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SALSB EXECTIVE COMMITTEE

(2025)

From the Editor-in-Chief. . . .

This is the 17th volume of the *Southern Journal of Business and Ethics,* an official publication of the Southern Academy of Legal Studies in Business. The Journal is being published in hardcopy and electronically on the Southern Academy's web page at http://www.salsb.org.

The SJBE has been included in Ebsco Host services, allowing for full text search on most university library systems! This provides a great benefit to our authors and readers!

All articles that appear in this volume of the *Southern Journal of Business and Ethics* have been recommended for publication by the Advisory Editors, using a double, blind peer review process. A personal thanks is extended to the Advisory Editors for all their hard work and dedication to the *Journal* and the Southern Academy; without their work, the publication of this Journal would be impossible.

This is my seventeenth year as Editor-in-Chief, and I wish to express my sincere thanks and appreciation to all the Officers of the Southern Academy for their support, encouragement, assistance and advice throughout this year. I would like to further express appreciation to all the reviewers for their efforts in coordinating this issue of the Journal. The publishing of this journal is an intense educational experience which I continue to enjoy.

Many of the papers herein were presented at the Southern Academy of Legal Studies in Business meeting in San Antonio, Texas, February, 2025. Congratulations to all our authors. I extend a hearty invitation to the next meeting of the SALSB in San Antonio, Texas, Feb. 26-28, 2026.

The Southern Academy annual meeting has been voted the "BEST REGIONAL" among all the regions affiliated with the Academy of Legal Studies in Business (ALSB) featuring over 60 authors and 50 papers. I hope to see ya'll in San Antonio! Please check the web site (www.salsb.org) for further information. To further the objectives of the Southern Academy, all comments, critiques, or criticisms would be greatly appreciated.

Again, thanks to all the members of the Southern Academy for allowing me the opportunity to serve you as editor-in-chief of the Journal.

M.P. (Marty) Ludlum
Editor-in-Chief
Southern Journal of Business and Ethics
www.salsb.org

Our Reviewers

The **Southern Journal of Business and Ethics** is truly a group effort, requiring the tireless efforts of many volunteers to review our submissions.

I would like to extend a very public and eternal thanks to our reviewers. Many are listed below. Some have chosen to be anonymous for their efforts. I thank them also for their many hours of work in supporting the **SJBE**.

Reviewers for this issue in alphabetical order were:

Jennifer Barger Johnson, University of Central Oklahoma

Darrell Ford, University of Central Oklahoma

Dinah Payne, University of New Orleans

Lee Usnick, University of Houston - Downtown

Several reviewers wished their efforts would be anonymous. Without them, the **SJBE** would not be possible. I am eternally grateful.

Notes for Authors:

The focus of the **Southern Journal of Business and Ethics (*SJBE*)** is to examine the current trends and controversies in business, law and ethics, both domestic and international. In addition, future issues will include a new section, *Short Notes*, which will consist of shorter articles focusing on pedagogical ideas for the new business law instructor.

All authors promise that any submission is original work, and has not been previously published.

Since the topics of ***SJBE*** cross into many different academic areas, the ***SJBE*** does not have a specific format. Authors are free to use Chicago style, Harvard style or the APA, as long as the application is consistent throughout the paper.

The title should be in ALL CAPS. The text should be in Times New Romans 12 point font for the text and 10 point font for the footnotes. Authors' names should be centered below the title.
Paragraphs should be indented five spaces.

The maximum size for a paper is twenty-five pages, all inclusive, single spaced. Articles substantially longer may be accepted as space allows.

All submissions should include a complete copy (with author identification) and a blind copy (with author identification left blank).

All submissions are electronic, in MS-Word format. No paper copies will be reviewed or returned.

Artwork is discouraged. Tables and charts should be kept to a minimum and should be included in an appendix following the paper.

Submissions deadline is 45 days after the SALSB spring meeting each year. Articles sent after the deadline will be reviewed for the next issue, or may be withdrawn by the author and submitted elsewhere.

Look for the call for papers at the Southern Academy's website (www.salsb.org). If you would like to serve ***SJBE*** as a reviewer, your efforts would be appreciated. Many hands make light work.

If you have any questions, please submit them to the Editor in Chief.

Please submit all papers to:
Marty Ludlum
Editor in Chief, SJBE
mludlum@uco.edu

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STUDENT-ATHLETE ABUSE: COACHING AND INSTITUTIONAL FAILURES FROM PAST TO PRESENT

ADAM EPSTEIN*

This article examines decades of student-athlete abuse in collegiate sports, highlighting systemic failures by coaches, institutions, and the NCAA. Through specific examples across major universities, it reveals patterns of physical, emotional, and sexual misconduct, hazing, and retaliation, often met with inadequate oversight. The analysis critiques the NCAA's limited authority and explores shifting dynamics in athlete rights, mobility, and public accountability. While acknowledging that not all allegations are legitimate, the article calls for enforceable standards, institutional transparency, and a cultural shift that prioritizes athlete safety over competitive success.

INTRODUCTION

The issue of student-athlete abuse by college coaches is a deeply troubling and pervasive problem that has plagued universities across the United States. Despite the National Collegiate Athletic Association's (NCAA) commitment to student-athlete well-being, the enforcement of rules and the punishment of institutions for creating toxic environments often fall short.

This article delves into the institutional failures and abusive behaviors exhibited by coaches at various prominent coaches and universities. It also mentions additional scandals throughout. The article highlights the challenges faced by student-athletes and the systemic issues within college sports that allow such misconduct to persist. It also examines the responses from coaches and others to allegations of abuse.

COACHING AND INSTITUTIONAL FAILURES: AN HISTORICAL JOURNEY

The prevalence of allegations of coaching abuse at the intercollegiate level is disheartening and frequent.[1] In fact, it is not limited to abuse of student-athletes, but also departmental staff as

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[1] *See, e.g.*, Thomas Clouse, *Suspended University of Idaho volleyball coach Chris Gonzalez resigns*, SEATTLE TIMES (May 31, 2024), https://www.seattletimes.com/sports/college/suspended-university-of-idaho-volleyball-coach-chris-gonzalez-resigns/.

well.[2] A recent study revealed that one in five NCAA student athletes report abusive coaching.[3] Of course, coaching abuse is not limited to just college coaches as demonstrated by the state of Kentucky introducing a bill to combat student-athlete abuse at the interscholastic level.[4] Nevertheless, this section provides an historical roadmap of some of the most egregious examples and allegations of college coaching abuse and intercollegiate neglect at prominent institutions beginning in the 1970s to the present.

Ohio State University

Ohio State University (OSU) football coach Woody punched Clemson University noseguard Charlie Bauman after Bauman made an interception of OSU quarterback Art Schlichter's pass in the final two minutes of the game Hayes at the Gator Bowl on December 29, 1978.[5] Hayes was fired the next day.[6] OSU President Harold Enarson said that "there isn't a university or athletic conference in this country that would permit a coach to physically assault a college athlete."[7] However, this outrageous behavior by Hayes was nothing new. As noted by one journalist,

> Mr. Hayes hated to lose and often had tantrums when he did. Incidents that preceded the one that ended his career included punching an ABC television cameraman after an Ohio State fumble with only four minutes remaining in the game in a 1977 loss to Michigan; pushing a camera back into a Los Angeles Times photographer's face just before the

[2] *See, e.g.*, Xuan Thai, *Reports Find Stanford's Taylor Bullied, Belittled Female Staffers*, ESPN (Mar. 19, 2025), https://www.espn.com/college-football/story/_/id/44319805/stanford-football-coach-accused-reports-bullying-belittling-female-staffers (offering despite a pair of investigations and a warning letter, the coach remains on the job); see also David Cobb, *Ex-Minnesota Football players, Staffers Allege Toxic Culture under Coach P.J. Fleck within Program*, CBS Sports (July 26, 2023), https://www.cbssports.com/college-football/news/ex-minnesota-football-players-staffers-allege-toxic-culture-under-coach-p-j-fleck-within-program/ (authoring that former University of Minnesota football players described coach P.J. Fleck's program as a "cult" and that the football program's culture is "fraught with intimidation and toxicity."); *see also* Josh Peter, *Texas Tech Fallout from USA TODAY Sports Investigation Continues as Third Women's Coach Leaves*, USA TODAY (Aug. 18, 2022), https://www.usatoday.com/story/sports/college/2022/08/18/texas-tech-todd-petty-womens-tennis-investigation/10341828002/ ("For the third time in less than two years, the head coach of a women's sport at Texas Tech has left the school under the cloud of an investigation and allegations of mistreatment of athletes.").

[3] *See* Andy Berg, *Study Reveals 1 in 5 NCAA Student-Athletes Report Experiencing Abusive Coaching*, ATHLETIC BUS. (Mar. 4, 2025), https://www.athleticbusiness.com/operations/safety-security/article/15738917/study-reveals-1-in-5-ncaa-studentathletes-report-experiencing-abusive-coaching?utm ("According to the report, nearly 19% of more than 3,300 athletes on NCAA rosters said they'd experienced abusive supervision from their coach.").

[4] *See* Madison Carmouche, *Bill Introduced to Combat Student Athlete Abuse*, WKYT (Feb. 11, 2025), https://www.wkyt.com/2025/02/12/bill-introduced-combat-student-athlete-abuse/ (reporting that the bill would not only change the student-athlete consent form each to include information about reporting abuse by coaches, but it would also clarify the responsibility of coaches if they have reason to believe an athlete is being abused.).

[5] *See* Brian Bennett, *Woody Hayes' Last Game Coaching*, ESPN (Dec. 30, 2013), https://www.espn.com/college-football/bowls13/story/_/id/10215217/the-punch-ended-woody-hayes-career (quoting Ohio State guard Jim Savoca, "Everybody who played for Ohio State probably got slugged in the stomach or slapped by Coach Hayes. It was the era. We would joke about it and say, 'Circle right to get away from that left hook.'").

[6] *Id*.

[7] *See* Paul Rubalcaba, *Violence Never Solved Anything, Especially in Sports*, SUN (Sept. 10, 2009), https://www.sbsun.com/2009/09/10/violence-never-solved-anything-especially-in-sports/ (authoring, "Even though Woody won five (that's right – five) national championships with the Buckeyes, he will always be remembered for that fateful day when his volatile temper got the best of him and he struck one of his players.").

> 1973 Rose Bowl game, and tearing up the sideline downs marker in the waning minutes of a 1971 loss to Michigan after a Michigan interception of an Ohio State pass.[8]

It would seem unimaginable that Hayes would have remained a college coach in today's world for given his propensity for physical violence against student-athletes and others, particularly with the instantaneous delivering of thoughts, news, and video clips via social media.[9] The OSU football complex is named after Hayes, the coach who is still revered by OSU supporters today, having won five national championships for the school.[10]

Indiana University

Indiana University (IU) basketball coach Bobby Knight, too, was known for repeated incidents involving his aggressive and angry demeanor and physicality both on and off the court which ultimately led to his firing on September 20, 2000.[11] Knight's behavior was so over-the-top that the president of IU, Myles Brand, announced on May 15, 2000, that IU was implementing a "zero-tolerance policy" with the Knight, and he was fined $30,000 and also suspended for three games in part due to allegations that Knight choked a player during practice.[12] That 1997 incident involving player Neil Reed with Knight's hands around his neck was later revealed, having been recorded on videotape.[13]

Knight coached at IU 29 seasons, won three national championships, and then was hired for seven more seasons at Texas Tech University (TTU), retiring at the end of the 2007–2008 season with 899 career victories.[14] Despite his success in terms of victories, many accused Knight of coaching misconduct which by today's standards might have landed him in jail for physical and

[8] *See* Bart Barnes, *Controversial Ohio State Coach Woody Hayes Dies*, WASH. POST (Mar. 13, 1987), https://www.washingtonpost.com/archive/local/1987/03/13/controversial-ohio-state-coach-woody-hayes-dies/19b86c7d-13e6-4130-ad19-e41f70a9c878/.

[9] *See* Bennett, *supra* note 5 (noting, "If such an incident happened today, Twitter would detonate, and we'd see millions of instant replays.").

[10] *Id*.

[11] *See List of Incidents Involving Bob Knight*, CHRON (Nov. 14, 2006), https://www.chron.com/sports/college-basketball-men/article/List-of-incidents-involving-Bob-Knight-1849372.php (providing a list of year-by-year incidents to include September 20, 2000, when Knight was terminated from IU, "Is fired for violating "zero-tolerance" policy and for what university President Myles Brand calls a "pattern of unacceptable behavior."").

[12] *See* ABC News, *Bobby Knight in Hot Water Again*, ABC NEWS (Sept. 8, 2000), https://abcnews.go.com/Sports/story?id=100616&page=1. Brand also became the president of the NCAA. *See* Dept. of Philosophy, *Myles Brand*, IND. UNIV., https://philosophy.indiana.edu/about/history/in-memoriam/brand.html (providing a bio of Myles Brand which includes that he served as president of the NCAA from January 1, 2003, through September 16, 2009, the day he passed away).

[13] *See* ESPN.COM NEWS SERVICES, *Ex-Indiana player Neil Reed Dies*, ESPN (July 26, 2012), https://www.espn.com/mens-college-basketball/story/_/id/8204126/indiana-hoosier-neil-reed-figure-bobby-knight-firing-dies-36 (authoring that Reed died at age 36 in 2012 California and quoting Reed from an interview with ESPN The Magazine, "Believe it or not, I'm not happy that Indiana fired coach Knight." The article notes that "Reed transferred to Southern Mississippi shortly after the incident at Indiana and played there in the 1998-99 season. He told the magazine he "fell out of love" with basketball.").

[14] *See* Scooby Axson, *Ex-Indiana Basketball Player Alleges Abuse by Bob Knight in Book*, SI.COM (Oct. 26, 2016), https://www.si.com/college/2016/10/26/indiana-todd-jadlow-alleged-abuse-bob-knight (referencing a book, JADLOW: ON THE REBOUND, by former IU basketball player Todd Jadlow, who claimed that Knight "physically and emotionally abused him and his teammates during his time with the team." Axson continues, "Jadlow was a member national championship team in 1987 and says that Knight repeatedly abused players while he was with the Hoosiers.").

emotional abuse, according to former IU player Todd Jadlow who authored a book on his experiences at IU.[15] Another former IU player—Ricky Calloway, who played under Knight from 1985-88 before transferring to Kansas—stated,

> It's all definitely true, the physical abuse, the mental abuse. He never put his hands on me, but I've seen him slap players, seen him punch players, seen him kick players out of the gym when it's two degrees outside. I saw him hit Jadlow in the back of the head. The clipboard over Todd's head, absolutely, he sure did. I saw him punch Daryl (Thomas), punch Steve (Alford) in the stomach. I could go on.[16]

Other antics by Knight included in 1985 when he threw a chair across the court during a game against Purdue while objecting to foul calls, and in 1988 during an interview with NBC's Connie Chung when he commented in relation to how to deal with stress, "I think if rape is inevitable, relax and enjoy it."[17]

Rutgers University

On April 3, 2013, Rutgers fired basketball coach Mike Rice after a videotape aired on television showing him shoving, grabbing, and throwing balls at players during practice in addition to using gay slurs.[18] The videotape had been reviewed by athletic director Tim Pernetti months earlier in November, and Pernetti decided to suspend Rice for three games that fall, fined him $50,000, and ordered him to attend anger management classes.[19]

However, Eric Murdock, Rutgers former director of player development and who also blew the whistle by delivering the videotape to ESPN's television show *Outside the Lines*, sued Rutgers after his own contract was not renewed.[20] Months later, Rice admitted that he had gone

[15] *Id*.; *see also* Rob Goldberg, *Former Indiana Player Alleges Bob Knight Physically, Emotionally Abused Players*, BLEACHER REPORT (Oct. 25, 2016), https://bleacherreport.com/articles/2671962-former-indiana-player-alleges-bob-knight-physically-emotionally-abused-players (authoring, "Per Bob Kravitz of WTHR in Indianapolis, Jadlow stated Knight punched him in the back of the head, grabbed him by the neck and shook him violently and "made a habit...of grabbing players by the testicles and squeezing.""); *see also* Michael Niziolek, *Third Former Indiana Basketball Player Comes Forward in Alleged Abuse Case*, HERALD-TIMES (Oct. 15, 2024), https://www.heraldtimesonline.com/story/sports/college/iu/2024/10/15/indiana-basketball-lawsuit-brad-bomba-senior-john-doe-sexual-abuse-allegations-medical-examinations/75690166007/ (alleging mistreatment also by former IU team physician Brad Bomba Sr.).

[16] *See* Hannah Withiam, *Sides Forming over Whistleblower's Horrid Bob Knight Allegations*, N.Y. POST (Nov. 1, 2016), https://nypost.com/2016/11/01/sides-forming-over-horrid-allegations-made-by-bob-knight-whistleblower/ (quoting Calloway, but also noting, "our members of the Hoosier's medical staff, all of whom served under Knight, penned a letter Tuesday in defense of the coach who led their program to three national championships.").

[17] *See* Bob D'Angelo, Cox Media Group National Content Desk, *Bob Knight Investigated by FBI after Complaints of Inappropriate Conduct*, ATLANTA J. CONST. (July 7, 2017), https://www.ajc.com/sports/basketball/bob-knight-investigated-fbi-after-complaints-inappropriate-conduct/QaTcEnUh08kuSfuuH1O4LM/ (reporting that Knight then attempted to clarify his rape comment by saying, "The plane's down, so you have no control over it. I'm not talking about that, the act of rape. Don't misinterpret me there.").

[18] *See* ESPN.com News Services, *Rutgers Fires Coach Mike Rice*, ESPN (Apr. 3, 2013), https://www.espn.com/new-york/mens-college-basketball/story/_/id/9128825/rutgers-scarlet-knights-fire-coach-mike-rice-wake-video-scandal.

[19] *Id*. (noting that a lawyer "was hired to conduct an investigation that began on Nov. 27 and lasted approximately two weeks.").

[20] *See* Keith Sargeant, *Eric Murdock Finally Settles with Rutgers over Mike Rice Scandal*, NJ.COM (Aug. 29, 2016), https://www.nj.com/rutgersbasketball/2016/08/eric_murdock_vs_rutgers_feud_finally_over_after_6-.html

too far in terms of his behavior and apologized for his misconduct, but he denied that he was abusive.[21] The fallout from the scandal was severe as both Pernetti and the university's general counsel resigned three days later.[22] Murdock settled his lawsuit in 2016 as did a former player who also claimed physical and psychological abuse by Rice.[23]

Penn State University

For example, on June 22, 2012, a jury convicted former Pennsylvania State University (PSU) assistant football coach Jerry Sandusky on 45 counts related to child sex abuse of ten young boys.[24] Sandusky, who had been an assistant coach at PSU for 32 years and founded a non-profit charity group *The Second Mile* that "helps young people to achieve their potential as individuals and community members," was sentenced on October 9, 2012, to a minimum of 30 years and a maximum of 60 years in prison.[25] Problematic for PSU was that despite having received complaints about Sandusky's misconduct, no action was taken for over a decade.[26]

The on-campus Sandusky scandal led to the downfall of PSU's president, Graham B. Spanier, Senior Vice President for Finance and Business Gary Schultz, and athletic director Tim Curley.[27] It also led to the taking down of the recently erected statute of head football coach Joe Paterno.[28]

(authoring, "Murdock's lawsuit was filed in Superior Court in Newark on April 4, 2013, against Rutgers, Rice, university President Robert Barchi, Pernetti and former university President Richard McCormick. During the settlement discussions, sources said, Murdock agreed to drop claims against all individual parties and turned the lawsuit to a complaint against the university."). For further discussion of whistleblowing in college sports, *see generally* Adam Epstein, *The NCAA and Whistleblowers: 30-40 Years of Wrongdoing and College Sport and Possible Solutions*, 28 SO. L. J. 65-84 (2018) (referencing Murdock and many others).

[21] *See* Mike Chiari, *Mike Rice Speaks Out 7 Months After Rutgers Firing for Abusing Players*, BLEACHER REPORT (Nov. 6, 2013), https://bleacherreport.com/articles/1839541-mike-rice-speaks-out-7-months-after-rutgers-firing-for-abusing-players (quoting Rice, "Everything I've ever done is fight, scratch and claw and now I have to sit back and take it, listen to people say I was abusing my players? I was an idiot, but I never abused anybody."); *see also* Rob Wallace, Lisa Soloway & Alexa Valiente, *Ex-Rutgers Coach Mike Rice Apologizes for His Mistakes: 'I've Changed'*, ABC NEWS (Nov. 6, 2013), https://abcnews.go.com/US/rutgers-coach-mike-rice-apologizes-mistakes-ive-changed/story?id=20794407 (providing segments of Rice's ABC's 20/20 video interview with Robin Roberts in which Rice claimed he was embarrassed, shocked, and saddened about putting himself in the position he was in. This portion of the interview also included clips of Rice attacking his players in practices in which he kicks players, throws balls, smacks players with foam pads, ranting, swearing, and "screaming homophobic slurs." Rice admitted that some of his actions may have been bullying.); *but see* Zach Braziller, *Players, Parents Rip Mike Rice's 'Disingenuous' Interview*, N.Y. POST (Nov. 6, 2013), https://nypost.com/2013/11/06/mike-rice-has-lots-of-regrets-and-a-new-job/ (referring to the ABC interview and authoring, "The former Rutgers coach claims he has been rehabilitated, having attended the John Lucas Wellness and Aftercare Program in Houston to deal with his anger issues, and has learned over the last seven months through "embarrassment" and losing his "dream job" he needed to coach and act differently.").

[22] *See* Sargeant*, supra* note 20.

[23] *Id*.

[24] *See* CNN Editorial Research, *Penn State Scandal Fast Facts*, CNN (Apr. 23, 2023), https://www.cnn.com/2013/10/28/us/penn-state-scandal-fast-facts/index.html.

[25] *Id*.

[26] *Id*.

[27] *Id*.

[28] *See* Don Van Natta, Jr., *Joe Paterno Statue Taken Down*, ESPN (July 22, 2012), https://www.espn.com/college-football/story/_/id/8188530/joe-paterno-statue-removed-penn-state-university-beaver-stadium (authoring, "The decision came 10 days after a scathing report by former FBI director Louis J. Freeh found that Paterno, with three other top Penn State administrators, had concealed allegations of child sexual abuse made against former defensive

Despite the reporting of Sandusky's misconduct from Mike McQueary, a former graduate assistant and later receiver's coach, who claimed to have witnessed sexual abuse and rape by Sandusky, it appeared that PSU did not take the allegation seriously.[29] McQueary's contract was not renewed by PSU, he then filed a whistleblower lawsuit and was ultimately awarded $12 million for his wrongful termination.[30]

At first it appeared that PSU would suffer financially from both the NCAA and the Big Ten conference as a result of the scandal.[31] However, the PSU punishment was rolled back significantly, calling into question the authority of the NCAA and the extent of its bylaws and rules, no matter how despicable the acts and the cover up were.[32] Though the PSU scandal did not directly affect student-athletes, it did involve coaches and institutional administrators at the highest level of authority.

Baylor University

In another scandal involving an institution and primarily its football team, in 2016 Baylor University fired its head football coach Art Briles, ended its relationship with president Ken Starr, and athletic director Ian McCaw resigned after tens of Baylor football players were accused of sexually assaulting numerous women.[33] An independent law firm had been retained in 2015 to "conduct a thorough and independent external investigation into the university's

coordinator Jerry Sandusky. The Freeh report concluded their motive was to shield the university and its football program from negative publicity.").

[29] *See* CNN Editorial Research, *supra* note 24.

[30] *See* David Ingram, *Award for Penn State Whistleblower in Sandusky Scandal Rises to $12 Million*, REUTERS (Nov. 30, 2016), https://www.reuters.com/article/us-pennsylvania-sandusky/award-for-penn-state-whistleblower-in-sandusky-scandal-rises-to-12-million-idUSKBN13P2VW (reporting that McQueary was awarded $7.3 million in compensatory and punitive damages by a jury but that a judge subsequently awarded him an additional $4 million for past and future lost salary and $1 million for reputational damage and humiliation under Pennsylvania's whistleblower law).

[31] *See* CNN Editorial Research, *supra* note 24 ("The NCAA announces a $60 million fine against Penn State and bans the team from the postseason for four years. Additionally, the school must vacate all wins from 1998-2011 and will lose 20 football scholarships a year for four seasons. The Big Ten Conference rules that Penn State's share of bowl revenues for the next four seasons - roughly $13 million will be donated to charities working to prevent child abuse.").

[32] *See, e.g.*, Pat Forde, *Baylor's Slap on the Wrist Doesn't Feel Right, But There's Not Much NCAA Rules Could Do*, SI.COM (Aug. 11, 2021), https://www.si.com/college/2021/08/11/baylor-football-ncaa-sanctions-investigation (authoring, "In the Penn State case, the NCAA overreached due to the collective horror over what had occurred. President Mark Emmert, empowered by the university presidents who sat atop the association's power structure, tried to freelance a punishment from outside the dictates of that rules manual. The sanctions handed down in the summer of 2012 included a four-year postseason ban, a $60 million fine and a loss of 10 scholarships per season for four years. A year later, after significant blowback and some digging into how much of a mandate Emmert truly had to drop the hammer, the Penn State sanctions started to be rolled back. First the scholarship reductions were reduced. Then in 2014, the postseason ban disappeared. That essentially marked the end of Emmert as a true power player and the beginning of his transition to diminished figurehead status atop a flawed organization."); *see also* Josh Moyer, *Penn State to Regain Scholarships*, ESPN (Sept. 24, 2013), https://www.espn.com/college-football/story/_/id/9716482/ncaa-reduce-penalties-penn-state-regarding-jerry-sandusky-child-sexual-abuse-matter.

[33] *See* Associated Press, *Former Baylor AD Ian McCaw Blames Sexual Assault Scandal on Regents, Police in Deposition*, SI.COM (July 20, 2018), https://www.si.com/college/2018/07/21/baylor-sexual-assault-scandal-ian-mccaw-art-briles-regents-police.

handling of cases of alleged sexual violence."[34] In 2016, the law firm reported that the culture of the football team enabled Baylor football players to appear to be "above the rules" with "no culture of accountability for misconduct."[35]

In response to the findings by the law firm, Board of Regents chair Richard Willis responded accordingly with disappointment, stating:

> This investigation revealed the university's mishandling of reports in what should have been a supportive, responsive and caring environment for students. The depth to which these acts occurred shocked and outraged us. Our students and their families deserve more, and we have committed our full attention to improving our processes, establishing accountability and ensuring appropriate actions are taken to support former, current and future students.[36]

In October 2018, the NCAA served notice of allegations against Baylor that former head coach Art Briles failed to promote an atmosphere of compliance and that there also existed a lack of institutional control.[37] Nevertheless, the supervisory bad actors at Baylor were paid large sums to leave the university.[38]

On August 11, 2021, the NCAA completed its lengthy five-year investigation of Baylor,[39] and the NCAA Committee on Infractions (COI) announced that the school would be placed on four years of probation.[40] However, the COI also determined that neither Baylor nor Briles violated NCAA rules by not acting after there were allegations of sexual assault.[41] The COI stated,

[34] *See* ESPN, *The Timeline of Art Briles' Downfall at Baylor Before His Hire at Grambling State*, ESPN (Feb. 24, 2022), https://www.espn.com/college-football/story/_/id/33365146/the-line-art-briles-downfall-baylor-hire-grambling-state.
[35] *Id*.
[36] *See* Tim Daniels, *Baylor Paid Art Briles $15.1M, Ken Starr $4.5M After Sexual Assault Scandal*, BLEACHER REPORT (Mar. 31, 2018), https://bleacherreport.com/articles/2767598-baylor-paid-art-briles-151m-ken-starr-45m-after-sexual-assault-scandal.
[37] *See* Ben Kercheval, *Baylor Avoids NCAA Punishment for Sexual Assault Scandal, Gets Probation for Football-related Violations*, CBS SPORTS (Aug. 11, 2021), https://www.cbssports.com/college-football/news/baylor-avoids-ncaa-punishment-for-sexual-assault-scandal-gets-probation-for-football-related-violations.
[38] *See* Associated Press, *supra*, note 33 (noting that McCaw became the athletic director at Liberty University and Art Briles was paid $15 million as a contract settlement); *see also* Daniels, *supra* note 36 (reporting that former athletic director Ian McCaw was given $761,059 after his resignation).
[39] *See* Associated Press, *Key Dates and Developments in the Baylor Assault Scandal*, AP NEWS (Aug. 11, 2021), https://apnews.com/article/sports-college-football-violence-lawsuits-sexual-assault-9fe035761dc3d1f3d42c714a87c78a10 (authoring, "The NCAA notes that due to several unique factors, including the pandemic, the case has had a longer procedural history than most.").
[40] *See* Kercheval, *supra* note 37.
[41] *Id*. (authoring, however, that "…the NCAA found other impermissible benefits and recruiting violations that occurred between 2011-16 for which it has decided to penalize the Bears."); *see also* Paula Lavigne, *Negligence Claims vs. Ex-Baylor Coach Art Briles Dismissed*, ESPN (Oct. 20, 2023), https://www.espn.com/college-football/story/_/id/38704304/negligence-claims-vs-ex-baylor-coach-art-briles-dismissed; *but see* Paula Lavigne, *Jury Finds Baylor University Negligent, in Violation of Title IX*, ESPN (Oct. 24, 2023), https://www.espn.com/college-football/story/_/id/38736187/jury-finds-baylor-university-negligent-violated-title-ix (awarding plaintiff $270,000 for the negligence claim but no financial award for the Title IX violation).

> Baylor admitted to moral and ethical failings in its handling of sexual violence on campus but argued that those failings, however egregious, did not constitute violations of NCAA legislation. Ultimately, and with tremendous reluctance, this panel agrees.[42]

The NCAA could not conclude that Baylor violated NCAA rules when it failed to report allegations of sexual violence and interpersonal violence on its campus.[43] At Baylor, a few of the football players were convicted of crimes, but the campus leaders to include Briles, Starr, and McCaw were not.[44] Further, some compared the NCAA's COI determination to the Sandusky case at PSU, declaring that it had no real authority over these types of on campus matters in the first place.[45] Even NCAA President Mark Emmert stated,

> The conduct by some former Baylor administrators, coaches, and student-athletes described in today's Committee on Infractions decision is unacceptable and runs counter to the values of the NCAA. Schools have taken many steps to address sexual violence on campus, but as the COI points out, the authority of the NCAA in this area is very limited today.[46]

As demonstrated with PSU and Baylor, it has become increasingly apparent that the NCAA avoids moral responsibility as an organization for the criminal misconduct on college campuses, nor does it have the power to punish member institutions for toxic or criminal environments *unless* they are direct violations of specific NCAA rules. This may be best represented by the outcome in the 2017 academic scandal at the University of North Carolina at Chapel Hill (UNC) which enabled both students and student-athletes to take classes and earn college credit for them without doing any work and also resulted in essentially no punishment from the NCAA.[47] After a three-and-half-year investigation and an admission by UNC that there was academic fraud, the NCAA concluded that the "paper courses" in the department of African and Afro-American

[42] *See* Kercheval, *supra* note 37.
[43] *Id*.; *see also* Meghan Durham, *Baylor Provided Impermissible Benefits and Violated Recruiting Rules*, NCAA.ORG (Aug. 11, 2021), https://www.ncaa.org/news/2021/8/11/general-baylor-provided-impermissible-benefits-and-violated-recruiting-rules.aspx (providing an official announcement with the list of penalties and also a link to download the pdf of the Aug. 11, 2021 Baylor University Public Infractions Decision, *available at* https://ncaaorg.s3.amazonaws.com/infractions/decisions/Aug2021INF_BaylorDecisionPublic.pdf. The 52-page decision offers language regarding Briles such as, "In each instance, when the head coach received information from a staff member regarding potential criminal conduct by a football student-athlete, he did not report the information and did not personally look any further into the matter. He generally relied on the information provided to him by his staff and likewise relied on them to handle problems. His incurious attitude toward potential criminal conduct by his student-athletes was deeply troubling to the panel." *Id*., p. 35); *see also* ESPN News Services, *Baylor Settles 2016 Sexual Assault Lawsuit with 15 Survivors*, ESPN (Sept. 18, 2023), https://www.espn.com/college-sports/story/_/id/38434684/baylor-settles-2016-sexual-assault-lawsuit-15-survivors (noting that the lawsuit was first filed in 2016, and authoring, "Baylor University has settled a yearslong federal lawsuit brought by 15 women who alleged they were sexually assaulted at the nation's biggest Baptist school, ending the largest case brought in a wide-ranging scandal that led to the ouster of university president Ken Starr and football coach Art Briles, and tainted the school's reputation.").
[44] *See* Kercheval, *supra* note 37.
[45] *Id*.
[46] *Id*.; *see also* Media Center, *NCAA President Mark Emmert's Statement on Baylor*, NCAA (Aug. 11, 2021), https://www.ncaa.org/news/2021/8/11/general-ncaa-president-statement-on-baylor.aspx.
[47] *See* Jeremy Bauer-Wolf, *NCAA: No Academic Violations at UNC*, INSIDE HIGHER ED (Oct. 15, 2017), https://www.insidehighered.com/news/2017/10/16/breaking-ncaa-finds-no-academic-fraud-unc.

studies were for all students, not just to benefit the athletes. Therefore, the argument was that there was no violation under NCAA rules in that there were no *extra benefits* for the student athletes, which would have been a violation.[48] This argument prevailed and perpetuated the skepticism over the authority and role of the NCAA.[49]

Michigan State University

Epic failures were revealed at Michigan State University (MSU) after Larry Nassar, who worked as an assistant professor, sexually assaulted hundreds of women and girls, many at MSU though many others with his involvement with USA Gymnastics.[50] More than 265 gymnasts came forward detailing the physical abuse they suffered under Nassar even though he had been cleared in 2014 by MSU.[51] Nassar pleaded guilty in 2017 to federal child pornography charges and multiple state of Michigan sexual abuse charges.[52]

Just like Baylor and UNC, however, neither MSU nor the NCAA believed the institution violated any NCAA rules even though Nassar's criminal conduct was "abhorrent and a violation of every standard of conduct expected of university of employees."[53] Again, the role and

[48] *Id*. (writing, "The university aggressively fought the NCAA's efforts to assert its authority in this case, spending roughly $18 million on legal and other fees. The NCAA's enforcement division, which essentially acts as the prosecutor in infractions cases, had charged North Carolina with "lack of institutional control" and "failure to monitor" its athletes' academic courses, among the most serious charges in the associations' rule book. But the infractions committee said it could not reach those findings because it did not have evidence to prove the underlying charges of awarding "extra benefits" to athletes.").

[49] *Id*. (authoring that the failure to punish UNC for "one of the worst academic scandals in college sports history" demonstrates "mounting evidence of the NCAA's continuing weakness in controlling and punishing its member institutions."); *see also* Forde, *supra* note 32 (writing, in reference to PSU and Baylor, "In between those two scandals was the North Carolina academic ruling in 2017, in which the NCAA was outsmarted by the school's lawyers. In an infractions case adjudicated by Southeastern Conference commissioner Greg Sankey, the school got away scot-free with decades of systemic cheating by saying it ultimately was O.K. with the academic sham—with the key distinction being that the bogus classes also were available to regular students, and not just athletes. Thus, there was no bylaw upon which to nail the Tar Heels. "The fact that the courses did not meet our expectations doesn't make them fraudulent," said UNC general counsel Mark Merritt at the time of the NCAA ruling.").

[50] *See* C.A. Bridges, *Ex-USA Gymnastics Doctor Larry Nassar Was Stabbed in a Florida Prison. Here's What We Know*., TALLAHASSEE DEMOCRAT (July 12, 2023), https://www.tallahassee.com/story/news/local/2023/07/11/larry-nassar-ex-gymnastics-doctor-convicted-sexual-abuse-stabbed-in-prison-what-we-know/70400955007/ (providing detailed summary of the Nassar case to the present).

[51] *Id*.; *see also* Bob Wojnowski, *Someone Must Lead Michigan State Out of Latest Mess, and It Won't be Mel Tucker*, DET. NEWS (Sept. 10. 2023), https://www.detroitnews.com/story/sports/columnists/bob-wojnowski/2023/09/10/wojo-mel-tucker-michigan-state-spartans-latest-mess/70817033007/ (reporting on the 2023 scandal involving then head football coach Mel Tucker, but also authoring, "The school's leadership void, first horrifically revealed in the Larry Nassar sexual assault scandal, is still a problem, in perception and reality." Wojnowski continues, "During the Nassar fiasco, administrators ignored complaints, minimized allegations and resisted records requests. The awful handling of that scandal will ensure increased scrutiny of the Tucker case."); *see also* Jared Ramsey, *Mel Tucker Allegation Falls in Long Line of Sexual Misconduct Issues at Michigan State*, LANSING ST. J. (Sept. 12, 2023), https://www.lansingstatejournal.com/story/news/local/2023/09/12/mel-tucker-msu-history-timeline/70821189007/ (providing an outline of the timeline from Nassar to Tucker).

[52] *Id*. (summarizing the charges to include, "Federal child pornography: Nassar was sentenced to 60 years in federal prison. Ingham County sexual assault: Nassar was sentenced to 40 to 175 years in Michigan State Prison. Eaton County sexual assault: Nassar was sentenced to an additional 40 to 125 years in Michigan State Prison.").

[53] *See* Kyle Austin, *Michigan State Cleared of NCAA Wrongdoing in Nassar Probe*, MLIVE (Aug. 30, 2018), https://www.mlive.com/spartans/2018/08/ncaa_clears_michigan_state_in.html (authoring that a letter was sent from the NCAA Vice President of Enforcement to then Michigan State athletic director Bill Beekman informing him that

authority of the NCAA related to on-campus matters was called into question.[54] In fact, MSU affirmed that it was "committed to NCAA Bylaw 20.9.1.6, which covers the well-being of student athletes including their health and safety," although also noting that the bylaw is merely a guide and not subject to NCAA enforcement.[55] Numerous MSU employees were charged with crimes (several were subsequently dismissed),[56] and others resigned or otherwise lost their jobs at MSU over the Nassar scandal including MSU president Lou Anna K Simon.[57]

On August 8, 2017, the NCAA Board of Governors adopted a sexual violence policy which has been updated at least three times.[58] According to the NCAA, campus leaders—the school president or chancellor, athletics director, and Title IX coordinator—now must attest annually

two NCAA reviews have not "substantiated violations of NCAA legislation" and "it does not appear there is a need for further inquiry."); *see also* Matt Mencarini, *MSU to NCAA: Nassar Sexually Assaulted 25 Student-athletes, but 'No NCAA Rules Violations'*, LANSING ST. J. (May 3, 2018), https://www.lansingstatejournal.com/story/news/local/2018/05/02/msu-nassar-abused-25-student-athletes-but-no-ncaa-rules-violations/575408002/.

[54] *See* Matt Wenzel, *Experts Analyze Michigan State's Claim It Didn't Commit NCAA Violations Related to Larry Nassar*, MLIVE (May 4, 2018), https://www.mlive.com/spartans/2018/05/experts_analyze_michigan_state.html (quoting Ohio University professor David Ridpath, "I don't they're going to go the executive authority route like they did in Penn State," he said. "If they do an actual investigation into this, I'd be shocked. I think the NCAA is just taking the approach of 'we want to show that we're doing something' and then we can come back and say 'well, it's not within our authority.' It's kind of like North Carolina and it gives them a bit of cover.").

[55] Mencarini, *supra* note 53 (referencing the bylaw in place at that time); *see also* Matt Charboneau, *MSU: No NCAA Rules Violations in Larry Nassar Case*, DET. NEWS (May 3, 2018), https://www.detroitnews.com/story/sports/college/michigan-state-university/2018/05/03/michigan-state-ncaa-larry-nassar/34525067/ (quoting the letter that was sent to the NCAA by the investigative law firm hired by MSU, "The University agrees wholeheartedly and is committed to providing the most safe and healthy environment possible for its student-athletes…Regrettably, we have learned that Nassar did not share the University's commitment and violated criminal law.").

[56] *See* Beth LeBlanc & Kim Kozlowski, *Court Upholds Dismissal of Charges Against Lou Anna Simon, Calls Probe a 'Sham',* DET. NEWS (Dec. 23, 2021), https://www.detroitnews.com/story/news/local/michigan/2021/12/22/michigan-court-appeals-lou-ann-simon-charges-sham-nassar-msu/8994257002/ (providing a copy of the judicial decision in the article and authoring, "A Michigan Court of Appeals panel unanimously upheld the dismissal of charges against former Michigan State University President Lou Anna Simon, with one judge calling the investigation into Simon following the Larry Nassar scandal a "sham." The authors continue, stating that the 3-0 appellate decision believed that the state attorney general's office, "provided no evidence that Simon knew the details of a complaint against Nassar in 2014,"…and that therefore "it's difficult to conclude she lied to police in 2018 when she told them she knew an MSU sports medicine doctor was "under review" but knew "nothing of substance" beyond that, the judges ruled."); *see also* Kim Kozlowski, *Court Vacates Conviction of Former MSU Gymnastics Coach Kathie Klages*, DET. NEWS (Dec. 21, 2021), https://www.detroitnews.com/story/news/local/michigan/2021/12/21/kathie-klages-larry-nassar-conviction-vacated-lying-to-police-michigan-state-university/8985174002/ (authoring that the Michigan Court of Appeals in a 2-1 decision vacated the conviction of former MSU gymnastics coach Kathie Klages for lying to police after the majority concluded that her statements about not remembering a 1997 conversation were not material to a criminal investigation although the judges also did not ascertain whether her statement were truthful or not).

[57] *See* Joe Sommerlad & Ariana Baio, *Larry Nassar: A Timeline of the Sexual Abuse Allegations Against the Former USA Gymnastics Team Doctor*, INDEP. (July 10, 2023), https://www.independent.co.uk/news/world/americas/crime/larry-nassar-now-abuse-timeline-b1920783.html; *see also* Kim Kozlowski, *Court Vacates Conviction of Former MSU Gymnastics Coach Kathie Klages*, DET. NEWS (Dec. 21, 2021), https://www.detroitnews.com/story/news/local/michigan/2021/12/21/kathie-klages-larry-nassar-conviction-vacated-lying-to-police-michigan-state-university/8985174002/.

