely not. Again, the general rule is that advertisements are not offers. The commercial did not contain "clear, definite, and explicit [language that] leaves nothing

---

[59] *See, e.g.*, *Ethics Pays*, Bus. Ethics Res. Ctr., https://www.businessethicsresourcecenter.org/ethics-pays/ (last visited Mar. 9, 2023).

[60] *See, e.g.*, John D. Kammeyer-Mueller, Lauren S. Simon & Bruce L. Rich, *The Psychic Cost of Doing Wrong: Ethical Conflict, Divestiture Socialization, and Emotional Exhaustion*, 38 J. Mgt. 784 (2012).

[61] *Pepsi, Where's My Jet?: Landing the Plane*, *supra* note 19, at 16:00.

[62] *See supra* note 20 and accompanying text.

[63] Lefkowitz v. Great Minneapolis Surplus Store, 86 N.W.2d 689, 691 (Minn. 1957).

open for negotiation,"[64] so this general rule applies. Students often find this to be unfair. But the purpose for the general rule that advertisements are not offers can be explained by imagining a scenario whereby Pepsi had 5,000 jackets to meet the expected demand but was met with an unforeseeable demand for 10,000 jackets. Here, it would be unfair to force Pepsi to attempt to acquire 5,000 more jackets to meet this unforeseeable demand.

4. Todd Hoffman stated, "You can fight; you can always fight. You can always try. You can lose—you can win. But if you don't fight you already lost. So you always fight."[65] Is this a logical way to view the filing of lawsuits?

Note: This is ultimately an issue of personal preference, but the logic embodied in Hoffman's quote is highly suspect. First, a more reasonable outlook on when to fight should consider the probabilistic outcome from fighting. In other words, one should choose to fight when the weighted probability of what is to be gained from a success is greater than the weighted probability of the total costs (financial, temporal, and psychological). Second, it is likely impossible to "always fight," as people have finite financial and temporal resources to invest into fighting. If one attempted to "always fight," he or she may find himself or herself unable to take on an additional, more advantageous fight in the future because all of his or her available resources are tied up fighting more trivial matters.

5. In the documentary, the advertising executives mention that part of the reason why they used the Harrier jet is because it was in the public domain.[66] What does it mean that an item is in the public domain and why was this beneficial to Pepsi?

Note: Works of authorship that are fixed in a tangible form of expression are protected by copyright law.[67] Examples include written works, photographs, paintings, and videos.[68] Copyright law grants authors the exclusive right to publish, reproduce, distribute, and publicly display or perform the copyrighted work for a specified statutory term.[69] Once the term of copyright protection has run, or if the author of the work has otherwise abandoned its copyright in the work, the work is said to be in the public domain.[70] This means that the previously copyrighted work is no longer subject to copyright protection and is able to be reproduced by the public without infringing on the copyright.[71] Additionally, most U.S. government creative works are copyright-free from inception.[72] Because the Harrier jet was in the public domain, using it in the commercial saved Pepsi the hassle of acquiring the rights to use it for commercial purposes.

---

[64] *Id.*
[65] *Pepsi, Where's My Jet?: Let's Make a Deal*, *supra* note 6, at 29:00.
[66] *Id.* at 19:30.
[67] *See* 18 C.J.S. *Copyrights & Intellectual Property* § 3 (2023).
[68] *Id.* at § 7 (discussing the general nature of copyright law).
[69] *Id.*
[70] *Id.* at § 65.
[71] *Id.*
[72] *Copyright Exceptions for U.S. Government Works*, USA.GOV (June 6, 2022), https://www.usa.gov/government-works (explaining the general rule and providing narrow exceptions such as works prepared for the government by independent contractors and the use of a government work which implies a governmental endorsement).

6. The documentary discusses in detail Leonard's rationale for why he rejected Pepsi's settlement offer.[73] If you were a twenty-one-year-old college student like Leonard, how would you decide whether to accept or decline Pepsi's offer? Conversely, if you were an attorney for Pepsi, how would you decide how much to offer Leonard? In either scenario, would it be a good idea to take into consideration the attitude of the other side (in other words, if the other side was acting like a jerk, should you be less likely to accept its offer)?

> Note: The question about what the Pepsi attorneys should offer to Leonard has great potential for the agency problem. The interests of a Pepsi attorney may not be perfectly aligned with the interests of PepsiCo. For example, perhaps the attorney wants to go to court because of the potential to appear on national news programs. It is also important to note that, while Pepsi almost certainly would have been successful after a full trial, the discovery process would have likely uncovered some inconvenient facts, such as how the advertisement originally listed the Harrier jet for 700,000,000 Pepsi Points but was changed to 7,000,000 Pepsi Points at the request of Pepsi executives.
>
> In addition to these prescribed questions, discussing the case in class will inevitably lead to numerous questions arising organically from the students. Often these involve a misunderstanding as to details mentioned in the documentary that are largely irrelevant to the case. Students also often ask about related, hypothetical scenarios; discussing these further helps illustrate the legal concepts.

VII. ATTENTION CHECK QUESTIONS

The following eight questions may be distributed for the students to answer while watching the documentary. These are simple questions, the purpose of which is just to provide confirmation that the student watched the documentary. These questions are evenly staggered throughout the documentary and are provided here in sequential order. The footnotes, which provide the exact time for where in the documentary the questions are answered, are for reference only and should be deleted before distributing to students. The correct answer is underlined.

1. What is the name of Todd Hoffman's mother, who lives in Palm Beach Florida?[74]
   Ruth
   <u>Phyllis</u>
   Gertrude
   Edna

2. In the original business plan, John Leonard determined that he would need to acquire Pepsi Points from how many 12-packs to acquire the Harrier jet?[75]
   850,000
   1,200,000
   <u>1,400,000</u>
   1,650,000

---

[73] *Pepsi, Where's My Jet?: Let's Make a Deal*, *supra* note 6, at 37:00.
[74] *Pepsi, Where's My Jet?: The Kid from Seattle*, *supra* note 38 at 16:00.
[75] *Id.* at 24:20.

3. What was the name of the advertising agency that produced the commercial?[76]

Sterling Cooper Draper & Price
Hamlin Hamlin & McGill
Batton Barton Durstine & Osborn
Wyant Wheeler Hellerman Teltow & Brown

4. John Leonard's second attorney was a highly controversial attorney named what?[77]

Michael Avanetti
G. Gordon Liddy
Mark Geragos
Denny Crane

5. John Leonard alleges that Pepsi stopped him from going on what show at the last minute?[78]

The Oprah Winfrey Show
60 Minutes
The Jerry Springer Show
The Late Show with David Letterman

6. The alleged arms dealer was only able to produce what item?[79]

Shrimp platter
Non-functioning helicopter
Harrier jet owner's manual
Speedboat

7. What was the winning number from the Pepsi contest in the Philippines?[80]

42
140
349
789

8. The case was a question on which gameshow?[81]

Cash Cab
Jeopardy!
Who Wants to Be a Millionaire
The Hollywood Squares

---

[76] *Pepsi, Where's My Jet?: Let's Make a Deal*, *supra* note 6, at 14:00.
[77] *Id.* at 40:00.
[78] *Pepsi, Where's My Jet?: The Bad News Bears*, *supra* note 49, at 19:00.
[79] *Id.* at 25:15.
[80] *Pepsi, Where's My Jet?: Landing the Plane*, *supra* note 19, at 4:30.
[81] *Id.* at 35:30.

"THAT'S WHAT SHE SAID": USING "THE OFFICE" TO TEACH HOSTILE WORK ENVIRONMENT LAW

WADE S. DAVIS*

I. INTRODUCTION

Michael Scott, the lead character of the hugely popular television situational comedy "The Office," is simultaneously offensive and caring, incompetent and effective. Michael is the regional manager of the Dunder Mifflin paper office in Scranton, Pennsylvania. His character is infamous for his timely injection of the statement, "that's what she said," into day-to-day conversation. The comment would transform an innocuous statement between co-workers into a sexualized joke by reframing the statement into something a woman would say about her sex partner. The joke carried so much cultural significance that, a decade after the series ended, the *Rolling Stones* dedicated an article ranking each of the 41 times that Michael used "that's what she said" throughout the lifespan of the show.[1] This comedic tension sets the tone for the activity described in this article, which uses a provocative episode of The Office to teach the hostile work environment theory of discrimination.

The Office is one of the most popular television shows in the 21st century, initially running from March 2005 through May 2013. Even years after the show ended, it continued to capture the public's attention and gain new generations of fans. The Office was the most watched show on TV in 2020, during the height of COVID, and was streamed on Netflix for 57.1 billion minutes in 2020 alone.[2] Yes, that is *billion* with a "*b*" and is equivalent to over 950 million hours watched in a single year. The Office's relevance and cultural significance was further cemented when Peacock streaming service purchased the exclusive rights to the show in 2021 for $500 million which was accompanied by increased viewership that year.[3]

Much of the popularity of The Office comes from contrasting absurdity and offensive moments with moments of authenticity and genuine connection. The driving character, Michael Scott, is a study in contrasts. He is an often incompetent and unprofessional boss with poor judgment and social skills while, at the same time, a kind and caring person who succeeds at his job in important moments. This dichotomy that creates comic tension also serves a useful basis to analyze the legal issues that arise in such a fast-and-loose workplace culture.

This teaching activity pulls on the comedic and narrative tension depicted in an episode of The Office called "Diversity Day" to help students learn and apply policies and laws governing harassment and hostile work environment in a specific workplace context.[4] Students are placed in the shoes of a new human resources employee charged with investigating a potentially hostile

* J.D., M.A., Associate Professor of Business Law, Minnesota State University, Mankato.

[1] Barry Levitt, '*The Office': A Definitive Ranking of Every 'That's What She Said' Joke*, ROLLING STONE, May 16, 2023.

[2] Todd Spangler, *'The Office' Was by Far the Most-Streamed TV Show in 2020, Nielsen Says*, VARIETY, Jan 12, 2021.

[3] Julia Alexander, *Are The Office and Friends bets paying off for Peacock and HBO Max? / Two shows, $1 billion, one simple strategy,* THE VERGE, Feb 23, 2021.

[4] B.J. Novak, *Diversity Day*, THE OFFICE (Mar. 29, 2005).

work environment setting. They are tasked with identifying the unprofessional and potentially harassing conduct, evaluating the company's potential legal exposure, articulating a response to the situation, and recommending future action to corporate leadership. Section II of the article identifies the learning outcomes, discusses the teaching schedule and process, and introduces the student handout and case study facts. Section III provides detailed guidance to teach the activity. It explains the legal requirements to prove and defend against harassment and hostile work environment claims, applies those principles to the specific conduct depicted in the episode, and identifies and evaluates possible actions available to the company. Section IV provides the grading and evaluation recommendations, and Section V concludes the article.[5]

II. The Teaching Activity and Student Handout

A. The Learning Outcomes

By the end of this activity, students should be able to accomplish the following:

1. Articulate and apply the standard to determine whether an employer is liable under a quid pro quo or adverse employment action theory.
2. Analyze the law and facts of the case to determine whether the employer is liable under a hostile work environment theory.
3. Examine and evaluate the facts of the case to determine whether the employer can assert an affirmative defense to avoid hostile work environment liability.
4. Identify and implement an effective response the employer should take to respond to the situation and prevent future hostile work environment concerns.
5. Recognize conflicting business, ethical, and legal interests at play in the case study.

The target audience of this activity is students in undergraduate Business Law, Human Resource Management, Public Policy, and Gender Studies classes as well as students in Master of Business Administration, Master of Public Policy, and other graduate programs studying legal and practical issues involving discrimination and harassment in the workplace. This teaching activity has been taught in undergraduate legal environment of business courses, employment law courses, and MBA courses.

This activity follows a long line of case studies using television shows and movies to examine and apply particular legal concepts.[6] These case studies are ripe territory to create

---

[5] The initial student handout and directions, a written assignment, and grading materials are included in the Appendices.