[58] *See* NCAA, *NCAA Board of Governors Policy on Campus Sexual Violence*, NCAA.ORG, https://www.ncaa.org/sports/2017/8/17/ncaa-board-of-governors-policy-on-campus-sexual-violence.aspx (stating, "If a school is not able to attest its compliance with the NCAA policy, it will be prohibited from hosting any NCAA championship competitions for the next applicable academic year.").

that coaches, athletics administrators and student-athletes were educated in sexual violence prevention.[59] Some may say that this new policy is a bit underwhelming and simply places the burden of misfeasance on campus rather than the NCAA.[60] Nevertheless, given the aforementioned sexual abuse scandals at PSU, Baylor, MSU, and elsewhere to include the University of Michigan,[61] the University of Southern California,[62] and The Ohio State University,[63] at least the NCAA now has a formal policy in place. This might also remind college boards of trustees, presidents, and general counsel offices how costly these lawsuits and settlements can be.[64]

University of Maryland

[59] *See* NCAA, *Board Adopts Sexual Violence Policy*, NCAA.ORG (Aug. 10, 2017), https://www.ncaa.org/news/2017/8/10/board-adopts-sexual-violence-policy.aspx.
[60] *See* S. Daniel Carter & Katherine Redmond Brown, *NCAA's New Sexual Violence Policy Underwhelming at Best*, HUFFINGTON POST (Aug. 14, 2017), https://www.huffpost.com/entry/ncaas-new-sexual-violence-policy-underwhelming-at_b_598e82a3e4b0caa1687a6031 (writing, "This provides slightly more accountability than the Clery Act, amended by the Violence Against Women Reauthorization Act of 2013, which merely requires that all incoming students and employees receive sexual violence education, and that there be ongoing educational campaigns. It, however, is far short of the types of reforms that both of us, and other advocates, have been seeking for several decades.").
[61] *See* Hayley Harding, *UM Finalizes $490M Settlement with Victims of Dr. Robert Anderson* (Sept. 17, 2022), https://www.detroitnews.com/story/news/education/2022/09/16/um-finalizes-490-m-settlement-those-abused-anderson/10401762002/ (reporting that each accuser will receive an average of more than $438,000 over claims that the physician, who passed away in 2008 after serving UM from 1966 to 2003 as head of University Health Service and the team physician for the UM Athletic Department, allegedly sexually abused more than 1,000 people in his nearly 40 years working at the school).
[62] *See* Scott Jaschik, *USC Settles with 80 Ex-Students Over Misconduct Claims*, INSIDE HIGHER ED (May 1, 2022), https://www.insidehighered.com/quicktakes/2022/05/02/usc-settles-80-ex-students-over-misconduct-claims (reporting that it was related to Dr. Dennis Kelly who retired from USC in 2018 and surrendered his medical license two years later); *see also* Rick Seltzer, *USC Settles Sexual Abuse Lawsuit for $852M*, INSIDE HIGHER ED (Mar. 25, 2021), https://www.insidehighered.com/quicktakes/2021/03/26/usc-settles-sexual-abuse-lawsuit-852m ("The University of Southern California agreed to settle a lawsuit with 710 women who were former patients of gynecologist George Tyndall for $852 million.").
[63] See George Shillcock, *US Supreme Court Declines to Hear Ohio State Sexual Abuse Case, Allowing Survivors to Sue OSU*, WOSU (June 26, 2023), https://news.wosu.org/politics-government/2023-06-26/us-supreme-court-declines-to-hear-ohio-state-sexual-abuse-case-allowing-victims-to-sue-university (reporting on the unsettled lawsuits against the university over sexual abuse by the late OSU team doctor Richard Strauss who "sexually abused more than 170, mostly male, victims between 1979 and 1996." The author also states, "In April, Ohio State reached a settlement agreement that totaled $1.995 million with an anticipated 57 additional survivors. Overall, Ohio State said they have reached settlement agreements with 289 survivors, more than half of the plaintiffs, for $59.79 million.").
[64] *See* Elissa Welle, *Multimillion-Dollar Payouts Are on the Rise in Sexual-Misconduct Lawsuits. Colleges' Insurers Have Had Enough*., CHRON. HIGHER EDUC. (Mar. 1, 2023), https://www.chronicle.com/article/multimillion-dollar-payouts-are-on-the-rise-in-sexual-misconduct-lawsuits-colleges-insurers-have-had-enough (mentioning the PSU, Baylor, and MSU cases); *but see* Paula Lavigne, *Title IX Lawsuit Naming Baylor, Art Briles, Ian McCaw Moves Closer to Trial*, ESPN (Oct. 4, 2023), https://www.espn.com/college-football/story/_/id/38522114/title-ix-lawsuit-naming-baylor-art-briles-ian-mccaw-moves-closer-trial (offering that U.S. District Judge Robert Pitman of the Western District of Texas allowed the only remaining lawsuit that was not settled to proceed to trial in its Title IX and negligence claim); *see also* Donald E. Heller, *How Weak Leadership Enables Campus Scandals*, CHRON. HIGHER EDUC. (Oct. 13, 2023), https://www.chronicle.com/article/how-weak-leadership-enables-campus-scandals (providing the enormous dollar amounts of expenses and settlements involving athletic-related abuse).

In November, 2021, two former University of Maryland football players— Gus Little and E.J. Donahue—settled a lawsuit for $200,000 apiece after accusing former head football coach D.J. Durkin of running a toxic program in which there was "constant, inescapable physical, emotional, and psychological abuse."[65] Both of the players accused Durkin of misconduct by "intentionally instituted a toxic culture of cruelty, humiliation, [and] degradation," resulting in "thoughts of self-harm, anxiety, insomnia and depression."[66] The impetus behind the lawsuit was the death of University of Maryland offensive lineman Jordan McNair as a result of exertional heatstroke during a workout when Durkin was the head coach.[67] McNair died in June 2018 after suffering exertional heatstroke at a team workout.[68] Soon thereafter, some players and staff began to speak out and voiced concerns about a toxic, abusive culture.[69] One of the lawyers for the players said the case was important to "send notice to other coaches all over the country that this type of behavior will not be tolerated and will be addressed."[70]

Though the university settled the lawsuit on behalf of all the defendants, which included coach Durkin, the strength and conditioning coach, and the former head athletic trainer, the university ultimately admitted to no wrongdoing.[71] The school conducted two investigations, one of which confirmed "abusive language, the intensity of workouts, mistreatment of injured athletes and instances of abuse or bullying."[72] Despite that finding, it also reported that it "found that the Maryland football team did not have a 'toxic culture,' but it did have a culture where problems festered because too many players feared speaking out."[73] Durkin was ultimately fired, university president Wallace D. Loh retired, and James T. Brady, the former chair of the University System of Maryland's board of regents, resigned.[74]

University of Washington

Some allegations of misconduct are self-evident and in plain sight for the public-at-large to witness. This is especially true when coaches cross the line on a live television broadcast. For example, University of Washington (UW) football head coach Jimmy Lake was suspended one game in November 2021 after he ran down the sideline and hit one of his players in the facemask

[65] *See* Rick Maese, *Ex-Maryland Football Players Reach Settlement over Abuse Claims from DJ Durkin Tenure*, WASH. POST (Dec. 16, 2021), https://www.washingtonpost.com/sports/2021/12/16/maryland-football-abuse-lawsuit-settlement/.
[66] *Id*.
[67] *Id*.
[68] *Id*.
[69] *Id*.
[70] *Id*.
[71] *Id*.
[72] *Id*.
[73] *Id.*
[74] *Id*.; *but see* Ryan Dickstein*, DJ Durkin Gets First Coaching Job Since Jordan McNair Death, UMD Firing,* WMAR (Jan. 2, 2020), https://www.wmar2news.com/news/local-news/dj-durkin-gets-first-coaching-job-since-jordan-mcnair-death-umd-firing (reporting that Durkin was subsequently hired at Ole Miss)*; see also* Cameron Salerno, *Auburn Extends D.J. Durkin, More Than Doubles Defensive Coordinator's Salary As Part of Lucrative Deal*, CBS SPORTS (Feb. 10, 2025), https://www.cbssports.com/college-football/news/auburn-extends-d-j-durkin-more-than-doubles-defensive-coordinators-salary-as-part-of-lucrative-deal/.

and shoved him, both immediately after the end of the play.[75] After the game, UW athletic director Jen Cohen suspended Lake and stated,

> Our staff has spent the last 24-plus hours reviewing video of the incident, as well as speaking with Coach Lake, the involved student-athlete and several other student-athletes and members of the staff, and I have made the decision to suspend Coach Lake for next Saturday's game against Arizona State.[76]

Cohen continued,

> President (Ana Mari) Cauce, our faculty athletics representative, Alexes Harris, and members of our executive staff are in agreement that while we do not believe that his actions were intentional or deliberate, we can have no tolerance for a coach interacting with a student in the manner Coach Lake did. We have high expectations of conduct for our coaches, and we will not shy away from those expectations.[77]

Allegations then surfaced that Lake may have made physical contact as an assistant coach at UW two years earlier at halftime of a game against the University of Arizona.[78] However, Lake denied that incident occurred.[79] Ultimately, UW fired Lake in just his second season and without cause, and therefore UW owed his full buyout of $9.9 million, minus any new compensation he earned during that time.[80]

Northwestern University

Abuse claims sometimes involve hazing, which appears to be a widespread problem in college sports that is not going away.[81] In 2023, Michael Schill, the president of Northwestern

[75] *See* Mike Vorel, *UW Football Coach Jimmy Lake Suspended One Game After Hitting and Shoving Player on Sideline*, SEATTLE TIMES (Nov. 8, 2021), https://www.seattletimes.com/sports/uw-husky-football/uw-football-coach-jimmy-lake-suspended-after-sideline-incident-with-linebacker-ruperake-fuavai/ (providing a copy of the video).
[76] *Id*.
[77] *Id*.
[78] *See* Mike Vorel, *Suspended UW Football Coach Jimmy Lake Faces Allegations He Shoved Player in 2019*, SEATTLE TIMES (Nov. 13, 2021), https://www.seattletimes.com/sports/uw-husky-football/suspended-uw-football-coach-jimmy-lake-faces-allegations-he-shoved-player-in-2019/.
[79] *Id*.; *compare with* James Parks, *Georgia's Kirby Smart Shoves MSU Player During Game: Video,* ESPN (Oct. 12, 2024), https://www.espn.com/college-football/story/_/id/41762599/georgia-smart-says-shove-van-buren-jr-unintentional (offering video of Georgia head football coach Kirby Smart shoving Mississippi State quarterback Michael Van Buren, and authoring, "While the shove may have seemed incidental and unintentional, it still isn't the best look for a head coach to ever touch an opposing player during a game."); *see also* Chris Low, *McCarron's 'Spanking' Vintage Saban*, ESPN (Nov. 16, 2010), https://www.espn.com/blog/sec/post/_/id/16875/mccarrons-spanking-vintage-saban (reporting on tirade and subsequent spanking caught on camera that Head Coach Nick Saban gave quarterback AJ McCarron as he walked off the field and quoting Saban's perspective as a "good opportunity to teach" and a "good opportunity for [McCarron] to learn."); *see also* Paolo Uggetti, *UL Monroe Says Assistant's Sideline Meltdown 'Unacceptable'*, ESPN (Nov. 2, 2024), https://www.espn.com/college-football/story/_/id/42158428/ul-monroe-says-assistant-sideline-meltdown-unacceptable (authoring a video of the meltdown and physically shoving a football player would result in discipline to coach Camerson Blankenship).
[80] *See* Mike Vorel, *UW Huskies Fire Football Coach Jimmy Lake after 13 games*, SEATTLE TIMES (Nov. 14, 2021), https://www.seattletimes.com/sports/uw-husky-football/report-uw-huskies-head-coach-jimmy-lake-to-be-fired-after-just-14-games/.
[81] *See* Nicole Markus, *Three New Plaintiffs File Lawsuits Against Northwestern in Football Hazing Scandal*, DAILY NW., (May 8, 2024), https://dailynorthwestern.com/2024/05/08/campus/three-new-plaintiffs-file-lawsuits-against-

University (NU), and as a direct result of a hazing scandal involving the football program, publicly penned an announcement, stating, inter alia:

> Beyond the immediate actions we have announced to combat hazing, including intensive anti-hazing training for all teams and coaches, Northwestern has engaged former U.S. Attorney General Loretta Lynch to conduct a thorough review of the university's processes and accountability mechanisms to detect, report and respond to potential misconduct in its athletics programs, including hazing, bullying and discrimination of any kind. As part of her review, Lynch will also examine the culture of Northwestern athletics to ensure it is consistent with the university's mission and values.[82]

Sadly, NU's athletic department appeared to be a magnet for allegations of impropriety involving hazing, bullying, or retaliation around the same time.[83] Soon after the Northwestern University

northwestern-in-football-hazing-scandal/ (alleging hazing and mistreatment); *see also* Ralph D. Russo, *Why is Hazing Such a Widespread Problem? Abuse Prevalent Despite Efforts to Stop it*, AP NEWS (July 20, 2023), https://apnews.com/article/northwestern-hazing-fitzgerald-86f87fc8e673f284ff2c80a22f3d95ab (authoring, "The NCAA provides specific guidance to stop hazing, though it leaves anti-hazing rules and punishments to its member schools and the federal Clery Act does not require colleges to report hazing incidents."); *see also* Paul Steinbach, *Longtime Database-Keeper Hank Nuwer on Hazing: It's Not Going Away*, ATHLETIC BUS. (Sept. 5, 2023), https://www.athleticbusiness.com/leadership/article/15544248/longtime-databasekeeper-hank-nuwer-on-hazing-its-not-going-away (interviewing Hank Nuwer who began compiling a hazing database since 1975); *see also* Ron Barnett, *Former Clemson Soccer Player Settles with All but One Defendant in Hazing Lawsuit*, GREENVILLE NEWS (Mar. 21, 2016), https://www.greenvilleonline.com/story/news/local/pickens-county/2016/03/21/pcn-0330-soccer-hazing-settlement/82070650/ (reporting that Clemson soccer play Haley Ellen Hunt alleged "she suffered serious head injuries during a hazing ritual in August 2011 in which she ran at full speed into a brick wall face-first while blindfolded and made dizzy by being spun around.").

[82] *See* Michael Schill, *Michael Schill: I Accept the Criticism Over Northwestern's Hazing Scandal. We Can and Will Do Better*., CHI. TRIB. (Aug. 3, 2023), https://www.chicagotribune.com/opinion/commentary/ct-opinion-northwestern-hazing-response-michael-schill-20230803-hwwjtw4wdzflnd62wbfvcqb63e-story.html (announcing, too, that "to combat hazing, including intensive anti-hazing training for all teams and coaches, Northwestern has engaged former U.S. Attorney General Loretta Lynch to conduct a thorough review of the university's processes and accountability mechanisms to detect, report and respond to potential misconduct in its athletics programs, including hazing, bullying and discrimination of any kind."); *see also* Associated Press, *Northwestern Recommended to Enhance Hazing Prevention Training*, ESPN (June 27, 2024), https://www.espn.com/college-football/story/_/id/40445692/northwestern-recommended-enhance-hazing-prevention-training (reporting that a law firm led by Lynch recommended "…that the Athletics Department consider ways in which it can incorporate more bystander intervention, interactive, and scenario based trainings into its existing anti-hazing training program.").

[83] *See* Adam Rittenberg, *Ex-Northwestern AD Mark Murphy Named in New Hazing Lawsuits*, ESPN (Aug. 3, 2023), https://www.espn.com/college-football/story/_/id/38129125/ex-northwestern-ad-mark-murphy-named-new-hazing-lawsuits (reporting on two lawsuits by former players alleging that former head football coach Pat Fitzgerald "knew and encouraged this behavior to happen to these very young and impressionable men."); *see also* Claire Savage, *A Latino Player Says His Northwestern Teammates Hazed Him by Shaving 'Cinco de Mayo' onto His Head*, AP NEWS (Aug. 2, 2023), https://apnews.com/article/northwestern-football-hazing-cinco-de-mayo-7c3f77cec4067b5f00b9ae174b6cb307 (reporting on the tenth lawsuit filed against Northwestern University at that time, accusing the athletic department of causing psychological and emotional damage to athletes of color, and suggesting that head football coach Fitzgerald may have been aware of hazing which ultimately led to his firing after 17 seasons); *see also* Chris Bengel, *Northwestern Fires Baseball Coach Jim Foster Following Allegations of 'Bullying and Abusive behavior'*, CBS SPORTS (July 14, 2023), https://www.cbssports.com/mlb/news/northwestern-fires-baseball-coach-jim-foster-following-allegations-of-bullying-and-abusive-behavior/ (reporting that the coach was fired just three days after the football coach); *see also* Adam Rittenberg, *Three Ex-Northwestern Baseball Staffers File Lawsuit*, ESPN (Aug. 14, 2023), https://www.espn.com/college-sports/story/_/id/38191367/three-ex-northwestern-baseball-staffers-file-lawsuit (reporting that two former assistant coaches and the baseball operations

football hazing scandal in 2023, more than 1,000 former Northwestern athletes sent a letter condemning hazing and asserted that the athletics culture at the institution was not defined by the allegations. The letter was entitled "Support Northwestern Athletics, An Open Letter from Northwestern Student-Athlete Alumni"[84] Litigation related to NU and hazing continues to this day.[85]

The NCAA

In addition to coaching misconduct, many institutions have demonstrated that they are often incapable of dealing with allegations of abuse. Despite the National Collegiate Athletic Association's (NCAA) Constitution and Bylaws which proclaims the well-being of student-athletes as a driving principle for its member institutions, when coaching abuse start to fly, the NCAA may be of little practical assistance in addressing those concerns.[86] The NCAA's guiding principle of institutional control vests solely in the institution for the conduct of its athletics program, including the actions of its staff members and representatives of its athletics interests.[87]

Calls for athletic reform among NCAA member institutions are nothing new particularly in the way college football is managed in Division I.[88] Though the NCAA maintains that one of its purposes is to maintain the well-being of student-athletes, this principle seems to fall flat in the real world.[89] According to the Preamble of the NCAA Division I Manual from 2024-2025, "The National Collegiate Athletic Association is a voluntary, self-governing organization of four-year

director filed a lawsuit "against the university, baseball coach Jim Foster, athletic director Derrick Gragg and two other athletic administrators, alleging they were retaliated against for reporting concerns about an "abusive, toxic, and dangerous environment" within the program.").

[84] *See* Jeff Hirsh, *1000+ Alumni Athletes Sign Open Letter Supporting NU Sports*, EVANSTON NOW (Aug. 17, 2023), https://evanstonnow.com/1000-alumni-athletes-sign-open-letter-supporting-nu-sports/ (providing a copy of the letter in its entirety).

[85] *See* Michael Johnson, *Report: Judge Rules for Consolidation in Northwestern Hazing Lawsuits, 2 Cases Will Go to Trial Together*, WGN (May 21, 2024), https://wgntv.com/northwestern-hazing-allegations/report-judge-rules-for-consolidation-in-northwestern-hazing-lawsuits-2-cases-will-go-to-trial-together/.

[86] *See, e.g*., Nicholas Iovino, *NCAA Accused of Letting Coaches Sexually Abuse Athletes*, COURTHOUSE NEWS SERV. (Mar. 11, 2020), https://www.courthousenews.com/ncaa-accused-of-failing-to-protect-athletes-from-sexual-abuse-by-coaches/ (providing a link to a 106 page class action lawsuit naming the NCAA, the Board of Governors of the NCAA, and coach John Rembao).

[87] *See* NAT'L COLLEGIATE ATHLETIC ASS'N, 2024-2025 NCAA® DIVISION I MANUAL (2024-2025) ("NCAA MANUAL"), https://www.ncaapublications.com/productdownloads/D123.pdf (the expression, "institutional control" is found 36 times in the NCAA Manual, to include in the "Commitments to the Division I Collegiate Model" that, "It is the responsibility of each member institution to monitor and control its athletics programs, staff members, representatives and student-athletes to ensure compliance with the Constitution and bylaws of the Association. Responsibility for maintaining institutional control ultimately rests with the institution's campus president or chancellor.").

[88] *See* Martin Fritz Huber, *The U.S. Model for College Sports Is Unsustainable*, OUTSIDE (Aug. 17, 2023), https://www.outsideonline.com/health/running/culture-running/college-sports-pac-12-running-programs/ (writing, in reference to the recent conference realignments in college football, "The fates of thousands of amateur athletes in "non-revenue" sports will be dramatically affected by the college sport that operates most like a professional sports business." Huber continues, "Sooner or later, the football bonanza for Olympic sports will be over, especially if the players win the right to be financially compensated for their efforts on the field.").

[89] *See* Jack Baer, Missouri's *Eli Drinkwitz Asks a Good Question About Athletes' Mental Health After Big Ten's Latest expansion*, YAHOO SPORTS (Aug. 5, 2023), https://sports.yahoo.com/missouris-eli-drinkwitz-asks-a-good-question-about-athletes-mental-health-after-big-tens-latest-expansion-224121448.html

colleges, universities and conferences committed to the well-being and development of student-athletes…"[90] Additionally, in its own Constitution, Article 1, it states:

> **D Student-Athlete Well-Being.** Intercollegiate athletics programs shall be conducted by the Association, divisions, conferences and member institutions in a manner designed to protect, support and enhance the physical and mental health and safety of student-athletes. Each member institution shall facilitate an environment that reinforces physical and mental health within athletics by ensuring access to appropriate resources and open engagement with respect to physical and mental health. Each institution is responsible for ensuring that coaches and administrators exhibit fairness, openness and honesty in their relationship with student-athletes. Student-athletes shall not be discriminated against or disparaged because of their physical or mental health.[91]

Despite its commitment to student-athlete well-being in writing, some have publicly called into question the NCAA's sincerity on its mental health importance and support campaign.[92] Also, the NCAA has avoided liability in the courts for its rules and policies related to student-athlete welfare.[93] When the national organization might have the chance to send a message to its members that verbal, emotional, mental, physical, and sexual misconduct is unacceptable on college campuses, it demurs and instead maintains that it is a campus-by-campus issue, not an Indianapolis-based organizational one.[94]

In the end, it may be unrealistic to expect the NCAA to punish member institutions related to creating or fostering toxic, workplace environments for student-athletes, coaches, or anyone who

[90] *See* NCAA MANUAL, *supra* note 87, at page 1.
[91] *Id*. at 2 (referencing as Adopted: 1/20/22 effective 8/1/22). Similar language is used in Bylaw 20.9.1.6, The Commitment to Student-Athlete Well-Being. *Id*. at 378.
[92] *See* David Ubben, *Deion Sanders Blasts NCAA's Handling of Mental Health Issues after Player's Eligibility Denied*, ATHLETIC (Aug. 29, 2023), https://theathletic.com/4816543/2023/08/29/colorado-deion-sanders-tyler-brown-eligibility/?source=cfbtw (reporting and quoting Colorado head football coach Deion Sanders in relation to the NCAA, "Do you really care (about mental health), or are you saying you care? Are you caring when it's convenient?"…"Or when it's profitable?"…"It don't make sense. Some things just don't make sense."); *see also* Cydney Henderson, *'Shame on You': UNC Football Coach Mack Brown Rips NCAA after Tez Walker Ruled Ineligible*, USA TODAY (Sept 7, 2023), https://www.usatoday.com/story/sports/ncaaf/acc/2023/09/07/unc-coach-mack-brown-rips-ncaa-tez-walker-ineligible/70789098007/ (quoting UNC head football coach Mack Brown after the NCAA denied Tez Walker's transfer to the university, "We're absolutely crushed to learn that Tez Walker's eligibility has been denied for this season and he won't be able to play. I don't know that I've ever been more disappointed in a person, a group of people, or an institution than I am with the NCAA right now…").
[93] *See* Iovino, *supra* note 86; *see also* Aldrich v. Nat'l Collegiate Athletic Ass'n, 565 F. Supp. 3d 1094 (S.D. Ind. 2021) (dismissing the case based upon statute of limitations); *see also* Andy Berg, *NCAA Contends It is Not Liable for Athlete Abuse*, ATHLETIC BUS. (June 3, 2020), https://www.athleticbusiness.com/operations/legal/article/15159490/ncaa-contends-it-is-not-liable-for-athlete-abuse (referencing the Aldrich case and authoring, "For its part, the NCAA argues that it cannot be held legally responsible for sexual abuse on campuses nationwide. Attorneys for the NCAA contend "more specifically, what the NCAA's legal responsibility is for the alleged sexual abuse (all outside California) by one track coach twenty years ago. The NCAA respectfully submits the Complaint is flawed as a matter of law and that all claims against the NCAA and its Board be dismissed and/or stricken.").
[94] *See* Berg, *supra* (offering, "For its part, the NCAA argues that it cannot be held legally responsible for sexual abuse on campuses nationwide."); *but see* Claire Stevens, *Class Action Lawsuit Claiming Sexual Abuse, Harassment by Former UT Track Coach Dropped*, DAILY TEXAN (July 25, 2022), https://thedailytexan.com/2022/07/25/class-action-lawsuit-claiming-sexual-abuse-harassment-by-former-ut-track-coach-dropped/ (providing a link to the case related to the Indiana-based NCAA which had been dismissed).

falls under the purview of its bylaws or policies. In fact, some have argued that it could be impractical to expect the NCAA to enforce its own rules about anything at all.[95]

Defenses against Claims of Misconduct

Certainly, not all coaches are bad people or abusers. Nevertheless, with access to instant reports and allegations of misconduct postings via social media, their actions are put under a microscope like never before.[96] Coaches and alumni often defend themselves and their institutions against allegations as being either outright illegitimate or bias-driven by the accusers, and they might decide to sue the institution for wrongful termination.[97] In response to first-hand allegations of abusive coaching, the lawyer for one coach responded to the publication of the essay in Sports Illustrated as follows and in the name of educating others on the challenges facing female coaches around the country:

> These allegations are similar to a number of other bias-driven claims leveled primarily at female coaches. These student-athlete complaints are directed at women and label female coaches as bullies for engaging in normal coaching behavior. This is a national epidemic that is mowing down great female coaches, undermining women's rights, and threatening the future of the profession of coaching. … I have identified 200 female coaches and counting who are simply coaching just like men but are being mowed down by bias-driven complaints.[98]

Indeed, coaches do fight back against the allegations themselves—some of which might be illegitimate—and can be successful in their defense.[99] Just like anyone, coaches can choose to

[95] *See* Dan Wetzel, *Credit Kansas for Exposing What an Utter Joke the NCAA Has Become*, YAHOO SPORTS (Oct. 11, 2023), https://sports.yahoo.com/credit-kansas-for-exposing-what-an-utter-joke-the-ncaa-has-become-022733129.html (providing numerous examples of inconsistencies in NCAA enforcement and stating, "The system produces little more than selective enforcement, uneven punishments and billable hours." Wetzel continues, "Even Washington politicians know the NCAA is a fraud.")

[96] *See* Adam Epstein & Kathryn Kisska-Schulze, *Northwestern University, the University of Missouri and the "Student-Athlete": Mobilization Efforts and the Future*, 26 J. LEGAL ASPECTS OF SPORT 71, 105 (2016) ("As the iGen class continues its social media savviness within the realm of college sports, both the NCAA and university athletic programs will be hard-pressed not to take into consideration the voices of a generation raised on Google, armed with the most powerful operating systems in history, and literally within the grasp of their #hands.").

[97] *See* A Recent Member of the Cal Women's Swim Team, *Essay: As a Swimmer at Cal, I Observed Coach Teri McKeever's Abusive Behavior Firsthand*, SI.COM (June 28, 2022), https://www.si.com/college/2022/06/28/first-person-essay-recent-cal-swim-team-member-coach-teri-mckeever (providing a response to the essay and allegations at the end of the piece from McKeever's lawyer); *see also* Associated Press, *Pat Fitzgerald Suing Northwestern for $130M for Wrongful Termination*, ESPN (Oct. 5, 2023), https://www.espn.com/college-football/story/_/id/38574639/pat-fitzgerald-suing-northwestern-130m-wrongful-termination; see *also* Chris Vannini, *Pat Fitzgerald, Northwestern reach settlement in wrongful termination lawsuit*, THE ATHLETIC (Aug. 21, 2025), https://www.nytimes.com/athletic/6567478/2025/08/21/pat-fitzgerald-northwestern-settlement-hazing/.

[98] *Id*.

[99] *See* Josh Peter, *Texas Tech, Former Women's Basketball Coach Settle Lawsuit After USA TODAY Investigation*, USA TODAY (Aug. 11, 2022), https://www.usatoday.com/story/sports/ncaaw/big12/2022/08/11/texas-tech-marlene-stollings-lawsuit/10298561002/ (reporting on the lawsuit in which the head coach accused the school and athletics director of discrimination and retaliation. It is also noted that the U.S. District Court for the Northern District of Texas dismissed three parts of the lawsuit including claims of breach of contract, fraud and fraud in the inducement. Interestingly, "The claims were not dismissed on merit, but rather because the court held that Texas Tech, as a public university, enjoys the benefit of sovereign immunity.").

express their opinions on social media as well. Consider the case of former TTU women's basketball coach Marlene Stollings who sued the university after her termination, but then settled out of court and celebrated by posting the following to Twitter on August 10, 2022,

> **TODAY**, equality wins! Settled! Brought this case to clear my name, set the record straight & contribute to principles of equality & fair treatment. Thrilled! Worth the fight! Grateful to so many including SA's, parents & TTU fans. Eager to return to my life's work![100]

According to one report, former associate coach Nikita Lowry Dawkins who served under Stollings and who was also fired by the school, posted on Twitter, "Congrats Marlene! God is a just God No weapons formed against you shall EVER prosper Way to fight the good fight of faith."[101]

It is not easy to coach in a world where everything you do or say can be recorded and displayed for immediate and public consumption. Coaching in an environment in which one can be silenced, shamed, or cancelled merely due to a matter of a difference of opinion or misinterpretation can force some coaches to supervise out of fear.[102] However, coaches and institutions must also change to the changing times. College coaching abuse is a problem that must be addressed especially as the balance of power between the athletes and coaches continues to shift given the transfer portal, in which college athletes can transfer to other schools more frequently and easily than before, and state legislation related to athletes having the right to earn income based upon the use of their name, image, and likeness, something verboten in the NCAA for decades.[103]

CONCLUSION

In conclusion, the issue of student-athlete abuse by college coaches is a deeply rooted problem that has persisted for decades, as evidenced by the historical journey of this article

[100] *Id*. (reporting also that according to Stollings complaint that the TTU and the athletics director "created an environment in which male and heterosexual coaches were treated better than female and gay and lesbian coaches, and men's athletic programs were treated better than female athletic programs.'').

[101] *Id*. (reporting also, "In response to Stollings' tweet, Dawn Staley, head coach of the reigning NCAA champion women's basketball team at South Carolina and Naismith Coach of the Year, tweeted, "Congrats Marlene! Way to battle, fight and come out on top!!""); *see also* Jori Epstein, *Texas Tech Fires Assistant Women's Basketball Coach Nikita Lowry Dawkins*, USA TODAY (Aug. 7, 2020), https://www.usatoday.com/story/sports/ncaab/big12/2020/08/07/texas-tech-fires-nikita-lowry-dawkins-assistant-basketball-coach-abuse/3317705001/ (reporting that the termination followed "a USA TODAY investigation into what 10 players allege was an abusive culture under head coach Marlene Stollings, Lowry Dawkins and strength and conditioning coach Ralph Petrella. Athletic director Kirby Hocutt met with Lowry Dawkins Friday morning before terminating her, effective immediately, the spokesperson said. Hocutt fired Stollings on Thursday night. Petrella, who denies any misconduct, resigned voluntarily in March after the conclusion of the season.").

[102] *See* Ingrid Jacques, *Oberlin Coach Stood Up for Women in Sports. Then Faced Public Shaming from Her College*., USA TODAY (Aug. 29, 2023), https://www.usatoday.com/story/opinion/columnist/2023/08/29/trans-rights-womens-sports-conflict-college-coaches-fear-cancelled/70699982007/ (opining, "Until now, not many female coaches have spoken openly on this topic – perhaps out of fear of the repercussions for doing so.").

[103] *See* Ross Dellenger, *Big Money Donors Have Stepped Out of the Shadows to Create 'Chaotic' NIL Market*, SI.COM (May 2, 2022), https://www.si.com/college/2022/05/02/nil-name-image-likeness-experts-divided-over-boosters-laws-recruiting (writing, "A record of more than 2,700 FBS players entered the transfer portal since August. That's roughly 20 per team.").

beginning with the infamous punch thrown by coach Woody Hayes. Litigation abounds on the intercollegiate sports landscape. Certainly not all coaches are bad actors, and there are both examples of successful defenses by coaches and examples of where allegations may have ruined careers in the aftermath. Still, numerous high-profile cases or scandals were explored in this article which highlights that there are systemic failures within college sports that allow such abusive and toxic misconduct to continue unchecked. Sometimes, failure to report wrongdoing makes matters worse.

Despite the NCAA's written commitment to student-athlete well-being, the enforcement of rules and the punishment of institutions for creating toxic environments often fall short. The examples provided in this article demonstrate the need for more stringent oversight and accountability measures to protect student-athletes from abusive behaviors and to ensure a safe and supportive environment. Though specific steps to minimize abuse are beyond the scope of this article, moving forward it is imperative that both the NCAA and individual institutions take more proactive steps to address and deter instances of coaching abuse. Indeed, the stakes—and the pressure—are high for all parties involved.

ETHICAL FAILURE AT THERANOS

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ABSTRACT

On December 8, 2021, the lawyers for "Elizabeth Holmes… rested their case… in her criminal-fraud trial, after the founder of blood-testing start-up Theranos Inc. gave testimony over seven days in which she acknowledged regrets but also placed blame on her former deputy and boy-friend." *The Wall Street Journal* reports, "Ms. Holmes faced 11 counts of wire fraud and conspiracy. Each count carries a maximum sentence of 20 years in prison." Then, on January 3, 2022, Ms. Holmes was convicted by a federal jury "on four of eleven charges that she conducted a yearslong fraud scheme against investors while running Theranos Inc., which ended up as one of Silicon Valley's most notorious implosions." Theranos now appears to be a story of the tension between a Silicon Valley "fake-it-till-you-make-it" ethos and abandoned ethics toward the honest disclosure and treatment of investors in the capital formation process.

Keywords: accounting, AICPA, audit standards, Ramesh 'Sunny' Balwani, corporate governance, deontology, entrepreneurship, ethics, fake-it-till-you-make-it, fraud triangle, Elizabeth Holmes, patent, shareholder rights, Theranos, utilitarianism, venture capital, virtue ethics

OVERVIEW

On December 8, 2021, the lawyers for "Elizabeth Holmes… rested their case… in her criminal-fraud trial, after the founder of blood-testing start-up Theranos Inc. gave testimony over seven days in which she acknowledged regrets but also placed blame on her former deputy and boy-friend."[1] *The Wall Street Journal* reports, "Ms. Holmes faced 11 counts of wire fraud and conspiracy. Each count carries a maximum sentence of 20 years in prison."[2] Then, on January 3, 2022, Ms. Holmes was convicted by a federal jury "on four of eleven charges that she conducted a yearslong fraud scheme against investors while running Theranos Inc., which ended up as one of Silicon Valley's most notorious implosions."[3] Theranos now appears to be a story of the tension between a Silicon Valley "fake-it-till-you-make-it" ethos and abandoned ethics toward the honest disclosure and treatment of investors in the capital formation process.

Our Article proceeds in seven parts. First, we look at the history of Theranos. Second is a discussion of the litigation. Third, we present an ethical framework analysis. Fourth, we look at accounting and auditing issues. Fifth is coverage of the verdict. Sixth, we explore lessons learned. And last, we conclude. The corporate landscape is littered with the remains of fraudulent failures; many notorious, like Enron, Worldcom and Adelphia Communications.[4] Others have fallen with time from our memories. We believe that the lessons from the Theranos failure are important. Our failure to understand and reflect upon these lessons may result in a repeated pattern of these ethical failures.

I. HISTORY OF THERANOS

Start-up enterprises engaged in new and innovative technologies often present novel legal challenges and require new laws to reflect technological change.[5]

[1] Heather Somerville & Sara Randazzo, *Holmes Lawyers Rest in Theranos Fraud Trial,* WALL ST. J., Dec. 9, 2021 at B1.
[2] *Id.*
[3] Sara Randazzo, Heather Somerville & Christopher Weaver, *Theranos's Holmes Found Guilty,* WALL ST. J., Jan. 4, 2022 at A1.
[4] *See* Kenneth J. Sanney, Lawrence J. Trautman, Eric D. Yordy, Tammy W. Cowart, & Destynie Sewell, *The Importance of Truth Telling and Trust,* 37 J. LEGAL STUD. EDU. 7 (2020), http://ssrn.com/abstract=3430854; Lawrence J. Trautman, Kenneth J. Sanney, Eric D. Yordy, Tammy W. Cowart & Destynie Sewell, *Teaching Ethics and Values in an Age of Rapid Technological Change,* 17 RUTGERS BUS. L. REV. 17 (2021), http://ssrn.com/abstract=3102552.
[5] *See* Lawrence J. Trautman, *Governance of the Facebook Privacy Crisis,* 20 PITT. J. TECH. L. & POL'Y 41 (2020), http://ssrn.com/abstract=3363002; 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, *E-Commerce, Cyber and Electronic Payment System Risks: Lessons from PayPal,* 17 U.C. DAVIS BUS. L.J. 261 (2016), http://www.ssrn.com/abstract=2314119; Lawrence J. Trautman, W. Gregory Voss & Scott Shackelford, *How We Learned to Stop Worrying and Love AI: Analyzing the Rapid*

Because Theranos Inc. imploded before it became publicly traded and therefore was required to report detailed financial statements to the Securities and Exchange Commission (SEC), we must rely exclusively on court filings for detailed financial information.

Early Background

Organized under the laws of the State of Delaware, Theranos maintained its principal place of business in Palo Alto, California. A privately held life sciences and healthcare company, the stated mission of Theranos, "was to revolutionize medical laboratory testing through allegedly innovative methods for drawing blood, testing blood, and interpreting the resulting patient data — all for the purpose of improving outcomes and lowering health costs."[6] The Third Superseding Indictment filed in the United States District Court for the Northern District of California on July 28, 2020, states:

> Theranos opened and maintained a corporate bank account in Palo Alto, California at Comerica Bank. Comerica Bank is headquartered in Dallas, Texas. When Theranos solicited and received financial investments from investors, the money was deposited into its Comerica Bank account. Theranos's investors included individuals, entities, certain business partners, members of its board of directors, and individuals and entities who invested through firms formed for the exclusive or primary purpose of investing in Theranos's securities…
>
> During its first ten years, from approximately 2003 to approximately 2013, Theranos operated in what HOLMES called 'stealth mode,' with little public attention. While operating in 'stealth mode,' Theranos pursued the development of proprietary technology that could run clinical tests using only tiny drops of blood instead of the vials of blood typically drawn from an arm vein for traditional analysis. Theranos also worked to develop a method for drawing only a few drops of capillary blood from a patient's finger using a small lancet, and collecting and storing that blood in a proprietary device called the 'nanotainer.' Theranos's stated goal was to produce a second proprietary device that

Evolution of Generative Pre-Trained Transformer (GPT) and its Impacts on Law, Business, and Society, 34 ALB. L.J. SCI. & TECH. (2025), http://ssrn.com/abstract=4516154; Lawrence J. Trautman & Larry D. Foster II, Purdue Pharma, The Sackler Family, and The U.S. Opioid Epidemic, __ MICH. ST. L. REV. (forthcoming), https://ssrn.com/abstract=4679642; Lawrence J. Trautman, TikTok! TikTok: Escalating Tension Between U.S. Privacy Rights and National Security Vulnerabilities, 108 MARQ. L. REV. (forthcoming), http://ssrn.com/abstract=4163203.

[6] The Third Superseding Indictment in United States of America v. Elizabeth A. Holmes and Ramesh "Sunny" Balwani CR 18-0258 EJD was filed in United States District Court for the Northern District of California in San Jose on July 28, 2020. [hereinafter "Third Superseding Indictment].

> could quickly and accurately analyze blood samples collected in nanotainers. Theranos referred to these devices using several terms, including 'TSPU' (or Theranos Sample Processing Unit'), 'Edison,' and 'miniLab.'[7]

Decade Later Developments

After about a decade of corporate existence, Theranos reached a point where it started to publicize claims of technological advances around 2013. For example, Theranos claimed, "its proprietary methods and technologies carried several advantages over conventional blood testing.[8] The Third Superseding Indictment states that:

> For example, Theranos claimed that its laboratory infrastructure yielded test results in less time than conventional labs — requiring hours instead of days. Theranos claimed that its proprietary technology and methods would minimize the risk of human error and generate results with the highest accuracy. According to Theranos, the small blood sample size required for Theranos's proprietary tests, and its method of collecting blood by finger stick, would also benefit elderly individuals with collapsed veins, individuals who required frequent blood tests due to chronic health conditions, and any individual who feared needles. In addition, Theranos claimed that its blood tests provided substantial cost savings, advertising that it billed all of the tests on the Medicare Clinical Laboratory Fee Schedule at rates 50% or more below the published reimbursement rate.
>
> Prior to its commercial launch, HOLMES heavily promoted Theranos's supposed technological and operational capabilities. In a September 2013 press release, Theranos claimed that it had 'eliminat[ed] the need for larger needles and numerous vials of blood' by relying instead on samples 'taken from a tiny finger stick or a micro-sample taken from traditional methods.' In another press release, dated November 13, 2013, Theranos touted its use of 'blood sample[s] as small as a few drops—1/1000th the size of a typical blood draw.' In that same statement, the Company again declared that it had 'eliminat[ed] the need for large needles and numerous vials of blood typically required for diagnostic lab testing.'
>
> In addition to directing the actions of the Company, HOLMES also made statements to the media advertising the capabilities of Theranos's technology. In an interview for a Wall Street Journal article published on September 9, 2013, HOLMES said that Theranos could 'run any combination of tests, including sets of follow-on tests' at once, very quickly, all from a single small blood sample…
>
> As part of its commercial launch, as early as 2010, Theranos pursued a partnership with national pharmacy chain Walgreens. On

[7] *Id.* at 2.
[8] *Id.*

> September 9, 2013, Theranos announced that it would be rolling out Theranos 'Wellness Centers' inside Walgreens retail locations.[9]

The Scheme

At trial, a pattern of fraudulent misleading of investors over many years is presented. Many institutional venture capitalists and wealthy families are counted among Theranos investors.[10] According to reports in *The Wall Street Journal*, at trial, "During opening statements, prosecutor Robert Leach described how Ms. Holmes told investors that Theranos's technology had been validated by 10 of the 15 largest pharmaceutical companies, a claim he says was outright false."[11] For example, "Mr. Leach showed jurors a document with the Pfizer logo that he said Ms. Holmes portrayed to investors as evidence of the pharmaceutical giant's support. In fact, he said, it was a forged document."[12] Consider:

> 'Pfizer did not write this. Pfizer did not put its logo on this. Pfizer didn't give its permission to put its logo on this. Pfizer did not make the conclusions in this report,' Mr. Leach said in court…
>
> Pfizer did have a $900,000 contract before 2009, he said, but after seeing initial reports from Theranos it concluded it had no use for Theranos's technology and never did business with the company again…
>
> Investors poured more money into the company than previously known: $944.56 million over six investment rounds, according to a March 15, 2015 report… In one instance, Theranos told investors to expect $990 million in revenue in 2015, while the company had told [a valuation company it hired] that it would have $113 million or less in revenue… Prosecutors allege Ms. Holmes and Mr. Balwani lied to investors about having a profitable business relationship with the Defense Department and having Theranos technology deployed on the battlefield.[13]

Senior scientist Surekha Gangakhedkar worked at Theranos for eight years; but left during 2013, "because of her concern that the blood testing technology wasn't ready for real patients, [she] described a workplace where employees were kept in silos and Elizabeth Holmes… pressured employees to validate lab tests before they were ready to be used on patients."[14]

The Missing Patient Database

Charges that might have been brought based upon harm caused to patients from defective blood tests performed by Theranos were hampered due to a missing database.

[9] *Id.* at 3.
[10] Erin Griffith, *Tech insiders claim they saw through Elizabeth Holmes's playbook of hype, but that is a rewriting of history,* N.Y. TIMES, Jan. 5, 2022 at B1.
[11] Sara Randazzo, *Holmes's Trial Opens Window Into Her Startup,* WALL ST. J., Sept. 18-19, 2021 at B3.
[12] *Id*.
[13] *Id.*
[14] Heather Sommerville, *Ex-Theranos Chemist Says CEO Knew of Test Issues,* WALL ST. J., Sept. 18-19, 2021 at B3.

The Wall Street Journal reports, "the government subpoenaed a copy of Theranos's proprietary lab-result database, called the 'Laboratory Information System'… The database was supposed to be the key to prosecutors' ability to unearth detailed problems with the company's testing platform — and the patients its errors affected."[15] However:

> In August 2018, just days after the government received a copy on an external hard drive, Theranos officials destroyed the entire database and a couple of weeks later, dissolved the company. The government later learned that a passcode needed to make use of their hard drives was missing. A forensic expert determined the government couldn't recover the data without it.
>
> A separate grand jury investigation examining whether the database's deletion amounted to criminal obstruction of justice by Theranos officials — who had swapped emails about the missing password in the weeks before its destruction—hasn't resulted in charges, according to court filings and people familiar with the matter.[16]

Elizabeth Holmes

At age 19 Elizabeth Holmes was considered the world's youngest female billionaire after dropping out of college at Stanford University and started Real-Time Cures, later known as Theranos. Moving with her parents from Washington, DC to Houston, Texas at an early age. By age 7 she is credited with attempting to invent a "time machine, filling up an entire notebook with a detailed engineering drawing… [By] 9, Holmes told relatives she wanted to be a billionaire when she grew up… during high school… [she] developed her work ethic… quickly became a straight-A student."[17] Her entrepreneurial interest was evident early when she started her own business selling "C++ compilers, a type of software that translates computer code, to Chinese schools."[18] Ms. Holmes is 37 years old at the time of her trial.[19]

Ramesh 'Sunny' Balwani

Ramesh 'Sunny' Balwani was born in Pakistan, and in 1986 he relocated to the United States to pursue his undergraduate studies. Before working at Theranos, he worked for Microsoft and Lotus software. He later co-founded CommerceBid.com. Mr. Balwani joined Theranos in 2009 and served as its Chief Operating Officer and President. As the C.O.O. and President, he was in charge of the day-to-day operations of Theranos,

[15] Christopher Weaver & Heather Sommerville, *Theranos Patients Got Small Play,* WALL ST. J., Jan. 5, 2022 at B1.
[16] *Id.* at B2.
[17] Avery Hartmans, Sarah Jackson, Aine Cain, Azmi Haroun & Lloyd Lee, *The rise and fall of Elizabeth Holmes, the Theranos founder who is now on trial for fraud,* BUSINESS INSIDER (Dec. 7, 2021), https://www.businessinsider.com/theranos-founder-ceo-elizabeth-holmes-life-story-bio-2018-4.
[18] *Id.*
[19] *See* Griffith, *supra* note 10.

but he had no training in the medical science field.[20] The Washington Post reports that Mr. Balwani is "An immigrant from a long line of farmers, Mr. Balwani studied information systems at the University of Texas, graduating in 1990, and got a master's degree in business administration in 2003 from the University of California, Berkeley, his lawyer said."[21] In addition:

> Mr. Balwani is a veteran tech executive who worked in software, including at Lotus and Microsoft, but much of his wealth derived from work at an earlier startup. In the dot-com boom, he helped run e-commerce startup CommerceBid.com, which was acquired in 1999 for roughly $228 million in cash and stock. Mr. Balwani received shares as part of the deal that he sold for more than $40 million, based on a lawsuit he later filed against a tax adviser.
>
> He used his own money as collateral when he guaranteed a $12 million loan to Theranos in 2009, and he later invested in the company.[22]

The Directors

The Wall Street Journal reports that, "Ms. Holmes recruited a star-studded board of Washington insiders, including former Secretaries of State Henry Kissinger and George Schultz, who knew little about healthcare but were drawn in by her vision and conviction about Theranos's prospects."[23] This impressive group of high profile and experienced corporate directors appears to have been missing in action when it comes to oversight. *The Washington Post* reports:

> At one point, Theranos's board also included former Secretary of State Henry Kissinger; former Defense Secretary William Perry; former senators Sam Nunn and William Frist; Richard Kovacevich, a former chief executive officer of Wells Fargo & Co.; William Foege, the former director of the Centers for Disease Control; Gary Roughead, a former U.S. Navy admiral; Riley P. Bechtel, a former board chairman of Bechtel Group Inc., and James Mattis, a former U.S. Marine Corps general who later served as a defense secretary in the Trump administration.[24]

We will now explore the role of the board in discharging their duties and responsibilities in furtherance of their corporate governance function.

[20] Heather Somerville, *Ramesh 'Sunny' Balwani: Who Is the Former Theranos President and What Was He Convicted Of?,* WASH. POST, Nov. 18, 2022, https://www.wsj.com/articles/who-is-ramesh-sunny-balwani-theranos-what-to-know-11647291759.
[21] *Id.*
[22] *Id.*
[23] *See* Randazzo, et al., *supra* note 3 at A2.
[24] Timothy L. O'Brien, *Theranos Directors Pay No Price for Holmes's Fraud,* WASH. POST, Jan. 4, 2022, https://www.washingtonpost.com/business/theranos-directors-pay-no-price-for-holmess-fraud/2022/01/04/858bc27c-6d95-11ec-b1e2-0539da8f4451_story.html.

Failure of Corporate Governance

Corporations are created by state-granted charters, their governance dictated by state law, with corporate directors responsible for managing the affairs of the corporation.[25] Delaware courts have stated that the business judgment rule is a "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[26] Under Delaware law, directors owe their corporation and shareholders fiduciary duties of care and loyalty.[27] Unfortunately, like Enron,[28]

[25] DEL. CODE ANN. tit. 8, § 141(a) (1991) ("The business and affairs of a corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation."). While more than half of all publicly-owned United States corporations are chartered under the laws of the state of Delaware, corporate counsel and directors will want to closely examine the laws of relevant states when considering any particular matter. See also Gilson & Kraakman, *Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?,* 44 BUS. LAW. 247, 248 (Feb. 1989) ("Delaware corporate law… governs the largest proportion of the largest business transactions in history"); Lawrence J. Trautman, *Who Sits on Texas Corporate Boards? Texas Corporate Directors: Who They Are and What They Do,* 16 HOUSTON BUS. & TAX L.J. 44 (2016) (describing the experience and demographics of corporate directors in Texas), http://ssrn.com/abstract=2493569; Stephen M. Bainbridge, *Why a Board? Group Decision making in Corporate Governance,* 55 VAND. L. REV.1 (2002), http://ssrn.com/abstract=266683; Lawrence J. Trautman, *Corporate Boardroom Diversity: Why Are We Still Talking About This?*, 17 SCHOLAR 219 (2015), http://www.ssrn.com/abstract=2047750.

[26] Lawrence J. Trautman & Kara Altenbaumer-Price, *The Board's Responsibility for Information Technology Governance,* 29 J. MARSHALL J. COMPUTER & INFO. L. 313 (2011), *citing Unitrin, Inc. v. Am. Gen. Corp.,* 651 A.2d 1361, 1373 (Del. 1995) (*quoting Aronson v. Lewis,* 473 A.2d 75 (Del. 1992). *See also* Robert J. Rhee, *The Tort Foundation of Duty of Care and Business Judgment,* 88 NOTRE DAME L. REV. 1139 (2013), http://ssrn.com/abstract=2261708; Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence,* 55 DUKE L.J. (2005), http://ssrn.com/abstract=728431.

[27] *See* Trautman & Altenbaumer-Price, *supra* note 26 at 313, *citing Smith v. Van Gorkom*, 488 A.2d 858 (Del.Supr. 1985). *See generally* Stephen M. Bainbridge, Star Lopez & Benjamin Oklan, The Convergence of Good Faith and Oversight. UCLA School of Law, Law-Econ Research Paper No. 07-09, http://ssrn.com/abstract=1006097; Julian Velasco, *How Many Fiduciary Duties Are There in Corporate Law?,* 83 S. CAL. L. REV. 1213 (2010), http://ssrn.com/abstract=1457804; Bernard S. Black, *The Core Fiduciary Duties of Outside Directors,* ASIA BUS. L. REV. 3 (2001), http://ssrn.com/abstract=270749. *But see* William T. Allen, Modern Corporate Governance and the Erosion of the Business Judgment Rule in Delaware Corporate Law, CLPE Research Paper No. 06/2008, http://ssrn.com/abstract=1105591; Stuart R. Cohn, *Demise of the Director's Duty of Care: Judicial Avoidance of Standards and Sanctions Through the Business Judgment Rule,* 62 TEX. L. REV. (1983), http://ssrn.com/abstract=2147199; Eric J. Pan, *Rethinking the Board's Duty to Monitor: A Critical Assessment of the Delaware Doctrine,* 38 FLA. ST. U. L. REV. (2011), http://ssrn.com/abstract=1593332; Bernard S. Black, Brian R. Cheffins & Michael Klausner, *Outside Director Liability,* 58 STAN. L. REV. 1055 (2006), http://ssrn.com/abstract=894921; H. Justin Pace & Lawrence J. Trautman, Mission Critical: *Caremark. Blue Bell,* and Director Responsibility for Cybersecurity Governance, 2022 WIS. L. REV. 887 (2022), http://ssrn.com/abstract=3938128; H. Justin Pace & Lawrence J. Trautman, Climate Change and *Caremark* Doctrine, Imperfect Together, 25 U. PA. J. BUS. L. 777 (2023), http://ssrn.com/abstract=4202412; H. Justin Pace & Lawrence J. Trautman, *Financial Institution D&O Liability After Caremark and McDonald's,* 76 RUTGERS U. L. REV. 449 (2024), http://ssrn.com/abstract=4566471; Lawrence J. Trautman, Seletha Butler, Frederick Chang, Michele Hooper, Ron McCray & Ruth Simmons, *Corporate Directors: Who They Are, What They*

WorldCom, the GM ignition switch failure,[29] more recently with the FTX crypto implosion,[30] and here in the case of Theranos, examples of failures in corporate governance may be found in newspapers almost daily. The key duties of corporate directors – the duty of care, duty of loyalty, and duty of good faith represent the foundation of corporate governance.[31] While technology companies often present difficult governance issues,[32] the facts portrayed in the Theranos litigation may create serious questions about the directors' discharge of their duties and responsibilities. See additional discussion at § VI, *Infra.*

II. THE LITIGATION

Securities and Exchange Commission Civil Lawsuits

Do, Cyber and Other Contemporary Challenges, 70 BUFF. L. REV. 459 (2022), http://ssrn.com/abstract=3792382.

[28] Paul M. Healy & Krishna G. Palepu, *The Fall of Enron,* 17 J. ECON. PERSPECTIVES 3 (2003) (market capitalization in excess of $60 billion at dec. 30, 2000), https://pubs.aeaweb.org/doi/pdf/10.1257%2F089533003765888403.

[29] Marianne M. Jennings & Lawrence J. Trautman, *Ethical Culture and Legal Liability: The GM Switch Crisis and Lessons in Governance,* 22 B. U. J. SCI. & TECH. L. 187 (2016), http://ssrn.com/abstract=2691536.

[30] Lawrence J. Trautman & Larry D. Foster II, The FTX Crypto Debacle: Largest Fraud Since Madoff?, 54 U. MEMPHIS L. REV. 289 (2023), http://ssrn.com/abstract=4290093.

[31] *See* 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, *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.

[32] *See* 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; 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, Mohammed T. Hussein, Louis Ngamassi & Mason Molesky, *Governance of The Internet of Things (IoT)*, 60 JURIMETRICS J. 315 (Spring 2020), http://ssrn.com/abstract=3443973; Lawrence J. Trautman & Peter C. Ormerod, *WannaCry, Ransomware, and the Emerging Threat to Corporations*, 86 TENN. L. REV. 503 (2019), http://ssrn.com/abstract=3238293; David D. Schein & Lawrence J. Trautman, *The Dark Web and Employer Liability*, 18 COLO. TECH. L.J. 49 (2020), http://ssrn.com/abstract=3251479; 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, *Managing Cyberthreat,* 33 SANTA CLARA HIGH TECH. L.J. 230 (2016), http://ssrn.com/abstract=2534119.

It is the role and responsibility of the Securities and Exchange Commission (SEC) to protect investors from fraud.[33] The SEC is constantly challenged by the rapid pace of technological change.[34]

In 2018, Holmes settled civil securities fraud charges with the Securities and Exchange Commission (SEC) for raising over $700 million from investors in what it described as an "elaborate, years-long fraud in which they exaggerated or made false statements about the company's technology, business and financial performance…[35]" The SEC alleged in its complaint[36] that Holmes and Balwani made "…numerous false and misleading statements in investor presentations, product demonstrations, and media articles by which they deceived investors into believing that its key product – a portable blood analyzer – could conduct comprehensive blood tests from finger drops of blood, revolutionizing the industry…[37]" However, the Theranos analyzer could only complete a "small number of tests, and the company conducted the vast majority of patient test on modified and industry-standard commercial analyzers manufactured by others…[38]" instead.

In addition, the SEC alleged that Holmes and Balwani claimed that Theranos products were deployed on the battlefield in Afghanistan by the U. S. Department of Defense and on medevac helicopters, but the technology was never deployed in this capacity[39]. Finally, Holmes and Balwani claimed that the company would generate $100

[33] *See generally* David Nows & Lawrence J. Trautman, The Growing Role of Venture Studios in Startup Finance, 76(2) CASE WESTERN RES. L. REV. (forthcoming), http://ssrn.com/abstract=5124599; Neal F. Newman, Lawrence J. Trautman & Brian Elzweig, *Capital Formation, The SEC, and Accredited Investors*, 27 U. PA. J. BUS. L. 130 (2024), https://ssrn.com/abstract=4771089; Lawrence J. Trautman, Brian Elzweig & Neal F. Newman, Guide to SEC and Business Open Source Corporate Intelligence, 25 U.C. DAVIS BUS. L.J. 54 (2025), https://papers.ssrn.com/abstract=5002093; Lawrence J. Trautman & Neal F. Newman, *A Proposed SEC Cyber Data Disclosure Advisory Commission*, 50 SEC. REG. L.J. 199 (2022), http://ssrn.com/abstract=4097138.

[34] 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; Lawrence J. Trautman & Brian Elzweig Neal F. Newman, The SEC Proposed Cybersecurity Infrastructure Rules and New Disclosure Requirements, 94 UMKC L. REV. (forthcoming), https://ssrn.com/abstract=4536669; 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, Brian Elzweig & Neal F. Newman, The SEC, Fraud, and Crypto Currencies, 90 MO. L. REV. (forthcoming), https://ssrn.com/abstract=4965035; Lawrence J. Trautman, Scott Shackelford, Brian Elzweig & Peter C. Ormerod, *Understanding Cyber Risk: Unpacking and Responding to Cyber Threats Facing the Public and Private Sectors,* 78 U. MIAMI L. REV. 840 (2024), https://ssrn.com/abstract=4262971; Lawrence J. Trautman & George P. Michaely, *The SEC & The Internet: Regulating the Web of Deceit*, 68 CONSUMER FIN. L.Q. REP. 262 (2014), http://www.ssrn.com/abstract=1951148; 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.

[35] Securities and Exchange Commission Litigation Release No. 24069, March 19, 2018.

[36] Securities and Exchange Commission v. Elizabeth Holmes and Theranos, Inc. Case 5:18-cv-01602.

[37] *Id*.

[38] *Id.*

[39] *Id.*

million in revenue in 2014, but it generated a little more than $100,000 from operations that year[40]. In the settlement with the SEC for these claims, Holmes never admitted or denied the allegations in the SEC complaint[41]. Holmes agreed to pay a $500,000 penalty and return the 18.9 million shares that she earned as part of the fraud and relinquish voting control of Theranos. In addition, she is barred from serving as an officer or director of a public company for 10 years[42]. The SEC continued to litigate the claims against Balwani.

Criminal Conspiracy and Wire Fraud Charges against Holmes and Balwani

On July 20, 2020, Holmes and Balwani were indicted by a federal Grand Jury[43] for conspiracy[44] and wire fraud[45] charges relating to the fraud committed against investors and patients in addition to a claim seeking the forfeiture of wire fraud proceeds[46]. A "conspiracy" is an agreement among two or more people to commit a crime. On the other hand, "wire fraud" occurs when any communication using a wire including writings, signals and sounds made to intentionally defraud others and is subject to a maximum of 20 years[47]. This case is very similar to the case brought by the SEC. In both cases, investors were allegedly deceived by means of verbal and written communications, marketing materials, financial statements and models that were false or misleading, and by misleading statements made to the media[48].

Also similar to the SEC case, Holmes and Balwani represented to investors that the portable blood analyzer was at that time capable of performing a wide range of clinical tests using tiny blood samples that were drawn from a finger stick and producing results that were more accurate and reliable than those yielded by larger conventional methods. However, the defendants knew that the company's machine had accuracy and reliability problems and performed a limited number of tests that were slower than the devices manufactured by their competitors[49].

Similarly, the Justice Department alleged that Holmes and Balwani claimed that Theranos was a strong and stable company and would generate $100 million in revenues and break even in 2014 and that Theranos was expected to generate approximately $1 billion in revenue the next year. However, it would generate only a few hundred thousand dollars in 2014 and 2015[50].

Law Versus Ethics

Ethical behavior falls on a continuum from what is viewed as ethical and what is viewed as unethical. The law provides a boundary or moral minimum standard of conduct

[40] *Id*.
[41] *Id*.
[42] *Id*.
[43] Third Superseding Indictment, *supra* note 6.
[44] 118 U.S.C. §1349.
[45] 18 U.S.C. §1343.
[46] 18 U.S.C. § 981 (a)(1)(C) and 28 U.S.C. § 2461 (c) allow recovery of the proceeds traceable to offenses relating to the fraud counts alleged in the complaint.
[47] 18 U.S.C. §1343.
[48] *See* Third Superseding Indictment, *supra* note 6 at 4.
[49] *Id.*
[50] *Id*.

and when a person's conduct falls below that minimum standard set by the government, that person is punished by the law. Ethics goes above and beyond that minimum set by the law. We will now examine this fact pattern via an ethical framework analysis.

III. ETHICAL FRAMEWORK ANALYSIS

An Overview of Corporate Governance

Corporate governance is the implementation of policies and procedures to moderate or minimize the risk of unethical behavior by organization members.[51] It is a system of management and control that is intended to infuse accountability and trust in an organization.[52] Corporate governance rules, practices, and procedures are most effective when they balance the needs and interests of the many different company stakeholders.[53]

At the board and officer levels, good corporate governance activities include having a board and slate of officers that are diverse in background and experience, practices and policies that ensure director independence and objectivity, and regular review of director and officer compensation.[54] Payment of directors with at least some ownership interests is likely to ensure that they are invested in the long-term reputation and well-being of the organization.[55]

Aspects of corporate governance might include a formal ethics program for the reporting of questionable behavior, an articulated code of conduct or code of ethics, and formal training for employees on ethics.[56] In addition, corporate governance includes implementation of policies and procedures to reduce the likelihood of unethical behavior. Examples of these policies and procedures include ensuring that there is a paper trail for all financial transactions, that the trail of cash includes multiple individuals, and that no single individual can collect cash, report cash, deposit cash, and reconcile the accounts.[57] Corporate governance also includes personnel policies and procedures to ensure that employees are not supervised by family members and that relationships between supervisors and supervisees are not allowed (or that there is a process for reporting those relationships and altering reporting structures when they are reported).[58]

[51] Kuldeep Singh & Deepa Pillai, *Corporate Governance in Small and Medium Enterprises: A Review*, 22 Corporate Governance 23 (2022). *See also* 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; Lawrence J. Trautman & Janet Ford, *Nonprofit Governance: The Basics*, 52 AKRON L. REV. 971 (2018), https://ssrn.com/abstract=3133818.

[52] OECD, *G20/OECD Principles of Corporate Governance,* OECD Publishing (2015), *http://dx.doi.org/10.1787/9789264236882-en*.

[53] Aimee B. Forsythe, *Six Essential Elements of Effective Corporate Governance,* CAMBRIDGE TRUST (Jul. 24, 2018), https://www.cambridgetrust.com/insights/investing-economy/six-essential-elements-of-effective-corporate-gove.

[54] *Id.*

[55] Melody Carper, *10 Board Compensation Best Practices*, Climbtheladder.com, Nov. 13, 2022. https://climbtheladder.com/10-board-compensation-best-practices/

[56] *See* FERRELL, FRAEDRICH & FERRELL, BUSINESS ETHICS: ETHICAL DECISION MAKING AND CASES 40-44 (12th ed.) 2019.

[57] *Id.*

[58] *Id*.

In some countries, corporate governance is largely a governed by law or nationally articulated principles, while in others corporate governance is the result of individual companies or industries setting standards to comply with laws related to securities, consumer protection, and similar fields.[59] In the United States, minimum standards for corporate governance are the result of state law or federal securities law, primarily through the Sarbanes-Oxley Act of 2002.[60]

Title III of Sarbanes-Oxley, known as SOX, is entitled "Corporate Responsibility" and includes several provisions directly related to corporate governance practices.[61] Section 301 requires that the board of directors of any corporation registered with the Securities and Exchange Commission have an audit committee made up of all members who "external directors" or not affiliated with the company in any way other than serving on the board.[62] This independent audit committee is directly responsible for selection and oversight of external auditors.[63]

Section 302 requires that the chief executive officer and chief financial officer sign any financial statements and SEC reports and certify that they have reviewed the report and attest to the accuracy and fairness of the report to their knowledge.[64] In addition, Section 302 requires that internal controls be established and maintained to assist the officers in the detection of any irregularities or inaccuracies in the financial statements and reports.[65]

Section 302 also requires officers to disclose to the auditors and audit committee any "weaknesses in internal controls" including "deficiencies in the design or operation of internal controls."[66] They also must disclose any identified fraud that involved management and other employees with a role in the internal control processes.[67] The details of the internal control policies and procedures generally are left to the company, but they must be reviewed and assessed regularly to ensure that they are sufficient to detect fraud.[68] In designing and reviewing the controls, it is helpful to understand the theory behind why and how fraud occurs in organizations. One common articulation in accounting and finance literature of the reasons fraud can occur is the three-factor "fraud triangle."[69]

The Fraud Triangle and Failures of Corporate Governance

[59] OECD (2021), "OECD Corporate Governance Factbook 2021", https://www.oecd.org/corporate/corporate-governance-gacrbook.htm at 33.
[60] *Id*. at 36-7. *See also*, Theodore O'Brien, *The Bleeding Edge: Theranos and the Growing Risk of an Unregulated Private Securities Market*, 28 U. MIAMI BUS. L. REV. 404, 414. (2020).
[61] SOX, https://www.govinfo.gov/content/pkg/PLAW-107publ204/html/PLAW-107publ204.htm.
[62] SOX Sec 301.
[63] *Id*.
[64] SOX Sec 302.
[65] *Id*.
[66] *Id.*
[67] *Id. See also* Neal Newman & Lawrence J. Trautman, *Securities Law: Overview and Contemporary Issues,* 16 OHIO ST. BUS. L.J. 149 (2021), http://ssrn.com/abstract=3790804.
[68] *Id*.
[69] Assn. Of Govt. Accountants, https://www.agacgfm.org/Intergov/Fraud-Prevention/Fraud-Awareness-Mitigation/Fraud-Triangle.aspx

The fraud triangle theory was developed to explain why some employees in positions of trust would abuse their authority and embezzle or otherwise steal from the company while others would not.[70] The three components of the fraud triangle are summarized as pressure (or motivation), opportunity, and rationalization.[71] Pressure to commit fraud, whether financial fraud and theft, or other types of fraud like inflated production or sales numbers (or even a situation like Volkswagen where there was a coordinated effort to circumvent testing of emissions), can come from a variety of sources.[72] Organization-generated pressure comes from an overly competitive culture, a pay structure based on achievement or "numbers," or a perception (or reality) that the organization is understaffed, and the workload is not manageable.[73] Pressure also might be unrelated to the organization but may be personal to the individual tempted to commit the fraud. This pressure could be unexpected bills, vices such as gambling, life changes such as a child entering college or a spouse losing a job.

Rationalization is the concept that the person tempted to commit the fraud must believe (or convince oneself) that the fraud is not only "needed" which is the pressure component, but also is worth the risk.[74] Justification can be related to the organization such as a feeling that the employee is undervalued either financially or in terms of recognition and praise.[75] Rationalization could come from organization decisions, such as an employee not getting a promotion or a bonus. Other times, the rationalization is more internal – a sense of entitlement or a belief that the activity is "victimless." Taking a few dollars or taking supplies or equipment might be seen as a minimal incursion to the organization but a tremendous benefit to the actor.[76]

The third component of the fraud triangle is opportunity.[77] Opportunity arises when an actor has the ability to commit fraud or theft with very low risk of detection.[78] Opportunity most often is the target of internal controls and corporate governance – implementation of policies that minimize or eliminate the opportunity to commit fraud or theft without collusion by multiple actors.[79] For example, separating a purchasing function from a receiving function would require one person or group to place and record orders and a different person or group to receive and record orders when arrived. A reconciliation of the records of the two different groups should show consistent numbers

[70] Leandra Lederman, *The Fraud Triangle and Tax Evasion*, 106 IOWA L. REV. 1153, 1156-57 (2021).
[71] *Id*.
[72] AICPA, Management Override of Internal Control: The Achilles' Heel of Fraud Prevention, at 10 (2016), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwifx4vM4Y38AhVMNEQIHTsJAVgQFnoECBsQAQ&url=https%3A%2F%2Fus.aicpa.org%2Fcontent%2Fdam%2Faicpa%2Fforthepublic%2Fauditcommitteeeffectiveness%2Fdownloadabledocuments%2Fachilles_heel.pdf&usg=AOvVaw2SiAn7Q-P10SHyPr1RHkK2.
[73] *Id.*
[74] Lederman, *supra* note 68 at 1200-1206.
[75] *Id.*
[76] *See*, Lederman *supra* note 68 at 1200-1206 for a discussion of normative thinking.
[77] *Id.* at 1156.
[78] *Id.* at 1188-90.
[79] *See* Scott Langlinais, *Reducing the Opportunity to Commit Fraud,* IRMI (March 8, 2008) https://www.irmi.com/articles/expert-commentary/reducing-the-opportunity-to-commit-fraud.

and dollar amounts from the order to the receipt. To commit fraud, two people (or two actors from the two groups) would have to work together.[80]

III. THE ACCOUNTING AND AUDITING ISSUES

Role of an Auditor

Management (the auditee) is responsible for designing and implementing programs and controls to prevent, deter, and detect fraud. The auditor, however, has responsibility to plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement, whether caused by error or fraud.[81] On the auditor's part, this includes maintaining an attitude of what's referred to as professional skepticism which includes a questioning mind and critical assessment of audit evidence [82]. Moreover, the auditor should consider that fraud can occur regardless of any past experience with the entity or any belief about management's honesty and integrity.

- The auditor should assess fraud risks as part of planning for the audit. These procedures include:
- Discussing with the audit team the risk of material misstatement due to fraud
- Inquiring with management, audit committee, and others about their views on the risks of fraud and how it is addressed.
- Identifying and assessing fraud risks factors and developing an appropriate response
- Evaluating audit evidence and making an appropriate communication about fraud
- Documenting the auditor's consideration of fraud[83]

Discussion among the team should include brainstorming about:

(1) how and where the financial statements might be susceptible to material misstatement due to fraud,
(2) how management could perpetuate and conceal fraudulent financial reporting,

[80] At least one theory posits a requirement for a fourth criteria, creating a "fraud diamond." *See* David T. Wolfe and Dana R. Hermanson, *The Fraud Diamond: Considering the Four Elements of Fraud*, CPA J. 38 (2004) for a description of "capability" as the fourth element. Wolfe and Hermanson argue that successful fraud requires, in addition to the original three components, capability, which is described as not only the desire but the position, responsibility, and skills to actualize the activity. It appears that Wolfe and Hermanson really are separating opportunity into two components – the weakness in the system which creates "opportunity" and the traits or position of the actor, which constitutes "capability." Both factors fall under opportunity in descriptions of the fraud triangle.

[81] WILLIAM MESSIER JR, STEVEN GLOVER, DOUGLAS PRAWITT, AUDITING & ASSURANCE SERVICES: A SYSTEMATIC APPROACH, 43 (12th Ed., 2022).

[82] *Id.*

[83] BECKER CPA EXAM REVIEW - AUDITING V4.1 MODULE 1 A3-4 - A3-5.

> (3) how assets could be misappropriated, and 4) how financial statements could be manipulated through management bias in accounting estimates, or… override of controls.[84]

Best practices seem to indicate that, Inquiries of management and others should be made regarding 1) the programs and controls that management has established to mitigate specific fraud risk factors 2) how the audit committee exercises oversight activities and 3) whether management has satisfactorily responded to internal audit findings during the year."[85] In addition, "Identifying and assessing fraud risks factors includes 1) analyzing risks to determine if it involves fraudulent financial reporting or misappropriation of assets, 2) determining if it leads to material misstatement, [and] (3) determining how likely it is to happen.[86]

Best practice indicates that auditors should, 1) determine[e] how to assign personal to the engagement and level of supervision 2) alter[] the nature, extent, and timing of audit procedures according to specifically identified fraud risks, and 3) obtain[] an understanding of the entity's financial reporting process and controls of journal entries and other adjustments.[87]

Evaluating audit evidence involves an understanding what conditions identified during fieldwork may affect the auditor's assessment of fraud risk. More importantly, however, is appropriate communication. Generally, any indication of fraud should be discussed with an appropriate level of management at least one level above those involved.[88] Particular attention should be given to fraud that causes a material misstatement which should be discussed with senior management and reported directly to those charged with governance, and fraud involving senior management which should be reported directly to those charged with governance (audit committee of the board).[89]

Finally, the auditor is required to document 1) the planning discussion, 2) procedures performed to obtain information related to fraud risk, 3) results of procedures performed to address the risk of management override of controls, and 4) the nature of communications made about fraud.[90] This includes determining if management (the auditee) has adequately identified, controlled, and mitigated business risks to reduce the risks or material misstatement to an acceptable level.

Was There No Audit at Theranos?

The issues at Theranos beg the question of whether there was an audit committee or audits of Theranos' financial statements by outside auditors. As explained above, all companies registered with the SEC are required under SOX to have an auditor, an audit committee, or some person(s) serving such functions.[91] If such a company has a chief

[84] Becker CPA Exam Review – Auditing v4.1.Module 1 A3-5.
[85] MESSIER JR, *supra* note 79 at 110.
[86] Becker CPA Exam Review – Auditing v4.1. Module 1 – A3-6.
[87] Becker CPA Exam Review – Auditing v4.1.Module A3-8.
[88] Becker CPA Exam Review – Auditing v4.1.Module 1 A3-9.
[89] Hon. Bernice Donald, Brian Elzweig, Neal F. Newman, H. Justin Pace & Lawrence J. Trautman, Crisis at the Audit Committee: Challenges of a Post-Pandemic World, REV. BANKING & FIN'L L. 119 (2023-2024), http://ssrn.com/abstract=4240080.
[90] Becker CPA Exam Review – Auditing v4.1. Module 1 A3-10.
[91] *See* discussion *supra* Part III and note 50.

financial officer ("CFO") or someone serving that function, that person must attest to the accuracy of the financial statements and reports to the SEC.[92] These requirements are generally for public companies and not necessarily private companies issuing private offerings like Theranos. But often such requirements are required by lenders or investors, especially for larger companies like Theranos.[93] The financial issues at Theranos would likely not have been possible if Theranos had been a public company.[94]

Apparently, Theranos had a formal CFO from its inception through 2006 but never hired another one thereafter, except when Philippe Poux was appointed as interim CFO in mid-2017 as interim CFO as interim CFO as the company was faced with federal investigations and lawsuits.[95] According to Francine McKenna, investigative journalist and lecturer at The Wharton School, The University of Pennsylvania, Justin Offen of PwC, testified that he represented Theranos between 2016 and 2019 and that the company had no permanent CFO or external auditor during that period.[96] An SEC filing indicates that Howard Bailey served as CFO in from February 2006 to November 2006.[97] Apparently, Henry Mosley also served as CFO for Theranos in 2006 as journalist and author John Carreyrou writes that Holmes fired Mosley and that before Mosley was fired, he hired So Han Spivey, a.k.a. "Danise Yam Spivey" or "Danise Yam."[98] According to the FBI's report of their interview with Yam dated July 15, 2021 (the "Interview Report"), Yam stated that although Bailey hired her, she was surprised that Bailey left Theranos "a few months after she started" working there.[99] Yam served as Theranos' corporate controller and reported directly to Elizabeth Holmes from 2006 until March, 2017.[100]

The Interview Report indicates that Theranos had audited financial statements from 2005 through 2008.[101] Yam testified during Holmes' criminal trial that Ernst & Young was Theranos' corporate auditor in 2006, 2007, and 2008, but that Theranos hired KPMG as its auditor in 2009 to replace Ernst & Young.[102] Yam also testified that KPMG never issued an opinion for 2009 or 2010 financial statements due to a disagreement between KPMG and Theranos regarding the valuation of stock options issued to Holmes and other employees in May 2010.[103] The Interview Report indicates that the valuation issue was the main hurdle regarding the audited financial statements and that after there was no resolution to the disagreement with KPMG, Theranos had no audited financial

[92] *Id.*
[93] T. O'Brien, *The Bleeding Edge: Theranos and the Growing Risk on an Unregulated Private Securities Market,* 28 U. MIAMI BUS. L. REV., 404 (2020).
[94] *Id.*
[95] Francine McKenna, Elizabeth Holmes and her Big 4 audit firm buddies at Theranos. *The Dig (Online)* (Jan. 6, 2022), https://thedig.substack.com/p/elizabeth-holmes-and-her-big-4-audit.
[96] *Id.*
[97] Corsair Components, Inc. *Form S-1,* (Apr. 26, 2012), (https://www.sec.gov/Archives/edgar/data/1486183/000119312512186418/d52593ds1a.htm.
[98] JOHN CARREYROU, BAD BLOOD: SECRETS AND LIES IN A SILICON VALLEY STARTUP, (Vintage 2020).
[99] FBI Interview of Danise Yam Spivey, *USA v. Holmes, et al.*, Criminal Docket For Case #: 5:18-cr-00258-EJD-1, Docket Entry No. 1000-4.
[100] *See* McKenna, *supra* note 93.
[101] *See* FBI Interview of Yam, *supra* note 97.
[102] *See* McKenna, *supra* note 93.
[103] *Id*.

statements.[104] Yam also noted in the FBI interview that in her experience, "it was unusual for a company to have financial statements for a period of time, then stop having audited financial statements."[105]

Again, lenders and investors often require companies to provide audited financial statements that are audited by an outside audit firm. McKenna reports that Fortress Investment Group LLC demanded an independent auditor's opinion on Theranos' In turn, Theranos hired audit firm OUM & Co. LLP, whose audit opinion reportedly concluded that even with the financing sought, "Theranos would not have enough cash to support itself for the next 12 months."[106] McKenna further reports that according to people knowledgeable about the contents of OUM's audit opinion, the opinion "included an 'emphasis of matter' paragraph that highlighted the existence of material uncertainty regarding Theranos' ability to continue as a going concern."[107]

Where Was The Theranos Audit Committee?

Accounts of the Theranos fraud leaves fundamental questions of: "where were the outside auditors;" and "where was the board's audit committee during all these years of capital formation? Helpful to understanding how this situation may have come to pass, The New York Times reported that during 2014, "Dan Mosley, a lawyer and power broker among wealthy families, asked the entrepreneur Elizabeth Holmes for audited financial statements of Theranos. Theranos never produced any, but Mr. Mosley invested $6 million in the company anyway — and wrote Ms. Holmes a gushing thank-you email for the opportunity."[108]

IV. THE VERDICT

Holmes Found Guilty

On January 3, 2022, Ms. Holmes was convicted by a federal jury "on four of eleven charges that she conducted a yearslong fraud scheme against investors while running Theranos Inc."[109] The first was Count No. 1, a conspiracy to commit wire fraud with Balwani to defraud Theranos investors from 2010 to 2015 under 18 U.S.C. §1349[110]. Holmes was also found guilty on Counts No. 6, 7 and 8 under 18 U.S.C. §1343[111] for wire fraud for defrauding investors. No verdict was rendered on Counts 3, 4 and 5 for defrauding investors. Holmes was acquitted on Count 2 for conspiracy to defraud Theranos patients who received inaccurate lab tests and for related wire fraud

[104] *See* FBI Interview of Yam, *supra* note 97.
[105] *Id.*
[106] Francine McKenna, *A Requiem for Independent Audits: The Last Days of Theranos*, (Oct. 21, 2018), https://francinemckenna.com/2018/10/21/a-requiem-for-independent-audits-the-last-days-of-theranos/
[107] *Id.*
[108] Erin Griffith, *What Red Flags? Elizabeth Holmes Trial Exposes Investors' Carelessness,* N.Y. Times (Nov. 4, 2021), https://www.nytimes.com/2021/11/04/technology/theranos-elizabeth-holmes-investors-diligence.html.
[109] Sara Randazzo, et al., *supra* note 3 at A1.
[110] *See* Final Verdict Form, Case No. 5:18-cr-00258-EJD-1.
[111] Wire fraud under §1343 requires the use of an interstate telephone call or electronic communication made in furtherance of a scheme to defraud.

charges in Counts 10, 11 and 12. The patient-related counts may have been more difficult to prove since Holmes never directly communicated with the patients[112].