[6] Jennifer C. Thor & Michael Griener, *How Legal Knowledge Can Ruin a TV Show: An Issue-Spotting Exercise for the Legal Environment of Business Course*, 27 ATLANTIC L. J. 121 (2024); Margaret B. Sherman, *When the Shark Bites: Using the TV Show "Shark Tank" to Teach Business Entities*, 23 ATLANTIC L. J. 198 (2021); Shelley McGill, *The Social Network and the Legal Environment of Business: An Opportunity for Student-Centered Learning,* 30 J. LEGAL STUD. EDUC. 45, 56 (2013); Michael R. Fricke, *HBO for ADR: Using Television's Silicon Valley to Teach Arbitration*, 36 J. LEGAL STUD. EDUC. 359 (2019); Judith K. Ruud, William N. Ruud, & Farzad Moussavi, You've Got A Deal! Using the Film Draft Day to Teach Fundamental Contract Law and Analytical Skills, 34 J. OF LEGAL ST. IN ED. 41 (2017); Christine

interactive activities to help students identify, apply and understand theoretical and business concepts.[7]

B. Setting Up and Administering the Activity

This class activity is designed to take place in a few contexts. It is primarily designed to be taught over two class periods of 50 to 65 minutes or a single two-hour class period. The first 60 – 75 minutes of the activity is dedicated to the students reviewing the assignment handout, watching the 22-minute "Diversity Day" episode, and working in groups to evaluate the legal and practical considerations raised in the video and handout. The second period is designed to lead a class discussion that deeply analyzes the episode and hostile work environment law.

For the students to get the most out of this activity, it will be helpful to expose them to the legal standards for unlawful harassment and hostile work environment claims beforehand. The author recommends that the students read a brief primer on hostile work environment law before attending the first class. This might include the federal regulations defining hostile work environment law,[8] EEOC guidance on harassment,[9] or excerpts from a chapter of the class textbook or an open access textbook.[10]

At the beginning of the initial class, the instructor should provide students the introductory memorandum setting up the activity, which is located in Appendix 1. It should take 5 to 8 minutes for the students to read the memorandum. The instructor should have access to The Office episode and be prepared to play the video in the classroom (Episode 2, Season 1 entitled "Diversity Day").[11] Before showing the video, the instructor should remind the students to watch it with the eye of an investigator and prepare to work in groups to address the questions raised in the handout.

C. The Student Handout / Case Study

The following memorandum should be provided to the students before showing the Diversity Day episode. A more complete handout that identifies the various employees is included in Appendix 1.

MEMORANDUM TO NEW DIRECTOR OF HUMAN RESOURCES

RE: Your Assignment – Investigate and Report on the Scranton Office Work Environment

---

Corcos, *Columbo Goes to Law School*: *Or, Some Thoughts on the Uses of Television in the Teaching of Law,* 13 LOY. L.A. ENT. L. REV. 499 (1993).

[7] Kamille Wolff Dean, *Teaching Business Law in the New Economy: Strategies for Success,* 8 J. BUS. & TECH. L. 223, 240 (2013); *see also* Justin Blount & Kristen Waddell, *Smithereen, Incorporated—An Employment Negotiation Exercise*, 40 Journal of Legal Studies in Business, 195 (2023) (negotiation activity addressing issues of race and sex discrimination)

[8] 29 CFR § 1604.11 (sexual harassment guidelines); 29 CFR § 1606.8 (national origin harassment guidelines).

[9] *Enforcement Guidance on Harassment in the Workplace*, EQUAL EMP'T. ENFOR. COMM'N, No. 915.064, (Apr. 29, 2024) https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace#_ftnref279 (last visited May 1, 2024); *see also Harassment*, EQUAL EMP'T. ENFOR. COMM'N, https://www.eeoc.gov/harassment (last visited May 1, 2024).

[10] *See, e.g.,* Don Mayer, et al., BUSINESS LAW AND THE LEGAL ENVIRONMENT, 1801- 1821 (Saylor Found. 2012), https://open.umn.edu/opentextbooks/textbooks/273 (last visited Apr. 28, 2024).

[11] Novak, *supra* note 4. "Diversity Day" is the second episode of season one of The Office. At the time of writing, the episode is available on Peacock or can be purchased through iTunes or Amazon Prime.

You recently started as the Director of Human Resources for Dunder Mifflin, Inc., a middle-market paper company. Up to this point, Dunder Mifflin has used an outside vendor to provide most of its human resources needs.

While you are new to Dunder Mifflin, you have already begun to hear rumblings about the fast-and-loose culture of the Scranton, Pennsylvania branch.

Although Kris Dickinson, your boss and the Chief Operating Officer, knows the paper industry, he is not well schooled in employment laws. The employee handbook is five pages long and includes a statement that "the Company will not tolerate any unlawful discrimination or harassment," "employees are expected to treat each other with respect," and the company will "discipline employees who engage in unlawful activity and punish violators to the fullest extent available at law."

Kris explains that the Scranton branch has the highest sales volume and profitability of the company's regional offices. While the other offices are struggling, Scranton is gaining market share. Kris praises the Scranton branch for its "fun culture," and said that he wants to find a way to reproduce the culture across the other branches. He attributes much of the office's success to the regional manager, Michael Scott, who he has characterized as a "hysterical guy with a lot of heart." Kris "does *not* want to shake things up" at Scranton or undermine its success.

Although you have heard various complaints of personality conflicts at the Scranton branch, there are no written documents in the personnel or Human Resources files. Nothing of note that stands out in the personnel records or the annual reviews, they are mostly generic and positive. You have also heard rumors of romantic relationships and pranks that may have "gone a bit overboard" in the Scranton office, but you are unsure if the rumors are true or if they have caused any problem.

Dundler Mifflin has historically contracted with an outside company, Diversity, Inc., to offer trainings and seminars designed to improve workplace culture. In response to a recent report that Michael Scott told an inappropriate joke a few weeks ago, the company is sending Mr. Brown, a consultant at Diversity, Inc., to conduct a diversity training for the office. The training is designed around the acronym HERO, which stands for Honesty, Empathy, Respect and Open-mindedness.

Kris has instructed you to accompany Mr. Brown and to conduct your own investigation into the Scranton branch to independently determine whether there are any potential legal concerns and, if so, to recommend the next steps.

YOUR SPECIFIC TASK – CONSIDER AND REPORT BACK

1. *Issue - Primary Questions.*
Is there any problem of *hostile work environment harassment* at the Scranton office? If so, what actions should the company take?

2. *Rule - Identify the Relevant Law and Legal Standard.*
State the applicable legal standard to determine whether unlawful harassment has occurred or whether the company faces a legal risk. Make sure to specifically consider the legal standard for a hostile work environment claim as well as the criteria to assert an affirmative defense to such a claim.

3. *Key Facts.*
Identify the essential relevant facts you discovered in your investigation. Make sure to identify the people involved and identify specific troubling actions or statements.

4. *Application - Analysis.*
Analyze the facts according to the legal standard to determine whether the company faces any legal risks of unlawful harassment. Be prepared to report your findings and to identify the primary risks and possible exposure to the company.

5. *Conclusion - Recommendations.*
State your recommendations for the company. Be specific. Make sure to discuss steps that need to be taken at an individual, office, or corporate level. Also feel free to discuss the business implications of your recommendations.[12]

III. Leading the Classroom Discussion and Debriefing the Activity

One of the key goals of this activity is to distinguish between unfair, boorish, and mean-spirited behavior and illegal harassment. Students will often focus on crude and bullying type behavior but will not know whether it crosses a legal line. This activity helps students differentiate between their intuitive reaction and the more systematic analysis based on discrimination law.

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sex, race, color, religion, and national origin.[13] Hostile work environment harassment is a form of unlawful discrimination."[14] The Supreme Court first articulated the hostile work environment theory in *Meritor Saving s Bank v. Vinson*, explaining that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."[15] "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive work environment.'"[16]

To establish a prima facie case for a hostile work environment, employees must prove: (1) they belongs to a protected group; (2) they were subject to unwelcome harassment; (3) the harassment was based on a protected class; (4) the harassment was sufficiently severe or pervasive to alter the terms and conditions of the employment; and (5) there is a basis for holding the employer liable for the harassment.[17]

A. What Protected Classes are at Issue?

1. The Law

The starting point of any discrimination or harassment claim is to determine whether the conduct in question is based on, or because of, a protected class. For an employer to be liable

[12] The handout in Appendix 1 also includes a chart with the names and photographs of the employees.
[13] 42 U.S.C. § 2000e-2(a)(1); *Harassment, supra note 9*.
[14] Vance v. Ball State Univ., 570 U.S. 421, 452 (2013) (citing Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 78 (1998) and Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64-65 (1986)).
[15] *Id.*, Meritor, at 66.
[16] *Id.* at 67.
[17] *Id.* at 66-67; Furcron v. Mail Ctrs. Plus, LLC, 843 F.3d 1295, 1304-05 (11th Cir. 2016).

under equal opportunity statutes for harassment, the harassment must relate to a protected category and affect a "term, condition, or privilege" of employment.[18] A "hostile behavior . . . cannot support a claim of hostile work environment unless there exists some linkage between the hostile behavior and the plaintiff's membership in a protected class."[19]

Title VII of the Civil Rights Act, as amended, protects employees and job applicants from employment discrimination based on race, color, religion, sex, or national origin.[20] The Supreme Court has interpreted "sex" to include sexual orientation and gender identity.[21] Other federal laws protect additional classes of employees. For instance, the Americans with Disability Act as Amended covers disability and the Age Discrimination in Employment Act includes age as protected classes.[22] The Genetic Information Nondiscrimination Act of 2008 prohibits discrimination on genetic information, and the Uniformed Services Employment and Reemployment Rights Act prohibits civilian employers from discrimination based on a person's military service.[23]

Several states have passed human rights laws that protect additional classes and categories of people. For instance, in addition to the federal classes, the New Jersey Law Against Discrimination also prohibits discrimination based on an individual's creed, ancestry, marital status, civil union status, domestic partnership status, affectional or sexual orientation, gender identity or expression, or atypical hereditary cellular or blood trait of any individual.[24] The Minnesota Human Rights Act also extends protection to people who receive public assistance, familial status (someone who lives with their child or guardian), and membership or activity in a local commission.[25] Because the Dundler Mifflin office in this case study is located in Scranton, Pennsylvania, students should be aware that the Pennsylvania Human Rights Act prohibits discrimination based on race, color, religious creed, ancestry, age, sex, national origin, non-job related handicap or disability, or the use of a guide or support animal.[26]

Harassment often occurs across multiple intersecting classes. For instance, an employee might be simultaneously subjected to harassment due to their sex, gender identity, race, religion, and national origin, or some combination thereof. In some instances, courts have evaluated the misconduct one protected class at a time and, as such, ignored or downplayed the impact of intersectionality and intersectional discrimination.[27] With this said, employers should act to protect employees from harassment based on all protected categories.[28]

---

[18] 42 U.S.C. § 2000e-2(a)(1) (identifying protected classes).
[19] Motley -Ivey v. District of Columbia, 923 F. Supp. 2d 222, 233 (D.D.C. 2013) (quoting Na'im v. Clinton, 626 F. Supp. 2d 63, 73 (D.D.C. 2009)).
[20] 42 U.S.C. § 2000e-5.
[21] Bostock v. Clayton County, 140 S. Ct. 1731, 1740-41 (2020).
[22] 42 U.S.C. § 1211 et seq. (ADA); 29 USC § 621 et seq. (ADEA); 42 U.S.C. § 2000ff-6(a) (GINA).
[23] 42 U.S.C. § 2000ff (GINA); 29 C.F.R. Part 1635 (GINA); 38 U.S.C. § 4311 (USERRA).
[24] N.J. LAD § 10:5-12. Some states also protect age discrimination at a younger age. For example, Minnesota law protects employee who are 18 years old and older from age discrimination. Minn. Stat. § 363A.03, subd. 2.
[25] Minn. Stat. § 363A.08, subd. 2.
[26] 43 Pa. Stat. § 955.
[27] Bradley Areheart, *Intersectionality and Identity: Revisiting a Wrinkle in Title VII*, 17 GEO. MASON U. CIV. RTS. L.J., 199, 199-200 (2006); Jamillah Williams, *Maximizing #MeToo: Intersectionality and the Movement*, 62 B.C. L. Rev. 1797, 1822-25 (2021) (citing cases that undermine women of color's ability to assert hostile work environment claims based on an intersectional analysis).
[28] *Id.,* Areheart at 225-229 (examining the various and inconsistent approaches that courts take towards intersectional claims in hostile work environment claims); *cf.* Mosby-Grant v. City of Hagerstown, 630 F.3d 326, 335-36 (4th Cir. 2010) (concluding that race-based and sex-based conduct should be considered cumulatively by the

2. Application to the Facts and Analysis

"Diversity Day" raises several problematic and awkward moments, many of which involve protected classes. It is helpful to start class discussion by having students list of each of the concerning interactions, identify the instigator and the target of the interaction, and examine whether the interaction implicates a protected class.

It is worth noting that "Diversity Day" was one of the most important and controversial episodes of the entire series. The series pilot skewed closely to the earlier British version of the show which the U.S. show was based on. As the second episode of the entire series, Diversity Day started taking the show on a slightly different trajectory than the British series. Diversity Day was written by B.J. Novak who also played the character of Ryan in the show. [29] Michael Schur, the producer of the show, explained that episode was important because it was "a little bit edgy in terms of dealing with race and racial politics in the workplace."[30] To avoid potential controversy, the cable company Comedy Central dropped Diversity Day from its programming and streaming in 2021.[31] The episode remained available on the other streaming services such as Netflix, Amazon, and Paramount.

The producers realized that Michael Scott's character - the manager - came across as too mean-spirited in the early episodes of the first season, which aligned his character more closely to the antagonist of the British version of the show. To connect with the American audience, the writers eventually evolved Michael's character to be "less negative and more of an optimist so that he seemed more like a fumbling idiot than someone who is purposely cruel."[32] The student's personal relationship to The Office and Michael's later and more likeable persona might influence their reaction to Diversity Day and whether they are inclined to severely discipline him.

a. Mean-Spirited or Bullying Activity Not Related to a Protected Class

Some of the concerning interactions are mean-spirited but are not illegal because they do not relate to a protected class. At the beginning of the episode, Dwight loudly shreds paper and a credit card while Jim is trying to conduct an important sales phone call and refuses to stop when asked. Jim is forced to end the call before making the sale. The audience later learns that the phone

---

jury); Hafford v. Seidner, 183 F.3d 506, 515-16 (6th Cir. 1999) ("It would not be right to require a judgment against Hafford if the sum of all of the harassment he experienced was abusive, but the incidents could be separated into several categories, with no one category containing enough incidents to amount to 'pervasive' harassment.").

[29] B.J. Novak was nominated for a Writers Guild of America for the best screenplay in a comedic episode. Writers Guild of America, West, *News Release*, Dec. 12, 2005, https://web.archive.org/web/20131012215422/http://www.wga.org/subpage_newsevents.aspx?id=1493 (last visited May 1, 2024).

[30] Ashley Burns and Chloe Schildhause, *The Behind-the-Scenes Story of 'Diversity Day,' The Episode that Defined NBC's 'The Office,'* UPROXX, Mar. 23, 2015, https://uproxx.com/feature/feature-the-behind-the-scenes-story-of-diversity-day-the-episode-that-defined-nbcs-the-office/ (last visited Apr. 28, 2024).

[31] Carly Mayberry, *Comedy Central Caves to Cancel Culture, Removes Episode from 'The Office' Line-up*, NEWSWEEK, Aug. 30, 2021.

[32] Lily Brown, *"The Office": Why Producers Demanded Steve Carell's Michael Scott Be Made More Likeable After Season I*, SHOWBIZ CHEATSHEET, Aug. 10, 2020, https://www.cheatsheet.com/entertainment/the-office-why-producers-demanded-steve-carells-michael-scott-be-made-more-likeable-after-season-1.html/#google_vignette(last visited May 1, 2024); *see also* Jason Hellerman, Four Changes to Michael Scott That Saved "The Office," NOFILMSCHOOL, Jan. 3, 2024, https://nofilmschool.com/michael-scott (last visited May 1, 2024).

call involved one of Jim's most important clients and historically accounted for a sizable portion of his annual commission. Near the end of the episode, we learn that Dwight placed the customer's order during the day and presumably earned Jim's commission.[33] While this type of behavior is annoying and negatively affects Jim's pay, it is not covered by equal opportunity laws because the conduct is not related to a protected class (*i.e.,* his sex, race, age, religion, etc.). Title VII is not a "general civility code" and does not prohibit employees from pranking or bullying each other.[34]

b. The Chris Rock Routine

The audience eventually learns that the impetus for the diversity training session is to address and respond to complaints arising from Michael's telling of a profanity-laced routine by Chris Rock called, "Niggas vs. Black People."[35] Chris Rock's routine was laced with racial epithets and provocative characterizations of Black Americans. Chris Rock stopped performing the routine because "some people that were racists thought they had license to say n----."[36] Michael reiterates this sentiment during the Diversity Day episode,

> How come Chris Rock can do a routine, and everybody finds it hilarious and groundbreaking, and then I go and do the exact same routine, same comedic timing, and people file a complaint to corporate? Is it because I'm white and Chris is Black?[37]

Mr. Brown starts his training by asking the employees to discuss and process the appropriateness of performing the Chris Rock routine. When Kevin describes the routine as a comparison between two types of Black people, Michael jumps in to take over. Michael then lets loose with an excited recreation of the routine in which is bleeped out because it is littered with racial slurs and swear words.[38] Michael's reenactment of the skit clearly involves the protected class of race. It also

---

[33] Novak, *supra* note 4.

[34] Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (quoting Oncale, *supra* note 14 at 80); *see, cf.* Harvin v. Manhattan & Bronx Surface Transit Operating Auth., 767 F. App'x 123, 128 (2d Cir. 2019) (supervisor being "rude and hostile" to plaintiff on several occasions reflected a "fraught relationship" but not actionable harassment); Browne v. N.Y. State Dep't of Corr. & Cmty. Supervision, 2024 U.S. Dist. LEXIS 37467, 21-22 (S.D.N.Y 2024) (granting summary judgment for employer where plaintiffs were subject to "mean-spirited gossip and bullying in the form of prank calls" and hidden timecards).

[35] Chris Rock's "Niggas vs. Black People" appeared in his 1996 HBO special "Bring the Pain" and on his 1997 album "Roll with the New." *Chris Rock: Bring the Pain*, IMDB, https://www.imdb.com/title/tt0200529/ (last visited May 1, 2024).

[36] Rebecca Long, *Rock: Bring on Oscar 'Safety Net,'* 60 MINUTES, Feb. 17, 2005, https://www.cbsnews.com/news/rock-bring-on-oscar-safety-net/(last visited Apr. 28, 2024).

[37] Novak, *supra* note 4.

[38] Brian Baumgartner, the actor who played Kevin's character, explained the reason that he thought that, although inappropriate, he viewed the scene as an important contribution to the larger societal discussion of race, culture, and the workplace:

> It was certainly an inappropriate thing for someone to do in the workplace, but the message behind that was the same message that was behind a lot of the episode. His naiveté got him in trouble, but part of what he was doing, in an age where you were so overloaded on the PC side, and nobody was able to say anything, was forcing people to examine from a naive perspective, why isn't this something we can talk about? Obviously, a work-place setting is what makes everyone uncomfortable, but I think just bringing up the issue of race and not hiding is why I'm proud of it.

Ashley Burns, *supra* note 30.

raises significant questions about appropriateness, context, racism, and power that circulate around the use of the N-word, particularly by a supervisor.[39]

The author recommends that instructors not use the N-word while teaching this activity and that they consider how they plan to address discussion of racism, sexism, xenophobia, and homophobia before they lead the activity.[40] Faculty need to prepare their students to address these issues directly and frankly, but engaging in an informed, civil, and empathetic discussion is difficult.

c. Michael's Follow-Up Training and the Notecard Activity

The next significant event happens during Michael's follow-up diversity training. Michel hands out note cards with various races and nationalities written on them and tells everyone to tape their cards to their forehead without looking at them. He then instructs his employees to interact with and treat their peers according to the stereotypes of the groups identified on the cards. He tells them to see if the card wearer can guess their assigned identity. Throughout the exercise, he uncomfortably encourages his employees to lean into and embody the stereotypes.

As he hands out the cards, he says, "You'll notice I didn't have anyone be an Arab" because it would be "too explosive." This reference to invokes anti-Muslim anti-Middle Eastern biases that heightened in the post 9/11 era, which was less than four years before the episode aired, and implicates national origin, religion, and racial biases.[41] It also illustrates how common memes or themes used in the media, social media, news, and political campaigns may, if repeated in a work setting, create the foundation of a hostile environment claim.[42]

At one point in the exercise, Michael encourages Pam (a White woman with the word "Jew" on her card) and Stanley (a Black man with the word "Black") to play out the stereotypes, eventually saying that it is the, "Olympics of suffering, slavery versus the holocaust." This exchange related to issues of race, ancestry, and possibly religion.

The notecard scene is punctuated when Kelly, an East Indian woman, enters the room after returning from a customer meeting. To illustrate his desire for the employees to play-up and lean-into the stereotypes, Michael approaches an unwitting Kelly and starts to talk loudly at her in a thick Indian accent. Although Kelly is not aware of the exercise, Michael acts as if he is an East

---

[39] *See* Gene Demby, *Who Can Use the N-Word? That is the Wrong Question*, CODE SWITCH, Sept. 6, 2013, https://www.npr.org/sections/codeswitch/2013/09/06/219737467/who-can-use-the-n-word-thats-the-wrong-question (last visited May 1, 2024); Michelle Goodwin, *The Economy of Citizenship*, 76 Temp. L. Rev. 129, 129-131 (2003) (addressing the complex history and interaction of culture and society with the use of the N-word).

[40] *See* Randall Kenedy & Eugene Volokh, *The New Taboo: Quoting Epithets in the Classroom and Beyond*, 49 CAP. U.L. REV. 1 (2021) (addressing the complexities of quoting racial epithets in the classroom).

[41] *See* Sahar F. Aziz, *Sticks and Stones, The Words That Hurt: Entrenched Stereotypes Eight Years After 9/11*, 13 NEW YORK CITY L. REV. 33 (2009). For instance, the Fourth Circuit reversed summary judgment for the employer in *EEOC v. Sunbelt Rentals, Inc.* where the Muslim plaintiff from Middle East decent was called "towel head," "Taliban," and "terrorist." *EEOC v. Sunbelt Rentals, Inc.,* 521 F.3d 306, 311, 318-19 (4th Cir. 2008). The court held that there was sufficient evidence for a jury to find hostile work environment based on religion and national origin, particularly after the post 9/11 backlash against Muslims. *Id.*

[42] For instance, President Trump bragging that he could "grab [women] by the pussy," telling Muslim Congressmen "go back" to the "totally broken crime infested places which they came," and leading chants to "build the wall" would be problematic if spoken between co-workers. *See* Joe Davidson, *Talking in the Workplace as Trump Does Can Get You Fired and Your Employer Fined.*" Seatle Times, Aug. 7, 2019, https://www.seattletimes.com/explore/careers/talking-in-the-workplace-as-trump-does-can-get-you-fired-and-your-employer-fined/ (last visited May 1, 2024).

Indian worker in a convenience store and repeatedly and loudly asks, "Would you some cookie-cookie cookie? I have some very delicious cookie-cookie, only ninety-nine cents plus tax. Try my cookie-cookie. Try my cookie-cookie." Kelly, who is confused and clearly offended, eventually slaps Michael and angrily walks out of the room. Michael, who is obviously stunned, turns to the group and says, "[s]he gets it. Now she knows what it's like to be a minority."[43] Michael's comment is clueless because, as an Indian woman, Kelly experiences discrimination in her life and does not need her White American boss yelling at her in an Indian accent to "get it." This interaction is based on Kelly's national origin, ancestry, and possibly religion.

There are two other instances worth noting during the card exercise. First, when Michael asks which races people find sexually attractive, Dwight says that he finds Whites and Indians sexually attractive while sitting next to Kelly, who is of East Indian descent.[44] This comment is both sexually charged and relates to national origin. It also illustrates the notion of intersectional harassment because Kelly the comments implicate her sex and national origin.