The Wall Street Journal reports that, "Jurors were persuaded that Ms. Holmes conspired to defraud investors. This could be significant because it means the hundreds of millions of dollars Theranos investors lost could be taken into consideration during her sentencing."[113] In addition, Ms. Holmes during 2018, "settled separate civil securities-fraud charges brought by the Securities and Exchange Commission; she paid a $500,000 penalty and was banned from being an officer or director of any public company for 10 years, without admitting or denying the allegations."[114] During late November 2022, Ms. Holmes was sentenced to more than 11 years "in a minimum-security prison camp in Texas… U.S. District Judge Edward Davila… ordered Ms. Holmes to surrender to the facility in April [2023]. He also recommended that she be allowed family visitation…"[115] Reports state, "The prison camp where Ms. Holmes has been recommended to serve time is in Bryan, Texas, about 100 miles north of Houston, and is designated for female inmates."[116]

Trial of Mr. Balwani

Balwani and Holmes were tried separately. The Balwani trial began in March 2022. *The Wall Street Journal* reports that Mr. Balwani's trail was less of a spectacle than Holmes' trial, but lawyers following the case deemed it no less important. Balwani's lawyers argued that Holmes was in charge at Theranos, not Balwani. [117] In Holmes' trial, she insinuated that Balwani manipulated her, but Balwani's attorneys placed the blame squarely on Holmes.[118] They also argued that he used investor money as promised and that he even invested his own money in the company. [119] Unlike Holmes, Balwani did not testify in his own defense.[120]

The federal jury consisted of thirteen jurors—seven men and 5 women—who deliberated for about thirty-two hours before coming to a verdict on July 7, 2022.[121] The jury convicted Mr. Balwani on all twelve charges that he helped commit and actually committed fraud against Theranos investors and paying patients.[122] Counts 1 and 2 were for conspiracy in violation of Section 1349.[123] Count 1 was for conspiracy to commit

[112] Michael Liedtke, *Former Theranos CEO Holmes Convicted of Fraud and Conspiracy,* ASSOCIATED PRESS, (Jan. 4, 2022).
[113] *See* Randazzo, *supra* note 3 at A2.
[114] *Id.*
[115] Sarah E. Needleman, *Judge Recommends Texas Prison Camp For Elizabeth Holmes,* WALL ST. J., Nov. 25, 2022 at B3.
[116] *Id.*
[117] Heather Somerville & Meghan Bobrowsky, *Theranos's Ramesh 'Sunny' Balwani Found Guilty on All 12 Fraud Counts,* WALL ST. J. (July 7, 2022), https://www.wsj.com/articles/theranos-former-president-ramesh-sunny-balwani-found-guilty-on-all-12-fraud-counts-11657220410.
[118] Michael Liedtke, *Former Theranos exec Ramesh Balwani convicted of fraud*, ASSOCIATED PRESS (July 8, 2022), https://apnews.com/article/ramesh-balwani-theranos-verdict-d9fb19f13a1c930a6ff091dff10a0b5d.
[119] *See* Somerville, *supra* note 115.
[120] *Id.*
[121] *Id.*
[122] *See* Verdict Form, Case No. 5:18-cr-00258-EJD-2, Dkt. No. 1507.
[123] *Id.*

wire fraud against Theranos investors; Count 2 was for conspiracy to commit wire fraud against Theranos paying patients.[124]

Counts 3 through 12 were for Wire Fraud in violation of Section 1343.[125] Counts 3 through 8 were for Wire Fraud against Theranos investors; Counts 9 through 11 were for Wire Fraud against Theranos paying patients regarding their laboratory blood test results; and Count 12 was for Wire Fraud against Theranos paying patients in connection with a wire transfer.[126] Unlike Holmes, Balwani was convicted of all charges related to defrauding patients.[127]

Counts 3 through 5 were in connection with wire transfers at the end of December 2013 in the amounts of $99,990 on or about December 30th and wire transfers of $5,349,900 and $4,875,000 on or about December 31st. Count 6 was for a wire transfer of $38,336,632 on or about February 6, 2014. Counts 7 and 8 were for wire transfers in the amount of $99,999,997 and $5,999,997 on or about October 31, 2014.[128]

Again, Counts 9 through 11 were for Wire Fraud against Theranos paying patients regarding their lab test results. Count 9 was for a phone call from a patient to Theranos regarding the patient's laboratory blood test results on or about October 12, 2015. Counts 10 and 11 were for wire transmissions of a patient's laboratory blood test results on or about May 11, 2015, and May 16, 2015, respectively. Lastly, Balwani was convicted of Count 12 in connection with a wire transfer in the amount of $1,126,661 on or about August 3, 2015.[129]

Mr. Balwani was free on a $750,000 bond while awaiting sentencing.[130] He was sentenced during early December 2022 "to nearly 13 years in prison."[131]

V. LESSONS LEARNED

Weak Board

Although the Board had very well-regarded members with decades of experience in politics and foreign affairs, few members had any experience in the biotech industry and may have failed to see red flags about some of the technology that others with experience in the field would have heeded. According to the Washington Post[132], in addition to former Secretary of State George Schultz, at "… one point, Theranos' board also included former Secretary of State Henry Kissinger; former Defense Secretary William Perry; former U.S. senators Sam Nunn and William Frist; Richard Kovacevich, a former chief executive officer of Wells Fargo & Co.; William Foege, the former director

[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *See* Somerville, *supra* note 115.
[128] *See* Verdict Form, *supra* Note 120.
[129] *Id.*
[130] *See* Minute Entry on July 7, 2022, Case No. 5:18-cr-00258-EJD-2, Dkt. No. 1508; *see also* Stipulation and Order Regarding Conditions of Release and Appearance Bond, dated July 14, 2022, Case No. 5:18-cr-00258-EJD-2, Dkt. No. 1511.
[131] Rachel Lerman, *Elizabeth Holme's ex-Theranos Partner Gets Nearly 13 Years in Prison,* WASH. POST, Dec. 7, 2022, https://www.washingtonpost.com/technology/2022/12/07/sunny-balwani-theranos-sentencing/.
[132] *See* O'Brien, *supra* note 24.

of the Centers for Disease Control; Gary Roughead, a former U.S. Navy admiral; Riley P. Bechtel, a former board chairman of Bechtel Group Inc., and James Mattis, a former U.S. Marine Corps general who later served as a defense secretary in the Trump administration." These luminaries may have been chosen in order for the company to gain lucrative military contracts or serve as window dressing to attract investors. At this time, we can only conclude that Theranos management purposefully attempted to finesse their lack of audit and accountability, including staying private to avoid public reporting requirements.[133] We now explore more fully this "culture of secrecy."

Culture of Secrecy

The company's culture of secrecy was revealed to the public in a televised interview with Charlie Rose[134], whereby Elizabeth Holmes was asked to explain her reasons for the company's notorious secrecy. Keeping trade secrets private is important for most businesses, but snooping through employee emails[135], as alleged by several former employees, demonstrates paranoia – and something to hide. An appearance of hushing up potential whistleblowers[136] is another bad sign. Finally, keeping financial information from investors is another "red flag".

Whistleblowers

Erika Cheung was a lab assistant at Theranos for several months, beginning in 2013 who began to have concerns about the company's practices about a month into her employment. Some of her concerns involved the company's practice of deleting "…outliers in its data to ensure that its devices passed quality control tests…[137]" Later, she became fearful when confronted with private investigators and high-powered lawyers who tried to prevent her from speaking to anyone about her employment and her concerns at the company[138]. She contacted federal investigators in 2015.

Retaliating Against Employees

The defendants appeared to have retaliated against former employees Tyler Schultz and Erika Cheung[139] by using private investigators to follow them and also had high-powered lawyers attempt to silence them[140].

[133] *See also* Lawrence J. Trautman & Larry D. Foster II, *Sam Altman, OpenAI, and The Importance of Corporate Governance*, 16 CASE W. J.L. TECH. & INTERNET 133 (2025), https://ssrn.com/abstract=4679613.
[134] The interview aired on June 3, 2015, https://charlierose.com/videos/27979
[135] The Inventor: Out for Blood in Silicon Valley, HBO Documentary Films; 2019.
[136] Erin Woo & Erin Griffith, *Theranos whistle-blower concludes her testimony in trial of Elizabeth Holmes*, N.Y. TIMES, Sept. 17, 2021.
[137] *Id*.
[138] *Id.*
[139] Sara Randazzo, *Retaliation Against Former Theranos Employees Could Figure Into Testimony*, WALL ST. J., Sept. 15, 2021.
[140] *Id.*

Bad Apples or Bad Barrels or Both?

Some ethics researchers focus on personality traits that make someone a "bad apple", in other words, someone who is predisposed to acting unethically. Other researchers focus on "bad barrels", which are cultures, typically corporate cultures, which would corrupt someone who is otherwise ethical. The Silicon Valley "fake it 'til you make it[141]" startup culture, "…tends to encourage hype, exaggeration and eye-popping evaluations…[142]" which enabled the rise of Theranos and companies like it. Criticism about this "bad barrel" culture has been circulating for decades.

What About the Patents?

In testimony before the Senate Committee on the Judiciary, Subcommittee on Intellectual Property, law professor Jorge L. Contreras "highlights the existence of patents that claim non-existent and inoperative inventions. While such patents may ultimately be subject to validity challenges in court, their issuance nevertheless has harmful effects on markets and innovation."[143] Relevant to Theranos, Professor Contreras observes:

> On March 9, 2020, two days before the World Health Organization (WHO) declared COVID19 to be a global pandemic, a little-known patent assertion entity (PAE) named Labrador Diagnostics sued BioFire, a medical device manufacturer that was about to release a diagnostic test for COVID-19.1 Labrador alleged that BioFire and its French parent bioMérieux infringed two U.S. patents2 that claimed various features of microfluidic testing devices. In addition to monetary damages, Labrador sought to enjoin the manufacture and sale of the infringing devices in the U.S.
>
> It was bad enough that Labrador sued one of the first companies to develop a COVID-19 test just as the disease was taking hold in the United States. But even more surprising was the source of the patents that Labrador asserted. They were two of more than one thousand patents originally assigned to Theranos, the now defunct blood analysis company founded by Stanford dropout Elizabeth Holmes in 2003. Holmes, who left the company in 2018 after settling charges brought by the Securities and Exchange Commission (SEC), is currently under federal indictment for multiple counts of criminal conspiracy and wire fraud. Holmes is named as the lead inventor on both patents asserted by Labrador.

[141] Michael Liedtke, *Former Theranos CEO Holmes Convicted of Fraud and Conspiracy*, Associated Press, January 4, 2022.
[142] Bobby Allyn, Former Theranos CEO Elizabeth Holmes to be Sentenced on Sept. 26, npr.org, January 12, 2022.
[143] *Protecting Real Innovations by Improving Patent Quality: Hearing Before the S. Comm. on the Judiciary, Subcomm. on Intell. Prop.* (Statement of Jorge L. Contreras, Professor of Law, University of Utah) 117th Cong. (2021), https://www.judiciary.senate.gov/imo/media/doc/Contreras%20-%20Written%20Testimony%206-22-2021%20final.pdf.

> But as journalist John Carreyrou first reported in 2015, Theranos never produced the blood testing devices that brought it to national prominence and enabled it to raise hundreds of millions of dollars from investors and business partners. If this is true, one might reasonably ask how a company that never developed its claimed technology, and went to great lengths to conceal its failures, could have obtained hundreds of patents protecting that technology. In other words, how could the U.S. Patent and Trademark Office (PTO) issue multiple patents for a technology that was, at a minimum, incomplete, and at worst, fraudulent?[144]

Professor Contreras suggests the following legislative and administrative measures that are focused on eliminating inoperative inventions from obtaining patent protection:

> (1) increasing PTO efforts to detect potentially inoperable inventions,
> (2) heightening examination requirements, including a certification of enablement, for certain inventions,
> (3) enabling greater public input into the examination process, and
> (4) increasing penalties for fraudulent conduct before the PTO.
>
> In addition to addressing inoperative inventions, some of these reforms could help to alleviate broader enablement concerns that have been identified by scholars over the past decade. Given the serious consequences that these issues have on markets and innovation, such measures merit serious consideration by the PTO and Congress.[145]

VI. CONCLUSION

On January 3, 2022, Ms. Holmes was convicted by a federal jury "on four of eleven charges that she conducted a yearslong fraud scheme against investors while running Theranos Inc. Mr. Balwani was convicted on 12 fraud counts in federal court in San Jose, California.[146] Then, in November 2022, Elizabeth Holmes was sentenced to more than 11 years for her fraud conviction[147] and in December 2022, Balwani was sentenced to nearly 13 years.[148]

[144] *Id.* (internal citations omitted).
[145] *Id. 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.
[146] Rachel Lerman, *Former Theranos Executive Sunny Balwani Convicted on 12 Fraud Counts,* WASH. POST, July 7, 2022, https://www.washingtonpost.com/technology/2022/07/07/theranos-trial-verdict/.
[147] Erin Griffith, *Elizabeth Holmes Is Sentenced to More Than 11 Years for Fraud,* N.Y. TIMES, Nov. 18, 2022, https://www.nytimes.com/2022/11/18/technology/elizabeth-holmes-sentence-theranos.html.
[148] Rachel Lerman, *Elizabeth Holme's ex-Theranos Partner Gets Nearly 13 Years in Prison,* WASH. POST, Dec. 7, 2022, https:// www.washingtonpost.com/technology/2022/12/07/sunny-balwani-theranos-sentencing/.

Theranos now appears to be a story of the tension between a Silicon Valley "fake-it-till-you-make-it" ethos and abandoned ethics toward the honest disclosure and treatment of investors in the capital formation process. We believe that the lessons from the demise of Theranos are important. Our failure to understand and reflect upon these lessons may result in a repeated pattern of ethical failures in the future.

NON-COMPETITION, NON-SOLICITATION, AND NON-DISCLOSURE AGREEMENTS: PROTECTING PROPRIETARY INFORMATION OR PERPETUATING EXPLOITATION?

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I. INTRODUCTION

When an employee leaves a company, an enforceable non-compete agreement will prevent the former employee from subsequently utilizing or sharing the confidential information of the business (whether it is a client list, chemical formulation, financial data, upcoming product, marketing plan, or secret recipe).

Business lawyers have received "the call" many times: "My ex-employee has defected to the competition and is using all of the information about my business to bury me! You have to do something!" This paper is a reference to assist the practitioner with triage in that situation and will help to establish a strategy to best assist the client in dealing with a business-threatening situation.

II. GATHERING FACTS

The first step is to determine what tools you have at your disposal. The most common documents which the employee may have signed prior to or during their employment include:

a. Non-Compete Agreement
b. Non-Solicitation Agreement
c. Non-Disclosure Agreement

The next important task is to determine which of the agreements are implicated under the facts. Once this determination is made, the next question is whether the agreement is enforceable under the law, and if it is, how the agreement can be used to stop the employee from harming the ex-employer's interests.

III. NON-COMPETITION AGREEMENTS IN TEXAS

A. The History and Background

The Texas Constitution broadly protects the freedom to contract.[1] Entering into a noncompetion agreement is a matter of consent; the decision to enter into the agreement, as well as delimitation of the terms and conditions of the agreement, are voluntary acts for both parties. Both parties can freely negotiate the terms, and are free to choose to agree, or not to agree to the potential agreement that is ultimately crafted between them. However, the Texas Legislature may, and has, imposed reasonable restrictions on the freedom to contract consistent with public policy concerns.[2]

In Texas, section 15.50 of the Business and Commerce Code is entitled "Criteria for Enforceability of Covenants Not to Compete" (the "Act") and is the starting point for the enforceability analysis.

According to the Act's statement of legislative intent, its purpose is "to maintain and promote economic competition in trade and commerce" occurring in Texas.[3] This is because unreasonable limitations on employees' abilities to accept new employment or solicit clients or former co-employees to join them in this new endeavor, *i.e.,* to compete against their former employers, could not only hinder legitimate competition between businesses, but could also impede the mobility of skilled employees.[4] On the other hand, valid noncompetition agreements can constitute a reasonable restraint on commerce. When the parties consent to such agreements, the result may be an increase in efficiency by encouraging employers to entrust confidential information and important client relationships to key employees.[5] Legitimate covenants not to compete also incentivize employers to develop goodwill by making them more likely to invest often significant resources in developing goodwill that an employee could otherwise immediately take and use to their own advantage and against the former employer.[6] In other words, enforceable covenants not to compete ensure that the costs incurred to develop human capital are protected against competitors who, having not made such expenditures, might appropriate the employer's investment to their own economic advantage.[7]

The Act (Texas Business and Commerce Code chapter 15.50(a)) provides:[8]

> a covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interests of the [employer soliciting the promise not to compete].[9]

[1] See Tex. Const. art. I, § 16; *Fairfield Ins. Co. v. Stephens Martin Paving, LP,* 246 S.W.3d 653, 663–64 (Tex. 2008); *see also In re Prudential Ins. Co. of Am*., 148 S.W.3d 124, 128–29 (Tex. 2004).
[2] See *Fairfield Ins. Co.,* 246 S.W.3d at 664–65. For instance, the Legislature has done so with the Texas Free Enterprise and Antitrust Act of 1983, Tex. Bus. & Com. Code ch. 15, which includes the act.
[3] Tex. Bus. & Com. Code § 15.04.

This seemingly simple paragraph has been extensively analyzed by judges, resulting in twenty-seven years of interpretative case law.

1. "Ancillary to or a part of..."

The first major case to interpret the Act was *Light v. Centel Cellular Co. of Texas*.[10] In *Light,* the Texas Supreme court held that a covenant not to compete is "ancillary to or part of" an otherwise enforceable agreement if: (a) the consideration given by the employer in that agreement gives rise to the employer's interest in restraining the employee from competing; and (b) the covenant is designed to enforce the employee's consideration or return promise in that agreement.[11] These words added burden to employers trying to enforce noncompetition agreements, and in fact, the agreement at issue in the *Light* case was found not to be enforceable.[12] The employer was now required to show that the consideration the employer provided in exchange for the employee's non-competition obligations "give[s] rise" to the employer's interest in restraining the employee from competing.[13] The easiest example is an employer providing confidential or proprietary information to the employee which one can easily understand would give rise to the employer not wanting the employee to compete. The problem, from the employer's perspective, was that it was hard to imagine any other consideration which would meet that burden.[14]

Additionally, the *Light* court interpreted the words "at the time it was made" to modify the words "an otherwise enforceable agreement."[15] This interpretation required that the consideration provided by the employer be provided contemporaneously with the signing of the contract, and not at a future time.[16] The Court's conclusion was that unless the consideration was provided by the employer contemporaneously, then the contract was illusory.[17] The court reasoned that an illusory contract is not an "otherwise enforceable contract" and therefore the covenant not to

[4] *Potomac Fire Ins. Co. v. State*, 18 S.W.2d 929, 934 (Tex. Civ. App.-Austin 1929, writ ref'd) (holding that a contract between two insurance companies to limit compensation and not hire their competitors' companies was unenforceable as it was intended to "crush and destroy competition.")

[55] See *Hill v. Mobile Auto Trim, Inc.,* 725 S.W.2d 168, 176–77 (Tex. 1987) (Gonzalez, J., dissenting) (citing Restatement (Second) of Contracts § 188 cmt. c (1981)), superseded by statute, Tex. Bus. & Com.Code § 15.50(a).

[6] See generally Richard A. Posner, Economic Analysis of Law § 3.1 (2d ed.1977); *Patterson v. Crabb*, 51 S.W. 870, 871 (Tex. Civ. App. 1899, writ dism'd) (recognizing under the common law the inequity of allowing a former employee to compete against an employer by using that employer's goodwill against the employer).

[7] Greg T. Lembrick, Garden Leave: A Possible Solution to the Uncertain Enforceability of Restrictive Employment Covenants, 102 Colum. L.Rev.. 2291, 2296 (2002) (noting the employers' high cost of developing human capital, including extensive training, revelation of confidential information and exposure to key customers)

[8] §15.50(b) of the Act provides the statutory guidelines for covenants not to compete applicable to physicians. This section is beyond the scope of this paper, but it is important to note that it is radically different from the typical employer-employee situation and this paper does not apply to that situation.

[9] Texas Business and Commerce Code §15.50(a).

[10] 883 S.W.2d 642 (Tex. 1994).

[11] *Light*, 883 S.W. 2d at 647.

[12] *Id.* at 648.

[13] *Id.* at 647.

[14] *Id.*

[15] *Id.* at 644.

[16] *Id.* at 646.

[17] *Id.*

compete would fail under that prong.[18] These common law requirements remained the law until the Court began chipping away at them starting with the *Sheshunoff* case.[19]

2. "At the time it was made…"

The decision in *Light* was very confusing for businesses, courts and practitioners. A large part of the confusion stemmed from the *Light* Court's decision that the words in the statute "at the time it was made" modified "an otherwise enforceable agreement." They concluded from this interpretation that the consideration the employer was to provide must be provided at the time the non-competition agreement was signed. However, applying this legal logic to the business world proved difficult. The Texas Supreme Court revisited this issue when it decided *Alex Sheshunoff Management Services, L.P. v. Johnson*, 209 S.W.3d 644 (Tex. 2006). The court decided that the words "at the time it was made" did not modify the words "an otherwise enforceable agreement" but instead modified the words "ancillary to or part of."[20] This watershed re-interpretation changed the legal landscape—no longer did an employer have to provide the consideration simultaneously with execution of the contract. Instead, the consideration merely had to be provided by the employer before the agreement could be enforced. This change made it much easier for covenants not to compete to be enforced and removed the confusion that employers faced after the *Light* decision. The decision also foreshadowed the Supreme Court's tilt towards making these agreements more enforceable. The next major case easing the enforceability of covenants not to compete was published just three years later.

3. "Consideration may be implied…"

In 2009, the Texas Supreme Court decided *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, ruling that even if the consideration provided by the employer was not explicitly stated, it could be implied from the contract using the general rules of contract construction.[21] This decision was a substantial deviation from *Light*, where the consideration had to be given contemporaneously with the execution of the document. In *Mann Frankfort,* the employer did not explicitly promise to provide confidential information, but because of the nature of the position (an accountant), the court concluded that it was implied from the facts that confidential information would be provided. This notion was bolstered by obligations on the part of the accountant not to provide accounting services to the employer's customers for at least one year without paying a fee for doing so.

[18] *Id.* at 645-46.
[19] *Alex Sheshunoff Management Services, L.P. v. Johnson*, 209 S.W.3d 644 (Tex. 2006).
[20] *Sheshunoff,* 209 S.W.3d at 651.
[21] 289 S.W.3d 844 (Tex. 2009).

4. *Marsh* Virtually Extinguishes *Light*

The *Light* decision was further eroded in 2011 when the Texas Supreme Court ruled that there is no requirement that the "consideration for the otherwise enforceable agreement give[] rise to the interest in restraining the employee from competing."[22] This decision continued the pattern of relaxing the requirements that employers must meet in order to enforce a covenant not to compete. The *Marsh* case evaluated a situation where a manager signed a stock option agreement which included a provision that he would not solicit Marsh customers for two years after the termination of his employment.[23] The Court found that this was an "otherwise enforceable agreement" and went on to say that "[c]onsideration for a noncompete [agreement] that is *reasonably related to an interest worthy of protection* such as trade secrets, confidential information or goodwill, satisfies the statutory nexus; and there is no textual basis for excluding the protection of much of goodwill from the business interests that a noncompete may protect."[24] This sentence effectively removed the obligation that the consideration by the employer "give rise to the employer's interest" required in *Light*. The *Marsh* Court also explained that "the rule [had become] well-established in Texas that reasonable noncompete clauses in contracts pertaining to employment are not considered to be contrary to public policy as constituting an invalid restraint of trade.[25] The Court has continued to rule in accordance with this philosophy.

B. Current Law of Noncompete Agreements in Texas (For Now): Analysis Under the Act

1. The Analysis Under the Act

There can be no doubt after the *Marsh* case that the Texas Supreme Court had become comfortable with the notion that reasonable covenants not to compete were not violative of public policy and should be enforced. The fitful (and painful for businesses) progression from the time that such covenants were nearly uniformly considered to be against public policy to their current status as a necessary tool for conducting business is complete.

Based on this sea-change in the law interpreting section 15.50 of the Texas Business and Commerce Code, Texas courts determine the enforceability of such an agreement with a multi-step analysis.[26]

[22] *Marsh USA Inc. v. Cook*; 354 S.W.3d 764 (Tex. 2011).
[23] *Marsh,* 354 S.W.3d at 766.
[24] *Id.* at 775.
[25] *Id.* at 771 (citing *DeSantis*, 793 S.W.2d 670, 681 (Tex. 1990); *Chenault v. Otis Engineering Corp.*, 423 S.W.2d 377, 381 (Tex. Civ. App. 1968)).
[26] See generally *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 773 (Tex. 2011).

Step 1. Is there an "otherwise enforceable agreement?"

The "otherwise enforceable agreement" requirement is satisfied when the covenant is "part of an agreement that contained mutual non-illusory promises."[27] If the agreement being examined includes mutual non-illusory promises supported by consideration, it should pass the first threshold. However, it is important to note that the obvious candidate for consideration, a promise of continued employment, is not sufficient consideration in this context.[28] Because employment in Texas is at-will, any promise of continued at-will employment is insufficient because such a promise is not binding upon either the employee promisor or the employer promisee, and both parties retains their right to terminate the relationship at any time.

Step 2: Is the agreement "ancillary to or part of" the "otherwise enforceable agreement?"

This requirement is present to prevent enforcement of agreements which are naked restraints of trade.[29] In order to ensure the "otherwise enforceable agreement" is not a naked restraint of trade, Texas court read the statute to require that there be a nexus between the consideration provided by the employer and an interest of the employer that is worthy of protection. It is blackletter law that "[c]onsideration for a noncompete that is reasonably related to an interest worthy of protection, such as trade secrets, confidential information or goodwill, satisfies the statutory nexus."[30]

In the *Marsh* case, Marsh provided stock options to Cook in exchange for Cook signing a noncompetition agreement.[31] The *Marsh* court ruled that awarding to Cook stock options to purchase MMC stock at a discounted price provided the required statutory nexus between the noncompete and the company's interest in protecting its goodwill.[32] The Court finds that the consideration (the stock options) is reasonably related to the company's goodwill – which is an interest worthy of protection. This consideration would not have worked for the *Light* Court because under their analysis, giving stock options does not "give rise" to an interest worthy of protection. Thus, the impact of the transformation in the law brought about by the *Sheshunoff* Court is clear. So long as the consideration is "reasonably related" to the interest worthy of protection, that is enough.

Based upon the Court's holdings in *Light* and *Mann Frankfort* that an employer providing confidential information, or even promising to provide confidential information in the future (so long as it is eventually provided) will satisfy the requirement that the consideration be reasonably related to the interest worthy of protection. It is clear from *Marsh* that the provision of stock options is reasonably related to goodwill–an interest worthy of protection–such that the "ancillary to or part of" requirement is surmounted. However, beyond that exact factual situation, there are no more examples of factual scenarios either approved or disapproved by the Texas Supreme Court. Since *Marsh* there has been only one significant Texas Supreme Court case which tangentially touched this issue and it focused on what agreements constitute "non-competition"

[27] *Sheshunoff*, 209 S.W.3d at 648–49; *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 773 (Tex. 2011).
[28] *Martin v. Credit Prot. Ass'n, Inc.,* 793 S.W.2d 667, 670 (Tex. 1990).
[29] *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 775-76 (Tex. 2011).
[30] *Id.*
[31] *Id.* at 764.
[32] *Id.* at 777.

agreements and did not further address the nexus between consideration and the interest worthy of protection.

The practical application of these cases is fairly straightforward when the contractual consideration is the provision by the employer of confidential information and the promise from the employee is to keep the information confidential. This consideration is adequate. The same holds true for stock options. However, the court has made it clear that one cannot simply "buy" a non-competition agreement.[33]

Step 3. Are the Terms Reasonable?

The *Marsh* Court, quoting the *Sheshunoff* Court, focuses the analysis on the reasonableness of the agreement, stating "Rather, the statute's core inquiry is whether the covenant contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee."[34] This opinion aligns well with the statute which states that "the agreement will be enforced to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable.…"[35]

There are three basic factors that the court considers when determining if the agreement is reasonable: time, scope and geography.[36] Each of these inquiries relating to "reasonableness" are questions of law for the Court to decide.[37] There is no right to have a jury decide what is "reasonable" in these cases – all of the issues in steps 1 – 3 are questions of law.

Step 3.1 Reasonable as to Time.

The agreement must be reasonable as to the geographic area in which the employee is prohibited from competing.[38] Texas courts have held that noncompete agreements as long as five years are reasonable, and therefor enforceable.[39] For instance, in *Stone*, the plaintiff was able to convince the court that the information possessed by the employee they were attempting to enjoin would be useful to a competitor for as long as five years. The courts inquire whether the time restriction (and also the geographic restriction) imposes upon the employee any "greater restraint than is reasonably necessary to protect the business and good will of the employer …"[40] A restraint of trade is unreasonable "if it is greater than is required for the protection of the person for whose benefit the restraint is imposed or imposes undue hardship upon the person restricted."[41] Two to five years has repeatedly been held by Texas court to be a reasonable time in a noncompetition agreement.[42]

[33] *Sheshunoff*, 209 S.W.3d at 650.
[34] *Marsh*, 354 S.W.3d at 777.
[35] §15.50 Texas Business and Commerce Code.
[36] *Id.*
[37] *Light,* 883 S.W.2d at 644 (holding that the "enforceability of a covenant not to compete is a question of law.")
[38] §15.50 Texas Business and Commerce Code.
[39] *Stone v. Griffin Commc'ns & Sec. Sys., Inc*., 53 S.W.3d 687, 689 (Tex. App. 2001) overruled on other grounds by *Am. Fracmaster, Ltd. v. Richardson*, 71 S.W.3d 381 (Tex. App. 2001). *AMF Tuboscope v. McBryde*, 618 S.W.2d 105, 108 (Tex. Civ. App. 1981), writ refused n.r.e).
[40] *Id.*
[41] *Id.*
[42] *Arevalo v. Velvet Door, Inc*., 508 S.W.2d 184 (Tex. Civ. App. El Paso 1974, writ ref'd n. r. e.); *Electronic Data Systems Corp. v. Powell*, 508 S.W.2d 137 (Tex. Civ. App. Dallas 1974, writ ref'd n. r. e.); *Weber v. Hesse Envelope*

Step 3.2 Reasonable as to Geography.

The agreement must be reasonable as to the geographic area in which the employee is enjoined from competing.[43] Generally, a reasonable area for purposes of a covenant not to compete is considered to be "the territory in which the employee worked while in the employment of his employer."[44] This has proven to be true even when the area is very large. In fact, the Court has held that "[e]ven a worldwide non-competition agreement may be upheld under circumstances where determining the scope of the geographical area of former employment was difficult."[45] In *Heidt,* the employee was a very high level employee in the very narrow field of thermometry.[46] He had sales responsibilities for large portions of the United States, Canada, all of Europe, and all of Russia.[47] The court was convinced because of his large territory and his very high ranking position (and commensurate access to highly sensitive information) that the non-competition agreement would be enforceable.

Step 3.3 Reasonable as to Scope.

The final factor subject to restriction of the Act is the scope of the enjoined activity.[48] The scope of the proscribed activity must be reasonable.[49] In order to be "reasonable," the restraint must not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.[50] Generally, the court will find it easier to approve restraint of some activity if it can be shown that there are other activities which are not restrained. For instance, in *Butler*, the Court reasoned that restraining an ex-employee from installing residential glass did not impose a greater restraint than necessary in part because it left open the possibility of employment installing glass in commercial buildings.[51] The *Butler* Court explained, "Restraints are easier to justify if ... limited to one field of activity among many that are available to the employee."[52]

2. What happens if the terms are not reasonable?

If a provision of a non-competition agreement is present but found to be unreasonable, the court will typically reform the agreement so that it is reasonable and find that, as reformed, it is enforceable. This reasoning pre-dates the Act. For instance, in 1973, the Texas Supreme Court opined:

Co., 342 S.W.2d 652 (Tex. Civ. App. Dallas 1960, no writ) quoted in *AMF Tuboscope v. McBryde*, 618 S.W.2d 105, 108 (Tex. Civ. App. 1981, writ refused n.r.e.).
[43] Texas Business and Commerce Code 15.50(a).
[44] *Cobb v. Caye Publ'g Grp., Inc*., 322 S.W.3d 780, 784 (Tex. App. 2010).
[45] *Daily Instruments Corp. v. Heidt*, 998 F. Supp. 2d 553, 567 (S.D. Tex. 2014), appeal dismissed (Sept. 11, 2014).
[46] *Id.* at 554.
[47] *Id.*
[48] Texas Business and Commerce Code §15.50.
[49] *Id.*
[50] *Id.*
[51] *Butler v. Arrow Mirror & Glass, Inc.*, 51 S.W.3d 787, 794 (Tex. App. —Houston [1st Distr.] 2001).
[52] *Id*.; Restatement (Second) of Contracts § 188 cmt. g (1979).

> Indeed, this Court approved the opinion in *Spinks v. Riebold*, 310 S.W.2d 668 (Tex.Civ.App.1958, writ ref'd) wherein it was written that contracts of employment containing restrictive covenants will not be declared void because they are unreasonable as to time, or as to the extent of territory covered, or unreasonable as to both time and territory. The contract is unenforceable in either instance, whether either or both, in the absence of reformation; and the result in each instance is the enforcement of restraints found by the Court upon evidence to be reasonable."

IV. CURRENT LANDSCAPE OF NONCOMPETE AGREEMENTS ACROSS THE COUNTRY

A. The Executive Order

On July 9, 2021, President Biden executed Executive Order 14036 (the "EO") entitled "Promoting Competition in the American Economy."[53] The EO is designed to "promote competition in the American economy, which will lower prices for families, increase wages for workers, and promote innovation and even faster economic growth."[54] While it does not impose any specific restrictions on non-compete agreements, Section 5(g) of the EO encourages the FTC to "consider … exercis[ing] the FTC's statutory rulemaking authority under Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses in agreements that may unfairly limit worker mobility."[55]

Subsequent to the issuance of the EO, the FTC announced a new cooperative agreement with the U.S. Department of Labor ("DOL") through which these agencies will share additional information to help police non-compete agreements. [56] The memorandum of understanding (MOU) between the two agencies outlined ways in which the FTC and DOL will work together on key issues such as labor market concentration, one-sided contract terms, and labor developments in the "gig economy."[57] The agreement enables the FTC and DOL to closely collaborate by sharing information, conducting cross-training for staff at each agency, and partnering on investigative efforts within each agency's authority, focusing on collusive behavior; the imposition of one-sided and restrictive contract provisions, such as non-compete and training repayment agreement provisions; the extent and impact of labor market concentration; and the impact of algorithmic decision-making on workers, among other issues.[58] Based upon this MOU, the FTC has prioritized the cracking down on anticompetitive contract terms that put workers at a disadvantage and has announced that it intends to protect workers in several Commission orders, including actions against Anchor Glass, Ardagh Group, Prudential Security, I-O Glass, 7-Eleven, and DaVita.[59]

[53] Exec. Order No. 14036, 86 Fed. Reg. 36,987, (July 9, 2021), Executive Order on Promoting Competition in the American Economy, www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.
[54] *Id.*
[55] *Id.*
[56] U.S. Federal Trade Commission, Department of Labor Partner to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices, (September 21, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-department-labor-partner-protect-workers-anticompetitive-unfair-deceptive-practices
[57] *Id.*
[58] *Id.*
[59] *Id.*

B. The Federal Agencies' Rules

Based on the issuance of this EO, other federal agencies began working to ban noncompete agreements as well. In January 2023, the FTC proposed a rule that would effectively ban most noncompete agreements in the United States.[60] A few months later in May, the National Labor Relations Board ("NLRB") followed suit and released a memo outlining its position that noncompete agreements violate the National Labor Relations Act ("NLRA").[61] The NLRB has yet to issue its final rule, but will likely follow the FTC and also ban noncompete agreements.

The government has identified several concerns with noncompete agreements. The FTC, for example, calls the use of noncompete agreements an "exploitive practice that suppresses wages, hampers innovation, and blocks entrepreneurs from starting new businesses."[62] The NLRB's main concern is that noncompete agreements unlawfully impede employees from engaging in protected activities under NLRA Section 7.[63] The General Counsel for the NLRB, Jennifer Abruzzo, stated in her memo that "non-compete provisions reasonably tend to chill employees in the exercise of Section 7 rights when the provisions could reasonably be construed by employees to deny them the ability to quit or change jobs by cutting off their access to other employment opportunities that they are qualified for based on their experience, aptitudes, and preferences as to type and location of work."[64]

Following its January 2023 proposal, on April 23, 2024, by a 3-2 vote, the FTC issued its final rule and implemented a nationwide ban on noncompete agreements.[65] While largely consistent with the proposed rule, the final rule contains several material changes that will impact the enforceability of existing agreements and how employers try to protect their legitimate business interests in the future.[66] Furthermore, except for agreements with senior executives, any existing noncompete agreements are deemed unenforceable, and employers cannot enter into new noncompete agreements with senior executives going forward.[67]

Absent an effective legal challenge delaying or barring enforcement, the rule will go into effect 120 days following its publication in the Federal Register, which the FTC has announced as

[60] U.S. Federal Trade Commission, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition, (January 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.

[61] U.S. National Labor Relations Board, Office of Public Affairs, NLRB General Counsel Issues Memo on Non-competes Violating the National Labor Relations Act, (May 30, 2023), https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-issues-memo-on-non-competes-violating-the-national.

[62] U.S. Federal Trade Commission, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition, (January 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.

[63] Section 7 of the National Labor Relations Act (the "Act") guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities." 29 U.S.C. § 157.

[64] U.S. National Labor Relations Board, Office of Public Affairs, NLRB General Counsel Issues Memo on Non-competes Violating the National Labor Relations Act, (May 30, 2023), https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-issues-memo-on-non-competes-violating-the-national.

[65] U.S. Federal Trade Commission, FTC Announces Rule Banning Noncompetes, (April 23, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes.

[66] Associated General Contractors of America, FTC Passes Rule Banning Post-Separation Non-Competes Nationwide, (April 24, 2024), https://www.agc.org/news/ftc-passes-rule-banning-post-separation-non-competes-nationwide

[67] *Id.*

scheduled for May 7, 2024. Companies must be in compliance with the rule by the effective date, which is expected to be September 4, 2024 (120 days after May 7).[68]

C. The Scope of the FTC Rule

In summary, the FTC's rule makes it unlawful for employers to: enter into a non-compete clause with a worker; attempt to enter into a non-compete clause with a worker; or enforce, or attempt to enforce, currently existing non-compete clauses with a worker.[69] The rule, however, carves out pre-existing agreements with "senior executives."[70] The new rule also requires employers to provide notice to workers with already existing non-compete agreements—excluding "senior executives"—that communicates to the worker that their non-compete is no longer effective and cannot be enforced against them.[71]

The final rule defines "non-compete clause" as "a term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from (1) seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition; or (2) operating a business in the United States after the conclusion of the employment that includes the term or condition."[72] The final rule further provides that a "term or condition of employment" includes, but is not limited to, a contractual term or workplace policy, whether written or oral.[73] The final rule further defines "employment" as "work for a person."[74]

1. "Workers"

The FTC's rule broadly prohibits employers from imposing non-competition clauses on workers, declaring it to be an "unfair method of competition" for an employer to:

> Enter into or attempt to enter into a non-competition agreement with a worker after the effective date of the rule;
> Enforce or attempt to enforce non-competition agreements with a worker, even when such agreements predate the effective date of the order, except for pre-existing agreements with "senior executives"; or
> Represent to a worker that they are subject to a non-competition agreement, except for pre-existing agreements with senior executives.[75]

[68] *Id.*
[69] U.S. Federal Trade Commission, 16 C.F.R. Part 910, (May 7, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete-rule.pdf (hereinafter "Final Rule")
[70] See Final Rule § 910.1 (defining "senior executive"). See also U.S. Federal Trade Commission, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition, (January 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.
[71] Final Rule § 910.2(b)(1).
[72] Final Rule § 910.1.
[73] *Id.*
[74] *Id.*
[75] Final Rule § 910.2(a)(2).

The final rule defines "worker" as "a natural person who works or who previously worked, whether paid or unpaid, without regard to the worker's title or the worker's status under any other State or Federal laws, including, but not limited to, whether the worker is an employee, independent contractor, extern, intern, volunteer, apprentice, or a sole proprietor who provides a service to a person."[76] The definition further states that the term "worker" includes a natural person who works for a franchisee or franchisor, but does not include a franchisee in the context of a franchisee-franchisor relationship.[77] In addition to employees, the rule's definition of "worker" includes independent contractors, consultants, interns, and volunteers.[78]

2. "Senior Executives"

The FTC rule states that non-compete agreements previously entered into with "senior executives" were, generally, neither exploitive nor coercive, given the senior executives' relative sophistication and bargaining power in comparison to that of their employer.[79] However, the FTC rule prospectively forbids companies from entering into future noncompete agreements with "senior executives," claiming the practice has the propensity to unduly suppress competition and innovation given the outsized role "senior executives" play in establishing new firms and setting businesses' direction as they lead corporations strategically and operationally with respect to innovation.[80]

The FTC rule adopts a two-part test for determining whether a worker is a "senior executive." The test consists of both a compensation threshold and job-duties test, similar to the DOL regulations defining and delimiting the executive employee exemption under the Fair Labor Standards Act.[81]

The first prong of the test requires the worker to have been in "a policy-making position" when the non-compete was executed to be deemed a "senior executive."[82] The rule defines "policy-making position" as an entity's president, chief executive officer or the equivalent, any other officer of a business entity who has "policy-making authority", or any other person with policy-making authority for the entity similar to an officer.[83] The final rule further defines "policy-making authority" as "final authority to make policy decisions that control significant aspects of a business entity or common enterprise."[84]

In order to satisfy the second prong of the definition of "senior executive" under the FTC rule, the worker must have received for their employment:

- Total annual compensation of at least $151,164 in the preceding year;
- Total compensation of at least $151,164 when annualized if the worker was employed during only part of the preceding year; or

[76] Final Rule § 910.1.
[77] *Id.*
[78] *Id.*
[79] *See,* Final Rule, Part IV.B.2.b.
[80] *See,* Final Rule, Part IV.C.2.
[81] Final Rule § 910.1.
[82] *Id.*
[83] *Id.*
[84] *Id.*

- Total compensation of at least $151,164 when annualized in the preceding year prior to the worker's departure if the worker departed from employment prior to the preceding year and the worker is subject to a non-compete.[85]

The final rule defines "preceding year" as meaning any of "the most recent 52-week year, the most recent calendar year, the most recent fiscal year, or the most recent anniversary of hire year."[86] It defines "total annual compensation" as including salary, commissions, non-discretionary bonuses, and other non-discretionary compensation earned during the preceding year.[87] The definition specifically excludes board, lodging, payments for medical or life insurance, contributions to retirement plans, as well as the cost of other similar fringe benefits.[88]

3. Exemption: "Bona Fide Sale"

The FTC's final rule contains an extremely narrow exception for non-compete agreements entered into in connection with the "bona fide sale of a business entity, of the person's ownership interest in a business entity, or of all or substantially all of a business entity's operating assets."[89] This differs from the proposed version of the rule, which limited this exception to "substantial" owners, members, or partners, which it defined as those possessing at least a 25 percent ownership interest in the business sold.[90] Based on a number of public comments objecting to the high ownership threshold during the rulemaking process, the 25 percent ownership threshold was removed from the final rule.[91]

The FTC explained in the final rule that non-competes allowed under the sale of business exception will continue to be governed by state law.[92] While more than a dozen states have laws either banning or limiting the use of non-competes, none of them have limited non-compete agreements as drastically as the FTC has in the context of the sale of a business.[93] Even those states with the broadest bans of non-compete agreements—California, Oklahoma, Colorado, North Dakota, and Minnesota—have exceptions for non-compete agreements involved in the sale of a business, regardless of ownership stake.[94]

4. Exemption: Franchisor-Franchisee Agreements

Under the final rule, the term "worker" excludes a franchisee in the context of a franchisor-franchisee relationship.[95] Thus, franchisors will be allowed to continue to include non-compete

[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] Final Rule § 910.3.
[90] Brodie D. Erwin, Joel D. Bush and Andrew T. Williamson, "FTC Passes Rule Banning Post-Separation Non-Competes Nationwide," (April 23, 2024), https://ktslaw.com/en/insights/alert/2024/4/ftc%20passes%20rule%20banning%20post-separation%20non-competes%20nationwide.
[91] U.S. Federal Trade Commission, FTC Announces Rule Banning Noncompetes, (April 23, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes.
[92] Final Rule § 910.4.
[93] Associated General Contractors of America, FTC Passes Rule Banning Post-Separation Non-Competes Nationwide, (April 24, 2024), https://www.agc.org/news/ftc-passes-rule-banning-post-separation-non-competes-nationwide.
[94] *Id.*
[95] Final Rule § 910.1.

provisions in their agreements with their franchisees. However, the rule specifically provides that "worker" does include individuals working directly for a franchisee or franchisor.[96]

5. Notice of Rescission of Banned Non-Competes

The FTC's rule takes a retroactive approach and prohibits employers from maintaining pre-existing non-compete clauses, except for those with senior executives. In accordance with this prohibition, the rule requires employers to send a notice to workers with existing non-competes, who are not senior executives, that communicates to the worker that their non-compete is no longer effective and may not be enforced against them. The required rescission notice must be sent no later than 120 days after the final rule is published in the Federal Register. The State of California recently amended state law to similarly require employers to notify all current and certain former employees with non-compete agreements of the fact that their agreements were void and unenforceable.

6. Employers Excluded from Coverage Under the Rule

The FTC cites Section 5 of the Federal Trade Commission Act[97] as the source of its power to promulgate its new rule.[98] The following categories of employers are exempted from the FTC's authority under Section 5:

Non-profit employers;
Banks, savings and loan institutions;
Federal credit unions;
Common carriers;
Air and foreign air carriers; and
Persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, subject to certain exceptions.[99]

While the FTC lacks authority to regulate these employers, many of them actively compete with employers who do fall within the FTC's jurisdiction.[100] As a result, the final rule creates an uneven playing field in certain industries.[101] For example, for-profit hospitals will be prohibited from entering into non-compete agreements with physicians, while non-profit hospitals will not, provided they do so in accordance with applicable state law.[102]

[96] *Id.*
[97] 15 U.S.C. 45
[98] Final Rule, 2§ 910.2(a)(1)(i) and § 910.2(a)(2)(i).
[99] Associated General Contractors of America, FTC Passes Rule Banning Post-Separation Non-Competes Nationwide, (April 24, 2024), https://www.agc.org/news/ftc-passes-rule-banning-post-separation-non-competes-nationwide.
[100] Associated General Contractors of America, FTC Passes Rule Banning Post-Separation Non-Competes Nationwide, (April 24, 2024), https://www.agc.org/news/ftc-passes-rule-banning-post-separation-non-competes-nationwide.
[101] *Id.*
[102] *Id.*

While the proposed rule sought to obligate employers to provide notice of the rescission in individualized communications, the final rule permits employers to comply by sending a mass communication such as a mass e-mail to current and former workers.[103]

The FTC included model safe harbor language with its final rule.[104] Employers are not required to use the model form, or the specific language contained therein.[105] However, the content of the notice must communicate to the worker that their non-compete clause is no longer in effect and may not be enforced against them.[106]

The rule provides that notices of rescission must be sent "in an individualized communication."[107] As a result, employers cannot satisfy the notice requirement, for example, by posting a notice in the workplace stating that workers' non-compete clauses are no longer valid.[108] The individualized communication cannot be provided verbally.[109] It must be provided on paper or in a digital format such as an e-mail or text message.[110]

D. Legal Challenge

Enforcement of the rule could be delayed—or barred completely—by legal challenges. In fact, the U.S. Chamber of Commerce announced on the same day that the FTC issued its rule that it would file a lawsuit seeking to block the rule.[111] The Chamber accused the FTC of overstepping its authority: "Noncompete agreements are either upheld or dismissed under well-established state laws governing their use," said Suzanne Clark, the chamber's CEO.[112] "Yet today, three unelected commissioners have unilaterally decided they have the authority to declare what's a legitimate business decision and what's not by moving to ban noncompete agreements in all sectors of the economy."[113] The two dissenting commissioners, Melissa Holyoak and Andrew N. Ferguson, both Republicans, expressed their concern that the FTC lacks authority to promulgate this rule.[114] Additionally, on April 22, 2024, the day before the Commission's vote, U.S. Chamber of Commerce officials vowed to immediately challenge the rule.[115] Daryl Joseffer, the Chamber's executive vice president and chief counsel, said the Commission "simply has no authority to issue

[103] *Id.*
[104] § 910.2(b)(3)
[105] *Id.*
[106] *Id.*
[107] § 910.2(b)(1)
[108] Associated General Contractors of America, FTC Passes Rule Banning Post-Separation Non-Competes Nationwide, (April 24, 2024), https://www.agc.org/news/ftc-passes-rule-banning-post-separation-non-competes-nationwide.
[109] § 910.2(b)(1)
[110] *Id.*
[111] https://apnews.com/article/jobs-employers-noncompete-agreements-economy-pay-4d7b3eb8e143cf d52025c7f2f5259fc4.
[112] *Id*.
[113] *Id*.
[114] "State Noncompete Laws Remain in Effect Despite FTC Legal Challenges, Says Assistant Attorney General, The National Law Journal, (May 9, 2024) https://www.law.com/nationallawjournal/2024/04/23/divided-ftc-finalizes-rule-to-ban-noncompete-agreements/
[115] "Chamber of Commerce Plans to Sue FTC Over Pending Ban on Noncompete Agreements," The National Law Journal, (April 22, 2024) https://www.law.com/nationallawjournal/2024/04/22/chamber-of-commerce-plans-to-sue-ftc-over-pending-ban-on-noncompete-agreements/?slreturn=20240412181331.

regulations prescribing unfair methods of competition."[116] The Chamber, as promised, filed a lawsuit in the Eastern District of Texas on April 25, 2024.[117]

The *Chamber* case, which was filed in federal court in the Eastern District of Texas, has been stayed (placed on hold).[118] The United States District Court for the Eastern District of Texas entered an Order on May 3, 2024, staying the proceedings in *Chamber of Commerce v. FTC* by granting the FTC's motion to apply the first-to-file doctrine, which generally requires a district court to order a "stay, transfer, or dismissal" of a second-filed action that shares a factual nexus with a pending, first-filed action—in this case, *Ryan, LLC v. FTC*—which was filed in the Northern District of Texas.[119]

Although the Eastern District Court found a transfer or consolidation of the two pending cases would avoid duplication of judicial effort, potentially inconsistent judgments, and piecemeal litigation, it nonetheless questioned its authority to do so.[120] Therefore, the Eastern District elected to stay proceedings in the *Chambers* case to allow the Chamber of Commerce to seek either intervention or addition as a party in the Ryan case, which is likely to occur.[121]

The Northern District of Texas, meanwhile, entered an Order on May 2, 2024, requiring the FTC respond by close of business on May 7, 2024 to the Ryan Plaintiff's emergency motion for an expedited briefing schedule for its request for a preliminary injunction and stay of the Non-Compete Rule.[122] The Ryan Plaintiff also recently amended its pleadings to elaborate on its arbitrary-and-capricious claim and seek an order vacating the Non-Compete Rule under the Administrative Procedure Act (APA), which would apply a vacatur of the Non-Compete Rule to parties and non-parties alike, if granted. Thus, the FTC's response to the Ryan Plaintiff's motion should be filed by Tuesday, May 7, 2024, and the Chamber of Commerce's efforts to join the Ryan suit should occur approximately concurrently, with the Court's schedule on Plaintiff's request for a preliminary injunction to be issued shortly thereafter.[123]

An obvious issue in the court challenges will be whether the FTC has the authority to implement such a broad rule. The two dissenting votes were based upon the belief that the agency was exceeding its authority by approving such a sweeping rule.[124] Other challenges are likely to raise issues of federalism and challenge the FTC's "unfair methods of competition" rulemaking

[116] *Id.*
[117] *Id.*
[118] *Chamber of Commerce of the United States of America et al v. Federal Trade Commission et al*, No. 6:2024cv00148 - Document 27 (E.D. Tex. 2024).
[119] The Eastern District's Order found that the first-to-file rule required deference to the Northern District's pending action because the two cases' procedural postures were roughly the same, "the substantial overlap between the cases and the comity factors support consolidation, and Ryan is the first-filed case."
[120] *Id.*
[121] *Id.;* Pete Alexopoulos, FTC Non-Compete Ban Lawsuits Update: Eastern District of Texas Stays Chamber of Commerce Suit in Favor of Ryan LLC as First-to-File (May 4, 2024), https://www.tradesecretslaw.com/2024/05/articles/ftcs-crackdown-on-non-competes/ftc-non-compete-ban-lawsuits-update-eastern-district-of-texas-stays-chamber-of-commerce-suit-in-favor-of-ryan-llc-as-first-to-file/
[122] The FTC had previously requested 21 days to respond to Plaintiff's motion to expedite briefing.
[123] Pete Alexopoulos, FTC Non-Compete Ban Lawsuits Update: Eastern District of Texas Stays Chamber of Commerce Suit in Favor of Ryan LLC as First-to-File (May 4, 2024), https://www.tradesecretslaw.com/2024/05/articles/ftcs-crackdown-on-non-competes/ftc-non-compete-ban-lawsuits-update-eastern-district-of-texas-stays-chamber-of-commerce-suit-in-favor-of-ryan-llc-as-first-to-file/
[124] *Id*.

authority, as well as the agency's authority more generally to make a rule with such broad-based economic and political consequences.[125]

Notably, the newly ideologically right-leaning United States Supreme Court has been adverse to upholding federal agency rules. In the likely event that a challenge reaches the Court, the Court would likely scrutinize the rule under the exacting "major questions" doctrine.[126] This doctrine—which holds there are certain "extraordinary cases" that require a "clear congressional authorization" for the agency to exercise certain powers that it claims—requires the Court to "hesitate" before upholding the rule and refrain from doing so unless the Court determines Congress "clearly" authorized the FTC to ban non-competes in this manner.[127] The Court has applied the major questions doctrine to block several other agency rules recently, including OSHA's COVID-19 Emergency Temporary Standard.[128]

E. The States

States are also increasingly becoming hostile to noncompete agreements. There are now five states that outright ban virtually all noncompete agreements including California, Colorado, Minnesota, North Dakota and Oklahoma.[129] Many other states have enacted legislation restricting noncompete agreements and their use. For example, California recently enacted two laws that restrict employers' ability to use noncompete agreements. On January 1, 2024, Assembly Bill 1076 and Senate Bill 699 went into effect.[130] Assembly Bill 1076 makes it unlawful for an employer to include a 'noncompete clause' in an employment contract, or to require an employee to enter into a noncompetition agreement, with very limited exceptions.[131] Senate Bill 699 prohibits employers from entering into or attempting to enforce post-employment noncompete agreements, regardless of where and when the contracts were signed.[132] The bill specifically provides that California's noncompete restrictions trump other states' laws when an employee seeks employment in California, even if the employee signed the noncompetition agreement while living outside of California and working for a non-California employer.[133]

The trend at the state level is clearly to restrict the use of noncompetition agreements. In addition to the California legislation, other states such as New York, Iowa, Maine, Michigan, New Jersey and Oklahoma all have bills pending that limit the use of noncompete agreements.[134]

[125] Associated General Contractors of America, FTC Passes Rule Banning Post-Separation Non-Competes Nationwide, (April 24, 2024), https://www.agc.org/news/ftc-passes-rule-banning-post-separation-non-competes-nationwide.
[126] Will Kishman, The Non-Compete Landscape in 2023: What Employers Should Know About Changes in Non-Compete Law from the FTC, NLRB, Antitrust Claims and New State Laws (September 28, 2023) https://www.employmentlawworldview.com/the-non-compete-landscape-in-2023-what-employers-should-know-about-changes-in-non-compete-law-from-the-ftc-nlrb-antitrust-claims-and-new-state-laws-us/.
[127] See, *e.g., West Virginia v. Environmental Protection Agency,* 597 U.S. ___ (2022).
[128] Congressional Research Service, (May 17, 2022), The Supreme Court's "Major Questions" Doctrine: Background and Recent Developments, https://crsreports.congress.gov/product/pdf/LSB/LSB10745
[129] *Id*.
[130] Daniel Turinsky, Stephen Taeusch, and Carsten Reichel, "What to know about noncompete agreements in 2024" (January 17, 2024) https://knowledge.dlapiper.com/dlapiperknowledge/globalemploymentlatestdevelopments/2024/what-to-know-about-noncompete-agreements-in-2024.html.
[131] *Id*.
[132] *Id*.
[133] *Id*.
[134] *Id*.

Companies must keep a close watch on these trends and adapt to unfavorable changes in the law by creating alternatives to protect their intellectual property by other means.

V. NON-SOLICITATION AGREEMENTS

There are two principal types of non-solicitation agreements. One is an agreement not to steal an employer's customers and the second is an agreement not to steal an employer's employees.[135] There are not a great number of reported cases on these agreements. Historically, Texas Courts did not consider these agreements restraints of trade and did not subject them to the same analysis as required under §15.50 of the Texas Business and Commerce Code. In 1998 the 1st Court of Appeals in Houston said (in what was apparently a case of first impression as the court could find no prior cases in Texas), "here, the nonrecruitment covenants do not significantly restrain the individual appellants' trade or commerce…"[136] This case was followed in 2005 by a Federal District Court decision in the *Nova Consulting* case, in which the court concluded that "Texas courts specifically considering the issue would find the covenants not to solicit Nova employees do not bar competition and are not restraints on trade or commerce in violation of § 15.05."[137]

However, in 2011, the Texas Supreme Court, in *Marsh,* stated "Covenants that place limits on former employees' professional mobility or restrict their solicitation of the former employers' customers and employees are restraints on trade and are governed by the Act."[138] There have been very few cases which examine non-solicitation agreements since *Marsh* and how other courts will apply this holding, which is partially dicta, remains to be seen.

VI. CONFIDENTIALITY/NON-DISCLOSURE AGREEMENTS

Nondisclosure covenants, on the other hand, are not restraints on trade.[139] The import of this statement is that nondisclosure covenants – agreements which require an employee to keep his or her employer's secrets secret – are subject to standard contract formation analysis. The *Zep Mfg. Co.* Court goes on to say "We find no Texas case requiring that enforceable nondisclosure covenants contain time, geographical, or scope-of-activity limitations. Employers have an interest in protecting trade secrets and confidential information disclosed to employees during the course of the employment relationship, especially when, as here, the former employee had signed an employment agreement containing a nondisclosure covenant.[140]

The fact that an employee is an at-will employee does not automatically render a non-disclosure agreement unenforceable. Provided that the agreement is supported by actual consideration, the agreement not to disclose trade secrets is enforceable. The employee in *Zep Mfg. Co.* case was an at-will employee.[141]

[135] Eric A. Welter, Non-Solicitation Agreements in the Internet Age (2019) https://welterlaw.com/wp-content/uploads/2020/03/Non-Solicitation-Whitepaper-2019-final.pdf
[136] *Totino v. Alexander & Associates, Inc., No*. 01-97-01204-CV, 1998 WL 552818, at *8 (Tex. App. Aug. 20, 1998) (not designated for publication).
[137] *Nova Consulting Grp., Inc. v. Eng'g Consulting Servs., Ltd.*, No. CIV. SA03CA305FB, 2005 WL 2708811, at *18 (W.D. Tex. June 3, 2005)
[138] *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 768 (Tex. 2011).
[139] *Zep Mfg. Co. v. Harthcock*, 824 S.W.2d 654, 663 (Tex. App. 1992).
[140] *Id.*
[141] *Id.* at 655.

VII. SUMMARY

The law of non-solicitation agreements is in flux. Whether the FTC's rule will survive judicial challenges remains to be seen; the litigation has only just begun. What is clear is that the Final Rule it does survive, it will invalidate many state statutes and decades of established precedent regarding non-competes in states across the country. Even if the final rule is immediately enjoined by the Northern District of Texas, employers should consider the FTC's (and the Department of Justice Antitrust Division's) hostile posture toward agreements that serve to restrict labor market competition. Recent enforcement actions have shown that both agencies will closely scrutinize restraints on workers.[142]

The resistance against these agreements as a restraint of trade and as a tool which interferes with a person's right to ply his or her trade has increased. It is of utmost importance that employers monitor the legal landscape and reassess their approach to noncompete agreements. In the short-term, until the legal challenges are decided (and likely appealed), or mooted by the outcome of the 2024 presidential elections, enforcement will be more difficult while the question of the enforceability of the patchwork of state laws will remain.

[142] Daniel Turinsky, Stephen Taeusch, and Carsten Reichel, "What to know about noncompete agreements in 2024" (January 17, 2024) https://knowledge.dlapiper.com/dlapiperknowledge/globalemploymentlatestdevelopments/2024/what-to-know-about-noncompete-agreements-in-2024.html.

WHEN CHEATING GOES DIGITAL: LEGAL HURDLES IN PROTECTING ACADEMIC INTEGRITY

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ABSTRACT

Students cheating and educators trying to prevent them from doing so has been an ongoing battle since time immemorial. However, the modern methods students are using have shifted from the classroom to the courtroom. Many in academe are unaware of this new dynamic and the legal hurdles they will encounter once they become informed and try to navigate through them. This paper will examine two such legal impediments to academic integrity. First, U.S. copyright law as amended by the Digital Millennial Copyright Act (DMCA) will be explored in terms of the work product of university professors being posted to online service platforms without their knowledge or permission. One such platform, Course Hero, will be closely examined to serve as a case study of the predicament presented by the DMCA and the labyrinth that online service providers can create to obstruct a takedown. Second, this paper will delve into a student's attempt to use the shield of the Fourth Amendment as a sword to block online proctoring which serves to maintain academic integrity.

INTRODUCTION

The greatest college cheating scandal that ever occurred is not Lori Loughlin and other celebrities who bribed their children's way into college. Instead, it is the rampant cheating that occurs every day within the halls of academe. It used to be that the greatest concern for professors was to be sure that students were not looking at another person's exam. Who knew that one day they would yearn for the simplicity of those cheating methods? The small cheating fires that used

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to occur have become a technological wildfire with the advent of ChatGPT, Course Hero, and other platforms.

According to one shocking poll by Kessler International, a digital forensics firm, eighty-six percent of college students surveyed admitted to cheating.[1] Of those surveyed forty-two percent admitted to purchasing custom term papers, essays, and thesis online, twenty-eight percent admitted to using a service to take their online classes for them, and seventy-two percent admitted to using their phone, tablet, or computer to cheat in class.[2] It appears that cheating has become the norm and digital tools are the du jour choice of dishonest students. The tools to aid them with their ethical downslide have become more prolific since the burgeoning internet and the emergence of accessible artificial intelligence, such as ChatGPT.

Chat GPT is a large language model (LLM) which uses deep learning to generate human-like text based on prompts from its users. An LLM is "a computer algorithm that processes natural language inputs and predicts the next word based on what it's already seen."[3] It is able to do this because it has been trained using deep learning.[4] This method uses large labeled data sets which enable a computer to learn by example.[5] It is similar to a parent teaching a toddler what a dog is through positive or negative reinforcement.[6] This very smart chatbot has made AI accessible to the common man, and its introduction on the world stage has been explosive. Everyone is using it, including students who prefer to take the easy route to writing papers and completing homework assignments. And they are willing to fight for the right to do it.

It did not take long for the ChatGPT landscape to become marred by litigation. A student in Massachusetts has already sued Higham High School (HHS) for penalizing him for using ChatGPT to research and do his outline for an assignment.[7] The facts reveal that all high school juniors at HHS are given an extensive writing assignment designed to teach them how to conduct primary and secondary source research.[8] Instructions regarding the importance of maintaining academic integrity were emphasized by the teacher, and a one-page document was provided to students that detailed how to use AI properly.[9]

[1] Karen Farkas, *86% of College Students Say They've Cheated, It's Easier Than Ever with Mobile Devices*, CLEVELAND,COM (Feb. 7, 2017), https://www.cleveland.com/metro/2017/02/cheating_in_college_has_become.html.
[2] *Id.*
[3] Lucas Mearian, *What Are LLMS, and How Are They Used in Generative AI?* COMPUTERWORLD (Feb. 7, 2024), https://www.computerworld.com/article/3697649/what-are-large-language-models-and-how-are-they-used-in-generative-ai.html.
[4] Kinza Yasar & Alexander S. Gillis, *What is Deep Learning and How Does it Work?* TECHTARGET (Sept. 23, 2024), https://www.techtarget.com/searchenterpriseai/definition/deep-learning-deep-neural-network.
[5] *Id.*
[6] *Id*.
[7] Harris v. Adams, 757 F.Supp.3d 111 (D. Mass. 2024).
[8] *Id*. at 123.
[9] *Id.* A one-page document given to students which was referenced as "HHS' written expectations on Academic Dishonesty and use of AI" contained the following information:

> The "Artificial Intelligence (A.I.) & Chatbots" section of the document instructs students not to use AI for assignments "unless explicitly permitted and instructed," as AI tools should not be used to "*replac*[*e*] [the students'] own critical thinking." (citation omitted) (emphasis in original). It explicitly states that, "[i]f there is a question about when, where, and how to use these tools, the

When Turnitin.com flagged a portion of the student's work as being generated by AI, the teacher investigated further using Chrome's Revision History tool.[10] The tool allows users to determine "how many edits students made to their essays, how long students spent writing, and what portions of the work were copied and pasted."[11] The teacher discovered that the student had only spent fifty-two minutes in the document compared to his classmates, who had spent between seven and nine hours in their documents.[12] Additionally, the teacher found several books cited in the student's work that do not exist.[13] The student's attorney argued that there was no specific AI policy in the student handbook and that getting help from AI to research and create an outline was not cheating.[14] The federal magistrate was not persuaded and denied the request for a temporary injunction.[15] In the past, allowing a friend to do one's work would have been a clear-cut case of cheating. The only difference in the present situation is that the friend's name is ChatGPT.

This digital deception by students has led many universities, such as UNC Chapel Hill, Pepperdine, University of Florida, Cornell University, and many others, to utilize AI detection tools to try to identify those who are cheating.[16] However, caution should be exercised as AI detection tools are far from perfect. The error rate can be as high as twenty percent, which is unsettling considering the ramifications that follow an accusation of a breach of academic integrity.[17] One can already feel the barrage of lawsuits being prepared now by disgruntled students claiming a false positive. Perhaps the focus of academe should be on creating a culture of academic integrity until foolproof AI detection software is available.

Before students get too enamored with the prospect of ChatGPT completing their assignments, they should recognize ChatGPT's inclination to hallucinate on random occasions

> student *must* communicate with their instructor in advance of use." (citation omitted) (emphasis in original). The document stresses that students must "[g]ive credit to AI tools whenever used, even if only to generate ideas or edit a small section of student work." (citation omitted) The written expectations also spell out that when students use AI to complete an assignment, they must create:
>
> > [A]n appendix for every use of AI showing: (a) the entire exchange, highlighting the most relevant sections; (b) a description of precisely which AI tools were used . . . (c) an explanation of how the AI tools were used . . . ; (d) an account of why AI tools were used (e.g. procrastination, to surmount writer's block, to stimulate thinking, to manage stress level, to address mismanagement of time, to clarify prose, to translate text, to experiment with the technology, etc.). (citation omitted) *Id.* at 122-23.

[10] *Id.* at 124.
[11] *Id*.
[12] *Id.* at 125.
[13] *Id*.
[14] *Id*. at 122.
[15] *Id.* at 145. *See also* Carol Britton Meyer, *Judge Denies Motion for Preliminary Injunction in AI Case Involving Hingham Student; Attorney Says Case Will Continue,* ANCHOR (Nov. 22, 2024), https://www.hinghamanchor.com/judge-denies-motion-for-preliminary-injunction-in-ai-case-involving-hingham-student-attorney-says-case-will-continue/.
[16] *AI detector by JustDone*, JUSTDONE, https://justdone.com/ai-detector?utm_source=bing&utm_medium=cpc&utm_campaign=485848552&utm_content=1233653131799896&utm_adset_id=1233653131799896&utm_term=justdone.com&utm_network=o&utm_matchtype=b&msclkid=d9c4db89129b1dfa49d7b3d8c028c980 (last visited June 17, 2025).
[17] Victor Tangermann, *There's a Problem With That App That Detects GPT-Written Text: It's Not Very Accurate*, FUTURISM (Jan. 9, 2023, 2:32 PM EST), https://futurism.com/gptzero-accuracy.

without rhyme or reason.[18] In other words, it makes things up. Perhaps AI is sentient after all, and it has a wicked sense of humor. Two New York attorneys were not amused, however, when they were chastised by a judge for citing six case citations in a brief generated by ChatGPT that were completely fabricated.[19] Neither of them knew about ChatGPT's penchant for whimsy.

COURSE HERO

Perhaps the most insidious nemesis that professors face is due to the birth and proliferation of online platforms designed to "assist" students. Although they sound innocent enough, a close examination reveals the dark underbelly that is a scourge to unsuspecting professors everywhere. Course Hero is one such online platform and will serve as the case study to illustrate the problem.

Course Hero was founded in 2006 by college student Andrew Grauer as an online learning platform for course-specific study resources. Course Hero is designed "to help students graduate confident and prepared."[20] The question is: prepared for what? If Course Hero means prepared to tackle future problems and responsibilities in the workplace and society ethically, they may want to revisit their business model. Course Hero is set up so that anyone can initially do a free search for a particular university and course to get a sampling of the documents that have been uploaded to see whether they might be advantageous to the searcher. There usually is nothing to identify the individual who uploaded the documents nor is there any discernible mechanism to verify whether the uploader was the author of the material. Viewers are teased with either small print or blurred segments. If they want to see the full document that piques their interest, they must pay the membership fee to gain full access. However, the monthly cost can be mitigated and even eliminated by uploading course documents because the more viewers load, the less they pay. This adds to the Course Hero treasure trove and is quite clever because the more documents on the site, the more users it will attract.[21] Given that Course Hero was valued at over one billion dollars in 2020, Course Hero's plan is working.[22] Unfortunately, this largess is due in part to the unauthorized uploading and posting of the work product of university professors, which makes one wonder if professors can sue Course Hero for such blatant copyright infringement. To ascertain the answer, it becomes necessary to examine copyright law. Copyright law is complex

[18] Anosha Shariq, *ChatGPT Hallucinations are Getting Worse--and Even OpenAI Doesn't Even Know Why,* ALLABOUTAI.COM (May 8, 2025), https://www.allaboutai.com/ai-news/chatgpt-is-making-more-mistakes-and-even-openai-doesnt-know-why/.
[19] Sara Merken, *New York Lawyers Sanctioned for Using Fake ChatGPT Cases in Legal Brief*, REUTERS (June 26, 2023), https://www.reuters.com/legal/new-york-lawyers-sanctioned-using-fake-chatgpt-cases-legal-brief-2023-06-22/.
[20] Matt Russoniello, *How Does Course Hero Work?,* COURSE HERO (Oct. 16, 2018), https://www.coursehero.com/blog/how-does-course-hero-work/.
[21] *Uploads for Unlocks,* COURSE HERO, https://support.coursehero.com/hc/en-us/articles/205142820-Uploads-for-Unlocks, (last visited June 17, 2025).
[22] Tony Wan, *With $1.1B Valuation, Course Hero Joins the Edtech Unicorn Stable*, EDSURGE (Feb. 12, 2020), https://www.edsurge.com/news/2020-02-12-course-hero-joins-the-edtech-unicorn-stable.

and multi-faceted, so this paper's foray will be somewhat cursory and framed in terms of the work product of professors whose work is being published and sold on Course Hero.

COPYRIGHT PROTECTION

A copyright is a type of intellectual property that protects original works of authorship as soon as an author fixes the work in a tangible form of expression.[23] In other words, as soon as an exam, discussion board, or assignment is created by a professor, copyright protection exists as long as it is an original work and was not copied from a test bank or other source. It must be an original product of the professor's mind. Many have the misconception that copyrights can only be achieved by filing with the U.S. Copyright Office, but this is not the case. Copyright protection is immediate upon the creation of the work into a tangible form of expression.[24] Copyright ownership may vary depending on the policy of a particular university and whether outside funding, such as grants, is involved.[25]

Although filing with the U.S. Copyright Office is not required to have copyright protection, there are clear advantages in doing so. The most significant advantage is that filing is a necessary prerequisite before the owner can bring a copyright infringement suit in federal court or be eligible for statutory damages or attorneys' fees.[26] Since most lawsuits are about money, being barred from the right to statutory damages might defeat the purpose of the lawsuit. Therefore, registering one's work product with the U.S. Copyright Office within three months of publication, or before infringement of the work, is wise to do.[27] Although a copyright has been created, this does not mean it is safe from infringement. Infringement in the legal realm refers to the unauthorized use of protected material.[28] The essential question is: When Course Hero and other such sites infringe upon a professor's copyright, can a professor sue for copyright infringement? To answer this question, a further examination into the law surrounding copyright is necessary.

THE DIGITAL MILLENIUM COPYRIGHT ACT

U.S. copyright law was amended in 1998 by the passage of the Digital Millennium Copyright Act (DMCA), which was signed into law by President Clinton.[29] Specifically, "Title II, the 'Online Copyright Infringement Liability Limitation Act,'" creates limitations on the

[23] Copyright Act, U.S.C. § 102 (1976).

[24] *Copyright Basics*, USPTO, https://www.uspto.gov/ip-policy/copyright-policy/copyright-basics (last visited June 17, 2025).

[25] Lindsey Gumb & William Cross, *In Keeping with Academic Tradition: Copyright Ownership in Higher Education and Potential Implications for Open Education*, 5(1) J. OF COPYRIGHT IN EDUC. & LIBRARIANSHIP 1, 5 (Apr. 25, 2022).

[26] *Benefits of Copyright Registration,* COPYRIGHT ALLIANCE, https://copyrightalliance.org/education/copyright-law-explained/copyright-registration/benefits-of-copyright-registration/ (last visited June 17, 2025).

[27] Gene Markin, *What You and Your Business Need to Know About Copyright Law and Infringement*, Nat'l L. Rev. (June 29, 2020), https://www.natlawreview.com/article/what-you-and-your-business-need-to-know-about-copyright-law-and-infringement.

[28] Ty McDuffy, *What Is Infringement?* LEGAL MATCH LAW LIBRARY (Apr. 19, 2022), https://www.legalmatch.com/law-library/article/what-is-infringement.html.

[29] U.S. Copyright Office Summary*, The Digital Millennium Copyright Act of 1998* (Dec. 1998), https://www.copyright.gov/legislation/dmca.pdf.

liability of online service providers for copyright infringement when engaging in certain types of activities."[30] The updates to copyright law are:

> (1) establishing protections for online service providers in certain situations if their users engage in copyright infringement, including by creating the notice-and-takedown system, which allows copyright owners to inform online service providers about infringing material so it can be taken down; (2) encouraging copyright owners to give greater access to their works in digital formats by providing them with legal protections against unauthorized access to their works (for example, hacking passwords or circumventing encryption); and (3) making it unlawful to provide false copyright management information (for example, names of authors and copyright owners, titles of works) or to remove or alter that type of information in certain circumstances.[31]

If an individual is a copyright owner, he has the exclusive right to reproduce, distribute, sell, or display his work product *subject to certain statutory limitations*.[32] These statutory limitations are the loophole upon which Course Hero and other such websites rely. The limitations derive from the DMCA, which was enacted to protect copyright holders from online theft via the unlawful reproduction or distribution of their works.[33] "The DMCA covers music, movies, text, and anything that is copyrighted."[34] Anyone who violates the DMCA can be forced to take down or delete copyrighted material from his site.[35] Once the material is taken down, the infringing party will be protected from copyright infringement liability if it qualifies as an online service provider (OSP). The protection derives from a safe harbor clause within the statute which acts as a shield against monetary liability for claims of copyright infringement.[36] Congress determined this protection for OSPs was needed to help usher in the new digital era and to allow technological innovation to flourish.[37] This makes sense as it would hardly be fair to expect Barnes and Noble to bear responsibility for every copyright violation in the multitude of books it displays and sells. Instead, when an author notifies the company of a violation, the book can be removed from the shelf. This same logic applies in the online arena.

Section 512 of the DMCA contemplates four distinct types of OSPs, each of which has different requirements to qualify for safe harbor:

> a) mere conduit (*i.e.,* serving as a conduit for the automatic online transmission of material without modification of its content, as directed by third parties (e.g., cable, DSL or cellular network providers);

[30] *Id.*
[31] U.S. Copyright Office, *The Digital Millennium Copyright Act*, COPYRIGHT.GOV, https://www.copyright.gov/dmca/ (last visited June 27, 2025).
[32] Copyright Act, 17 U.S.C. § 106 (1976).
[33] *The Digital Millennium Copyright Act of 1998-S. 2037-105th Congress, CONGRESS.*GOV, https://www.congress.gov/bill/105th-congress/senate-bill/2037 (last visited June 17, 2025).
[34] *Digital Millennium Copyright Act*, WILKES UNIVERSITY, https://www.wilkes.edu/about-wilkes/policies-and-procedures/copyright.aspx (last visited June 17, 2025).
[35] Will Roszcyk, *What is DMCA? The Digital Millennium Copyright Act Explained* (Oct. 5, 2022), ITPRO, https://www.itpro.com/development/web-development/368194/what-is-dmca-the-digital-millennium-copyright-act-explained.
[36] U.S. Copyright Office, *Section 512 of Title 17: Resources on Online Service Provider Safe Harbors and Notice-and-Takedown System*, COPYRIGHT.GOV, https://www.copyright.gov/512/ (last visited June 17, 2025).
[37] Kevin J. Hickey, *Copyright Law: An Introduction and Issues for Congress*, CONGRESS.GOV (Mar. 7, 2023), https://www.congress.gov/crs-product/IF12339.

> b) caching (*i.e.,* temporarily storing material that is being transmitted automatically over the internet from one-third party to another (e.g., making a local copy of a website and serving it up to its users who request the original website);
> c) storing (*i.e.,* hosting) material at the direction of a user on a service provider's system or network (e.g., websites that host user-generated content); and
> d) linking (*i.e.*, referring or linking users to online sites using information location tools (e.g., search engines).[38]

DMCA SAFE HARBOR PROTECTION

If anyone engages in any of the four activities listed above, or a combination of them, they will be considered an OSP eligible for a DMCA safe harbor concerning these activities if they comply with the other requirements of section 512. Course Hero seems to fall squarely in the storing/hosting category of 512(c) because it is a website that hosts user-generated content. The next inquiry is whether Course Hero meets the requirements for safe harbor. Those requirements are as follows:

> (1) adopt and reasonably implement a policy to terminate repeat infringers (including users who have repeatedly had material taken down either under the notice-and-takedown process or as the result of the OSP's own "red flag" knowledge of infringing activity, not necessarily as a result of having been found infringing in court);
> (2) accommodate and not interfere with *standard technical measures* [such as copyright symbols and watermarks] that identify or protect copyrighted works that have been developed according to broad consensus between copyright owners and OSPs to the extent any such measures exist.[39]

Course Hero has a policy entitled Notice and Take Down Procedures for Claims of Infringement, which states that Course Hero reserves the right "to terminate accounts of repeated alleged infringers."[40] While the verbiage tracks section 512(c)(1) of the statute, what about the implementation of the policy? How does Course Hero terminate alleged repeat infringers so that it can keep its safe harbor protections? Does Course Hero have a duty to scour its website to seek out alleged infringers? According to the DMCA, the answer is: No. It is the responsibility of the professor (or anyone alleging infringement) to do the scouring and to subsequently notify Course Hero of possible infringement.[41] As stated previously, uploaded work is initially presented in small print or blurred segments necessitating a paid subscription to view the full documents. There is a certain irony in having to contribute to the coffers of the platform profiting from one's work to locate that work. To this point, Alexander Toftness explains in his article that "[i]t certainly appears that Course Hero intentionally makes their website design frustrating and hard to access for people who want to take down their illegally shared materials."[42] Likewise, Wikipedia states

[38] 2020 U.S. REGISTRAR OF COPYRIGHTS REP. 23.
[39] 2020 U.S. REGISTRAR OF COPYRIGHTS REP. 24.
[40] *Service Terms for Course Hero -- Notice and Take Down Procedure for Claims of Infringement*. COURSE HERO, (Aug. 29, 2024) https://www.coursehero.co.m/copyright/#/terms-of-use.
[41] Kevin J. Hickey, *Digital millennium Copyright Act (DMCA) Safe Harbor Provisions for Online Service Providers: A Legal Overview*, CONGRESS.GOV (Mar. 30, 2020), https://www.congress.gov/crs-product/IF11478.
[42] Alexander R. Toftness., *How to Take Down Copyrighted Course Materials From Websites Like Course Hero: An unofficial guide for university instructors and TAs (2020),*

under the heading "Copyright Concerns" that "the process to remove copyright material [on Course Hero] is burdensome and discourages people from following through on such claims."[43] Professors should note that the takedown notice to Course Hero must follow the procedure outlined in the U.S. Copyright Office instructions.[44] This is simple enough to do, but only Course Hero can determine if an infringer is a *repeat* infringer that must be terminated in accordance with the statute. A professor is unable to make that determination because names rarely appear on uploaded material. In addition, many users keep their identities concealed behind an obscure username (*i.e.,* donut1), that bears no resemblance to their true names. Without names, it becomes all but impossible for anyone but Course Hero to discern if *repeated* infringements are occurring. Professors (and anyone else suspecting infringement) are blind as to whether it is one student *repeatedly* doing the infringing or *several different* students who are causing *singular* infringement incidents. This is a classic case of the fox guarding the henhouse. A claimant knows that a website is sponsoring cheating with infringed material but must rely on the website enabling cheating to ethically determine if infringement is being repeated which would trigger termination under the statute. This creates a Catch-22 situation for the professor. Unless there is accurate verification of the uploader, infringement can be repeated without repercussion while Course Hero reaps the monetary rewards.

One professor/attorney decided to use the power of the subpoena to navigate around Course Hero's cat-and-mouse game which prevented him from obtaining the name of the student who posted his online exam without his permission. Professor David Berkovitz, a business professor at Chapman University, discovered that a student had posted his final exam on Course Hero. He was disturbed by the unfair effect that cheating on his exam had on his non-cheating students. As Dr. Berkovitz stated, "They did nothing wrong. They studied hard, they didn't cheat, and yet their grade is artificially lower than it should have been because of the curve."[45] According to Dr. Berkovitz during a personal interview conducted by the authors of this paper, Course Hero was far from helpful and tried to thwart him at every turn. He initially tried to resolve the matter by calling an upper-level management employee of Course Hero expecting that person to share his concern that the Course Hero site was being utilized to cheat. Rather than being cooperative Course Hero informed Dr. Berkovitz that a subpoena duces tecum (a subpoena for documents rather than persons) would be necessary before Course Hero would comply. This meant that Dr. Berkovitz would have to file a lawsuit to gain subpoena power.[46]

Rather than sue Course Hero, Dr. Berkovitz sued his students "Doe's 1-5" and issued a subpoena accordingly. This brilliant legal move of suing his nameless students and not Course Hero meant that DMCA defenses were not available to Course Hero.[47] Although Course Hero told *The New York Times* that the company would comply with the court's subpoena in the

https://static1.squarespace.com/static/5a1b43e5f43b5510c0ec719d/t/5f3ea2d4a8f40576bd9f51a8/1597940436206/How+to+take+down+copyrighted+course+files+from+Course+Hero+8-17-20+by+Alexander+Toftness.pdf.

[43] *Course Hero*, WIKIPEDIA (Apr. 20, 2025), https://en.wikipedia.org/wiki/Course_Hero.

[44] *Id. See also Copyright Policy*, LEARNEO, https://www.coursehero.com/copyright/#/ (last visited July 16, 2025). Melissa says to use Melaney's link. What is it????

[45] Michael Levenson, *Hoping to Identify Cheaters, a Professor Sues His Own Students*, THE NEW YORK TIMES (Mar. 18, 2022), https://www.nytimes.com/2022/03/17/us/chapman-law-cheating-professor.html.

[46] *How to Subpoena a Witness or Documents*, TEXASLAWHELP.ORG (Mar. 8, 2023), https://texaslawhelp.org/article/how-to-subpoena-a-witness-or-documents.

[47] Colleen Flaherty, *Suing Students Who Shared Exams Online to Identify Them*, INSIDE HIGHER ED (March 18, 2022), https://www.insidehighered.com/news/2022/03/18/suing-students-who-shared-exams-online-identify-them.

Berkovitz case,[48] it is noteworthy that Course Hero filed a thirty-eight-page response to the subpoena raising eight general objections and forty specific objections to it.[49] Perhaps the defendant should have said it would *grudgingly* "comply" kicking and screaming all the way. It is interesting to note that the Berkovitz subpoena requested not only the *identity* of the person(s) who posted an answer to a question from his exam but also a complete history of *when* any such identified person accessed any of the questions and/or answers on any Course Hero Website.[50] This is due to Dr. Berkovitz's suspicion that students taking his online exam were utilizing tutors from Course Hero to answer exam questions in *real time during the exam*.[51] This was a belief bolstered by Course Hero's website which tells students they can "[g]et connected with a verified expert tutor 24/7 and [r]eceive answers and explanations in as few as 30 minutes."[52] The case ultimately did not have to proceed forward as the pressure of the lawsuit caused the student perpetrator to confess to the wrongdoing.[53] This will likely go down as one of the greatest moves in academe folklore of the current century. Kudos to Dr. Berkovitz from professors across this nation as it is now clear where the loyalties of Course Hero truly lie.

RED FLAGS

Another noteworthy gem that was gleaned from the conversation with Dr. Berkovitz was his statement that following the publication of his experience in several media sources, he was contacted by numerous professors from around the country. Professors were disturbed by the fact that despite their work having clear copyright symbols, it nonetheless was posted on the Course Hero website.[54] This puts Course Hero in troubled waters as Section 512 of the DMCA stipulates that Course Hero is not only required to remove material after receiving a takedown notice, but also in those circumstances in which its own "red flag" knowledge of infringing activity is triggered. In the legislative history of the DMCA, Congress considered "red flags" to be those things that cause an OSP to be "aware of facts or circumstances from which infringing activity is apparent, which creates an obligation of expeditious removal."[55] It is hard to imagine a brighter red flag than a copyright symbol to signal that material posted is copyright protected requiring the need to verify if the uploader is the owner, and if she is not, then an immediate takedown of the material must occur. Red flags are dangerous for Course Hero because although it is not statutorily required to monitor its websites for copyright infringement, it cannot willfully blind itself to it.[56]

Willful blindness occurs when an OSP consciously avoids learning about specific instances of infringement.[57] Emphasis on the word *consciously*. Given the number of exams on the Course Hero website, some of which clearly display copyright symbols, it is no stretch of the imagination

[48] Michael Levenson, *Hoping to Identify Cheaters, a Professor Sues His Own Students*, THE NEW YORK TIMES (March 18, 2022), https://www.nytimes.com/2022/03/17/us/chapman-law-cheating-professor.html.
[49] Telephone Interview with David A. Berkovitz (2023).
[50] *Id.*
[51] *Id.*
[52] *Homework Help - Q&A From Online Tutor*s, COURSE HERO, https://www.coursehero.com/tutors/homework-help/ (last visited Feb. 5, 2025).
[53] Telephone Interview with David A. Berkovitz (2023).
[54] *Id.*
[55] Nicolo Zingales, *Red Flag Knowledge*, GLOSSARY OF PLATFORM LAW AND POLICY TERMS (Dec. 17, 2021), https://platformglossary.info/red-flag-knowledge/.
[56] *Viacom Int'l, Inc. v. YouTube, Inc.* 676 F.3d 19, 35 (2d Cir. 2012).
[57] 2020 U.S. REGISTRAR OF COPYRIGHTS REP. 124.

to presume that copyright infringement could be afoot. Even without the copyright symbols, it is universally known that professors do not normally desire to share the contents of their exams with current or future students. Therefore, the very word "exam" on the document should trigger a red flag for Course Hero. Willful blindness can be compared to a person plugging her ears to avoid hearing what is being said, or, in the case of Course Hero, seeing what is blatantly posted on its website. Course Hero's days of safe harbor protection under Section 512 of the DMCA may be numbered if it continues to willfully blind itself to the flagrant red flags on its site and continues to use a Terms of Use statement that pays mere lip service to the statutory requirements for safe harbor protection.