In another exchange, Michael asks his employees to say where "they are from." When he asks Oscar, it clear that Michael is trying to highlight Oscar's Mexican heritage. Oscar responds that, although his parents were from Mexico, and he was born and raised in the United States. Michael then asks if he should use another word instead of Mexican because "Mexican is offensive."[45] This exchange clearly revolves around Oscar's national origin and employs a common microaggression – assuming that a Hispanic presenting person is not "from this country."[46]

B. Is This a Quid Pro Quo Harassment Situation?

1. The Law

The law of harassment in the United States largely evolved around sex and sexual harassment. It is worth noting that the terms "quid pro quo" and "hostile work environment" do not appear in the statutory text of Title VII passed in 1964, those theories were developed long after the passage of Title VII.[47] Section 703(a) of Title VII forbids an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's . . . sex."[48]

The U.S. Supreme Court first recognized the quid pro quo theory of harassment in the 1986 case of *Meritor Savings Bank, FSB v. Vinson.*[49] Quid pro quo applies to situations where a supervisor threatens to discipline or retaliate against an employee for rejecting the supervisor's

---

[43] Novak, *supra* note 4.
[44] *Id.*
[45] *Id.*
[46] Derald Wing Sue, et. al., *Racial Microaggressions in Everyday Life: Implications for Clinical Practice*, 62(4). AMERICAN PSYCHOLOGIST, 271 (2007); Capodilupo Wing, et al. *Racial Microaggressions in Everyday Life Implications for Clinical Practice,* 62:4 AM. PSYCHOLOGIST, 271-286 (2007).
[47] Burlington Indus. v. Ellerth, 524 U.S. 742, 751 (1998).
[48] 42 U.S.C. § 2000e-2(a)(1).
[49] Meritor, *supra* note 14 at 64-65 (distinguishing hostile work environment claim from a claim linked to the "grant or denial of an economic quid pro quo"); *see also* Ellerth, *supra* note 49 at 752 (explaining that "Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment"); Venters v. City of Delphi, 123 F.3d 956, 976-77 (7th Cir. 1997) (applying quid pro quo theory to religious harassment).

sexual advances. It also applies to situations where supervisors condition employment benefits in exchange for engaging in sexual interactions.[50] If a plaintiff establishes a quid pro quo claim, the employer will be subject to vicarious liability and not be able to raise an affirmative defense.[51]

2. Application to the Facts and Analysis

The quid pro quo theory is not applicable to this fact pattern because the supervisor, Michael, did not demand that any employee submit to sexual or other advances in exchange for an employment benefit or risk retaliation. Because none of the other employees are in the position of authority and they do not have the power to affect the terms and conditions of their peers' employment, their actions likewise do not fall under a quid pro quo theory. If Michael had engaged in a quid pro quo demand or retaliation, Dunder Mifflin would be automatically and vicariously liable for unlawful discrimination.

It is also worth noting at this point that the generally only the employer, and not the offending employee, can be held liable for unlawful discrimination under Title VII and most state Equal Opportunity statutes. Courts will dismiss Title VII claims against individuals because these statutes prohibit discrimination by an "employer," and not "employees."[52] Many state statutes authorize claims against individual employees for aiding and abetting another to engage in unlawful discrimination or retaliation. For instance, an individual employee may be liable for "aiding and abetting" another to violate the Pennsylvania Human Relations Act.[53] To succeed in such a case, the plaintiff must first prove that the employer is liable for the underlying unlawful discrimination.[54]

C. Was a Tangible Adverse Employment Action Taken in Relation to the Harassment Situation?

1. The Law

Harassment law was also expanded to situations where a protected class is used as the basis for a supervisor to negatively affect the tangible terms and conditions of an employee's work.[55] An employer will be vicariously liable "when the employer has empowered that employee to take tangible employment actions against the victim, i.e., to effect a 'significant change in employment

---

[50] *Id.* At 65.
[51] Ellerth, *supra* note 47 at 752-53.
[52] 42 U.S. C. § 200e-2(a) (defining "employer"); *see also* Newsome v. Admin. Off. of the Cts. of the State of New Jersey, 51 F. App'x 76, 79 n.1 (3d Cir. 2002) (affirming dismissal if Title VII against individual employee); Williams v. Banning, 72 F.3d 552, 555 (7th Cir. 1995); Kirkman v. Faurecia Emissions Control Techs., 2020 U.S. Dist. LEXIS 45838 (E.D. Mo. Mar. 17, 2020) (finding no individual liability under Title VII, ADEA, ADA, the Rehabilitation Act of 1973, and the Genetic Information Nondiscrimination Act); Pointer v. Walmart Corp., 2019 U.S. Dist. LEXIS 13004, 2019 WL 339633, *1 (E.D. Mo. Jan. 28, 2019) (compiling cases for Age Discrimination in Employment Act); Franklin v. City of Slidell, 936 F. Supp. 2d 691, 703 (E.D. La. 2013) (dismissing Americans with Disabilities Act claim against individual employee).
[53] 43 Pa. Stat. § 955(e).
[54] Scully v. Allegheny Ludlum Corp., 257 Fed. Appx. 535, 538 (3d Cir. 2007).
[55] Gregory v. Daly, 243 F.3d 687, 698 (2d Cir. 2001).

status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, a decision causing a significant change in benefits.'"[56]

A "tangible employment action" involves "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[57] To rise to the level of a tangible employment action, employees initially had to show that they suffered a "significant" and detrimental effect.[58] Adverse employment actions include hiring, firing, demoting to a significantly lower position, failing to promote, reducing pay or denying benefits, and reassignment with significantly different responsibilities. The Supreme Court subsequently clarified that an employee need only show that an employment action left the employee "worse off," and not that the employee was "significantly injured."[59] In cases of tangible employment action, the employer is held vicariously liable because "the injury could not have been inflicted absent the agency relation."[60]

2. Application to the Facts and Analysis

The tangible employment action theory of harassment is not applicable to this case study because no employee was disciplined or suffered an adverse employment action. At most, Michael instructed Toby, the Human Resources employee at the branch office, to leave the follow-up training session because Toby recommended that the group sit "Indian Style."[61] While this may be demeaning, it does not ultimately affect the terms and conditions of Toby's work.

Because this case does not involve a quid pro quo or tangible employment action, the facts will be evaluated based on a hostile work environment claim.

D. Are the Elements of a Hostile Work Environment Claim Met?

What qualifies as hostile work environment harassment? Title VII and state human rights act do not impose a "general civility code."[62] These laws to not reach "the ordinary tribulations of the workplace," for example, the "sporadic use of abusive language" or boorish conduct.[63] Courts regularly dismiss hostile work environment lawsuits where the offending comments are singular or stray comments.[64] To be actionable, the behavior does not need to force the victim to quit; instead, it must be severe or pervasiveness enough to pollute the working environment and ultimately "alter the conditions of the victim's employment."[65]

To help students distinguish between conduct that is improper, rude, or uncomfortable and conduct that crosses the threshold to create a hostile work environment, it is helpful to help the students linearly work through each of the elements of a hostile work environment claim.

---

[56] Meritor, *supra* note 14 at 765 ("An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.").
[57] *Id.* at 761.
[58] Muldrow v. City of St. Louis, 144 S. Ct. 967, 2024 U.S. Lexis 1816, *14-15 (2024) (citing cases).
[59] *Id.* at *13.
[60] Meritor, *supra* note 14 at 765; *see also* Vance, *supra* note 14 at 452 (quoting Oncale, *supra* note 11 at 81).
[61] Novak, *supra* note 4.
[62] Faragher, *supra* note 31 at 788.
[63] *Id.*
[64] Meritor, *supra* note 14 at 67; Kerri Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law*, 77 MO. L. REV. 149 (2012).
[65] Harris v. Forklift Sys., 510 U.S. 17, 21-22 (1993).

1. Unwelcome (Subjective and Objective)

a. The Law

To prove a hostile work environment claim, the employee must meet an objective and subjective test. The plaintiff must show that that (1) they subjectively found the conduct unwelcome, offensive, and abusive, and (2) that a reasonable person in the position of the plaintiff would find the work environment objectively hostile to the extent that it alters the terms and conditions of the employee's employment.[66] Offensive conduct may include, but is not limited to, "offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance."[67]

Initially, an employee must subjectively perceive the work environment to be unwelcome and offensive to assert a hostile work environment claim. The unwelcomeness requirement was initially articulated in the Supreme Court's 1986 opinion in *Meritor Savings Bank, FSB v. Vinson,* where the court explained, "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'"[68] In the 1993 *Harris* decision, the Court refined the hostile work environment analysis to require a showing that the conduct was both subjectively and objectively hostile.[69] The impetus for the unwelcomeness requirement was to safeguard against claims to safeguard against employees who engage in consensual sexual relationships.[70]

Though there is some variation between circuits as to how closely courts and juries consider whether the plaintiff solicited, invited, incited, or otherwise actively participated in the conduct.[71] The argument is, if the plaintiff engaged in and encouraged the conduct, the conduct, regardless of how improper or lewd, was not unwelcome and cannot therefore be actionable.

There is a significant critique of the unwelcome requirement to the extent that it presumes that victims welcome, or not offended, by conduct if they do not speak up. It invokes the stereotype that people, largely women, welcome sexual advances and "asked for it" while allowing the perpetrator to argue that their conduct was "flattering" and implicitly "consensual."[72] This interpretation of the standard ignores the many reasons that employees will not speak up and may feel forced to "go along to get along."[73]

---

[66] *Id.*
[67] *Harassment, supra note 9*.
[68] Meritor, *supra* note 14 at 68.
[69] Harris, *supra* note 62 at 21-22.
[70] Larsa Ramsini, *The Unwelcome Requirement in Sexual Harassment: Choosing a Perspective and Incorporating the Effect of Supervisor-Subordinate Relations*, 55 WM. & MARY L. REV. 1961, 1967-68 (2014); Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 831 (1991); Catherine M. Maraist, *Faragher v. City of Boca Raton: An Analysis of the Subjective Perception Test Required by Harris v. Forklift Systems, Inc*., 57 LA. L. REV. 1343, 1365 (1997) ("The 'unwelcomeness' requirement was included to protect both men and women who engage in consensual sexual relationships at work. If this protection is eliminated, then the sexual harassment claim could potentially exist in any relationship.").
[71] *Id.*, Ramsini at 1971-72; Meritor, *supra* note 14 at 68 (evaluating unwelcomeness by the complainant's "conduct indicated that the alleged sexual advances were unwelcome").
[72] Ramsini, *supra* note 70 at 1975.
[73] Meritor, *supra* note 14 at 68 (explaining that the inquiry is whether the conduct was unwelcome, not whether the complainant voluntarily participated in it); Kramer v. Wasatch Cnty. Sheriff's Off., 743 F.3d 726, 754-55 (10th Cir.

Courts will also evaluate other statements made by the complainant and their reaction to the challenged conduct. Statements that plaintiffs did not feel harassed by the conduct or were not affected by the conduct will likely undermine their hostile work environment claim. For instance, the Sixth Circuit affirmed summary judgment dismissing racial hostile work environment claim where the plaintiff testified that he did not consider a racially charged hate letter a "big deal," that he was not shocked or disturbed by it, and that he did not lose sleep over it.[74] On the other hand, a person who might welcome conduct at one point may later find the conduct unwelcome, such as after a romantic relationship ends.[75] And, although an employee may welcome certain conduct, such as sexually charged conduct, from one employee, the same conduct may not be welcomed by all employees.[76]

b. Application to the Facts

Considered in isolation, several employees were uncomfortable and shocked by some of the parts of the Diversity Day training. It appears that many found the conduct unwelcome. This is highlighted by the documentary style filming that captured employees' responses to Michael and their occasional glance at the camera with a shocked or deadpan facial reaction.[77]

Kelly did not appreciate when Dwight said that he was attracted to Indian women and was further offended when Michael talked at her with an Indian accent. Stanley appeared frustrated when Michael wanted him to act out the "Olympics of suffering" between slavery and the holocaust. Most employees appeared shocked by Michael's enactment of the Kris Rock routine.

Students will almost uniformly, and rightfully, assume that much of the Diversity Day training was uncomfortable and awkward, and that some of the employees found particular exchanges unwelcome. The discussion should then examine the requirement that the conduct be so severe or pervasive as create a hostile work environment.

2. Severe *or* Pervasive Enough to Change the Condition of Employment and Create an Abusive, Hostile Work Environment

a. The Law

2014) (holding that whether sexual conduct is unwelcome is a fact question for the jury to decide, regardless of whether the plaintiff voluntarily participated in it).

[74] Newman v. Fed. Express Corp., 266 F.3d 401, 405-06 (6th Cir. 2001); *cf.* Kratzer v. Rockwell Collins, Inc., 398 F.3d 1040, 1047-48 (8th Cir. 2005) (holding that a prima facie case of sexual harassment was not met where the plaintiff stated that she did not feel harassed by the conduct).

[75] *See, e.g.,* Gerald v. Univ. of P.R., 707 F.3d 7, 17 (1st Cir. 2013); Williams v. Herron, 687 F.3d 971, 975 (8th Cir. 2012); Pérez-Cordero v. Wal-Mart Puerto Rico, Inc., 656 F.3d 19, 28 (1st Cir. 2011).

[76] Kramer, *supra* note 73 at 749 n. 16.