FAIR USE

If Course Hero loses its safe harbor protection under the DMCA, its only recourse will be to claim the defense of Fair Use which allows the use of a limited amount of copyrighted material under certain circumstances without getting permission or paying any fees.[58] The courts will examine four factors to determine what qualifies as Fair Use.[59]

First, what is the purpose of the use of the material in question?[60] If the purpose is commercial use rather than educational, it weighs against the defense of Fair Use. Course Hero's subscription service alone brings in a revenue of one hundred million dollars per month.[61] For obvious reasons, Course Hero might be on shaky ground here.

Second, what is the nature of the copyrighted work?[62] Factual works are more likely to be considered Fair Use than highly creative works such as poems and music. An argument can be made that when a professor's work is created using his imagination and intellect tailored for his specific course rather than relying on a test bank or other canned resource for material, it is "creative." Encouraging creative expression is at the core of copyright protection, and this could weigh against the Fair Use defense for Course Hero in the right circumstances.[63]

Third, how much of the copyrighted work was used?[64] While there is no magic formula that courts apply for the quantity used, since Course Hero uses the entirety of each piece of work product posted, it could prove problematic for Course Hero in the eyes of the court.

Fourth, how much of the copyrighted work's market value is affected by Course Hero's use of it?[65] It is unknown how this will be viewed by a court in the academic realm, but here are

[58] *Fair Use,* GEORGETOWN UNIVERSITY LIBRARY. https://library.georgetown.edu/copyright/fair-use (last visited June 18, 2025).
[59] Richard Stim & Glen Secor, Fair Use: The 4 factors Courts Consider in a Copyright Infringement Case, NOLO (updated June 20, 2023), https://www.nolo.com/legal-encyclopedia/fair-use-the-four-factors.html.
[60] *Id.*
[61] Alexander R. Toftness, *How to Take Down Copyrighted Course Materials From Websites Like Course Hero: An unofficial guide for university instructors and TAs (2020)*, https://static1.squarespace.com/static/5a1b43e5f43b5510c0ec719d/t/5f3ea2d4a8f40576bd9f51a8/1597940436206/How+to+take+down+copyrighted+course+files+from+Course+Hero+8-17-20+by+Alexander+Toftness.pdf.
[62] Richard Stim & Glen Secor, Fiar Use: The 4 factors Courts Consider in a Copyright Infringment Case, NOLO (updated June 20, 2023), https://www.nolo.com/legal-encyclopedia/fair-use-the-four-factors.html.
[63] Copyright Information – Fair Use, PENNSTATE, https://copyright.psu.edu/copyright-basics/fair-use (last visited June 18, 2025).
[64] Richard Stim & Glen Secor, Fiar Use: The 4 factors Courts Consider in a Copyright Infringment Case, NOLO (updated June 20, 2023), https://www.nolo.com/legal-encyclopedia/fair-use-the-four-factors.html.
[65] *Id.*

a few facts to digest. As this paper is being read, a multitude of students are busily uploading exams, quizzes, discussion boards, and other assignments to Course Hero which are the work product of university professors across all fifty states. In 2021, Course Hero was listed as having two million annual subscribers on its platform with plans to reach fifty million by 2030.[66] There is currently an endless flow of copyrighted material on the Course Hero site, much of which is being utilized to cheat. Every academic institution across the United States is affected when their Honor Codes are violated in this manner. Just as the court in the infamous Napster case involving music downloads found that Napster's online operation went against public policy because the "market effect" on the music industry was significant, the same should hold true for the educational industry.[67] Every time students cheat, it waters down the value of their degrees and presents an ethical calamity for every company that unwittingly hires those students who have cheated their way to the job. The purpose of Honor Codes at a university is to ensure a level playing field for all students and to prepare them for future employment and ethical contributions to society. They allow the best and the brightest and those with a strong work ethic to rise to the top. Course Hero's business model defeats this purpose. However, the bell may be tolling for Course Hero as a barrage of copyright infringement lawsuits could be forthcoming.

ONLINE PROCTORING

Course Hero and similar websites are not the only problems that universities fighting for academic integrity are facing. Online education is creating some difficulties as well. More than ten million college students are enrolled in online classes at public higher education institutions.[68] Add a pandemic to the mix, and academic dishonesty reports at Texas A&M and the University of North Texas increased by as much as twenty percent. Texas State University also saw reports of cheating increase by one-third over the previous fall.[69] The common denominator was more classes being delivered online, which created academe's second foe: students attempting to circumvent online proctoring.

Exam proctoring has been in existence since the scribes of ancient civilizations were employed to write exam questions and monitor students while they took their exams.[70] Classrooms across America have long followed this practice, with teachers or professors walking around the room to observe students while they take an exam ensuring no one succumbs to the temptation to cheat. Proctoring exams is a hallmark of academic integrity that must be preserved whether one is taking an exam in person or online. The need for online proctoring has been met by several online proctoring services which differ somewhat in how they deliver their product. Some use a live proctor, such as ProctorU, while others, such as Honorlock, use Artificial Intelligence (AI) to monitor student behavior during an exam. A human proctor is alerted if AI

[66] Vikant Chaturvedi. *Course Hero Hits $3.6B Valuation For Its Online Class Study Materials Technology. Competitors Include Studypool, Chegg, StuDocu, And Quizle*, CBINSIGHTS (Dec. 16, 2021). https://www.cbinsights.com/research/course-hero-series-c-funding/.
[67] *A&M Records, Inc. v. Napster, Inc.,*239 F.3d 1004, 1018 (9th Cir. 2001).
[68] Ilana Hamilton, *2024 Online Learning Statistics*, FORBES (June 3, 2024), https://www.forbes.com/advisor/education/online-learning-stats/.
[69] Kate McGee, *Texas A&M Investigating 'Large Scale' Cheating Case as Universities See More Academic Misconduct in ERA of Online Classes,* THE TEXAS TRIBUNE (Dec. 16, 2020), https://www.texastribune.org/2020/12/16/texas-am-chegg-cheating/.
[70] *What Is the History of Exam Proctoring?*, PROCTORFREE (Jan. 9, 2023), https://www.proctorfree.com/news/what-is-the-history-of-exam-proctoring.

detects potential cheating. Unfortunately for ProctorU, there is a website devoted solely to methods to defeat ProctorU's anti-cheating mechanisms. The website contains the following language: "You might have forgotten to prepare for the tests and exams due to functions at your house. Don't panic; dive deep into the article to learn how to cheat in online exams despite ProcterU supervision."[71] To add fuel to the fire, an organization called Fight for the Future is gathering signatures to ban E-proctoring.[72] Students are on the warpath and seem to be willing to do anything to defeat online proctoring. A good case in point is the story of Aaron Ogletree.

THE OGLETREE CASE

Aaron Ogletree was a student at Cleveland State University (CSU) who filed a lawsuit against CSU for the scan of his room before his online exam. Mr. Ogletree claimed the scan was a violation of his Fourth Amendment right against unreasonable searches and seizures. CSU disagreed, and the battle was on in the Federal District Court in the Northern District of Ohio.[73] In a surprising decision rendered on August 22, 2022, the court ruled in favor of Aaron Ogletree. To understand the decision, a brief look at Fourth Amendment jurisprudence and the specific facts of the case is necessary. The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures."[74] The Fourth Amendment protects against governmental intrusions and, therefore, applies to searches of public-school students by public-school officials.[75] Since public universities receive federal funding, they are considered to be an arm of the government. Therefore, students are entitled to the protections of the U.S. Constitution. Consequently, Aaron Ogletree and every other student at a public university has the right to be free from unreasonable searches and seizures perpetrated upon them by their university. The pivotal questions to be addressed are: Is a room scan a search, and if so, is it unreasonable?

> An examination of the facts outlined by the District Court reveals the following:
> [A]t 10:25 am almost *two hours before scheduled exam* [emphasis added], Cleveland State Testing Services emailed Mr. Ogletree to inform him that the Proctor would be "checking [his] ID, [his] surroundings, and [his] materials." (citation omitted) At 10:40 am, Mr. Ogletree replied to the email. (citation omitted) Mr. Ogletree explained that he "currently [had] confidential settlement documents in the form of late arriving 1099s scattered about [his] work area and there [was] not enough time to secure them. (citation omitted)
> At the start of the exam, the proctor asked Mr. Ogletree to perform a room scan of his bedroom, and *Mr. Ogletree complied* [emphasis added]. (citation omitted) The scan lasted less than a minute, and as little as ten to twenty seconds. (citation

[71] George Orwell, *ProctorU Cheating Guide for College Students*, STUDENTS ASSIGNMENT HELP (Nov. 9, 2021), https://www.studentsassignmenthelp.com/blogs/proctoru-cheating-guide/.
[72] *Tell McGraw-Hill that Proctorio proctoring software is …,* FIGHT FOR THE FUTURE (Feb. 10, 2021), https://www.baneproctoring.com/.
[73] Ogletree v. Cleveland State University*,* 647 F. Supp. 3d 602 (N.D. Ohio 2022). The Sixth Circuit granted a consolidated motion for vacatur and dismissed the appeal as moot due to the death of Amelia Ogletree (nee Aaron M. Ogletree). It remanded the case to the district court and instructed the court to vacate its judgment and dismiss the complaint. (Laura Bloomberg was the President of Cleveland State University.) Ogletree v. Bloomberg, 2023 WL 8468654 (6th Cir., Dec. 4, 2023).
[74] U.S. CONST. amend. IV.
[75] New Jersey v. T.L.O., 469 U.S. 325, 341-42 (1985).

> omitted) [Mr. Ogletree had control of the scan of the room and which areas would be viewed.] The proctor testified that she did not see any tax documents or medications. (citation omitted)
>
> The room scan and the test were recorded, and the video recording was retained by Cleveland State's third-party vendor. (citation omitted) Cleveland State [was] not aware of any data breaches related to remote exam recordings, and access to the video [was] strictly controlled. (citation omitted)[76]

A search can occur in one of two ways: (1) by a physical intrusion of a person, house, or papers, or (2) the government's violation of a person's subjective expectation of privacy that society recognizes as reasonable.[77] "At the Fourth Amendment's 'very core' lies the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."[78] The court in the *Ogletree* case determined, and most would agree, that a bedroom within one's house deserves an expectation of privacy. Therefore, a search occurred, but the question remains: Was it unreasonable? Fourth Amendment jurisprudence generally would find a search without suspicion of an illegal activity to be unreasonable.[79] However, "an exception exists in certain circumstances where the government has 'special needs beyond the normal need for law enforcement'"[80] "Where a governmental intrusion serves 'special needs,' courts must balance the individual's privacy expectations against the State's interest to assess a search's unreasonableness and the practicality of the warrant and probable-cause requirements in the particular context."[81] In layman's terms, as it applies to the *Ogletree* case, it came down to whether CSU's "special need" for exam integrity outweighed Aaron Ogletree's privacy expectations. The *Ogletree* court found that it did not and decided in favor of Mr. Ogletree. The Ohio District Court quoted the United States Supreme Court's statement about constitutional encroachments when the Court stated, "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure."[82] Some might quibble with whether there were any illegitimate or unconstitutional practices carried out by CSU's brief scan of Aaron Ogletree's room for which he had two hours to prepare. Before academic panic ensues, it should be noted that part of the Ohio court's reasoning included the fact that it was during the COVID pandemic and Mr. Ogletree had no choice but to enroll in an online class. Under normal circumstances, he would have had more options to avoid the scan of his room which he considered intrusive. For instance, he could take classes on campus. Due to Mr. Ogletree's unforeseen death[83], an appellate court will not have the opportunity to weigh the relevance of these factors as well as:

- the two hours Ogletree had prior to the exam to hide or turn face-down the papers of concern in his room;
- the personal control he had over the room scan and what would be viewed by any onlookers;

[76] Ogletree v. Cleveland St. U., 647 F. Supp. 3d 602, 609 (N.D. Ohio 2022).
[77] Moore Law Firm, PLLC, 2021. *What Is a Search Under the Fourth Amendment?* THE MOORE LAW FIRM, PLLC (May 17, 2021), https://www.moorelawfirmwv.com/blog/2021/.
[78] Florida v. Jardines, 569 U.S. 1, 6 (2013).
[79] Vernonia Sch. District. 47J v. Acton, 515 U.S. 646, 652 (1995).
[80] Griffin v. Wisconsin, 483 U.S. 868, 873 (1987).
[81] Ogletree v. Cleveland St. U., 647 F. Supp. 3d 602, 614 (N.D. Ohio 2022) (citing Skinner v. Railway Lab. Execs.' Ass'n, 489 U.S. 602, 619-20 (1989)).
[82] Silverman v. U.S., 365 U.S. 505, 512 (1961) (quoting Boyd v. United States, 116 U.S. 616, 635 (1886).
[83] *See note* 73.

- the fact that he complied with the search; and
- the need for universities to maintain the integrity of their exams.

It is not difficult to imagine an appellate court reaching a conclusion that differs from the lower court. Also, it should be remembered that this case is not controlling precedent anywhere outside of its jurisdiction, which is limited to forty of the most northern counties in Ohio.[84]

If proctoring services cannot be utilized, what other methods are there to preserve the integrity of online exam results? Open-book exams with strict time constraints are an option, but this creates a high likelihood that the exam will be compromised through downloading, copying, or photographing the exam for the next round of students. Another alternative is requiring students to take exams at a facility near their residence that offers live proctoring. This alternative is more expensive but would certainly minimize cheating. Unfortunately, one can already imagine the difficulty of enforcing this arrangement as the excuses, legitimate or otherwise, will be rampant. The sounds of "I don't have a way to get there," or "I can't afford the cost," or "I have an accommodation that will not allow me to do it that way" are already wafting through the air. Students might do much better in their classes if they devoted as much time to their studies as they do to complaining about the proctoring systems universities are trying to put in place to defeat cheating. The battle lines have been drawn, and the future of online proctoring remains uncertain.

CONCLUSION

There is no doubt that technology has made for some rough terrain for universities fighting for academic integrity. The legal obstacles from online service providers and litigious students determined to cheat have created an uphill battle. However, the battle is worth fighting for as academic integrity is the bedrock of academe. Universities must stand firm, or the future will be bleak. The German philosopher Immanuel Kant espoused a universal law regarding ethical decision-making which can be summarized by asking: What would happen if everyone engaged in the same unethical conduct?[85] In terms of academic integrity, what would happen if every student at a university cheated? The answer is that a degree would be meaningless, and universities would become obsolete. A chilling thought that universities would be wise to remember.

[84] *Court Info*, U.S. DISTRICT COURT NORTHERN DISTRICT OF OHIO, https://www.ohnd.uscourts.gov/court-info (last visited May 30, 2025).

[85] Philosophy Terms, *Categorical Imperative*, https://philosophyterms.com/categorical-imperative/ (last visited July 16, 2025).

ENGAGING STUDENTS BY EXPLORING EMPLOYMENT LAW COMPLEXITIES

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"The obstacle is the way."[1]

ABSTRACT: Employment Law is extraordinarily complex, and that complexity can sometimes intimidate students and inhibit their engagement in its study. Students, like many of us, often prefer neatly packaged instant yes-or-no answers provided by a professor, by artificial intelligence, or by some other metaphorical information microwave. Such a shortcut can cheat students out of a nuanced appreciation of the field, which is essential in professional practice and which can be provided by an early and consistent investigative approach. This article provides relevant support for those professors experienced in teaching Employment Law, as well as those for whom this would be a new teaching topic.

For all Employment Law (EL) professors, this article (a) models an overarching approach to navigating the maze of EL complexities and (b) suggests student reflection and research experiences at effective inflection points to encourage critical thinking and research skills, facilitating student ability to confidently and productively engage with future legal complexities.

The activities suggested in this article can be reordered and used with any available textbook which includes EL chapters. In a full semester EL course, all these activities may be particularly valuable. In a Business Law class, the professor may find it helpful to select a subset. In a Legal Environment of Business course, there may only be room in the syllabus to adopt a few. All professors may find the exercises useful in providing the experimentation and innovation called for by the AACSB guiding principles and standards for business accreditation. The Appendix provides sample solutions.

Professors teaching EL topics for the first time will appreciate the 'initial lecture in a box' (in the Appendix) summarizing why it can be so difficult to address many employment issues. This can be used to introduce (pre-textbook) the first recommended student activity below (thus sensitizing students to the complex legal environment they will be exploring) or can be used to enrich class discussion of the results of that activity.

The first recommended student activity below will engage student interest immediately as it gives them permission to use Artificial Intelligence (AI) in an assignment. The value of the assignment is then to interpret the AI results to answer the provided questions. In order to encourage work beyond parroting AI, class discussion can highlight creative answers not identified by other AI-using students (as in the popular word game Boggle in which only uniquely identified solutions are rewarded).

[1] Ryan Holiday, The Obstacle is the Way: The Timeless Art of Turning Trials into Triumph, Portfolio, 2024.

Research on EL complexities: (a) Use readily available AI such as Chat GPT to compile a list of complications in EL and then (b) complete these summary statements.
EL stakeholders include:
EL protections are needed to ensure that treatment of workers provides (among other things):
EL primary sources (sources other than court decisions) include:
EL primary sources contribute to EL complexity because:
EL secondary sources (court decisions) contribute to EL complexity because:
Time contributes to EL complexity because:
Advancing science and technology can contribute to EL complexity because:
Federal EL agencies (and their URLs) and the acts/laws they enforce include:

In order to broaden student understanding of the complex range of employment issues, an early recommended reflection activity asks students to generate (individually, in groups or as a class) what they hope to gain from working. This can compensate for the likely differing employment experiences among students, provide a greater sensitivity to the need for protections which are at the heart of EL, and help students (who may soon be negotiating with employers) to think through a comprehensive set of potential employment advantages. Discussion may help students identify that, for some, the availability of health insurance, stock options, experience, travel, and retirement benefits can be more valuable than the listed salary. This activity can be done competitively or cooperatively, with the various responses discussed in class. Twenty answers are requested to encourage students to stretch their thinking. Depending on how student answers are structured, of course, students may have more than twenty or may struggle to name twenty. Also, as we see later, this activity sets a baseline for what would be lost upon termination of employment.

Reflection on the benefits of working. Many people will spend the majority of their productive waking hours in their employment. What are twenty potential compensations (other than salary) and advantages you hope to receive for your labor?

The suggested experience below provides an assessment of student beliefs and can be done individually, in groups, or as a class (no solution is needed or provided in the Appendix for this belief assessment). Student responses should serve to inform the professor and should start students thinking about what the law should be and what it is currently.

Reflection on student beliefs about employment rights. (a) Which of these rights do you have? (b) Which do you believe all American workers should have?	
Right to a guaranteed income?	Right to not be discriminated against…
Right to work?	…for race?
Right to a living wage (and how to define that)?	…for color?
Right to guaranteed health care?	…for religion?
Right to employer-provided health care?	…for gender?
Right to a safe workplace?	…for nation of origin?
Right to join coworkers to unionize?	…for age?
Right to strike?	…for disability?
Right to privacy from employer?	…for height?

…for a criminal record?	…for weight?
…for relationship status?	…for accent?
…for alcohol and drug use?	…for criminal record?
…for health history?	…for tattoos or body piercings?
…for genetics?	…for political views?
…for having children and other dependents?	…for talent?

The worker. For any employment claim, minimum background information is gathered by means of questionnaire and/or interview. Of course, a great deal of additional information will be needed subsequently, depending on the employment issue. The exercise below provides experience with developing pertinent general information and phrasing it appropriately. As the pertinent law in any EL case may be a function of any or all of the employee factors listed immediately below, this list can be presented to the class as an introduction to the exercise or kept in reserve as a convenient checklist on student responses:

- work authorization status (citizen, resident alien or appropriate visa)
- nature of position (managerial or professional employee or neither)
- work location (the city, state, or even country in which work occurs)
- existence of an employment contract
- at-will employment versus just-cause status
- length of employment with the employer
- number of hours worked
- promises about employment made by employer representatives, relied upon by client, and
- relevant protections (such as for race, color, religion, national origin, sex, disability, age, pregnancy, or veteran status)

Reflections on initial questions for EL clients. Design a list of questions to determine what you consider might be essential initial information likely to be pertinent to any EL client, being mindful that key employee and employer characteristics may alter the appropriate legal approach. [Recall the journalism guideline (who, what, when, where, why, why not, what else?).]

Identifying what <u>else</u> we need to know, regardless of the claim. One employment complication may be the need to distinguish the various client status possibilities which are relevant to EL. A claimant may not even be an employee, as EL also applies to applicants, for instance. Some workers may consider themselves independent contractors, interns, volunteers or partners (often at the suggestion of the employer) and be unaware that they actually *are* employees. Some workers may find out to their chagrin that they are *not* employees, with unexpected consequences such as owing 15.3% of pay to the government for Social Security and Medicare. Each worker who is determined to be an employee may be treated differently legally, depending on individual characteristics and situation.

Whatever the claim, additional information will be identified when addressing a claimant's issue. As some protections are available only to employees, but not to other workers, it is necessary to determine an individual's employment status, although this is not necessarily straightforward. Job titles may not in fact reflect an employee's actual status, and individuals may not understand their legal employment relationship, so employee status must be established.

There are different tests used by different courts under differing circumstances. The following exercise familiarizes students further with independent research into EL and can be done in class, in groups or individually. It may be done initially without access to resources as a Socratic project and subsequently approached with unlimited access to any resource.

Reflection and Research: Is the claimant actually an employee?
Pass 1, Reflection: • Develop a list of what workers might be, if not employees. • What employee attributes or aspects of the employment relationship might justify categorization as employees?
Pass 2, Research: Using and citing any resource, identify • the key tests for who is an employee • the nature of the tests and • the governmental agencies which typically use each test.

The employer. Even where one is sure of the employment status of the worker, several employer factors are essential to establish early in the process, such as company size and industries. Whether the employer in question is a governmental unit or a private employer can determine which laws and regulations apply. (The discussion here addresses non-governmental employers.) If the private employer is unionized, any union contract may provide legal guidance. If an employer has a contract with the federal government, certain requirements pertain.

Research on employer. Using online resources, citing sources, answer these questions about a professor-specified enterprise.

- Is the organization governmental, a public agency, or a private entity?
- In what industry(ies) does the organization operate?
    - Hospital or educational institution?
    - Religion or religion-adjacent (such as church-affiliated hospitals or schools)?
    - Mining or agriculture?
    - Provider of services of domestic service workers?
- Is this entity part of a complex corporate structure? Briefly describe.
- Does the organization engage in interstate commerce? In international commerce?
- Is this organization unionized?
- Does the organization have any contracts with the federal government?
- How large is the organization, measured by:
    - Number of employees?
    - Sales revenue?

It is essential to determine whether the named employer is in fact the actual employer, as this may not be the case, given the prevalence of subsidiary/parent corporate relationships, franchises, and company relationships with employment agencies. Employers may find out that they are responsible for employees they did not anticipate. On occasion, complex legal structures designed to minimize employer risk only serve to camouflage the risk and lead companies to be subject to unanticipated liabilities. The following activity assumes that students have had a

Legal Environment of Business course and should therefore be able to apply liability avoidance techniques to EL.

Reflection on ER extra-legal strategies to avoid EL responsibility and liability. Businesses frequently put a lot of thought and planning into attempting to avoid liability and to work around regulation. In addition to following recommended business practices (contracts, policy manuals, compliance audits), companies may use extra-legal (not illegal per se) actions or inactions to push the boundaries of employment fairness, even though they might be risking reputational damage and negative effects on employee morale. Identify as many such strategies as possible.

The law. The maze of legal sources may include the U.S. Constitution, federal statutes, federal agency rules and regulations, executive orders, and federal case law; state constitutions and statutes, state agency rules and regulations, and state case law; and ordinances of more than 20,000 towns and more than 3,000 counties. Furthermore, the law we find in these various sources is constantly changing and evolving, so what was true yesterday may no longer hold true today. A well-reasoned approach and framework can help develop a broader understanding that will enable the efficient interpretation, recall and application of the legal guidance applicable to specific employment issues. Seeing the complexity, utility and end goals of EL can encourage an active engagement and heightened interest in understanding how the EL puzzle is put together and how the maze can be navigated. A necessary step is to become broadly familiar with the most significant of the federal protections. This can be approached by completing the following activity.

Research federal laws, 1 of 3: Using and citing governmental sources, summarize briefly the protections provided by each law, to whom the protections are extended, the enforcing government agency, and any determining employer factors.
Discrimination:
Title VII of the Civil Rights Act
Age Discrimination in Employment Act, ADEA
Equal Pay Act
Americans with Disabilities Act, ASA
Rehabilitation Act

Research federal laws, 2 of 3: Using and citing governmental sources, summarize briefly the protections provided by each law, to whom the protections are extended, the enforcing government agency, and any determining employer factors.
Compensation:
Fair Labor Standards Act, FLSA
Equal Pay Act and Lilly Ledbetter Fair Pay Act
Migrant and Seasonal Agricultural Worker Protection Act, MSPA
Benefits: Employee Retirement Income Security Act, ERISA
Safety and Health: Occupational Safety and Health Act, OSHA
Leave:
Family and Medical Leave Act, FMLA
Uniformed Services Employment and Reemployment Rights Act, USERRA

Research federal laws, 3 of 3: Using and citing governmental sources, summarize briefly the protections provided by each law, to whom the protections are extended, the enforcing government agency, and any determining employer factors.
Privacy:
Fair Credit Reporting Act, FCRA
Omnibus Crime Control and Safe Streets Act, OCCSSA
Electronic Communications Privacy Act, ECPA
Employee Polygraph Protection Act, EPPA
Omnibus Transportation Employees Testing Act, OTETA
Freedom to associate, unionize:
National Labor Relations Act, NLRA
Railway Labor Act, RLA

Consequences. Unequal bargaining power between employers and employees can be addressed by providing protections using government regulation. An example which would highlight and extend class material would be examining the range of (a) at-will employment with few exceptions, (b) at-will employment with more exceptions, and (c) just cause employment. The exercise below can be done in the classroom, in groups or individually and may be a Socratic thought project without resources or with unlimited access to resources.

Reflection on intended consequences of employment protections. Employment protections can have envisioned benefits and costs. Why might states prefer:
• pure at-will employment:
• at-will employment with some exceptions:
• just cause employment:

Reflection on unintended consequences of employment protections. What might be unintended consequences of these protections?
• Minimum wage
• Disability accommodations
• Increasing women's access to traditionally male fields of employment

States (and localities) with differing situations, populations, and goals may expand but not contradict rights specified by the federal government (or by the state in which the locality exists). There may be topics of specific state or local interest. There may be potential rights the federal government has not chosen to protect. For example, much federal protection applies to employers of a certain size (at least 15, 20, or 50 employees), but states may wish to address the rights of their citizens employed by smaller employers. Accordingly, every state has governmental agencies to deal with state EL issues. The state EL exercise below provides students valuable research experience in identifying state EL exceptions.

Research on state ELs which extend federal law. Use and cite any resource to (a) determine minimum wage(s) for regular employees (and tipped employees if relevant) and (b) identify states with significant EL expansions by placing √ in cells under the appropriate columns.

Which are just-cause?	Minimum wage(s)	Overtime rates/ calculation	Breaks/ leave	Discrimination Harassment Retaliation	Safety and Health
US					
AL					
AK					
AR					
AZ					
CA					
CT					
CO					
DE					
HI					
IL					
MA					
MD					
ME					
MI					
MN					
MO					
MT					
NE					
NJ					
NM					
NV					
NY					
OH					
OR					
RI					
SD					
VT					
WA					
DC					

Issues. Employment issues arise in each of the phases of the work life cycle: recruitment, employment, and termination of employment. Some rights and responsibilities, such as the right to privacy and nondiscrimination, are relevant to all three phases. In the preemployment phase, issues such as access to job openings, testing, work eligibility and affirmative action are typical. Some rights and responsibilities are primarily relevant during employment, such as issues of work conditions, compensation, and the right to organize. And finally, some issues are typically associated with the termination of the employment relationship, such as the validity of

noncompete clauses, wrongful discharge, and providing tortious references. The two reflections below should raise student curiosity and interest as the class prepares to discuss Title VII and discrimination in hiring and various exceptions.

Research on range of issues: Design a list of the various categories of employment complaints for which a client might seek legal guidance. Make your list comprehensive and creative enough that you can include situations less likely to be identified by other students.

Reflection on additional client questions: Develop a list of additional appropriately worded questions for the client in order to identify and elicit (a) facts about the client's specific employment complaint and (b) the availability of any supporting evidence for the claim.

Balancing Competing Interests. The United States has a long history of protecting religious rights even further back than the First Amendment of the U.S. Constitution. Many employees and employers (and especially religious association employers) come to the workplace with sincerely held religious beliefs that they want the freedom to express without interference, that they frequently want to share with others, and that they want to be respected by others. The following exercise is designed to prepare students for discussions of reasonable accommodation of religion in employment (as recently expanded by the U.S. Supreme Court), workplace harassment due to religion (by employers and employees), and religious exemptions in hiring (on the basis of religion or on other criteria by religious associations). The following activity should lead students to an understanding of why EL is so complex as it attempts to balance so many competing interests.

Reflection on religious conflict in the workplace: Working in groups, enumerate as many situations as you can think of in which religious beliefs of the employer and employee may result in conflict in the workplace.

As we have previously discussed, employees work for a variety of reasons. Some enumerated benefits occur almost immediately and the employee can quit or seek redress if the promised benefits do not materialize. However, other benefits may not be evident for many, many years and the loss of those benefits may be irretrievable and devastating. This type of irreversible, calamitous loss is especially possible with long-term benefits like pensions, the loss of which can be impossible to replace. The student activity below involves envisioning how an employee might be unable to collect a promised pension (including intentional or accidental actions and/or inactions by an employer) and can prepare students for subsequent explorations of why and how ERISA is designed to protect employee pensions. This reflection may also serve to stimulate discussion on why market forces and court decisions may be too late or ineffective in protecting workers and why proactive regulation may be essential in some circumstances.

Group Reflection: Assume an employer promises you a pension of 80% of your highest calendar year earnings for the rest of your life if you continue employment full time for thirty years.

(a) What events might occur and what might your employer do or fail to do which would prevent you from being able to collect your promised pension?
(b) How could employees be better protected from pension loss?

Termination. As society contemplates the concept of wrongful discharge and under what circumstances an employer may discharge an employee, a relevant consideration will naturally be what an employee loses when terminated and just how destructive that loss of employment may be. On the opposite side of the discussion is of course the possibly legitimate need of an employer to part ways with an employee: to lessen exposure to liability, to find someone more productive, to 'right size', to respond to decline in business, to deal with insubordination. The following two activities allow the students to explore (a) reasons employers may wish to terminate employees and (b) what is lost when an employee is fired or laid off. This reinforces the previously envisioned employment benefits.

Reflection on termination motivations: Why might an employer wish to terminate an employee's employment?

Reflection on what is lost when employment is discontinued. In addition to losing the advantages and compensations identified in earlier reflection, what additional losses can be incurred when one loses employment through firing or downsizing?

Some situations in which the employee quits turn out to be in response to an employer's actions intended to motivate that exact behavior. Frequently when employers engage in behavior that would cause a reasonable person to discontinue employment, this could be considered a constructive discharge. Such a constructive discharge can be tantamount to termination by the employer and can result in being able to examine the termination for the possible applicability of relevant employee protections. In the following brief and enjoyable exercise, students work in groups to identify as many ways as possible that an employer may try to encourage employees to quit. Employers know that the discharge of employees is fraught with legal complications, and many can be quite innovative in encouraging employees to resign. This exercise will effectively predispose students to recognize potential instances of constructive discharge. Such an understanding can later assist in employers avoiding such behavior (to avoid the associated liability) and employees recognizing such employer actions for what they are, enabling them to make informed decisions about continuing employment.

Reflection on constructive discharge: Develop a list of actions and inactions on the part of an employer designed to encourage unwanted employees to quit.

Wrongful discharge is often difficult to assess, and as an employee may not know the termination reason, any explanation provided by the employer may simply be a pretext for the actual motivation. The following activity encourages students to explore this sensitive topic and sensitizes them further to the general need for protections. This experience should also be helpful in the future development of questions for any employment issue a client may present.

Reflection on questions specifically for a wrongful discharge client. Design a client questionnaire/interview form to determine all information that might be relevant to a worker's claim of wrongful discharge. Recall that generic questions were identified in an earlier reflection.

SUMMARY AND CAPSTONE EXPERIENCE

This article has provided a series of reflection and research experiences to engage students and encourage their curiosity, competence, and confidence in grappling with EL complexities. The final recommended experience below allows students to internalize the series of activities already attempted throughout the semester, as they prepare a flowchart to document the logical steps in sorting through legal complications. This activity, of course, can be attempted individually, in groups or as a class.

Reflection and research on documenting the navigation through the EL complexities. Prepare a flowchart beginning with a generic client claim and concluding with being able to provide recommendations to the client.

The professor may require manual flowchart production or encourage students to become familiar with and use the variety of readily available flowcharting software. General class discussion of the student-developed flowcharts should be of particular value to the class as a whole. Demonstrating to themselves, their classmates, and the professor that they understand the relationships of these steps should prove a satisfying conclusion to the process, as the way out is through the complexities.

APPENDIX[1]
ENGAGING STUDENTS BY EXPLORING EMPLOYMENT LAW COMPLEXITIES

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[1] Some sample solutions created with the assistance of Chat GPT.

Lecture-in-a-box: EL complexities and obstacles

1. To avoid pitfalls in the legal minefield of EL, educated decisions must be made by human resource managers, human resource employees, and managers who are responsible for and interact with employees daily.
2. A solid foundation in the field will enable the recognition of potential legal risks and facilitate the implementation of proactive workplace policies and procedures that minimize expensive legal and reputational losses.
3. Workers of all kinds would also be well advised to increase their understanding of the field of law which governs so much of their employment.
4. Even though EL attorneys are available for advice, effective use of such expensive resources requires an understanding of the relevant information to be collected and shared.
5. A general understanding of EL is essential to work with and carry out attorney suggestions.
6. The underlying problem: When an entrepreneur seeks to leverage the impact of efforts and to increase productivity by finding someone to assist in the endeavor, tensions and competing interests arise.
7. There exists in any employment situation a tug of war between the rights of an employee and those of the often more powerful employer, with both having legitimate concerns.
8. Any right carved out for employees implies a responsibility on the part of the employer to act (e.g., provide a higher minimum wage) or to refrain from action (e.g., from disciplining employees who are exercising governmentally protected rights).
9. The majority of employers would no doubt prefer to have fewer requirements and constraints dictated by anyone outside the company.
10. States generally legislatively impose a prewritten generic partnership agreement such as the Uniform Partnership Act (UPA) that clarifies the duties, benefits and responsibilities for partnerships which didn't choose to craft their own.
11. In *non*-partnership employment, similar adversarial tensions arise, but only a small percentage of employment relationships are governed by a written contract which might help avoid conflicts and misunderstandings.
12. Additionally, many of the employment contracts that do exist are employer provided take-it-or-leave-it one-sided contracts that only specify that the employee is an employee-at-will and that all employment disputes will be decided by arbitrators rather than the courts.
13. The absence of employment contracts in the face of their obvious utility is understandable when one considers that employment is often of short or unknown duration and potential employees are frequently reluctant and/or too underfunded to consider investing in legal representation to protect their rights.
14. Therefore, the employment contracts that do exist are frequently created for higher paid employees with a stronger bargaining position than most of their fellow employees.
15. Of course, workers represented by unions will have the protections afforded by a one-size-fits-all collective bargaining agreement that is forged from the stronger bargaining position that collective action provides employees.
16. In the absence of contracts or collectives to protect employees in the often one-sided employment environment, the task has typically fallen to the federal, state, or local governments to level the playing field and provide protection for employees with limited ability to protect themselves.

17. Unfortunately, governmental protections frequently only appear in the aftermath of a great tragedy or exposure of abuse.
18. In early U.S. history employees received very little governmental protection, which is not surprising because a significant portion of labor was supplied by individuals who were enslaved or indentured.
19. As employee protection was not one of the enumerated powers of the Federal Government, it fell to the individual states to provide any protection employees were to receive.
20. As industrialization occurred and people left the farm to pursue employment in cities the rise in employment numbers also gave rise to ever increasing power for employees at the ballot box to sometimes offset the economic power of the wealthier employers.
21. This rising political power led states to begin initiating new worker protections; however, Courts often thwarted efforts to protect employees by subjugating employee rights to the contract and property rights interpretations of Fifth and Fourteenth Amendment Substantive Due Process.
22. Eventually, when the great depression came and the U.S. Supreme Court changed direction at the hands of President Roosevelt, radical new powers were given to the U.S. Congress and Congressionally created administrative agencies, leading to an explosion of new federal laws and agencies designed to provide protections for workers.
23. The obvious advantage that federal regulation brings is national uniformity and dealing with problems for the entire country rather than waiting for piecemeal state regulation to deal with a problem.
24. Additionally, states may be reluctant to confront an employment issue for fear of losing employers and jobs to surrounding states that have less regulation and therefore lower costs of doing business.
25. However, this side-by-side development of state and federal EL leads to our current chaotic system of overlapping and concurrent regulation.
26. And when gaps in protection seemed evident in state and federal protections, even local municipalities began to jump in and provide worker protections perceived to be lacking.
27. The confusing multi-government approach to regulating employment and protecting employees is further exacerbated by the fact that each of the regulating governments in the United States will typically regulate with many different approaches.
28. Some regulation occurs by the legislatures, some by the executive branch creating executive orders, others by agencies creating and enforcing rules and regulations.
29. And some are created by state and federal courts rendering decisions that create precedent for future courts in our common law system.
30. And then, of course, there are the many complications inherent in specific clients, employers, and issues (explored in detail in the remainder of the course).

Sample research on EL complexities

EL **stakeholders** include: employers, employees, applicants, contract workers, apprentices, interns, volunteers, unions, government agencies, advocacy groups, employment lawyers.

EL **protections are needed** to ensure that treatment of applicants is equitable and that employees are provided:

- fair and equitable protections from discrimination and harassment
- minimum legal compensation (minimum wage, various paid and unpaid leave provisions)
- worker safety (health and safety standards)

- protection against employer retaliation for reporting violations and for exercising legally protected rights
- accommodations for disabilities and religious beliefs where needed
- safety nets of unemployment and disability insurance
- freedom of organization (unions) and association

EL **primary sources** (sources other than court decisions) include:

- U.S. and state constitutions
- federal and state statutes enacted by legislatures
- federal and state agency regulations and rules, as well as guidance documents (opinion letters, policy statements, enforcement manuals)
- presidential and state Executive Orders
- collective bargaining agreements, applicable to the parties to the contract
- employment contracts, narrowly applicable to the parties to the contract
- quasi legal: employer policies that can create enforceable obligations

EL **primary sources** contribute to EL complexity in the following ways.

- Employers/employees must deal with a patchwork of federal law, state law (which may be more inclusive/stringent) and local law (which may be more stringent still).
- If a company employs workers in multiple states, variations in the state laws can result in various employment law complications involving:
    - tax issues (e.g., state income tax withholding, state unemployment insurance, local payroll taxes, business income tax, state employment tax credits, state tax filings, state tax audits)
    - non-tax issues (e.g., minimum wage, overtime, breaks and leaves, discrimination bases, worker's comp, disability, unemployment, non-compete covenants, health and safety regulations)
- Any given law may only apply to a subset of companies, workers, and situations, further complicating their application.

EL **secondary sources** (court decisions) contribute to EL complexity because:

- The federal circuit courts have overlapping jurisdiction with state courts and may interpret the law differently from the state courts as well as from other circuit courts.
- U.S. Supreme Court rulings may alter EL interpretation.

Time contributes to EL complexity because:

- EL evolves over time, addressing new employment aspects, resulting in a piecemeal web of statutes and regulations.
- Culture and the economy evolves over time, resulting in EL revisiting employment aspects (e.g., minimum wages, safety and health standards, discrimination bases).
- The employment environment changes over time (gig workers, freelancers, contractors, remote workers), making it challenging to apply laws designed before their advent.
- The labor movement develops over time, resulting in superseding laws and agreements.
- The ultimate legal arbiter, the U.S. Supreme Court, shaped over time by changing administrations, can alter the legal landscape with its rulings, sometimes at odds with precedent, and sometimes increasing conflict with lower court decisions.

Advancing science and technology can contribute to EL complexity when:

- New problems are identified through scientific advances and more sensitive technology.
- New remediation techniques are developed, resulting in more stringent EL remedies.

- New technology can provide additional concerns not previously addressed in prior EL (e.g., remote employment, electronic privacy, genetic testing).