[77] The actor who played Angela explained that the deadpan looks allowed the characters to balance the comedic and critical discussion. She explained,

> The character Michael Scott, you as the viewer know he's inappropriate. So, what we're saying is this is inappropriate, and this guy is an idiot, and we're all reacting to him because he's an idiot. It's not saying what he's saying is okay, and that's how people should think. It's written that Michael Scott is inappropriate, and you shouldn't talk that way to people. Our reactions to him validate that. I guess as it went out to the world that people would see that we're saying, "No, this is wrong and we're going to laugh at it. And call it out."

Burns, *supra* note 30.

Even if an employee subjectively views conduct based on a protected class offensive, the conduct does not raise to an actionable claim unless it is also "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[78] The complained of conduct does not need to be severe *and* pervasive, it simply needs to be severe *or* pervasive. The two factors work on a continuum; the more severe the harassment is, the less pervasive it needs to be to establish a hostile work environment claim. Likewise, more pervasive conduct need not be as severe.[79]

Whether a series of acts is sufficiently severe or pervasive to constitute a hostile work environment depends on the specific facts of the case and viewed in the overall totality of the circumstance. Some of the key factors include:

- the frequency of the discriminatory conduct,
- its severity,
- the degree that it is physically threatening or humiliating,
- whether the complainant suffered psychological harm, and
- whether it unreasonably interferes with an employee's work performance.[80]

Whether the alleged harassment is sufficiently severe or pervasive to create a hostile work environment is "generally a question of fact for the jury."[81]

It is possible for a single individual incident to meet the standard if it is "extraordinarily severe."[82] It is very difficult to meet this standard when the harassment is from a co-worker and happened so quickly that the employer was not on notice of it.[83] Some examples of single incident harassment include sexual assault,[84] forced sexual touching,[85] physical violence or credible threat of violence,[86] racial slurs aggressively directed as subordinate, and display of symbols of hate such as a swastika or noose.[87]

Most hostile work environment claims involve a series of acts and incidents over a period of time. When considering whether the conduct is sufficiently pervasive, courts may consider factors such as whether:

---

[78] Meritor, *supra* note 14 at 67 (emphasis in original) (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

[79] Alamo v. Bliss, 864 F.3d 541, 550 (7th Cir. 2017) (explaining that the severe and pervasive requirements are inversely related); Flood v. Bank of Am. Corp., 780 F.3d 1, 11-12 (1st Cir. 2015) (same); EEOC v. Prospect Airport Servs., Inc., 621 F.3d 991, 1000 (9th Cir. 2010) (same).

[80] Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 103 (2002).

[81] Johnson v. Advocate Health & Hosp. Corp., 892 F.3d 887, 901 (7th Cir. 2018); *see also* Hernandez v. Valley View Hosp. Ass'n, 684 F.3d 950, 958 (10th Cir. 2012); Howard v. Burns Bros., Inc., 149 F.3d 835, 840-41 (8th Cir. 1998).

[82] Figueroa v. Johnson, 648 F. App'x 130, 135 (2d Cir. 2016) (noting that a single incident sexual harassment incident must be "extraordinarily severe" to be actionable); Paul v. Northrop Grumman Ship Sys., 309 F. App'x 825, 826, 828 (5th Cir. 2009) (requiring single incident of sexual harassment be "egregious," and affirming summary judgment for employer where a co-worker "chesting up" to plaintiff's breasts, and when she fled, followed her, forced his way through the door ahead of her, placed his hand on her stomach and around her waist, and rubbed his pelvis against her hips and butt); Brooks v. City of San Mateo, 229 F.3d 917,921, 922-27 (9th Cir. 2000) (affirming summary judgment for employer where co-worker trapped the victim behind a console and twice grabbed her breasts).

[83] Natalie S. Neals, *Flirting with the Law: An Analysis of the Ellerth/Faragher Circuit Split and a Prediction of the Seventh Circuit's Stance*, 97 MAR1. L. REV. 167, 177-78 (2013).

[84] Lapka v. Chertoff, 517 F.3d 974, 982-84 (7th Cir. 2008).

[85] Turner v. The Saloon, Ltd., 595 F.3d 679, 686 (7th Cir. 2010).

[86] Patterson v. Cnty. of Oneida, 375 F.3d 206, 230 (2d Cir. 2004).

[87] Tademy v. Union Pac. Corp., 614 F.3d 1132, 1145 (10th Cir. 2008).

- the conduct was by a co-worker, third party, or supervisor;
- the conduct took place in front of the employee's customers or peers;
- the same or different individuals are perpetrating the conduct; and
- the conduct is directed at the complainant.[88]

Generally, "simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment."[89] Likewise, isolated incidents' of discriminatory conduct and "run-of-the mill boorish, juvenile, or annoying behavior that is not uncommon in American workplaces" are often deemed insufficient to support a claim for hostile work environment.[90]

b. Application to the Facts and Analysis

When considered in isolation, it is unlikely that the specific conduct witnessed by the student investigators would be seen as severe on its face to constitute a hostile work environment. When considered in the larger context, the analysis of the case study generally revolves around the pervasiveness of the conduct. Michael's and the others' conduct should also be considered in context, it took place when his employer was trying to respond to and address complaints of Michael's prior conduct.

Most students will identify Michael's enactment of the Chris Rock comedy routine as the most troublesome event because it is laced with racial epithets and swear words. His conduct is problematic on several levels. First, his prior performance of the routine is the reason that the company sent a Human Resource specialist to the Scranton office to make it clear that the conduct was unacceptable. Second, Michael acted contrary to Mr. Brown's directions. Third, he refused to acknowledge that his conduct was improper and made it clear that he would not change his ways. His disobedience and aloofness were laid bare when he signed the diversity pledge with "Daffy Duck." While these facts clearly support the conclusion that Michael was insubordinate and did not agree to comply with the company's instructions, it is uncertain whether his conduct created a viable hostile work environment claim. His insubordination certainly justifies and requires a stern response from the company and Dundler Mifflin, including possible termination. But it might not, by itself, rise to the level of an actionable hostile work environment.

Some factors cut against a severe or pervasive finding. First, Michael does not direct the routine (or his racial slurs) at any specific the employees. He is playing to the entire crowd. Second, the statements do not seem designed to threaten or humiliate a particular employee. Third, it is unknown whether Michael or other employees otherwise engage in other racially tinged speech or conduct. Without a doubt, Michael's activity establishes a setting where others may see such speech as appropriate and even encouraged.[91] Finally, the students need to consider which

---

[88] *Enforcement Guidance on Harassment in the Workplace, supra note 9*, Reeves v. C.H. Robinson Worldwide, Inc., 594 F.3d 798, 803, 811-12 (11th Cir. 2010) (en banc) (holding that sexual comments and pornography between male employees created a hostile work environment for female employee even though they were not directed at her); Delozier v. Bradley Cnty. Bd. of Educ., 44 F. Supp. 3d 748, 759 (E.D. Tenn. 2014) (highlighting statements made in front of plaintiff's students that undermined her authority); Hanna v. Boys & Girls Home & Family Servs., Inc., 212 F. Supp. 2d 1049, 1061 (N.D. Iowa 2002) (focusing on harassing statements made in front of plaintiff's customers).

[89] Faragher, *supra* note 31 at 788.

[90] Throupe v. Univ. of Denver, 988 F.3d 1243, 1252 (10th Cir. 2021).

[91] Kristin Berger Parker, *Ambient Harassment Under Title VII: Reconsidering the Workplace Environment,* 102 NW. UNIV. L. REV. 945 (2008) (advocating for broader application of hostile work environment claims stemming from

employee might raise a hostile work environment claim. How might the routine impact the work environment of a White employee differently than a Black employee? Does it make a difference that it takes place in a somewhat mandatory training context?

It is worth noting that the N-word is one of the most historically charged and hateful words in the United States, it carries significant weight.[92] Some commentators argue that the single use of the N-word by a supervisor can and should meet the threshold for hostile work environment liability.[93] Many courts recognize that, "perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'n****r.'"[94] Therefore, Michael's statements would support the complaint of a hostile environment, particularly for a Black employee, but it the employee would likely need to point to additional evidence supporting their claim to survive summary judgment.[95]

Many courts have dismissed hostile work environment claims at the summary judgment stage when racial slurs were more widely used and aggressively deployed. For instance, in *Jackson v. Flint Ink N. Am. Corp.,* the 8th Circuit affirmed summary judgment where the plaintiff identified six instances where managers and coworkers made racially derogatory remarks, often with other expletives, around him.[96] Some of the remarks were not made to the plaintiff, two did not directly refer to him, and the final one was made during an altercation between the plaintiff and another employee.[97] The plaintiff also pointed to a crude drawing of a burning cross with "KKK" scrawled on a wall to support his claim.[98] While the court recognized that a work environment "dominated by racial slurs constitutes a violation of Title VII," it granted summary judgment for the employer because the racial slurs were infrequent and offhand.[99]

Similarly, in *McLemore v. Holiday Stationstores, Inc.,* the district court granted summary judgment to the employer where the manager repeatedly said, "what's up, my niggah," a line from the comedy movie "Rush Hour."[100] The manager also asked the plaintiff whether the rumors that black men have larger penises was accurate. In the end, the Court dismissed the claim at summary judgment because the conduct was not sufficiently severe enough to affect a term of condition of

---

conduct that is not clearly targeted at a particular group, such a pornography displayed in communal area or generalized use of sexist language).

[92] *See* Leora Einstadt, *The N-Word at Work: Contextualizing Language in the Workplace*, 33 BERKELY J. EMPL. L. 299 (2012) (advocating for a contextual framework to evaluate the use and meanings of racial slurs).

[93] Darryll Halcomb Lewis, *The Creation of a Hostile Work Environment by a Workplace Supervisor's Single Use of the Epithet "Nigger," 53* AM. BUS. L.J. 383, 400-405 (2016) (compiling cases).

[94] Banks v. GM, LLC, 81 F.4th 242, 266 (2nd Cir. 2023) (quoting Rivera v. Rochester Genesee Reg'l Transp. Auth., 743 F.3d 11, 24 (2d Cir. 2014)).

[95] *Id.*

[96] Jackson v. Flint Ink N. Am. Corp., 370 F.3d at 792-94 (8th Cir. 2004).

[97] *Id.* at 795.

[98] *Id.* at 796*; but see* Banks, 81 F.4th 242, 265 ("A reasonable jury could find that even a single placement of this object -- imbued as it is with historical gravity as a symbol and tool of actual violence -- directly at the workstation of a Black employee could amount to severe conduct sufficient to support an inference that the workplace is hostile to Black employees.").

[99] *Id.* at 795.

[100] McLemore v. Holiday Stationstores, Inc., No. 02-4335, 2004 U.S. Dist. LEXIS 18668, *11 (D. Minn. 2004).

the plaintiff's employment.[101] While the *Jackson* and *McLemore* cases may seem like outliers, they are not alone in holding plaintiffs to a high standard.[102]

A similar analysis can apply to the other instances of awkward and uncomfortable conduct in the case study. Does Michael's encouragement of employees to act out stereotypes contribute to a hostile work environment? Yes. Was it improper for Michael to tell Pam and Stanley to lean into the "Olympics of suffering" of the Jewish people and Black Americans? Yes. However, the ultimate answer as to whether the conduct reached the severe or pervasive threshold will depend on more evidence and context. Michael is clearly naïve and not prepared to lead a thoughtful training on the topic of racism, sexism, and harassment. Open conversations about racism, sexism, homophobia, and religion are notoriously difficult to navigate, even among Human Resource professionals.[103] Diversity-related trainings are often criticized and because they are unsuccessful and may do more damage that good.[104] As one commentator noted, "On one end of the spectrum, diversity training has become a bastion of political correctness and a feel-good activity. At the other end, it is criticized as overly confrontational and oppressive."[105] Here, Michael manages to run into both problems.

In addition, the standards for what is acceptable, severe, pervasive, and reasonable evolve as cultural and legal norms change. Reasonableness is socially defined and reflects the changing culture and norms.[106] Because the reasonableness standard is considered at "a reasonable person in the plaintiff's position," the standard for harassment evolves with the social demands of the moment.[107] The notion of what is reasonable with regards to sex and sexual harassment has expanded and evolved in the wake of the #metoo movement.[108] This is a ripe area for class discussions. Instructors might want to ask students whether they believe cultural norms are

---

[101] *Id.* at * 12 (citing Gilbert v. City of Little Rock, Ark., 722 F.2d 1390, 1394 (8th Cir. 1983) ("More than a few isolated incidents of harassment must have occurred to establish a violation of Title VII")).

[102] *See, e.g.,* Bainbridge v. Loffredo Gardens, Inc., 378 F.3d 756, 760 (8th Cir. 2004) (dismissing claim where the use of racial slurs were sporadic, used in reference to customers, competitors, and other employees, or overheard); Brown v. E. Mississippi Elec. Power Ass'n, 989 F.2d 858 (5th Cir. 1993) (affirming summary judgment where plaintiff was subjected to racial slurs); Bozeman v. Ark. Found., 2020 U.S. Dist. LEXIS 113473, *19-20 (E.D. Ark. 2020) (granting summary judgment for employer where ten racists statements and interactions over the course of the plaintiff's employment); Hampton v. J.W. Squire Co., No. 4:10CV00013, 2010 U.S. Dist. LEXIS 106176, *12-13 (W.D. Va. Oct. 5, 2010) (holding that a hostile work environment did not exist where a supervisor used N-word three times in one conversation); Miles v. Bellefontaine Habilitation Ctr., 2006 U.S. Dist. LEXIS 37117 (D. Mo. 2006) (granting summary judgment where the plaintiff's manager used a racial slur toward the plaintiff); Smith v. Beverly Health & Rehab. Servs., Inc., 978 F. Supp. 1116, 1126 (N.D. Ga. 1997) (holding that several utterances of racial epithets by a supervisor were insufficient to support hostile work environment claim); Grant v. UOP, Inc., 972 F. Supp. 1042, 1052-53 (W.D. La 1996), aff'd, 122 F.3d 1066 (5th Cir. 1997) (affirming summary judgment where the N-word was directed towards the plaintiff on five separate instances).

[103] Merideth Somers, *How to Have Productive Conversations About Race at Work*, MIT MANAGEMENT, Dec. 16, 2020, https://mitsloan.mit.edu/ideas-made-to-matter/how-to-have-productive-conversations-about-race-work.

[104] *See* Frank Dobbin & Alexandra Kalev, *Why Sexual Harassment Programs Backfire,* HARVARD BUSINESS REVIEW MAGAZINE, May-June 2020, https://hbr.org/2020/05/why-sexual-harassment-programs-backfire (arguing that training often puts men on the defensive and makes them more likely to blame the victims).

[105] Rebecca Hastings, *Diversity Training Pitfalls to Avoid*, SOCIETY OF HUMAN RESUOURCE MANAGEMENT, Feb. 24, 2011, https://www.shrm.org/topics-tools/news/inclusion-equity-diversity/diversity-training-pitfalls-to-avoid (quoting Christopher Metzler, THE DIVERSITY FACTOR (Sp. 2003)).

[106] Danielle Bernstein, *Reasonablenss in Hostile Work Environment Claims After #metoo*, 28 MICH. J. GENDER & L 119, 130 (2021).

[107] Oncale, *supra* note 11 at 81-82 (1998); *see also* Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991) (describing the standard as a "reasonable victim of the same sex as the plaintiff").

[108] *Id.* at 186-87.

changing, whether particular protected classes are gaining or losing ground, and whether additional classes of people should be protected.

Another troublesome moment in the card game is when Michael confronts Kelly as she walks into the room midway through the exercise. When Michael starts into her with a strong Indian accent and repeatedly asking if she "wants a cookie" is disorienting, aggressive, and clearly offensive to Kelly. Her response, slapping him in the face and walking out, is both shocking and seemingly appropriate. This exchange will be considered as part of the overarching context and a pervasiveness analysis. "Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people."[109]

While Mr. Brown's efforts were unsuccessful, they do illustrate that Dundler Mifflin is taking proactive steps to create an inclusive and safe work environment? Mr. Brown's efforts clearly did not remedy the underlying problem. Michael is still a problem. He is clearly offending some of his employees and his conduct may be encouraging and environment that accepts, and possibly embraces, sexist or racist undertones.

Instructors should also emphasize that a hostile work environment often arises from different sources including the victim's supervisor, co-worker, or non-employee. This might include statements and actions by Dwight, who says that he is sexually attracted to White and Indian women and later claims that sexual orientation is a choice, or Kevin, who asks Angela if she wants to "get high."

One final example worth noting is when Michal he asks Oscar where he "is from" and whether there is a more appropriate word than "Mexican," because the term "Mexican" has negative connotations. While this interaction is uncomfortable and demeaning to Oscar, it is more akin to a microaggression that may not arise to the level of a hostile work environment.[110] For instance, in *Aman v Cort Furniture Rental Corp*., co-workers referred to Black employees as "one of them," "another one," "poor people," and told Black employees to not " touch anything in the customers' homes" and not to steal.[111] The Third Circuit Court of Appeals reversed the trial court's grant of summary judgment to the employer, holding that the use of code words carried an undertone of racial motives and implications and could be considered by a jury.[112] With that said, microaggressions do have a cumulative affect and may constitute evidence of pervasive harassment.[113]

While the events of the Diversity Day episode may not reach the required level of severity or pervasiveness necessary to create an unlawful hostile work environment, students need to consider the larger context. If this conduct happened on one day, the day that the office was addressing race and a diversity, students should consider what happens on a week-to-week and month-to-month basis. It becomes increasing problematic the more often a manager injects the

---

[109] *Harassment, supra note 9*.

[110] Frances Baillon & Michelle Gibbons, *Kenneth v. Homeward Bound, Inc.: Potential Impacts of the Minnesota Supreme Court's Not-So-Severe "Severe or Pervasive" Standard to Race Harassment Claims Under the Minnesota Human Rights Act*, 49 MITCHELL HAMLINE L. REV. 570, 616 (2023). Microaggressions are seemingly minor but damaging put-downs and indignities based on a protected class and may include microassaults, microinsults, and microinvalidations. *Id.* at 616.

[111] *Aman v. Cort Furniture Rental Corp*., 85 F.3d 1074, 1078-79 (3d Cir. 1996).

[112] *Id.* at 1080.

[113] *See* Olivia Mendes, *Gender-Neutral Pronouns: They Are Here to Stay,* 52 SETON HALL L. REV. 317 (2021) (discussing how misgendering another employee is evidence of harassment and increasingly seen as the basis for raising hostile work environment claims).

phrase "that's what she said," into an innocuous conversation to sexualize it.[114] In short, while the incidents of this particular day may not rise to the level of an actionable hostile work environment claim, they are genuinely concerning and suggest that Dundler Mifflin has a longer-term problem that might subject it to significant legal exposure. It appears that Michael has glamorized and fostered a work environment where sexualized and racial joking is welcomed and encouraged. Dundler Mifflin needs to take further, prompt, and firm action to bring Michael under control.

F. Can the Employer Assert an Affirmative Defense?

1. The Law

An employer may be able to assert an affirmative defense to harassment depending on the nature of the harassment and the perpetrator of harassment. The employer is automatically vicariously liable if the harassment by a supervisor involves a quid pro quo or when the victim suffers a tangible adverse employment action. Likewise, if the harassment is perpetrated by senior leaders of a company such as an owner, president, or corporate officer, the employer will be vicariously liable because the "agent's high rank makes him or her the employer's alter ego."[115] No affirmative defense is available in any of these three situations. In other harassment situations, however, the employer may be able to raise an affirmative defense by proving that it took reasonable measures to prevent harassment and acted appropriately when it learned of the harassment.

The Supreme Court has established different affirmative defenses requirements depending on whether the perpetrator is a supervisor (and no quid pro quo or adverse action has been taken) or whether the perpetrator is a non-supervising co-employee or third party.[116] The Supreme Court allows a defense to "to accommodate the agency principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees."[117]

For the purposes of assigning liability to employers, a supervisor is someone who exercises immediate or higher authority over the victim of harassment. A supervisor must have the power to "make significant change[s] in employment status, such as hiring, firing, failing to promote, reassignment with significant different responsibilities, or a decisions causing significant change in benefits."[118]

If the harassment is perpetrated by a supervisor and *no* tangible employment action was taken, the defending employer may raise the *Faragher-Ellerth* defense.[119] This defense includes two elements:

1. that the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and
2. that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[120]

---

[114] Levitt, *supra* note 1.
[115] Meritor, *supra* note 14 at 768.
[116] Faragher, *supra* note 31 801-803; Ellerth, *supra* note 49; Meritor, *supra* note 14 at 763-765.
[117] Meritor, *supra* note 14 at 764.
[118] Vance, *supra* note 14 at 454.
[119] Meritor, *supra* note 14 at 765.
[120] *Id.*

The employer has the burden to prove both requirements with a preponderance of evidence.[121]

The *Faragher-Ellerth* defense requires the employer to take proactive steps to educate its workforce and prevent possible harassment and discrimination. Usually, employers are required to have a clear anti-discrimination and harassment policy and educate its workforce.[122] To be effective, the policies should identify and define unlawful harassment and discrimination, provide clear examples of improper conduct, require managers to report incidents of harassment, and establish a specific complaint procedure or policy for employees to report concerning conduct, and include an anti-retaliation protections.[123] The complaint procedure should also include a mechanism for an employee to report harassment to another person when the supervisor is the harasser.[124] The employer must also generally implement effective training. If the employer knows of previous harassment by the same offending supervisor and turns a blind eye to the harasser's conduct, the affirmative defense would be lost.[125]

To fulfill the second prong of the *Faragher-Ellerth* defense, the employer must take prompt and effective remedial action when it learns of possible harassment. The second prong also applies in situations where a complainant fails to follow the reporting guidelines and waits an unreasonable amount of time to inform the employer of the harassment.[126]

If the harassing employee is a co-worker, a negligence standard governs the employer's affirmative defense. To meet this standard, the complainant must show that the employer (1) unreasonably failed to prevent the harassment, or (2) failed to take reasonable corrective action of harassment that it knew or should have known.[127] This defense often considers the employer's policies, complaint procedures, and training to create a harassment free workplace; the relative relationship of the complainant alleged harasser; and the employer's efforts to monitor the workplace and minimize possible risks.[128]

The employer must also show that it promptly investigated the harassment and took reasonable action to stop the harassment and prevent future harassment.[129] The reasonableness of the corrective action will depend on the circumstance underlying the complaint, but often involves similar considerations at the *Farragher-Ellerth* defense. Courts will consider the proportionality of the corrective action to the harassment, whether the harassment stops or is minimized, the impact on the complainant, and other factors related to the investigation.[130]

---

[121] *Id.*

[122] *Enforcement Guidance on Harassment in the Workplace, supra note 9*; EEOC v. Boh Bros. Constr. Co., L.L.C., 731 F.3d 444, 462-63 (5th Cir. 2013); *see also* EEOC v. Mgmt. Hospitality of Racine, Inc., 666 F.3d 422, 436 (7th Cir. 2012) ("[A]n employer's complaint mechanism must provide a clear path for reporting harassment."); Agusty-Reyes v. Dep't of Educ., 601 F.3d 45, 55 (1st Cir. 2010) (holding that a jury could reasonable conclude that employer could not prove the first prong if it did not disseminate a harassment policy).

[123] Brenneman v. Famous Dave's of Am., Inc., 507 F.3d 1139, 1145 (8th 2007); Ferraro v. Kellwood Co., 440 F.3d 96, 102-03 (2d Cir. 2006).

[124] Meritor, *supra* note 14 at 73; Sanford v. Main St. Baptist Church Manor, Inc., 327 F. App'x 587, 596 (6th Cir. 2009).

[125] Minarsky v. Susquehanna Cnty., 895 F.3d 303, 312-13 (3d Cir. 2018).

[126] Faragher, *supra* note 31 at 807-08; Meritor, *supra* note 14 at 765; *see also* Roby v. CWI, Inc., 579 F.3d 779, 786 (7th Cir. 2009).

[127] Faragher, *supra* note 31 at 799; Meritor, *supra* note 14 at 758-759; *see also* 29 CFR §1604.11(d) (2012).

[128] Vance, *supra* note 14 at 445-46, 449; *Enforcement Guidance on Harassment in the Workplace, supra* note 9.

[129] Dawson v. Entek Int'l, 630 F.3d 928, 940 (9th Cir. 2011).

[130] *See, e.g.,* May v. Chrysler Grp., LLC, 716 F.3d 963, 971 (7th Cir. 2012).

2. Application to the Facts and Analysis

The students should initially identify the person who is engaging in the troubling behavior because the affirmative defense requirements are different if the perpetrator is the supervisor, Michael, or a co-employee. The most concerning conduct is by Michael. As the regional manager and supervisor of the office, Michael is not a top-level owner, officer, or executive who, by his position, constitutes an alter-ego of the company. Likewise, the harassing behavior was not tied to an adverse employment action. Dundler Mifflin may therefore be able to raise an affirmative defense.