Federal EL agencies (and their URLs) and the laws/acts they enforce include the following:

- Equal Employment Opportunity Commission (EEOC.gov) enforces:
  - Age Discrimination in Employment Act
  - Equal Pay Act of 1963
  - Americans with Disabilities Act of 1990
  - Rehabilitation Act of 1973
- Department of Labor (DOL.gov) enforces:
  - Fair Labor Standards Act
  - Occupational Safety and Health Act of 1970
  - Employee Retirement Income Security Act
  - Family and Medical Leave Act
  - Uniformed Services Employment and Reemployment Rights Act of 1994
  - Employee Polygraph Protection Act
  - Drug-Free Workplace Act
- Federal Emergency Management Agency (FEMA.gov) enforces:
  - Uniformed Services Employment and Reemployment Rights Act of 1994
  - Civilian Reservist Emergency Workforce Act of 2011
- Federal Trade Commission (FTC.gov) enforces:
  - Fair Credit Reporting Act
- Office of Justice Programs (OJP.gov) enforces:
  - Omnibus Crime Control and Safe Streets Act
  - Electronic Communications Privacy Act
- Department of Transportation (transportation.gov) enforces:
  - Omnibus Transportation Employees Testing Act
- Bureau of Justice Assistance (BJA.gov) enforces
  - Omnibus Transportation Employees Testing Act
- National Mediation Board (NMB.gov) enforces
  - Railway Labor Act
- National Labor Relations Board (NRLB.gov) enforces
  - National Labor Relations Act

Sample reflection on potential benefits/advantages of working

Financial other than salary:

- monetary benefits such as bonus, stock options, social security
- insurance (health, disability, life, unemployment)
- company car
- tools (phone, laptop)
- housing or housing allowance
- leave (vacations, family, medical)
- legal services
- child care, elder care
- discounts
- credit-worthiness

Work-related:

- on-the-job training, mentoring
- experience
- conferences
- licenses, certificates, degrees paid for and/or rewarded
- travel opportunities
- networking contacts

Quality of Life:

- opportunities to improve the world, to advance science and technology, to contribute to culture
- structure, reason to get up and out each day
- status, satisfaction
- may get to work at home
- friendships
- wellness programs, gym memberships, mental health benefits
- laundry service
- package delivery
- volunteer opportunities
- recreational opportunities (company teams, events)

Post-work benefits:

- retirement (social security, 401K plans, 403B plans, pensions)
- references for future employment applications

Sample reflection on initial questions for EL clients

Client questions to determine essential initial information, pertinent to any issue	
Employee name	
Phone(s),email	
Country of citizenship	
Job title, length of employment	
Full time or part time?	___ Full ____Part time (generally _____ hours/week)
Which, if any, apply to you?	___ partner ___ manager ___ intern ___ volunteer ___ contractor
How did you apply?	____Through employment agency ___through employer ____Other
Employer, industries	
Supervisor name, contact info	
Is your employer unionized?	
Location of your employment	City or county state
Employment contract?	Have an employment contract?
	Can you provide a copy of any contract?
Do you know if your employer requires mandatory arbitration of employment concerns?	
Specify all concerns which might apply to your situation. If you have an issue not listed, please describe.	____Applied for but denied employment? ____Compensation or benefits? ____Leave (vacation, sick, compensatory, etc.) ____Work conditions? ____Work hours or days? ____Work location? ____Retaliation for _____

	____Harassment ____Discrimination for being _____ ____Employment termination
Name any related attorney consultation and result.	
Describe briefly any appeal using an employer procedure.	
	Can you supply copies of appeal process and communications?
Briefly describe any appeal or consultation with any agency (name of agency and result).	
	Can you supply copies of related communications?
Can you provide copies of these items?	Employer handbook or communications about policies
	Communications with any union relevant to your concern
Describe any additional information you care to add.	

Sample reflection and research on whether a claimant is an employee.

Pass 1, Reflection:

- A list of what workers might be, if not employees:
  - Interns, volunteers, contractors, partners
- Employee attributes or aspects of the employment relationship might justify categorization as employees:
  - for instance, whether the employer directs the time, place, scope, or manner of compensated work

Pass 2, Research: These organizations use these tests and criteria to determine employee status.

- IRS, EEOC, state agencies and courts, pensions and benefits plans: **Common Law Control (Right to Control) Test** assesses whether employer controls
  - behavior (manner/methods of work),
  - finance (payments, expenses, tools),
  - relationship (written contract).
- DOL (FLSA), Courts, NLRB (NLRA): **Economic Realities Test** tests whether worker is in own business, based on
  - degree of integration within employer's business of worker's role and
  - extent to which worker is dependent on employer for a majority of income.
- Several state agencies and courts: **ABC Test**, worker is employee unless:
  A. worker is free from employer's control, in contract and in fact
  B. work is performed outside of premises or usual course of business
  C. worker customarily engages in independently established trade, occupation, profession, or business.
- Title VII and anti-discrimination laws: **Hybrid Test** assesses employer control and employee dependence, based on
  - permanence of relationship
  - worker's
    - right of control of manner and means
    - investment in equipment or materials
    - opportunity for profit or loss
- IRS and tax courts: **20-Factor Test** includes these considerations and others:

- Does the employer train, specify instructions, set work hours?
- Is worker's service integrated into business?
- Is there an ongoing work relationship?
- Is worker paid by hour or by the job?

Sample research on professor-specified enterprise

Example: Boeing[2]	
Government, public agency, private entity?	Private (Boeing.com)
Industry(ies) (including religions and religion adjacent)	Divisions: Commercial aircraft, Defense Space and Security, Global Services (aftermarket), Enterprise [possibly including Boeing Capital (leasing, lending)]
Is this entity part of a complex corporate structure? Describe.	Complex. Wiki lists 7 direct subsidiaries. SEC.com lists many hundreds in 6.5 single spaced pages.
Interstate commerce?	Yes and international
Is the entity unionized?	Three unions, cover 57,000 employees, per 10-K (2023) • International Association of Machinists and Aerospace Workers (IAMAW) = 21% of Boeing employees • Society of Professional Engineering Employees in Aerospace (SPEEA) • United Automobile, Aerospace and Agriculture Workers of America (UAW) = 1% of Boeing employees
Does the entity have a government contract?	Boeing was 2019 second largest (after Lockheed Martin) U.S. government contractor at $28,089 million, accounting for 4.75% of federal contract $. Federal Procurement Data System lists more than 70,000 contracts with Boeing or companies for whom Boeing is the ultimate parent. Unclear if this includes completed contracts.
Number of employees	Around 170,000,
Size (wealth)	Boeing.com: 2023 …sales revenue: $ 77./7 billion (37% from U.S. federal government) …op income - $773 million, …net loss - $2.2 billion (losses in each of last 5 years) …assets $ 137.01 billion

Sample reflection on employer avoidance of EL liability

- Claiming not to be the employer by using a complex corporate structure such as
  - Subsidiaries employing the workers in question, so that the deep-pocketed parent corporation is not the employer
  - Franchise arrangements such that the deep-pocketed franchisor is not the employer

[2] Boeing.com, Securities and Exchange Commission, Federal Procurement Data System, Wikipedia

  - Employment by subsidiaries with fewer workers than would trigger certain EL requirements (e.g., Title VII applying only to employers with 15 or more employees)
- Using temporary or contingent workers to avoid responsibilities of long-term employment relationship
- Perma-temping (not converting long-term temp workers to employee status)
- Claiming worker is not an employee (and instead is an independent contractor, volunteer, intern, partner, etc.)
- Avoiding full-time status of workers by offering fewer than full-time hours or by not guaranteeing number of hours
- Classifying workers improperly as to overtime eligibility, for instance,
  - By granting inflated job titles (manager, partner)
  - By claiming workers are seasonal
- Avoiding exposure of possibly questionable strategies by using
  - Non-disparagement and non-disclosure agreements
  - Mandatory arbitration clauses
- Extending probationary periods to delay having to provide eligibility benefits
- Discontinuing employees before probationary period complete
- Providing a hostile work environment to encourage workers to quit to avoid lawsuits, severance pay, unemployment benefits
- Providing on-call work and only paying worker when working
- Having most dangerous and polluting work done
  - by independent workers
  - by workers afraid to exercise their rights
  - overseas

Sample research 1 of 3, federal discrimination laws

EEOC.gov: **Title VII of the Civil Rights Act** *(if 15 or more employees):* enforces Equal Employment Opportunity Act and prohibits discrimination on basis of race, color, sex (including pregnancy/childbirth, sexual orientation, sexual identity), national origin, age, disability, genetic information, and religion (though limited exemption for religious employers (churches, many hospitals and schools); exemptions as well for other, such as national security.
EEOC.gov: **Age Discrimination in Employment Act** (ADEA) (if *20 or more employees):* forbids discrimination against and harassment of people age 40 and over, but can favor older employee.
EEOC.gov: **Equal Pay Act** of 1963 *(all employers):* men and women to be paid same for substantially equal work.
ADA.gov: **Americans with Disabilities Act** of 1990, ADA *(if 15 or more employees):* forbids discrimination against a qualified individual with a disability and requires reasonable accommodations for same.
ADA.gov: **Rehabilitation Act** of 1973 (*for federal government, federal contractors, and recipients of federal financial assistance):* prohibits discrimination on basis of handicap.

Sample research 2 of 3, federal laws for employment benefits and conditions

Compensation:
DOL.gov: **Fair Labor Standards Act,** FLSA (*for private and governmental employers except agriculture):* establishes $7.25/hour minimum wage and overtime pay (1.5 times regular pay) for exempt employees (but not independent contractors), also youth employment standards. Also provides guidance on distinguishing employees from independent contractors.
EEOC.gov: **Equal Pay Act of 1963,** EPA (equal pay between men and women for substantially equal work) and **Lilly Ledbetter Fair Pay Act** of 2009: greatly increases window for filing complaints about compensation.
DOL.gov: **Migrant and Seasonal Agricultural Worker Protection Act**, MSPA *(most farm labor contractors, agricultural employers, agricultural associations):* requires among other things that employers pay wages when due, not require workers to purchase goods or services from employer, and ensure safety of any transportation and housing of workers.
Benefits:
DOL.gov: **Employee Retirement Income Security Act,** ERISA: sets minimum standards for most voluntarily established retirement and health plans of private employers, which must be for all employees.
Safety and Health:
DOL.gov: **Occupational Safety and Health Ac***t* of 1970, OSHA (*for all private sector employers not otherwise regulated by the state or federal government such as mining-- which is Mining Safety and Health Act—and nuclear power plants--Nuclear Regulatory Commission*): sets and enforces safety and health standards and provides training, outreach and compliance assistance.
Nature of work: There is no federal protection about the nature of allowable work duties.
Leave:
DOL.gov: **Family and Medical Leave Act, FMLA (***employers who had 50 + employees during 20 or more weeks in calendar year):* • Eligible employees entitled to take 12 weeks job-protected unpaid leave in a 12-month period for specified family and medical reasons, and 26 weeks in a 12-month period to care for covered service member. • Applies to employees who worked for employer at least 1250 hours and for 12 or more months and at an employer facility with 550 or more employees.
DOL.gov and FEMA.gov: **Uniformed Services Employment and Reemployment Rights Act of** 1994, USERRA (*all employers, public and private, as well as foreign employers doing business in the U.S. and American companies doing business in foreign countries)*: • Protects members of the uniformed services (Armed Forces, Army National Guard, Air National Guard, Public Health Service officers, National Oceanic and Atmospheric Administration, National Disaster Medical Service, National Urban Search and Rescue system) from discrimination in their civilian employment and retaliation based on their service. Employers may not deny initial employment, reemployment, retention, promotions or any other benefit including reinstatement in employer-based health plan. • Applies to Applies to all employees of these employers (temporary, part-time, probationary, seasonal) but not to independent contractors nor employees whose service exceeded 5 years for that employer.]
FEMA.gov: **Civilian Reservist Emergency Workforce Act of 2011**, CREW expands USERRA to include FEMA reservists to protect their employment (job, seniority, status, pay

rate as if they had not been absent during FEMA training and deployment) and to protect them from employment discrimination for being or having been a Reservist.

Sample research 3 of 3, federal privacy, freedom, post-termination laws

Privacy:
FTC.gov: **Fair Credit Reporting Act,** FCRA (for any employer using consumer reports to make employment decisions): provides protections of information • collected by consumer reporting agencies (credit bureaus, medical info, tenant screening services) • consumer must be notified when an adverse (employment) action is taken on basis of such reports.
OJP.gov: **Omnibus Crime Control and Safe Streets Act** of 1968 (the 'wiretap. act') Title III prohibits the intentional actual or attempted interception, use, disclosure or procurement …of any written, oral or electronic communication by government agencies as well as private parties.
BJA/OJP.gov: **Electronic Communications Privacy Act** of 1986 protects wire, oral and electronic communications while being made, in transit, or stored on computers (includes monitoring employee data transmission). Accessing some info requires subpoena, other a special court order, other a search warrant.
DOL.gov: **Employee Polygraph Protection Act** *(most private employers)*; prohibits using lie detector tests for either pre-employment screening or during the course of employment; protects against retaliation for refusing to take such a test).
Transportation.gov: **Omnibus Transportation Employees Testing Act**
DOL.gov: **Drug-Free Workplace Act:** (1) federal workplaces and (2) non-federal workplaces with federal contract > $100,000 must implement DFW Program.
Freedom to associate, unionize:
NLRB.gov: **National Labor Relations Act**, NLRA (*all employers involved in interstate commerce except airlines, railroads, agricultural operations and government entities, among others*): enforces employee rights • to self-organize, • to bargain collectively through reps of their own choosing, • to form, join or assist labor organizations.
NMB.gov: **Railway Labor Act**, RLA *(railroad and airline industries):* promotes the use of bargaining, arbitration and mediation for strikes to resolve labor disputes.

Sample reflection on state preferences for employment law status

States might prefer pure at-will employment for its:
• maximum economic flexibility for employers to adapt to changing economic conditions • business-friendly environment to attract and hold businesses • low litigation risk as no termination justification is needed • minimal government interference preferred by some conservative cultures
States might prefer at-will employment with some exceptions for: • balance between flexibility and protection • key worker protections • lower litigation risk than just-cause

• appropriate government interference/involvement preferred by some moderate cultures
States might prefer just-cause employment for its: • strong worker protections • stable workforce • lower economic and social costs from wrongful terminations • greater government involvement preferred by some more liberal cultures

Sample reflection on unintended consequences of employment protections

Minimum wage: A higher wage could result in employers: • employing fewer workers, limiting jobs available to applicants, • maintaining their workforce, paying the higher wage, and passing the additional cost along to consumers.
Disability accommodations: Requiring employers to provide accommodations for disabled employees may discourage employers from hiring disabled potential employees, effectively reducing job opportunities for the disabled.
Increasing women's access to traditionally male fields of employment can increase women's exposure to sexual harassment.

Sample research on state expansions of federal employment protections

(not listed: states with same minimum wage as federal and no significant EL differences)

Which are just cause?	Regular/tipped/ minimum wage	Wage issues including Overtime calculation	Breaks/ Leave/ Schedules	Discrimination Harassment Retaliation	Safety and Health
U.S.	$ 7.25				
AK	$11.73	√	√	√	√
AR	$11.00				
AZ	$14.35/11.35				√
CA	$16.00	√	√	√	√
CO	$14.42/11.40		√	√	
CT	$15.69/6.38		√	√	√
DE	$13.25/2.23				
FL	$12.00				
GA	$ 5.15/7.25				
HI	$14.00/12.75				√
IL	$14.00/8.40		√	√√	√
MA	$15.00		√	√	√
MD	$15.00/3.63				√
ME	$14.15/7.08		√		√
MI	$10.33/3.93		√		√
MN	$8.85 or $10.85				√
MO	$12.30/6.15				
MT	$4.00 or $10.30				
NE	$12.00/2.13				
NJ	$15.13/5.26		√		√

NM	$12.00				√
NV	$12.00		√		√
NY	$15.00/10.00		√	√	√
OH	$7.25 or $10.45/5.25				
OR	$14.70		√√		√
RI	$14.00/3.89				
SD	$11.20/5.60				
VA	$12.00				√
VT	$13.67/6.84		√		√
WA	$16.28	√	√		√
WV	$8.75				
WY	$ 5.15 unless subject to FLSA				√
DC	$17.50		√	√	

Sample research on categories of employment issues

Discrimination
Harassment
Wage and hour violations
Retaliation
Breach of contract
Health and safety violations
Denial of benefits
Violations of FMLA
Failure to provide disability accommodations
Constructive discharge
Wrongful termination

Sample reflection, additional client questions to determine/assess client's complaint

Name
If you have a contract, were any agreements broken?
How, if at all, were you treated differently because of a protected characteristic (race, gender, age, religion, disability, sexual orientation)?
Have you experienced any of these, by any employees at your company: inappropriate comments or behaviors or harassment? If this was reported, to whom and with what response?
Have you experienced issues with incorrect uncorrected pay or overtime?
Have you experienced problems with unpaid wages or overtime?
Have you been required to work off the clock?
Have you been denied breaks or meal periods?
Were you retaliated against for any reason, and what do you think the reason might have been?
Have you been denied or penalized for requesting or taking medical or family leave?
Were you denied requested accommodation for a disability?
Have you been denied benefits you think you are entitled to (health insurance, retirement)?
Have you experienced unsafe or unhealthy working conditions?

Were you fired?
Did you quit because you thought your employer was trying to get rid of you?
What other employment concerns might you have?
For each relevant employment concern above, can you provide evidence (such as contracts, emails, texts, voicemails, paystubs, performance reviews, witness statements)?

Sample reflection, examples of conflict of religious beliefs in the workplace

Workers might want certain days off for religious reasons.
Workers night not want to engage in employment actions (selling alcohol, pornography, birth control medicines; performing abortions) that violate their religious beliefs.
Employers might not want to provide good or services that do not align with their religious beliefs.
Employers might want to hire employees whose religious beliefs correspond to their own.
Employers might want to discharge employees whose actions offend the employer's religious beliefs (e.g., religious associations terminating those who become pregnant or come out as LGBTQ).
Employers may wish to mandate attendance at religious events or events with religious components.
Employer may have dress codes that conflict with employee religious views on dress/hair.
Employers may wish to forbid wearing of religious symbols or messages in the workplace.
Employees may want to proselytize in the workplace to customers or fellow employees.

Sample reflection on pension vulnerability to events, actions, and inactions

Employee dies before 30 years of employment.
Employee is fired before 30 year of employment.
Employee is demoted with lower pay in the last year of employment.
Employer fails to fund pension.
Employer invests poorly in trying to fund pension.
Employer borrows from pension fund and fails to repay.
Employer goes bankrupt.
Employer goes out of business.
Better protections: current annual funding, fiduciary responsibilities when investing the funds, not borrowing from the funds, not overly investing funds in company stock, maintaining a diversified portfolio, vesting in case of employment termination, insuring pension funds

Sample reflection on termination motivations

Employee poor performance
Employee misconduct (insubordination, company policy violations)
Employee theft or fraud
Employee substance abuse
Employee excessive tardiness or absenteeism
Employee unreliability
Employee misalignment with employer culture
Employee disruptive behavior, such as unresolved conflict with colleagues
Employee breach of contract

Employee behavior outside of work which affects employer reputation or legal liability
Employee failure to maintain licensing or certification
Employee lack of work ethic
Employee harassment of other employees
Employer harassment of employee (including creating, encouraging, or failing to discourage a hostile work environment)
Employee/employer conflict of interest (e.g., employee working for or investing in another company, employee unauthorized disclosure of company data)
Employer restructuring, downsizing, relocation, closure, lack of business need

Sample reflection on additional losses when employment is discontinued

Self-esteem
Esteem of others/reputation
Sense of security
Ease of interviewing (job loss has to be explained in every future interview)
Professional growth opportunities
Personal fulfillment
Probability of re-employment (some employers will not hire the unemployed)
Credit-worthiness

Sample reflection on constructive discharge by employer actions, inactions

Require employees to return to office
Cut hours, shift, salary, benefits, leave
Relocate work place, including international
Increase hours, change shifts (making child care pickup, etc. difficult)
Change nature of work to less desired, more difficult and/or more dangerous
Reduce resources
Terminate friends, spouse, colleagues
Promote less competent colleagues and superiors, making worker's job more difficult
Instigate new undesirable policies (e.g., dress code, mandatory training or meetings)
Harass, demean, demote
Push to early retirement

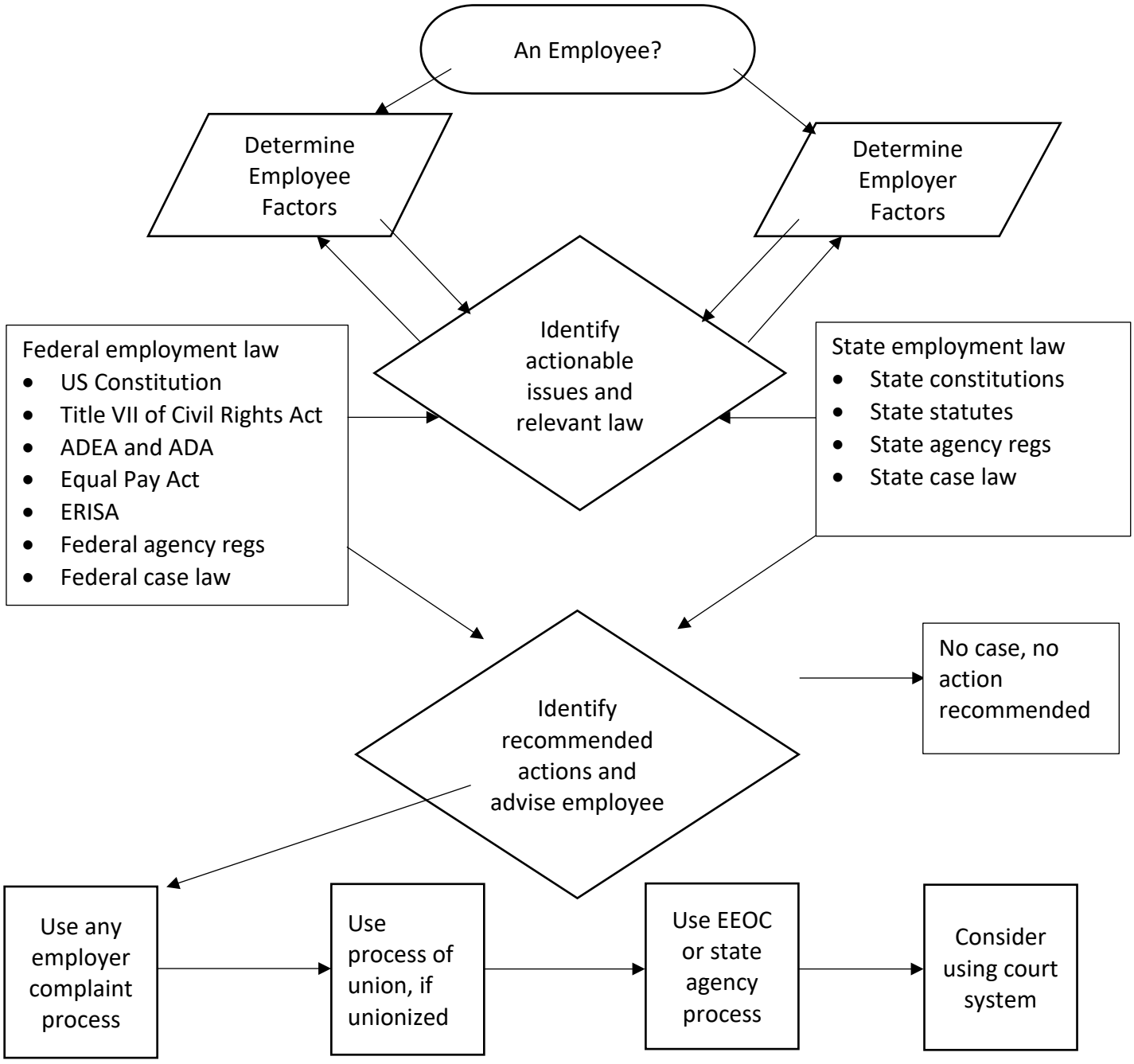
Sample reflection, additional questions for a wrongful discharge client

[Prior questions (to determine nature of claim) should have already established existence of any contract, whether member of protected class, etc.]

Employee name
Did you quit or were you fired?
If you quit, why did you do so?
If you were fired, what reason was given?
How was notice of termination given?
What was official date of termination?
What was last date you actually worked?

What financial losses (income, benefits, other damages) have you incurred as a result of the termination?
Did you pursue any internal company remedies?
Did you pursue any external remedies (government agencies, other attorneys)?
Describe any job search efforts you pursued after termination and results.
Are there any employees who might be willing to confirm your answers?
What would be an acceptable resolution of your issue (reinstatement, compensation, other)?
Is there any other information you would like to provide at this time?
What written evidence, if any, can you provide for your answers?

Sample EL flowchart



FEEDING SUCCESS: LEGAL & EMPIRICAL BLUEPRINT FOR CAMPUS FOOD RECOVERY PROGRAMS

TRAVIS ROACH, PHD[*]; GARETH MORTON J.D. CANDIDATE[**]

> "If there is anything more heart-breaking than a body perishing for lack of bread, it is a soul which is dying from hunger for the light."[±]

ABSTRACT

We study food insecurity on a suburban college campus in the Oklahoma City metropolitan area and evaluate the success of the "Broncho Bites" food recovery program. Our empirical analysis finds significantly increased educational attainment for students who participate in this food assistance program. While much of the research on food insecurity only addresses its effects, our analysis provides an implementable solution with liability protection. Considering our empirical findings, we provide a blueprint model (the Broncho Bites Model), which is viable for implementation at other institutions, while preserving liability protections afforded by the Bill Emerson Good Samaritan Food Donation Act.[1] Our findings and model offer universities a framework for addressing student food insecurity, improving academic outcomes, and reducing food waste, while minimizing legal exposure.

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[±] Victor Hugo, *Les Misérables* (1887).

[1] 42 U.S.C. § 1791.

I. INTRODUCTION

A recount of the typical college experience is often filled with anecdotes of the necessity of eating cheap packets of ramen noodles and peanut butter and jelly sandwiches to survive.[2] However, laughter about a cheap and easy meal being a part of the stereotypical college experience blurs the reality that true hunger actually detracts from the college experience of so many students.[3] The reason for the cheap, unsubstantial cup-a-noodles is not always born out of convenience, but it instead comes from limited access to affordable and nutritious food and the means to enjoy it. While this is a tragic truth for many college students, does it have to be? Hunger and poor nutrition should not be a rite of passage in higher education, but American society has yet to address its complacency in this regard. Colleges, like the University of Central Oklahoma (UCO), that fight hunger through thoughtful policy and programming like the Broncho Bites model will reap the benefits of increased educational attainment without fear of legal liability.

In this article, we analyze a case study in improving food insecurity at a mid-sized university in a major metropolitan area.[4] We assess a potential solution for decreasing collegiate food insecurity while improving classroom performance by examining a case study in addressing on-campus hunger through the UCO Central Pantry and the "Broncho Bites" program, which are direct, low-barrier nutritional assistance programs. UCO's primary assistance program is the Central Pantry, which was the first university-operated supplemental food pantry for college students in the state.[5] The Central Pantry is a pantry partner of the Regional Food Bank of Oklahoma (RFBO).[6] As the largest food bank in Oklahoma, RFBO partners with 1,300 partners across the state in fifty-three different counties.[7] RFBO not only distributes food, it is a leader in educating the public on hunger, advocating for those living with hunger and providing access to additional resources.[8] The Central Pantry partnership was established by UCO and RFBO leadership after many UCO students were observed using local community pantries on a level that warranted a pantry solely for the university.[9]

Research shows that students who face food instability, even when receiving nutrition assistance, experience decreased academic performance, but this is discussed mostly when considering adolescent children.[10] Food instability greatly affects educational attainment for

[2] *See* Donovan Storr, Beyond Ramen and Frozen Dinners: Students' Perceptions of and Experiences with Food Insecurity (May 2023) (unpublished M.S. in Applied Sociology thesis, Southeastern Louisiana University) (on file with author) (section regarding Yadina's interview).
[3] *See* Noreen M. Siddiqui, BEYOND RAMEN: STUDENTS' LIVED EXPERIENCES OF CAMPUS FOOD INSECURITY AT TWO CATHOLIC UNIVERSITIES (August 2021) (unpublished Ph.D. dissertation, Marquette University) (on file with author).
[4] The University is located in the northern suburb of the 20th largest city in the United States according to the latest census data.
[5] UCO CENTRAL PANTRY 2023, https://give.uco.edu/project/40231 (last visited Apr. 1, 2025).
[6] REGIONAL FOOD BANK OF OKLAHOMA, *Hunger of College Campuses*, https://www.regionalfood bank.org/about-us/our-programs/food-for-communities/hunger-on-college-campuses/ (last visited Oct. 6, 2024).
[7] REG'L FOOD BANK OF OKLA., https://www.regionalfoodbank.org/about-us/ (last visited July 10, 2025).
[8] REG'L FOOD BANK OF OKLA., 2024 IMPACT REPORT, https://www.regionalfoodbank.org/2024-impact-report/ (last visited July 10, 2025).
[9] Camryn Sturgill, *Central Pantry Offers Assistance to Campus* Community, U Central Media (Mar. 1, 2022), https://ucentralmedia.com/central-pantry-offers-assistance-to-campus-community/ (last visited Sept. 5, 2024).
[10] See, Anna Gassman-Pines & Laura Bellows, *Food Instability and Academic Achievement: A Quasi-Experiment Using SNAP Benefit Timing*, 55 American Educational Research Journal 897 (2018).

learners of all ages.[11] It is time to recognize that brain fog from limited food access can and does affect students of all ages and levels of education and that increased food access improves student performance in a multitude of ways.[12] We show this by assessing the grade impacts of a university's food access programs on students who use these programs, versus those who do not. Thoughtful problem solvers must not, in a rush to find solutions, forget to look at the sum of a system's parts, especially those of a social construct. This is why it is pivotal to lay a solid foundation of understanding Oklahoma food insecurity, university determining factors, and policies before analyzing program data and providing a guide to avoid liability concerns.

II. OKLAHOMA & UNIVERSITY FOOD INSECURITY

Oklahoma is an agricultural state with large livestock and crop industries.[13] Oklahoma exports millions of dollars of products for its many agricultural products to provide raw input goods for the national and worldwide food distribution system.[14] Food is grown in Oklahoma, but with the globalization of food creation and distribution, many agricultural products travel farther before arriving as consumable goods.[15] Oklahoma's food insecurity rate feels counterintuitive to its food production but stems in part from the delocalization of farm-to-table products.

The industrialized corporate food production and distribution system in Oklahoma and America is a major contributor to the modern lack of small businesses and overconsumption of unhealthy food.[16] The lack of localized food systems offering affordable, healthy options disproportionately affects people of color and low income.[17] This is likely exacerbated in Oklahoma because much of Oklahoma's population resides in rural communities that are not heavily populated.[18] Consider the importance of social cohesion in a rural state like Oklahoma. When the food system does not adequately provide for them, communities must adapt and make do through community-led efforts to address the scarcity of food.[19] Social cohesion has been shown to dampen the impacts of insecurity and food deserts, and it is a decentralized response that

[11] *Id*.
[12] *See* Madeleine Levin & Jessie Hewins, *Universal Free School Meals: Ensuring That All Children Are Able to Learn*, 47 Clearinghouse Rev. (2013).
[13] *See*, OKLA. DEPT. OF AGRIC., FOOD, AND FORESTRY, AN OVERVIEW OF OKLAHOMA AGRICULTURE https://ag.ok.gov/oklahoma-ag-overview/#:~:text=Oklahoma%20Specialty%20Crops,for%20exports%20of%20native%20pecans (last visited July 11, 2025).
[14] NAT'L AGRIC. STATISTICS SERV. & OKLA. DEPT OF AGRIC., FOOD AND FORESTRY, *2022 Oklahoma Agriculture Statistics*, Section 71(Oct. 2022). (Oklahoma contributes a variety of agricultural goods for export, but the state has heavily exported wheat and meat as shown by export data for the year 2020.)
[15] *See*, Food Miles: Background and Marketing – ATTRA – Sustainable Agriculture, https://attra.ncat.org/publication/food-miles-background-and-marketing/ (last visited Oct 8, 2024) (For information regarding the distance food travels for processing and distribution.)
[16] Eric Holt-Giméénez & Yi Wang, *Reform or Transformation? The Pivotal Role of Food Justice in the U.S. Food Movement*, 5 RACE/ETHNICITY 83 (2011).
[17] *Id.*
[18] Craig Gundersen et al., *Food Insecurity Across the Rural-Urban Divide: Are Counties in Need Being Reached by Charitable Food Assistance?*, 672 ANNALS AMERICAN ACADEMY POL. AND SOC. SCI. 217 (2017).
[19] *See*, Mader, E. and Busse, H. (2011) 'Hungry in the Heartland: Using Community Food Systems as a Strategy to Reduce Rural Food Deserts', *Journal of Hunger & Environmental Nutrition*, 6(1), pp. 45–53. doi: 10.1080/19320248.2011.549377.

helps mitigate the adverse effects of rural food insecurity.[20] The issues and discussion of the current food system is a field of research filled with plenty of policy discussion and data to review, but that is not the purpose of this paper. It is worth mentioning how that system is likely to affect largely rural Oklahoma and the very demographically diverse University of Central Oklahoma.[21]

The current food system and population distribution are driving factors in Oklahoma's heightened food insecurity compared to other, more urban states, and the national average. Oklahoma is one of only seven states to have a food insecurity rate higher than the national average from 2021 to 2023.[22] Six of these seven states (Oklahoma, Texas, Arkansas, Louisiana, Mississippi, and Kentucky) are in the south-central region of the United States and are rural agricultural states.[23] As shown in **Table 1**,[24] for the last seven years, Oklahoma has fluctuated around fifteen percent of its population -- over half a million Oklahomans -- being some level of food insecure. The United States Department Agriculture assesses food security and insecurity on a range: high food security, marginal food security, low food security, and very low food security.[25]

Table 1. Annual Food Insecurity Rate of Oklahoma

Year	%	Pop. #
2017	15.8	621,370
2018	15.1	594,140
2019	14.7	583,570
2020	13.0	514,990
2021	14.1	561,640
2022	16.7	672,170

The percentage of Oklahoma households that face low food security is also telling. **Table 2** uses data collected by the United States Department of Agriculture, which shows household averages over two-year increments, which supports the claim that roughly fifteen percent of Oklahomans are food insecure.[26] An additional significant detail is the percentage of Oklahoma households that are labeled as "very low food security."[27] Which is defined as "([under its] old label = Food insecurity with hunger): reports of multiple indications of disrupted eating patterns

[20] *See*, Denney JT, Kimbro RT, Heck K, Cubbin C. *Social Cohesion and Food Insecurity: Insights from the Geographic Research on Wellbeing (GROW) Study*. Matern Child Health J. 2017 Feb;21(2):343-350. doi: 10.1007/s10995-016-2119-5. PMID: 27439421; PMCID: PMC10627425; Daniel Brisson, *Neighborhood Social Cohesion and Food Insecurity: A Longitudinal Study*, Vol. 3, Iss. 4 J. Society for Soc. Work and Rsch. 268-79.

[21] The University of Central Oklahoma is the third largest university in the state Oklahoma, a large workforce educator, and the setting for this case study.

[22] U.S.D.A. ECONOMIC RESEARCH SERVICE, *Food Security in the U.S.*, https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/key-statistics-graphics (last visited July 14, 2025).

[23] UNITED STATES CENSUS BUREAU, CENSUS REGIONS AND DIVISIONS OF THE UNITED STATES https://www2.census.gov/geo/pdfs/maps-data/maps/reference/us_regdiv.pdf (last visited July 14, 2025).

[24] Source: Data compiled from Hunger & Poverty in Oklahoma | Map the Meal Gap, Feeding America, https://map.feeding america.org/district/2017/overall/oklahoma (last visited Aug 31, 2024). Original table created by author using data gathered by Feeding America.

[25] U.S.D.A. ECONOMIC RESEARCH SERVICE, *Food Security in the U.S. – Definitions of Food Security*, https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/definitions-of-food-security (last visited July 14, 2025).

[26] U.S.D.A. ECONOMIC RESEARCH SERVICE, *Oklahoma State Data*, https://data.ers.usda.gov/reports.aspx?StateFIPS=40&StateName=Oklahoma&ID=17854 (last visited Oct. 11, 2024).

[27] *Id.*

and reduced food intake."[28] Another roughly five percent of households are the lowest level of "food secure," and are on the brink of falling into insecurity.

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Table 2. Food Insecure and Very Low Food Secure Household % Averages

Household-level Food Insecurity and Very Low Food Security		2011-13 avg.	2018-20 avg.	2021-23 avg.
	Percent			
	Food insecure households	15.5%	14.6%	15.4%
	Very low food secure households	6.7%	4.5%	5.7%

The rate and challenges of food insecurity in Oklahoma are exacerbated on college campuses. Consider one of the previously discussed human responses society has to mitigate the harsh reality of food insecurity: social cohesion. When you are a part of a local or small community, your increased connection provides a communal safety net when times are hard. But young college students, new to the real world and often limited in their community to more than their peers also facing the same challenges, do not as easily benefit from social cohesion. This reality is exemplified by the fifty-five percent of students at UCO that internal survey data shows to be "food insecure".[29] UCO is no outlier; a 2018 national survey conducted by Temple University found high rates of food insecurity at colleges across the country.[30] But the Federal Supplemental Nutrition Assistance Program (SNAP) is not able to effectively assist students due to its application requirements, despite recent changes to qualifications for students.[31] The USDA provides a webpage revealing complicated and hard-to-understand criteria that college students must satisfy to be eligible for benefits.[32] The last thing students need is another difficult assignment to try and learn during their busy schedule, to get something as fundamental as food. Students are not eligible for SNAP unless they meet certain exemptions: having children, minimum hours that an applicant works, or seeking education through certain government placement

[28] U.S.D.A. ECONOMIC RESEARCH SERVICE, *Food Security in the U.S. – Definitions of Food Security*, https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/definitions-of-food-security (last visited July 14, 2025).
[29] UCO CENTRAL PANTRY 2023, UNIVERSITY OF CENTRAL OKLAHOMA FOUNDATION, https://give.uco.edu/project/40231 (last visited Apr. 1, 2025).
[30] *See* SARA GOLDRICK-RAB ET AL., COLLEGE AND UNIVERSITY BASIC NEEDS INSECURITY: A NATIONAL #REALCOLLEGE SURVEY REPORT (Apr. 2019).
[31] *See* CENTER FOR LAW AND SOCIAL POLICY, SNAP FOR COLLEGE STUDENTS: AN OVERVIEW https://www.clasp.org/wp-content/uploads/2022/01/SNAP-for-College-Students-An-Overview.pdf. (last visited Apr. 1, 2025).
[32] U.S.D.A. FOOD AND NUTRITION SERVICE, *Students*, https://www.fns.usda.gov/snap/students (last visited Sept. 10, 2024).

programs.[33] The limitations on student qualifications for SNAP benefits prevent the nation's largest assistance program from properly and easily helping college students—one of the most insecure populations—address hunger.[34] There have been policy pushes to improve SNAP benefits for higher education students, but federal and state policy changes have not yet gone far in addressing this need.[35] This is why campuses with high rates of food insecurity will see that university-operated pantries and supplemental programs are great resources to help prevent students from being left hungry behind.[36]

UCO's large population of international students who, with f-1 student visas, are left with particularly limited choices other than what is offered on campus, also need location-specific programs to provide them with adequate assistance.[37] Under the "Personal Responsibility and Work Opportunity Reconciliation Act," the eligibility and exemption requirements for legal and non-legal citizens are inconsistent and confusing.[38] International students in America with a f-1 student visa are not a listed category of qualified non-citizen for SNAP benefits eligibility, and therefore are unable to access the largest food assistance program in the nation.[39] Beyond job opportunities, these students often have limited transportation options, and may live in an on-campus dormitory with no kitchen space.[40] Additionally, college campuses tend to attract cheap, fast-food restaurants and other businesses of "convenience," leaving students with few options beyond meals with little nutritional value and sustenance. Simple "quick and easy" food can lead to nutritional "oppression" for students who need a rich nutritional diet to succeed in school.[41]

III. UNIVERSITY SOLUTIONS

The reason for focusing so heavily on how food and hunger affect education may not be intuitive. In the k-12 primary education setting, there is substantial research on how school lunch programs help students get the quantity and quality of food necessary to succeed.[42] Nutritional quality and consistency have a demonstrated and significant positive impact on attainment and achievement for k-12 students.[43] However, Oklahoma students do not just grow out of hunger

[33] *Id*.
[34] *Id.*
[35] *See* DUNYAK, E.M. (2018). THE END OF THE RAMEN DIET: HIGHER EDUCATION STUDENTS AND SNAP BENEFITS. *Journal of Food Law & Policy*, 14(1). Retrieved from https://scholarworks. uark.edu/jflp/vol14/iss1/13.
[36] *UCO Launches Broncho Bites Food Recovery Program*, U Central Media (Oct. 31, 2022), https://www3.uco.edu/press/prdetail.asp?NewsID=31104 (last visited Apr. 1, 2025).
[37] U.S. Citizenship and Immigration Services, *Students and Employment*, https://www.uscis.gov/working-in-the-united-states/students-and-exchange-visitors/students-and-employment (last visited Sept. 10, 2024).
[38] Gabe Rody-Ramazani, The Cruel Restrictions on Immigrants' Eligibility for Public Benefits in the United States, GEO. J. ON POVERTY L. & POL'Y (Nov. 5, 2023) https://www.law.georgetown. edu/poverty-journal/blog/the-cruel-restrictions-on-immigrants-eligibility-for-public-benefits-in-the-united-states/.
[39] U.S. DEP'T OF AGRIC., SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM: GUIDANCE ON NON-CITIZEN ELIGIBILITY, 9 (2001).
[40] Using UCO housing as an example, the university has five residential halls of which three are limited to microwaves and outlet appliances; one has a community kitchen for the entire dorm; and one offers kitchens for students in apartment-style housing. UCO: Housing and Residential Engagement, https://www.uco.edu/students/housing-dining/housing/#options-housing (last visited Sep 10, 2024).
[41] Andrea Freeman, *Fast Food: Oppression through Poor Nutrition*, 95 CALIF. 2221 (2007).
[42] *See*, Eleanor D. Thompson, *Why Nutritious Meals Matter in School*, 102 The Phi Delta Kappan 34 (2020).
[43] Marcus B. Weaver-Hightower, *Why Education Researchers Should Take School Food Seriously*, 40 Educ. Rsch. 15 (2011).

and the need for healthy food when they graduate high school and begin college.[44] This hunger and lack of healthy food is an issue for even college students, and the stakes for poor educational attainment due to hunger and food insecurity are just as high. This understanding explains why the Regional Food Bank of Oklahoma, the largest hunger-relief nonprofit in Oklahoma, partners with over a dozen college and vocational school campuses to provide food pantries for Oklahoma students seeking higher education.[45]

Knowing the risks of student hunger, UCO developed university safety-net programs for students and faculty who may need additional assistance in 2022.[46] UCO's primary assistance program is the Central Pantry, which was the first university-operated supplemental food pantry for college students in the state.[47] The Central Pantry is a partner pantry with the Regional Food Bank of Oklahoma (RFBO).[48] The Central Pantry was born out of the realization by the university and RFBO leadership that many students were recorded using local satellite pantries on a level that warranted the creation of a pantry solely for the university.[49]

The Central Pantry is a "client-choice" model pantry meant to supplement groceries (non-perishable goods only; no dairy, meat, or cold items), where patrons choose the grocery items they want.[50] Patrons are able to select which exact items they want and are able to feel the value of picking items in a grocery store space.[51] Students are only allowed a set number of items per visit which is verified at checkout.[52] These allowances are based on household size, preventing students from just receiving a set, pre-packed bag of items that may not be what they want or can eat, preventing further food waste.[53] The primary sources of food for the pantry are donations from the RFBO and weekly donations from two grocery stores located near the university.[54] The pantry attempts to help lower barriers to access for students who may struggle with issues such as hours of operation of the pantry and the social stigma of needing assistance by accepting online orders for pick up with requests for what students need. Once received, the online orders are then packed by a volunteer and placed in one of fifteen lockers the pantry occupies in a low-trafficked part of a university building with longer hours of operation. The "customer" then receives an email with a locker combination and has one week to retrieve the items.