Dundler Mifflin will need to prove that it took reasonable efforts to prevent harassment. The fact pattern says that the company has a handbook and policy stating that "will not tolerate any unlawful discrimination or harassment," that "employees are expected to treat each other with respect," and that the company will "discipline employees who engage in unlawful activity and punish violators to the fullest extent available at law." While this is a start, the ambiguity in the fact pattern provides the opportunity for the class to discuss what makes up an effective anti-discrimination policies and training.[131] This might include a widely disseminated policy with the following features:

- Clear definition of harassment
- Clear prohibition of harassment
- Comprehensive to all workers
- Examples of types of harassment
- Clear complaint and reporting procedure
- A commitment to maintain confidentiality or discreteness, to the extent possible
- No retaliation[132]

It is also worth noting that an employer cannot promise complete confidentiality during an investigation because it may need to communicate with the alleged harasser and potential witnesses during the investigation. However, the employer should be discrete in its investigation and only share information with those who need to know about it.[133]

The employer must also communicate the anti-discrimination policies and train the workforce, with a particular emphasis on training supervisors. The training should be tailored to the workforce and clearly communicate the employer's anti-discrimination policies, the complaint procedures, and be presented in an easy-to-understand format.[134] Even with the best anti-harassment policies, complaint procedure, and training, the employer still needs to implement the policies effectively.[135] Dundler Mifflin has a limited policy, and Mr. Brown's efforts illustrate that it taking some efforts to train its employees and respond to complaints.

Both affirmative defenses also require the employee to take prompt and effective measures to correct the problematic conduct. Here, Dundler Mifflin sent Mr. Brown to Scranton to conduct

---

[131] Ferraro v. Kellwood Co., 440 F.3d 96, 102 (2d Cir. 2006) ("An employer may demonstrate the exercise of reasonable care, required by the first element, by showing the existence of an antiharassment policy during the period of the plaintiff's employment, although that fact alone is not always dispositive.").
[132] *Enforcement Guidance on Harassment in the Workplace, supra note 9*.
[133] *Id.*; Georgia Stanton & Rebecca Herbst, *Mum's Not the Word: Employee Conversations and Confidentiality Rules*, 42 AZ. ATTORNEY, 16, 19-20 (2005).
[134] *Id.* For a more comprehensive discussion of best practices, *see* EEOC, *Promising Practices for Preventing Harassment*, OLC EEOC-NVTA, No. 2017-2 (2017).
[135] *Id.*

an office training and obtain signed statements from the employees apologizing for their missteps and affirming their commitment to anti-discrimination in the workplace. Setting aside Michael's obstinance, these facts raise the question of whether the employer's response was reasonable.

In most situations, the employer will need to initiate a prompt and adequate investigation. The longer the employer waits to investigate, the less likely that it will be seen as reasonable.[136] The investigation must also be thorough enough to arrive at a "reasonable estimation of the truth."[137] An investigation should be performed by someone with interviewing and critical analysis skills.[138] It usually includes talking with the complainant and the accused person and should be documented by the employer. When there is conflicting evidence, the investigator will need to assess the witnesses' credibility. The investigator should generally create a report of their findings.[139] The case study does not focus on whether an investigation occurred. It appears that Mr. Brown was focused on the Chris Rock incident and did not ask employees to share their experiences. Likewise, the students themselves are part of a more comprehensive investigation into the Scranton office. They have been charged to assess the situation and recommend further action.

Finally, the employer needs to take appropriate corrective action that stops the harassment and is reasonably calculated to prevent and deter future harassment by the perpetrator or others.[140] When issuing discipline, the employer also needs to consider issues of consistency.

There is room for a robust classroom discussion on whether the Mr. Brown's training was an effective way to respond to the complaint about the Chris Rock routine. Most students will agree that it was appropriate for Mr. Brown to conduct the training and that he seemed competent. Some questions to ask and address might include:

- Did Mr. Brown's training appropriately address the specific problem that was complained of? Was the message clear that such jokes were unacceptable?
- Did the HERO appropriately frame the employer's expectations for its employees?
- Should have Mr. Brown started with a one-on-one conversation with Michael instead of a group discussion?
- Should Mr. Brown or someone else in the company have further investigated the issue before the training? If so, what would the investigation look like?
- Was it an appropriate remedial measure to have all employees, including Michael, sign the commitment to diversity?
- Was Mr. Brown's efforts effective at stopping Michael and other employees from continuing to engage in improper behavior and deterring such behavior in the future?
- Does the company need to take more drastic action to follow up with Mr. Brown's training?

---

[136] *Id.*

[137] *Id.* (quoting Baldwin v. Blue Cross/Blue Shield of Ala., 480 F.3d 1287, 1304 (11th Cir. 2007)).

[138] John Pearce & Ilya Lipin, *Mitigating the Employer's Exposure to Third Party Claims of a Hostile Work Environment*, 26 HASTINGS WOMEN'S L.J. 319, 352-53, (2015).

[139] *See* Dori Meinert, *How to Conduct a Workplace Investigation*, SHRM, Dec. 1, 2014, https://www.shrm.org/topics-tools/news/hr-magazine/how-to-conduct-workplace-investigation (last visited Apr. 30, 2024).

[140] *Enforcement Guidance on Harassment in the Workplace, supra* note 9*; see cf., Vance* v. Ball State Univ., 646 F.3d 461, 473 (7th Cir. 2011), *affd.* by Vance, *supra* note 14 (affirming that the employer was not liable where it took reasonable steps to prevent continuing harassment).

Students will recognize that Michael was not receptive to Mr. Brown's training and did not take him or his message seriously. While this is accurate, it is worth slowing down to ask if the company has acted reasonably to date, at least initially.

Michael refused to accept that his telling of the Chris Rock routine and use of the N-word was improper, and he refused to commit himself to future change. His belligerence and defiance by signing the diversity statement with "Daffy Duck" amounted to insubordination, and the company can clearly take more drastic action against him. Unlike *Bazemore v. Best Buy*, where the Fourth Circuit affirmed the dismissal the plaintiff's claim because the employer disciplined the employee who told a racist and sexually charged joke and effectively stopped the harassment, Michael is still a problem.[141] Dundler Mifflin's ability to effectively assert the affirmative defense will likely depend on what it does next – which is shaped by the student's recommendations to the company's Chief Executive Officer.

G. What Should the Employer Do Next?

Because Dundler Mifflin and Mr. Brown's initial approach did not change Michael's approach to management or penchant to engage in sexual and racial joking and other boorish conduct, the company will need to ratchet-up its response to be able to assert the affirmative defense. Although complaining employees often argue that the employer could have done more, which is true here, the employer is only obligated to act *reasonably* to stop the harassment. This means that Dundler Mifflin must take increasingly aggressive measures to ensure that Michael is on board and stops engaging in racial and sexualized conduct.[142] These steps may include additional individualized meetings with Michael and disciplining Michael more aggressively such as through a formal written findings, suspension, a performance improvement plan, or possibly termination.[143] But, the effectiveness of the company's legal defense will depend on the student's recommendations to their boss and the company's follow through. Courts will often grant summary judgment in favor of employers where the employer takes continued and, when necessary, increasingly strong actions to respond to and remedy harassing behavior.[144] Students will also need to ensure that Dundler Mifflin reassesses its company-wide anti-harassment policies and training.

---

[141] Bazemore v. Best Buy, 957 F.3d 195, 202-203 (4th Cir. 2020); Carter v. Chrysler Corp., 173 F.3d 693, 702 (8th Cir. 1999) (affirming dismissal as a matter of law where the employer took reasonable corrective measures that stopped the harassment, despite plaintiff's argument that the employer could have done more).

[142] EEOC v. Xerxes Corp., 639 F.3d 658, 677 (4th Cir. 2011) ("So long as the employer's response to each known incident of coworker harassment is reasonably prompt, and the employer takes remedial measures that are reasonably calculated to end the harassment, liability may not be imputed to the employer as a matter of law.").

[143] *Enforcement Guidance on Harassment in the Workplace, supra note 9*.

[144] *See* Pimentel v. Atrium Hosp. LP, No. 3:19-CV-1284, 2022 U.S. Dist. LEXIS 161024, *17 (D. Conn. Sept. 7 2022) (granting summary judgment where conducted an investigation, required mandatory training for all supervisors, and ultimately terminated the offending employee); *see also* Van Alstyne v. Ackerley Grp., 8 F. App'x 147, 153 (2d Cir. 2001) (affirming summary judgment where employer investigated complaint and asked supervisor to resign); Perry v. Ethan Allen, Inc., 115 F.3d 143, 154 (2d Cir. 1997) (finding appropriate corrective action where employer conducted prompt investigation, confronted offending employees, and warning that future harassment would not be tolerated); Rouse v. City of Milwaukee, 921 F. Supp. 583, 589-90 (E.D. Wi. 1996) (granting summary judgment where employer took increasing severe actions against harassing but did not terminate that employee).

H. Other Potential Discussion Issues.

1. What is the Employer's Potential Legal Exposure?

This activity also presents an opportunity to educate students of the potential legal exposure to employer and the types of remedies available to injured employees. Title VII allows for a wide array of remedies to an injured employee which include compensatory and punitive damages, as well as costs and attorney fees.[145] When applicable, Title VII also allows for equitable remedies including injunctive relief, reinstatement, and updating development of policies.[146] Compensatory damages include out of pocket losses including lost wages and emotional harm.

Title VII treats backpay and front pay as forms of equitable relief and, as such, are not considered compensatory damages.[147] Back pay includes the lost wages, fringe benefits, and economic losses that a plaintiff suffers from the time of the alleged discrimination through trial. Back pay is available under Title VII for up to two years prior to the filing of a charge of discrimination.[148] Front pay is also designated as equitable relief under Title VII and is designed compensate the plaintiff for future lost wages. State statutes and courts generally treat lost wages as a legal remedy for the jury to decide.

Often, plaintiffs in a hostile work environment claim will not suffer lost wages because the legal claim is premised on the assumption that the employee did not suffer an adverse employment action. Their primary compensatory damages will therefore include emotional distress damages. If, however, complainants show "the abusive working environment became so intolerable that her resignation qualified as a fitting response," they may be able to assert a hostile-environment constructive discharge claim.[149] In those cases, the court would treat the resignation as an employer-caused termination and would allow for lost wages.

Punitive damages are issued to punish the wrongdoer and deter future misconduct. Punitive damages are available under Title VII if the employer intentionally discriminates against an employee "with malice or reckless indifference to the federally protected rights of an aggrieved individual."[150]

Under Title VII, the ADA, and the ADEA, the plaintiff's damages are capped based on the size of the employer. Compensatory and punitive damages are capped at $50,000 for employers with 15 – 100 employees, at $100,000 for employers with 101 – 200 employees, at $200,000 for employers with 201 – 500 employees, and $300,000 for employers with more than 500

[145] 42 U.S.C. § 1918a(b).
[146] 42 U.S.C. § 2000e-5(g) (successful complainant may "enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay. . ., or any other equitable relief as the court deems appropriate."); EEOC v. Prospect Airport Servs., No. 2:05-CV-01125, 2012 U.S. Dist. LEXIS 103256, * (D. Nev. Ju. 25, 2012) (ordering employer to develop, distribute, and implement anti-harassment policy).
[147] 42 U.S.C. § 2000e-5(g); *see also* Traxler v. Multnomah Cnty., 596 F.3d 1007, 1013 (9th Cir. 2010) (citing cases holding that front pay under the ADEA is an equitable form of relief for the court to decide).
[148] Backpay is considered an equitable remedy under Title VII.
[149] State Police v. Suders, 542 U.S. 129, 133-34 (2004) (analyzing constructive discharge theory in conjunction with hostile work environment claim). In *Sunders*, the Court held that employer can still assert a *Faragher-Ellerth* affirmative defense when the employee argues that the severity of the harassment rose to the level of a constructive discharge. *Id.*
[150] 42 U.S.C. § 1981a(b)(1).

employees.[151] This cap does not apply to backpay or interest on back pay.[152] By way of example, in *Glowacki v. O'Reilly Auto Enterprises,* the jury awarded the plaintiff $979,000 in past economic damages, $800,000 in future economic damages, $160,000 for emotional distress, $1 million in punitive damages. The district court awarded $140,075 in attorney fees and $8,301 in costs, allowed the economic damages and emotional distress damages, and reduced the punitive damages and emotional distress damages to $300,000 because of the company had more than 500 employees.[153]

The damages available under state laws may be more or less generous than Title VII. For instance, Minnesota law caps punitive damages for discrimination claims at $25,000 but does not cap compensatory damages.[154] Minnesota law also allows the court to award civil penalties and triple financial compensatory damages.[155] Pennsylvania, where the Scranton office of Dundler Mifflin is located, likewise does not cap punitive or compensatory damages.[156]

Finally, federal and state laws allow prevailing plaintiffs to recover legal costs and attorney fees.[157] Students are often surprised by the expense of hiring an attorney. As of August 2023, Clio reports that the average hourly rate for an attorney in the U.S. is $327 an hour.[158] The cost of litigation expenses can be buffeted by employers who purchase employment practices liability insurance which covers claims such as discrimination, hostile work environment, and wrongful termination.[159] On the employee side, most attorneys who represent plaintiff employees in discrimination claims use contingency fees or mixed fee approaches where they are not paid by the hours worked; instead, they receive a portion of the ultimate settlement or verdict, often in the 33 – 40% range. This area is also ripe for discussion about the legal process, the cost and risks associated with a lawsuit from the employee's perspective, the employer's perspective, and the attorney's perspective.

2. What Other Business Ethics and Considerations are Involved?

The case study offers a host of additional practical and ethical questions. For instance, the President of Dundler Mifflin made it clear that he supported Michael Scott and is looking for ways to export the fun culture of the Scranton, Pennsylvania office across the business. He sees Michael as a "hysterical guy with a lot of heart" and does "not want to shake thing up" in the branch. This puts the students in a tricky situation. How should the student approach their project if they view Michael as the problem and believe that the company needs to severely discipline or terminate

---

[151] 42 U.S.C. § 1981a(b)(3).
[152] 42 U.S.C. § 1981a(b)(2).
[153] Glowacki v. O'Reilly Auto Enters., LLC, No. 1:21-cv-868, 2023 U.S. Dist. LEXIS 222529, *37 (W.D. Mi. Dec. 14, 2023).
[154]Minn. Stat. § 363A.29, subd. 4.
[155] *Id.* The treble damage award only applies to lost wages, it does not include emotional distress damages.
[156] 43 Pa. Stat. § 962(c2).
[157] Minn. Stat. § 363A.20, subd. 4. Fee shifting statutes play a critical role to allow individuals access to the courts and legal remedies.
[158] Ashley Merryman, *What Does Hiring a Lawyer Cost*, U.S. NEWS AND WORLD REPORT, Mar. 1, 2024, https://law.usnews.com/law-firms/advice/articles/what-does-hiring-a-lawyer-cost#:~:text=Attorneys%20charged%20a%20national%20average,years%20they've%20practiced%20law (last visited May 1, 2024).
[159] *See* Erin Meyers & Joni Hersch, *Employment Practices Liability Insurance and Ex Post Moral Hazard,* 106 CORNELL L. Rev. 947 (2021) (discussing the relationship between employment liability practices insurance, deterrence of discrimination, compensation of victims, and dissemination of best practices).

him? How should students go about educating the Chief Operating Officer about the risk created by the "fun culture" at the Scranton office? How does the employee's status as a relatively new employee affect their ability to carry out their duties to the company?

Students also need to grapple with the difference between their and the company's ethical duties their employees, regardless of whether the employees can assert a legal claim. While often parallel and consistent, ethical obligations often exceed and transcend legal liability.

Finally, this activity highlights the role and obligation of bystanders.[160] Consider asking students how co-workers should act when they see or experience inappropriate behavior, even if that behavior is not directed towards them. Should they adopt an active, interventionist approach to stop harassment when they see it? Intervention among peers and bystanders may be an effective way to disrupt and reign-in fellow employees while establishing a supportive environment.[161] It might also open the employee up to retaliation.

IV. EVALUATION TECHNIQUES

This case study can be assessed in several ways. First, it can simply provide the framework for a thoughtful discussion of the legal and practical aspects of harassment without further evaluation. Second, students can be evaluated on the quality of their written memorandum to their boss or their disciplinary memorandum to Michael Scott. Third, this case can be assigned as an individual paper assignment. Appendix 2 includes a written paper option and Appendix 3 is a proposed a grading rubric. Finally, the case can serve as the basis for an examination question. Each of these methods can use a similar grading criterion that examines the quality of the writing or presentation as well as (1) the summary of the relevant facts, (2) identification of the legal rules, (3) application of the rules to the fact, and (4) conclusions and recommendations for future action.

V. CONCLUSION

The overwhelming popularity of The Office is, in part, due to its ability to depict and poke fun of the modern workplace, a place where boring work gets done, conflicts happen, and relationships develop and grow. While the show walks the line between offense and caring, it generally lands on the side of caring and connection. Diversity Day provides an accessible and inventive way for students to assume the role of an investigator to observe and evaluate whether a particular office is at risk of a hostile work environment claim. This activity is designed to help students learn the nuances of hostile work environment law while considering practical and strategic approaches to improving a concerning workplace culture. Hopefully, it will help them make deeper connections between legal obligations, human connection, and inclusiveness in a business setting.

---

[160] Stephanie Johnson et al. *Why We Fail to Report Sexual Harassment*, HARVARD BUSINESS REVIEW, Oct. 4, 2016, https://hbr.org/2016/10/why-we-fail-to-report-sexual-harassment (explaining need to train bystanders to intervene when they see sexual harassment).

[161] Justin Keepler et al., *Rethinking How to Manage Harassment and Discrimination in the Workplace*, 13 INDUS. AND ORG. PSYCH. 219, 219-21 (2020).

APPENDIX 1

MEMORANDUM TO NEW DIRECTOR OF HUMAN RESOURCES

RE: Your Assignment – Investigate and Report on the Scranton Office Work Environment

You recently started as the Director of Human Resources for Dunder Mifflin, Inc., a middle-market paper company. Up to this point, Dunder Mifflin has used an outside vendor to provide most of its human resources needs.

While you are new to Dunder Mifflin, you have already begun to hear rumblings about the fast-and-loose culture of the Scranton, Pennsylvania branch.

Although Kris Dickinson, your boss and the Chief Operating Officer, knows the paper industry, he is not well schooled in employment laws. The employee handbook is five pages long and includes a statement that "the Company will not tolerate any unlawful discrimination or harassment," "employees are expected to treat each other with respect," and the company will "discipline employees who engage in unlawful activity and punish violators to the fullest extent available at law."

Kris explains that the Scranton branch has the highest sales volume and profitability of the company's regional offices. While the other offices are struggling, Scranton is gaining market share. Kris praises the Scranton branch for its "fun culture," and said that he wants to find a way to reproduce the culture across the other branches. He attributes much of the office's success to the regional manager, Michael Scott, who he has characterized as a "hysterical guy with a lot of heart." Kris "does *not* want to shake things up" at Scranton or undermine its success.

Although you have heard various complaints of personality conflicts at the Scranton branch, there are no written documents in the personnel or Human Resources files. Nothing of note that stands out in the personnel records or the annual reviews, they are mostly generic and positive. You have also heard rumors of romantic relationships and pranks that may have "gone a bit overboard" in the Scranton office, but you are unsure if the rumors are true or if they have caused any problem.

Dundler Mifflin has historically contracted with an outside company, Diversity, Inc., to offer trainings and seminars designed to improve workplace culture. In response to a recent report that Michael Scott told an inappropriate joke a few weeks ago, the company is sending Mr. Brown, a consultant at Diversity, Inc., to conduct a diversity training for the office. The training is designed around the acronym HERO, which stands for Honesty, Empathy, Respect and Open-mindedness.

Kris has instructed you to accompany Mr. Brown and to conduct your own investigation into the Scranton branch to independently determine whether there are any potential legal concerns and, if so, to recommend the next steps.

YOUR SPECIFIC TASK – CONSIDER AND REPORT BACK

1. *Issue - Primary Questions.*
Is there any problem of *hostile work environment harassment* at the Scranton office? If so, what actions should the company take?

2. *Rule - Identify the Relevant Law and Legal Standard.*

State the applicable legal standard to determine whether unlawful harassment has occurred or whether the company faces a legal risk. Make sure to specifically consider the legal standard for a hostile work environment claim as well as the criteria to assert an affirmative defense to such a claim.

3. *Key Facts.*
   Identify the essential relevant facts you discovered in your investigation. Make sure to identify the people involved and identify specific troubling actions or statements.

4. *Application - Analysis.*
   Analyze the facts according to the legal standard to determine whether the company faces any legal risks of unlawful harassment. Be prepared to report your findings and to identify the primary risks and possible exposure to the company.

5. *Conclusion - Recommendations.*
   State your recommendations for the company. Be specific. Make sure to discuss steps that need to be taken at an individual, office, or corporate level. Also feel free to discuss the business implications of your recommendations.

THE EMPLOYEES

To help orient and prepare yourself for your visit, here is a list and photo of the employees in the Scranton branch:

APPENDIX 2 - WRITTEN PAPER OPTION

Memorandum Assignment

After you conduct your investigation, write a memorandum between 1,200 – 2,000 words that address the following:

1. *Relevant Law and Legal Standard.* First, identify the applicable legal standard and test to determine whether a company faces legal liability under an unlawful hostile work environment theory. Cite the relevant statutes and case law. If relevant, identify the relevant affirmative defenses available to a hostile work environment claim.
2. *Key Facts.* State the essential relevant facts you discovered in your investigation. Focus on the facts that are key to your analysis.
3. *Analysis.* Analyze the facts with the legal standard to explain whether the company faces any legal risks. Identify the primary risks and explain the possible exposure to the company.
4. *Recommendations.* State your recommendations for the company. Be specific. Feel free to discuss steps that need to be taken at an employee, office, or corporate level. Make sure to address the business needs and the relative strengths and weaknesses (pros and cons) of your recommendations.

Citation Requirements:

Cite the relevant authority in your memorandum. At minimum include:

- at least one statute, regulation, or formal agency guidance
- at least one court opinion; and
- at least one law review article.

Grading Criteria

The paper will be graded on the following criteria:

- *Analysis and Completeness – 70%.* Does the memorandum accurately and completely identify the legal standard accurate? Does the paper identify the essential facts without including extraneous facts? How well does the writer apply the facts to the law? Is the analysis thoughtful and helpful? Do the recommendations follow from the legal analysis? Are the recommendations helpful, do they into account the business needs? Does the writer meaningfully address the concerns of the CEO?
- *Writing Quality – 20%.* Is the paper well written? Is the tone and presentation professional and credible? Does the writer use proper sentence structure, grammar, spelling, and mechanics? Does the writer have a strong, credible voice?
- *Citations and Sources – 10%.* Does the paper use proper citations and source attribution? Does the paper cite relevant and quality sources? Do the sources support the argument? The driving question is whether the reader has confidence that information is accurate and can be trusted. Papers will be checked against Turnitin.com to review for plagiarism and improper citation.
- *Length.* Is the paper the proper length? Papers that are not the proper length will lose one full grade.

APPENDIX 3 - GRADING RUBRIC FOR WRITTEN MEMORANDUM

Student:______________________________ Overall Score:____________

Analysis and Completeness – 70%. Score: ______/______

Does the memorandum accurately and completely identify the legal standard accurate? Does the paper identify the essential facts without including extraneous facts? How well does the writer apply the facts to the law? Is the analysis thoughtful and helpful? Do the recommendations follow from the legal analysis? Are the recommendations helpful, do they into account the business needs? Does the writer meaningfully address the concerns of the CEO?

Analysis and Completeness	Outstanding	Very Good	Satisfactory	Needs Improvement
Legal Standard - Protected Class - Unwelcome - Offensive - Severe or Pervasive - Hostile Environment				
Essential Facts				
Application of Law to Facts				

Recommendations				

Writing Quality – 20% Score: ______/______

Is the paper well written? Is the tone and presentation professional and credible? Does the writer use proper sentence structure, grammar, spelling, and mechanics? Does the writer have a strong, credible voice?

Writing Quality	Outstanding	Very Good	Satisfactory	Needs Improvement
Overall Writing				
Tone and Presentation				
Proper Mechanics				

Citations and Sources – 10% Score: ______/______

Does the paper use proper citations and source attribution? Does the paper cite relevant and quality sources? Do the sources support the argument? The driving question is whether the reader has confidence that information is accurate and can be trusted.

Writing Quality	Outstanding	Very Good	Satisfactory	Needs Improvement
3+ Relevant and Credible Sources				
Proper Citations				
Length				