The Central Pantry offers one other major meal assistance program to its students and staff: a pantry umbrella program called Broncho Bites.[55] Broncho Bites, funded with a grant provided by the Oklahoma Department of Environmental Quality, serves as a food waste prevention

[44] Naomi Curtis, Oklahoma College Students Are Hungry, and There's More We Can Do to Help, OKLAHOMA POLICY INSTITUTE (Nov. 27, 2019), https://okpolicy.org/oklahoma-college-students-are-hungry-and-theres-more-we-can-do-to-help/.
[45] Hunger on College Campuses, REGIONAL FOOD BANK OF OKLAHOMA https://www.regional foodbank.org/about-us/our-programs/food-for-communities/hunger-on-college-campuses/ (last visited Apr. 1, 2025).
[46] Confirmed through the co-investigator's direct involvement with the pantry.
[47] Gareth Morton (co-investigator) was a student coordinator for the Central Pantry and has comprehensive experience with the university's food assistance programs and their functioning.
[48] Regional Food Bank of Oklahoma, *Hunger of College Campuses*, https://www.regionalfood bank.org/about-us/our-programs/food-for-communities/hunger-on-college-campuses/ (last visited Oct. 6, 2024).
[49] Camryn Sturgill, *Central Pantry Offers Assistance to Campus Community*, U CENTRAL MEDIA, Mar. 1, 2022, https://ucentralmedia.com/central-pantry-offers-assistance-to-campus-community/.
[50] *See* Reg'l Food Bank of Okla., Client Choice Workbook https://www.regionalfoodbank.org/wp-content/uploads/2021/01/client-choice-workbook.pdf.
[51] *Id*.
[52] *Id*.
[53] *Id*.
[54] Confirmed through the co-investigator's direct involvement with
[55] Broncho Bites is named after UCO's mascot, the Bronchos.

program and hunger mitigation.[56] The program mitigates food waste and provides students with free ready-made meals.[57] When weekday classes are in session, Broncho Bites volunteers package leftover food, in partnership with the university's contracted food service provider. Food that is eligible for Broncho Bites is excess food that was prepared and stored but never placed on the cafeteria's buffet line. This leftover food is frozen, packaged in single portion, biodegradable containers, and labeled with any allergens and a "good-until" date. These individual portions are then placed in a refrigerator in the university center. Students can sign up for daily email newsletters informing them what meals are available for the take in addition to Central Pantry advertisements posted across the entire campus thanks to the communications office. There is also a camera that shows a live feed of the refrigerator so students can check if there is food available before traveling to the university center. Any food not taken by students before its labeled expiration date is composted on campus.

There is added benefit to Broncho Bites being a waste prevention model. In 2010, the USDA estimated "133 billion pounds and $161 billion dollars of food waste" were created in the United States.[58] Broncho Bites satisfies the top two preferred methods of the food recovery hierarchy provided by the USDA: source reduction and feeding hungry people.[59] First, Broncho Bites feeds students food that would otherwise be wasted. Second, all recovered food is recorded by weight and ingredients to help the food provider reduce its overproduction following meal trends.

Broncho Bites is an envelope-pushing food assistance program for UCO students. Not only is it heavily focused on sustainability and waste prevention, but it also greatly helps students have access to ready-to-eat meals that do not require cooking or kitchen tools to prepare. Many students who need assistance may live in campus housing with limited cooking capacity. The combination of Broncho Bites and Central Pantry helps contribute to UCO's food power and stability for its student population, by providing varying safety nets for students in different circumstances to help prevent any student from falling through the cracks and being left hungry. The Broncho Bites program in particular, and its utility for and impact on UCO students is the principal focus of the empirical research discussed herein.

IV. DATA METHODS

To assess the full impact of the Broncho Bites program, it is critical to empirically evaluate two important, but separate channels: i) who the participants are and what demographic characteristics predict self-selection into the Broncho Bites program; and ii) what effects, if any, participation in the program has on student academic achievement.

[56] See John A. Aitken et al., *Initial Assessment of the Efficacy of Food Recovery Policies in US States for Increasing Food Donations and Reducing Waste*, Center for Health Law and Policy Innovation https://chlpi.org/resources/initial-assessment-of-the-efficacy-of-food-recovery-policies-in-us-states-for-increasing-food-donations-and-reducing-waste/ (last visited Oct. 7, 2024); 117 P.L. 362; 2023 Enacted S 5329; 117 Enacted S 5329; 136 Stat. 6295. (Federal policymakers have amended the Bill Emerson Food Donation Act to allow limited liability for more individuals and entities to donate food to reduce waste and improve food donations.)
[57] *UCO Launches Broncho Bites Food Recovery Program*, U Central Media (Oct. 31, 2022) https://www3.uco.edu/press/prdetail.asp?NewsID=31104 (last visited Sep 5, 2024).
[58] FOOD WASTE FAQS, https://www.usda.gov/about-food/food-safety/food-loss-and-waste/food-waste-faqs (last visited Apr. 2, 2025).
[59] *Id.*

Each "transaction" in the Broncho Bites program involves a student swiping their student ID. [60] This allows program administrators to monitor demand and understand service utilization.[61] In coordination with the program director, we connected this usage data with student demographic data, based on each ID swipe.[62] The student demographic data is available to faculty and leadership at the University of Central Oklahoma, and it is maintained by the Office of Institutional Research at the University of Central Oklahoma.

From this data, we determined the likelihood that a particular student would elect to interact with the Broncho Bites program based on demographic information such as the student's race and ethnicity (or international status), gender, and whether the student is an Oklahoma resident. To study this, we made use of a standard Logit model and predicted odds-ratios. An odds-ratio is a statistical measure used in epidemiology, medical research, and other fields to quantify the strength of association between two events or variables. It compares the odds of an outcome occurring in one group to the odds of it occurring in another "base" group.

In this Logit model, the dependent variable is a dichotomous indicator for whether a student visited a Broncho Bites touchpoint.[63] The sample is the entire student population over four academic semesters. In total, there were 16,415 individual "transaction" occurrences over the four-semester period. The independent explanatory variables used are the demographic characteristics listed above and indicator variables for the semester and academic year. These latter variables capture unobserved heterogeneity, such as a greater or lesser need due to general economic conditions, higher or lower demand due to attrition from Fall to Spring, or even the prevalence of alternative, off-campus options that are season-dependent (e.g., meals offered during holiday seasons).

Table 3 presents the results. Here, estimated odds-ratios are listed for each of the demographic characteristics we can control for. We elected to present odds ratios because these are more straightforward to understand than the raw point estimate.[64] Each row in the table should be interpreted as the likelihood or "odds" of visiting Broncho Bites based on the demographic characteristics. Any number that is statistically significantly above (or below) the number one reflects an increased (decreased) likelihood of visiting Broncho Bites. This odds ratio is relative to the base or "excluded" group. In the model, the base categories are Resident, White, and Female.[65]

We found that non-Oklahoma resident students are much more likely to visit Broncho Bites than an Oklahoma resident. Specifically, we estimate non-residents are 77% more likely to visit Broncho Bites, and this is statistically significant at the 1% level. This corresponds with our expectation that students from out-of-state potentially face more dire food insecurity than those who are in-state residents.

[60] Not a transaction, per se since money is not exchanged.

[61] Important note on possible missed "transactions." Students often ask to take food from volunteers during transportation across the university campus. This may result in undercounting the number of times a student uses the program. This likely does not equate to concerns of skewing our results as the students asking to take food while it is in transit are routine customers whose information has already been collected from previous "transaction" swipes.

[62] The principal investigator, Dr. Travis Roach, maintains this data and ensures that all student-identifying information is kept private, in accordance with all standard IRB protocols.

[63] 0 if the student has never visited BB, 1 if they have visited BB.

[64] Which is the effect of a unit change on the log-likelihood of the outcome, whether or not Broncho Bites was visited.

[65] Note, that these estimates are reflexive and are not sensitive to the choice of the base group. If instead we assumed African American students were the base group, then given our estimates below we would find a *decreased* likelihood that white students go to BB relative to African American students.

With respect to gender, we do not find that males or females are any more likely to go to a Broncho Bites location than one another. This was quite unexpected, since prior literature indicates that females tend to face more food poverty than males; especially in single-person households.[66] Though we measure usage not gender outcomes in regard to food insecurity, it seems inconsistent with that food assistance programs' usage would not be reflective and consistent with populations with increased food insecurity.

Table 3. Self-Selection Characteristics - Logit Model Estimates

Characteristic	Odds Ratio	Std. Error	Z	P-value
Non-Resident	1.774	0.340	2.99	0.003
Male	1.043	0.102	0.43	0.668
African American	1.485	0.262	2.24	0.025
American Indian	0.830	0.272	-0.57	0.570
Asian	1.685	0.374	2.35	0.019
Hispanic	2.095	0.276	5.61	0.000
International	1.727	0.389	2.42	0.015
Pacific Islander	1.026	0.400	0.07	0.948
Two or More Races	2.274	2.362	0.79	0.429

Notes: Dependent variable is Visit Dummy; Odds ratio and statisticall significance determined as greater than (less than) one; Observations = 16,415; Wald Chi-squared statistic = 82.94

With regard to race and ethnicity, we found that African American, Asian, and Hispanic students are all more likely to utilize the Broncho Bites program than white students. These are all statistically significant at the 5% level or better. African American and Asian students are 48.5% and 68.5% more likely to visit the Broncho Bites program than white students, respectively. Hispanic students are nearly twice as likely to utilize the Broncho Bites program than white students, and this effect is statistically significant at the 1% level. International students are also statistically more likely to visit the Broncho Bites program as compared to white students. The point estimate for American Indian students is less than one, hinting at a decreased likelihood of using Broncho Bites, but this effect is not statistically significant. Accordingly, we do not find this to be a significant and reliable result. Similarly, the estimate for those that are Two Or More races is quite large, hinting at an increased likelihood of visiting. However, due to the wide variance of the estimate, we cannot statistically distinguish this effect as being different than white students.

From this analysis, we conclude that there is substantial variation in the demographic characteristics of students utilizing the Broncho Bites program. Interestingly, this is self-determined. Broncho Bites does not necessarily target any single demographic group, but its effects are felt across campus and in a range of student populations. The decentralized approach of the program, coupled with what to many might look like targeted aid *ex post,* highlights that these populations are truly in need and that reducing barriers to aid by simplifying food aid distribution can potentially lead to more distributional equity at a lower cost than "targeted" aid.

[66] See *Why Women are Facing Hunger at a Disproportionate Rate*, Move for Hunger https://move forhunger.org/the-links-between-hunger-and-the-gender-gap (last visited Oct 10, 2024). (Women globally face a worse rate of hunger, and women in the U.S. suffered a hunger rate double men's in single-parent households during the Covid-19 pandemic.)

Our next hypothesis to explore was whether utilizing the Broncho Bites program is associated with improved student academic performance outcomes.[67] Here, we made use of student GPA data over time, which allows us to monitor growth (achievement impacts) by student over time. The dependent variable is the student's GPA, and the independent variable of interest is whether the student has ever utilized Broncho Bites.[68] In this model, we control for the same categorical variables from before, as well as fixed effects based on class (freshman, sophomore, etc.) and admit-type (transfer, first-time freshman, etc.). The model is estimated with ordinary least squares, and all robust standard errors are clustered at the student-level.[69]

Table 4 shows the results. Column one is our preferred specification with all fixed effects variables included, and column two shows how the result changes when we toggle these variables off for robustness. For the sake of brevity, we only show the estimate associated with visiting Broncho Bites. "Visit Dummy" shows the point estimate for the effect of visiting Broncho Bites on a student's GPA, "% Effect" translates this point estimate into percentage change form. We only calculate this percentage change if the variable of interest is statistically significant.

Here, we see that utilizing Broncho Bites is associated with a GPA score that is approximately 0.05 higher. This may seem trivial, but relative to the mean, this is approximately a 6.73% increase in GPA. This increase is statistically significant at the 1% level. We note that our fixed effects variables soak up important heterogeneity in the model. Without these effects (column two), the point estimate is about 27% larger than before, but it is not statistically significant. This means that the model shown in column one is much more precise. We also note the disparity in r-squared, which measures the model's goodness of fit. Our preferred specification explains approximately 25% of the variation in GPA, while the latter model explains less than 2%.

[67] Note, we also investigated the possibility that higher-achieving students self-select into the Broncho Bites program by including GPA as a factor in the prior Logit model. This was not found to be a statistically significant factor; so we are not concerned about reverse causation in this case.

[68] There is evidence of repeat visits among approximately 4% of students. Our results do not meaningfully change when we re-classify this variable as the count of visits instead of a simple dummy variable for having visited.

[69] The student-level fixed effect is identified because we have observations of students over time. This means that a student may have an observation in the data in one semester without having attended Broncho Bites, and another observation in another semester after having visited Broncho Bites at least once.

Table 4. Broncho Bites Effect on Academic Performance.

	(1)	(2)
Visit Dummy	.0496**	0.0634
	(0.009)	(0.040)
% Effect	6.73	-
	(0.012)	-
Gender FE	Y	N
Residency FE	Y	N
Student Level FE	Y	N
Admit Type FE	Y	N
Class FE	Y	N
Obs.	15,630	15,630
Adj. R2	0.2479	0.0145

Notes: Robust standard errors clustered by student level; ** Denotes statistical significance at the 5% level; % Effect is percentage of a standard deviation.

V. LEGAL LIABILITY FOR UNIVERSITY FOOD PROGRAMS

Universities serve the dual purposes of educating students and preparing them for the workforce. University policies that improve collegiate food security help ensure that these purposes are executed with the best impact on students. But what are the best practices for addressing student food insecurity through university-led initiatives, without creating worrisome and potentially prohibitive legal liability?

The "Bill Emerson Good Samaritan Food Donation Act" (Bill Emerson Act) was signed into federal law on October 1, 1996.[70] This law resulted from a national initiative to "'rescue' food of a highly perishable, but nutritious nature" by establishing a uniform national law that alleviated inconsistencies in legal liability protection between different state laws.[71] Although the Act has undergone subsequent revisions, the University of Arkansas School of Law offers a comprehensive legal guide for the act as it stood prior to most recent amendments, along with an extensive review of its legislative history.[72] Commentators have critiqued the act, criticizing the Bill Emerson Act for being relatively toothless; until it was amended for the first time in 2023.[73] The recently amended version, effective since January 5th, 2023, serves as a great tool for the Broncho Bites model to succeed without debilitating legal liability.[74] The Act sets a floor of liability that all states must comply with, but the Act allows states to create further protections than the Bill Emerson Act

[70] Presidential Statement on Signing H.R. 2428, 32 WEEKLY COMP. PRES. DOC. 1943 (Oct. 7, 1996).
[71] *Id.*
[72] James Haley, THE LEGAL GUIDE TO THE BILL EMERSON GOOD SAMARITAN FOOD DONATION ACT (2013). This guide is still applicable to the bulk of the current act, and we briefly make light of the benefits of the amended statute.
[73] *Id* at 11.
[74] Bill Emerson Good Samaritan Food Donation Act, 42 U.S.C. § 1791 (2023).

already offers participants.[75] In complying with initiatives for state law uniformity, Oklahoma adopted nearly identical language in 2024 after the latest amendments adopted in 2023.[76]

Universities generally manage their food services programs and campus cafeterias through two primary methods: either by internal management for campus food services operations or by outsourcing to a third-party contractor.[77] Most campuses that choose the latter approach, partner with one of the "big three" private companies that provide most campus food services -- Aramark, Sodexo and Compass Group.[78] UCO is in this category, and contracts with service provider Chartwells to operate the university's dining hall, restaurants, and food court.[79] Chartwells, a subsidiary of Compass Group, is in partnership with more than 4,500 schools (from public education to higher education) in the United States for dining services, and serves over two million meals a day.[80] Regardless of which approach a university chooses for dining services, our proposed Broncho Bites model could be introduced in either environment, while also qualifying for the liability protections afforded by the Bill Emerson Act.

For universities with internally operated food services, the current version of the Bill Emerson Act classifies a higher education institution as a "qualified direct donor".[81] The Act lists a higher education institution as a qualified direct donor as long as it satisfies the criteria of §1002 of Title 20.[82] This definition for qualified direct donors as a "liability exempt party" was previously absent from the Bill Emerson Act, before its most recent amendment.[83] "A qualified direct donor shall not be subject to civil or criminal liability arising from the nature, age, packaging, or condition of apparently wholesome food. . . that the qualified direct donor donates in good faith to a needy individual at zero cost."[84] The excess food that is donated in the Broncho Bites model is not subject to civil or criminal liability, as long as the donated food is donated "in good faith" and at "zero cost" and is "apparently wholesome food."[85] The definition of "apparently wholesome food" under the Act is defined as "food that meets all quality and labeling standards imposed by Federal, State, and local laws and regulations even though the food may not be readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions."[86] The Act only allows potential liability exception to liability protection where "injury to or death of an ultimate user or recipient of the food. . . results from an act or omission of the person, gleaner, or nonprofit organization, as applicable, constituting gross negligence or intentional misconduct."[87] For purposes of food donations within the statute, gross negligence or intentional misconduct are defined as "voluntary and conscious conduct (including a failure to act) by a person who, at the

[75] James Haley, THE LEGAL GUIDE TO THE BILL EMERSON GOOD SAMARITAN FOOD DONATION ACT 15 (2013).
[76] Okla. Stat. Ann. tit. 76, § 5.6 (West)
[77] *See* Greta Anderson, *Colleges Break From Corporate Dining Services*, INSIDE HIGHER ED (Mar. 2021) https://www.insidehighered.com/news/2021/03/31/movement-against-corporatized-campus-dining-services-renewed (last visited Apr. 2, 2025).
[78] *Id.*
[79] UCO: CAMPUS DINING SERVICES, https://www.uco.edu/students/housing-dining/dining/ (last visited Mar 21, 2025).
[80] CHARTWELLS SCHOOLS, https://www.chartwellsk12.com/meet-chartwells/ (last visited Mar 21, 2025).
[81] 42 U.S.C. § 1791(b)(12).
[82] *Id* (referencing 20 U.S.C. § 1002).
[83] Bill Emerson Good Samaritan Food Donation Act, Pub.L. 89-642, § 22, 80 Stat. 885 (1996) (current version at 42 U.S.C. § 1791 (2023)).
[84] 42 U.S.C. § 1791(c)(3)
[85] *Id.*
[86] 42 U.S.C. § 1791(b)(2)
[87] 42 U.S.C. § 1791(c)(4)

time of the conduct, knew that the conduct was likely to be harmful to the health or well-being of another person" or "conduct by a person with knowledge (at the time of the conduct) that the conduct is harmful to the health or well-being of another person."[88] Universities who operate their food services on campus would be able to qualify for liability protection by using the Broncho Bites model to donate their excess food production, as long as they comply with all relevant state and local food safety regulations. The third-party contractor or university's compliance with all necessary labelling, food safety, and packaging requirements are likely to be satisfied prior to implementing the Broncho Bites model with its current operations of food services in accordance with health department or regulatory inspections or would easily be determined by contacting a local inspector. Parties should still thoroughly and cautiously mark allergens and "good-until" dates when food is packaged for donation and consumption.

For universities that outsource dining services, there is still liability protection for implementing the Broncho Bites model, just as UCO has done, despite this donor scheme requiring a chain of donations from the contractor to the distributor (the Broncho Bites program for UCO) before reaching ultimate users, instead of direct donations.[89] A third-party food service contractor would qualify as a "person" under the Act's wide and expansive definition and would likewise be afforded liability protection.[90] The campus entity, student organization, or distributor of donated food would qualify as an incorporated or unincorporated nonprofit organization "that-- **(A)** is operating for religious, charitable, or educational purposes; and **(B)** does not provide net earnings to, or operate in any other manner that inures to the benefit of, any officer, employee, or shareholder of the entity."[91] The nonprofit organization distributor would be protected from civil and criminal liability as well.[92] The only exceptions to liability protection for this donor scheme are the same as those noted before: gross negligence or intentional misconduct.[93]

The Food Donation Improvement Act, presented in the House, would have required the Secretary of Agriculture to issue regulations to clarify the quality and labelling standards necessary to be eligible for liability protection under the Bill Emerson Act.[94] Congress ultimately struck the language and did not pass these sections of the Act that would have promulgated regulations for labelling standards for liability protection under the Bill Emerson Act.[95] This was, however, the source of the amendatory language for the Bill Emerson Act adopted and codified into law in 2022.[96] With the clear rejection of regulations promulgated by the Secretary of Agriculture, it is best to follow all relevant state and local regulations for food packaging, as the Bill Emerson Act provides.[97] Additionally, the only major concern with statutory interpretation is the liability protection of gleaners.[98] This term refers to volunteers who collect apparently wholesome grocery products for donation.[99] But there appears to be no similar definition or inclusion of volunteers for apparently wholesome food that would allow for protection to be afforded to those who

[88] 42 U.S.C. §§ 1791(b)(8)-(9)
[89] 42 U.S.C. §§ 1791(c)(1)-(2).
[90] 42 U.S.C. §§ 1791(b)(11), (c)(1).
[91] 42 U.S.C. § 1791(b)(10).
[92] 42 U.S.C. § 1791(c)(2).
[93] 42 U.S.C. § 1791(c)(4).
[94] H.R. 6251, 117th Cong. (2021) (as referred to the House Comm. On Educ. and Labor, Dec. 13, 2021).
[95] *Id*.
[96] *Id*.
[97] 42 U.S.C. § 1791(c)(f)
[98] 42 U.S.C. § 1791(b)(5).
[99] *Id.*

volunteer to collect cooked food for donation.[100] This discrepancy is unlikely to deprive these volunteers of the same protections as all other parties involved in food donation and would likely be inferred to be within the legislative intent to protect these parties as well. There is currently no case law regarding actual use of the Bill Emerson Act's protections.[101] Without any judicial review thus far, this assumption of liability protection is no more than that, but will likely remain an uncontested issue with a low likelihood of resulting in barred protection.[102] The omission of a distinct definition for volunteers who glean, collect, or repackage apparently wholesome food is not likely to be found to indicate an intent to bar liability protection.

VI. CONCLUSION

UCO and its administration have ventured into a fruitful pilot program to help feed their students and increase their chances to excel and complete their higher education and degree. The findings in this paper show that offering food resources for students pays off by improving academic GPAs, while at the same time reducing food waste and reaching a demographically diverse set of students. We do not expect that these benefits are idiosyncratic to the UCO campus, but rather, are likely to be externally valid and could lead other universities to similar successes. The small university investment per food insecure student certainly pays for itself in the long run. Fewer students having to stop pursuing higher education due to lack of resources and actually experiencing an improvement in grade outcomes will result in better student retention, providing a nice increase in tuition revenue and future economic output once students graduate and join the Oklahoma workforce. Consequently, we implore universities and administrations to recognize and implement food assistance programs for their students. Additionally, we implore businesses that serve universities to incorporate the Broncho Bites model into their practices and procedures in order to reduce waste, decrease student hunger and food insecurity, improve educational attainment, and develop cohesive partnerships on campus. Through implementing the Broncho Bites food donation model, in accordance with the Bill Emerson Food Donation Act, universities can only "win." America is more than capable of satisfying the hunger for food and wisdom of its citizens; it, like students, just requires food for thought.

[100] *Id.*
[101] A Westlaw search resulted in only six cases citing 42 U.S.C. § 1791. Five of those cases were *pro se* cases with miscited statutory law, and the other was a typo citing the wrong section of Title 42.
[102] *Id.*

UTILIZING AN OPEN EDUCATIONAL RESOURCE (OER) TEXT FOR BBA LEGAL ENVIRONMENT OF BUSINESS AND COMMERCIAL LAW COURSES: POSITIVE AND NOT SO POSITIVE EXPERIENCES

LEE USNICK*

Driven by a five-year institutional exploration of non-commercial teaching materials potential, this paper summarizes the observed strengths, opportunities, challenges, limitations, and weaknesses of teaching BBA Legal Environment and Commercial Law classes utilizing an open educational resource text, a movement whose influence is expanding in all levels of teaching and learning.[1]

I. DEFINING OER FOR PURPOSE OF THIS PAPER

For the purpose of this paper, the term Open Educational Resources (hereafter OER) will generally mean communication and information resources where the copyright and ownership, and where the owner/author of the works place very little, if any, limitations on any editing, alteration, reuse, or publication. There are extensive discussions about the range of different OER configurations and legal boundaries which are beyond the scope of this paper.[2]

II. OER LEARNING MATERIALS ARE ADOPTED FOR A VARIETY OF REASONS

OER is not implemented for no apparent cause. Often, the context for considering OER implementation tells a lot about the desired outcomes as well as predicting outcomes resulting from their use.

A. *Text Decision Making and Implementation Does Not Occur in a Vacuum*

Prior to 2017, the author was never in much hurry to change texts for a lot of reasons, including a history of not liking test banks, multiple choice testing, and power points.

1. The Lead Professor Model Development Begins

In late spring 2017, the author was appointed to be the lead professor for all sections of the required Legal Environment of Business course for the BBA degree. The plan was for the lead professor to be the professor of record for sixteen course sections each semester.

All learning objectives, texts, tests, quizzes, and assignments as well as a rich array of audio-video learning tools would be designed and created by the lead professor, with the sixteen sections of forty students each having an assigned faculty or adjunct responsible for the actual classroom activities.

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1 William & Flora Hewlett Found., Open Education, https://hewlett.org/strategy/open-education/#overview, n.d. *See also* Open Educational Resource Commons defining OER as "…educational materials – everything from a single lesson plan to an entire textbook – that saves students and teachers money because they are free to use, customize, and share," at oercommons.org/oer-101, n.d.

2 Creative Commons, OER, http://creativecommons.org/about/education/education-oer-resources, n.d.

2. Lead Professor Starts with a Market Text

The author determined that a more current text for use in the Lead Professor model was needed, and a market text was adopted and successfully placed in service in the fall of 2017 with the advent of the Lead Professor program for all sections of the Legal Environment course.

3. University Call for OER Consideration and Potential Focused Implementation

In late 2018, the faculty were also urged to try OER texts. Spring 2019 saw integration of an OER Commons Resources text prepared and ready for Fall 2019 launch in the Lead Professor program. It was also designed and edited for use as the required text for the author's Commercial Law course.

4. Lead Professor Model Quickly Disappeared and OER Large Scale Implementation Never Occurred in Legal Environment Courses

Shortly thereafter, in late spring 2019, the Lead Professor experiment was unexpectedly ended for the Legal Environment of Business course, essentially reverting the course to pre-2017 status. All Legal Environment sections continued using the market text used in the Lead Professor model.

5. OER Used for Three Years in Only Classes Taught by Author

Starting in Fall 2017, the OER designed course was used only in the author's four to six sections per year of Legal Environment of Business courses rather than in the 30 sections which were anticipated. The OER text was also used for only a fraction of the Commercial Law courses during that period, the author's one section per semester. The hope for having the resource of a large pool of students using the OER instead turned into acceptance of a much smaller pool of students per year.

6. After Three Years, OER Text Is Replaced With a New Edition Market Text

In each of the teaching situations above, with both an OER text and several different market texts, each text had a character and personality that commended it. There are no favorites here. Rather, in each class delivery mode setting for each product, the author's overarching issue driving text selection considerations was (and remains), what can be done for these students in this setting using this tool to continuously improve students' achievement on course learning objectives?

7. Additional Factors Had Various Effects on the Outcomes Reported Here

The author has a general dislike for power points, test banks, and multiple-choice testing. Long before the Lead Professor model, the author created original assessment questions were whenever possible. The courses using different texts and teaching delivery modalities were delivered to a highly diverse set of students. The mix often included working professional grandparents finally completing their BBA degree sitting next to eighteen-year-old college students with their associates degree.

III. FIVE FOCUS TOPICS

This discussion considers five subjective areas that arose from the author's OER experiences. This is not intended as a deeply documented set of specific parameters on course design or implementation but rather is an attempt to reflect the impact of the OER adoption and use in terms of personal, subjective observations of OER strengths, opportunities, challenges, limitations, and weaknesses. Substantive

quantitative analysis of OER, and for that matter the Lead Professor model, dissolved with the cancellation of the Lead Professor model exactly when the OER experiment began.

Each of the five focus topics have two aspects. First, how does an OER work for and affect the classroom instructor, course creator, and/or course manager creating and operating a course, or set of courses, using an OER tool? Second, how are student learning, and how is their well-being supported and enhanced by using an OER text and OER supporting material.

A. OER Strengths

- fast, easy to access by downloads
- no outside permission required to modify, publish, edit, etc.
- cost is hard to beat
- students have required text from day one
- no confusion about which edition of text is or is not permitted (as students often purchase cheaper older editions of a required text)
- easy to retain text revisions and additions for use next semester using course copy in the learning management system (LMS)

B. OER Opportunities

- again, easy modification, easy ability to insert class or group exercises at appropriate text locations
- easy to select and deselect any part of the OER text document
- select and deselect any part of the OER related content
- easy to select and deselect any previous instructor revisions or modifications as needed
- flexibility in breadth and depth of coverage of specific topics, emphasizing more key topics while decreasing coverage of less important topics
- most importantly, very easy to update when current state of the law changes

C. OER Challenges

- easily outdated, requiring instructor to follow numerous regulatory agency decisions and legislative updates to ensure currency of content of assigned topics (time consuming)
- wide range in quality of available OER quality
- often difficult to determine date of last content update, requiring close review before adoption
- varying quality in analysis/explanations of topics included in OER
- potential lack of adequate coverage on some topics
- often not the depth of coverage of many market texts
- often overly complex explanations of certain topics with a depth of detail not appropriate in a non-law school survey course

D. OER Limitations

- sometimes no author is identified, only the web host name/source
- often no dates of most recent updates are on OER's website
- often no contact to call such as help desk, salesman, etc.

E. OER Weaknesses

- no helpline for functionality problems
- hard to know status of latest revisions
- author is unable to speak specifically to test banks, no search for support materials done (author created own support content, exercises, quizzes and exams)
- in author's experience, a great deal of time is required to prepare not only the text, but videos, print lectures, outlines, etc. But if this content is already created and loaded in the learning management system (LMS), then keeping the text current is not that much effort (many free law blogs and law firm newsletters follow breaking news and proposed legislation and regulations; regulatory agencies list current enforcement actions and are easy to review).

IV. FACTORS IN DECIDING TO CONSIDER OER

A. Course Design

Course design can vary widely. It is all about the specific course or courses that are about to be designed. The design process attempts to integrate a wide range of large and small considerations leading to an optimal product.

Course design starts with very broad questions usually including the following. What are the course realities? What are the fixed boundaries for the decision process? What are the overriding philosophical and tactical factors that add up to the reason that this course exists? Who is the decider in general? Who decides particulars about the course such as framework, purpose, assessment tactics and the like? Who is the course target audience? Is the audience very homogeneous or mostly diverse? Who is designing the course? Is the designer one person or a designated group? Who is actually on the ground, designing the course and what is their relationship to the entity and the course? Are there establish key objectives for the course, and who is responsible for managing those objectives? Are the objectives of the course already clearly established and suitable to the design process? Is the course mandated or in some lesser status? Is it possible to readily identify the boundaries for this course design process?

Many times, the course design process is initiated when the desired outcome is limited to minor, tangential targets. Very broad course design and delivery frameworks in fact are used to overlook the fact that a wide and deep collection of constraints leaves little room for variation in many aspects of course design.

B. Identify All Design Constraints

This paper contends that identifying those constraints need to be clearly and honestly set out at the outset. Often, decisions having significant impact on students and faculty have already been frozen by any number of management, accreditation, contributor, or a long list of other influences. This paper begins with a supposition that there are no constraint issues, and that just you or your law group have full responsibility for all course design decisions.

In this context there is also a presumption that the decisions made will set the best possible relationship between the goals and objectives of both the faculty creators and the students that will be the recipients of high-quality academic advancement.

This approach calls for several simple steps. First, identify all of the learning objectives, including those that are mandated, without concern for the source of a particular objective. Second, identify and publish all of the topical concepts and terms that every student should have converted into personal, usable knowledge. Publication supports student learning by identifying a focus, and assists in assessment efforts. Some OERs list learning outcomes for each chapter topic, making it easy and quick to ensure a particular OER covers all the mandated BBA course concepts learning outcomes.

Finally, identify mandated and not mandated specific activities which give the student the desired learning outcomes in such a way that they can adapt them to their life-long personal and professional repertoire.

C. Factors Affecting Both OER and Market Texts

On one level, there are many features of both OER and market learning tools that are similar. In varying ways, both resources balance general understanding of the topic with specific information, they both usually cover mandated topics, and they attempt to balance learning concepts and boundaries. Additionally, they both can come in a range of configurations, provide for information and activities beyond the text, ease the inclusion of outside supplemental materials, and function in a variety of teaching settings. They can be used to scale up or down for a class, depending on students' background, as well as the various reasons students enrolled in the course. There is an implication that OER may be more amenable to modification, but some market texts can be quite flexible as well. In the end, the decision process necessarily occurs when the interests of these students and these instructors support the conclusion that the OER is a better fit at this time and complies with the institution's mandated framework.

D. Specific Factors in This OER Case

The Texas government requested that public teaching entities explore the potential for OER-based course material to reduce student costs and increase accessibility. This author's university solicited faculty experimental use of OER materials. This author presumed that the OER format coupled with the stabilized lead professor model could be valuable in many ways. Some of those potential information and data collecting activities included the use of original written quizzes and tests for example.

1. Learning Philosophy

Ideally, the author's OER trial would provide the opportunity to test on a sizable sample size the qualitative value of the Lead Professor system. The hope was that using an OER text could provide an opportunity to help students think expansively beyond just understanding and remembering[3]. Further, it could provide an opportunity to broadly explore which concepts and tools were being used by students post-graduation. The author believes that that no instructor of legal environment or commercial law topics really knows the class impact until a graduated student encounters a legal situation months or years after graduating. A part of this concern is to understand whether memorization is still valuable to these students in near future times.

3 Dorina Tila & Dawn Levy, Curating OER Content through AI and ChatGPT, Open J. of Soc. Sci., vol. 11, 510-527, Dec. 2023, DOI: 10.4236/jss.2023.1112035 (discussing in detail how AI and ChatGPT can provide benefits to students and faculty when working together to curate OER content).

2. Learning Objectives

Learning objectives if used correctly can be a valuable tool for making course modifications. Matching the learning objectives for these students in the lead professor format with this material would provide multiple opportunities to match learning objectives to students and to easily modify text material.[4] While this takes significant faculty effort,[5] learning objectives used strategically can be strong tools to sharpened focus of the learning process.

3. Measuring Success of OER versus Market Text

A recent surge in OER studies has provided a number of subtopic measures, often with multiple contradictory outcomes. The outcomes are literally all over the map. Because there are so many permutations to consider that study after study fails to come to clear conclusions about OER in general or in terms of a specific issue. This could be due, in part, to an instructor's inability to randomize enrolled students into experimental and control groups. Interestingly, there are an increasing number of studies reporting that other influences such as course modality (face-to-face, hybrid, synchronous online, asynchronous online) are more informative of student learning than comparisons of OER and market texts.

E. The OER Creative Setting Can be Highly Influential

To start with, is the OER a text only or a whole course?[6] And what is the specific course setting? OERs are being implemented in some parts of the country to serve many students taking the course in a community college. Many contemporary techniques are generating stronger class products than in the recent past.[7] Is the text authored by a single individual in contrast to an extended collection of authors? On the other hand, design by committee can sometimes result in a weaker product.

V. SELECTING AN OER TO USE IN YOUR CLASS

There is a fast growing number of directories and extensive bibliographies created to assist in finding an appropriate OER text and teaching materials.[8] Before searching for an OER, the author reviewed the course design model and course learning objectives as it is important to identify what the variables are for making OER choices, and there is a fast growing literature on this process.[9] Well-developed learning objectives coupled with design models should be helpful in aligning an OER with the intended use.[10] It seems that there is still a lot of lower quality OERs available, but some sources attempt to assist culling out weaker prospects.[11]

4 Timothy S. Faith, Donna Mandi & Jill Burke, Open Educational Resources in Business Law: Notes from the Field, Teaching & Learning Excellence Through Scholarship (TALES), vol.1, no.1 (2021), https://tales.journals.publicknowledgeproject.org/index.php/tales/article/view/1358, DOI: https//doi.org/10.52938/tales.v1i1.1358.

5 *Id*.

6 *Id.*

7 *Id.*

8 William H. Walters, Finding Free OER Texbooks Online: Untangling the Web, Mary Alice & Tom O'Malley Library, Manhattan University, Riverdale, NY *Publications*, 2024, 12(4), 32; https://doi.org/10.3390/publications12040032. (finding high quality OER directions and presenting comparative information for each).

9 *See* L. Dee Fink, "A Self-Directed Guide to Designing Courses for Significant Learning," from Creating Significant Learning Experiences: An Integrated Approach to Designing College Courses (San Francisco: Jossey-Bass, 2003).

10 *Id.*

11 Walters, *supra* note 8.

Factors that can add to the quality of an OER text selection search include whether the open pedagogy framework allows students to interact with fact checking of content, thereby contributing to curating course material, and creating thoughtful and original learning materials.[12] By involving students in the selection process (time permitting), the author believes in the potential to increase student engagement with the course material, especially with the text.

In sum, the set of evaluation factors of a given OER should in some degree include content quality issues, appropriateness for use with the course level, whether the necessary copyright and license for the desired use is present, and whether an OER includes support materials for instruction and assessment. Several OER directories exist whose authors have evaluated an OER (and any support materials) on quality and other factors, and the key is to ensure the OER's currency based on the directories, including the directly are not simply out of date.[13]

A. Creating the Course Content and Layout

More than anything else, the actual design of the course and its content organization is a very major part of creating a long-lasting learning tool which can be upgraded and updated over a considerable period. Quickly or incompletely creating the course content is likely to lead to constant upgrading, program and materials correction, and other activities that lead away from the desired learning tool rather than closer to the desired outcome.

Instead of continually updating OER material, this author strongly encouraged students to add to their notes to include updating and enrichment materials provided in class. The reality is that any law text and course will need over time to be updated,[14] and in the case of a legal environment survey course, it may need almost annual updates.[15] Some legal OER texts, similar to commercial texts, undergo significant review.[16] The text itself becomes a key piece of the course design. An OER can serve as a center point for the course ensuring currency. The OER text can also play a role in establishing (or increasing) the indirect assessment measures of students' view of the course's impact. That is, how confident are in their learning of individual topics? Students' feelings, emotions, knowledge, and beliefs that are a key part of driving the course[17] and students' success.

B. Tactical OER Example

This example is likely available in many commercial texts, but the ease with which it functioned demonstrates that sometimes simplicity provides additional opportunity. In developing the course, portions of the text were extraneous to the way a topic would be covered. Consequently, those sections were removed or highly edited down to a summary paragraph.

Next, before opening the course in the LMS, the author highlighted sections of chapter selected topics using yellow highlighter. These highlighted sections became the be the part of the text that would be mandatory reading and evaluated in the course.

12 *Id.*
13 Hewlett Found., *supra* note 1. *See also* additional resources, including support materials, on the Texas Digital Library website at tdl.org.
14 Walters, *supra* note 8.
15 Faith, *supra* note 4.
16 *Id.*
17 *Id.*

Both versions described above were then placed in the course LMS. One version had the full text (with edits) and highlighting on the topics covered in class and assessed. This first version gave the students everything in the text and identified everything that was mandatory. The second version of the text consisted of only the yellow highlighted portions of the topic that were covered in class and assessed.

Some students used only the highlighted material text with the other material not present. Another group used the full text, but for the most part, focused their reading on the highlighted material. A smaller group significantly read parts of the full text, finding the full version gave them a better understanding of the highlighted topics when presented in the larger topic framework.

C. To Pilot Test or Not to Pilot Test

Some institutions urge faculty to pilot an OER in only one class. However, the author had already revised all assigned courses into the OER format, so the experience was an all or nothing approach. It is difficult to contemplate what changes the author would have made going forward if piloting the OER in a single course while teaching with a commercial text in other courses.

VI. FACTORS AFFECTING OER SUCCESS

In both Legal Environment of Business and Commercial Law courses, the same OER text was used, and according to student evaluations, was well received in both courses. Mostly due to the total front-end preparation, the courses were smooth and calmly accepted by most students. The impact of knowing that all quiz and exam questions were written by the professor and not available anywhere until test availability seemed to be generally accepted.

VII. OTHER POSITIVE EFFECTS

Overall, there seemed to be a small but noticeable impression in the classroom and outside the classroom that the instructor and her teaching style with the OER were not radically changed than was first anticipated. Overall, student performance seemed to have slightly improved, but the fact that this system came into operation just before the Covid shutdown and to move to all online courses could be a major factor in this perceived change.

One clear positive impact in the OER classes was an increased interest in and proficiency at notetaking. Students were encouraged to enter their notes directly into the text for easy reference, and use of their annotated text was allowed on all quizzes and exams. This was, from the instructor's vantage point, the second most noticeable difference with the OER.

VIII. THE FUTURE

The net observation from the seven-year involvement with OER is that it is doable, it is a lot of work, and it was a helpful tool for some students, perhaps less so for others. There was clearly a positive "teaching feeling" in OER classes, though perhaps solely a relief from the mandated no-cost text. Several other positive teaching experiences could be listed, though in the author's view, the most beneficial shift was the resulting "new lens" with which to view the future of the classroom in higher education.

The OER experience forced consideration of questions such as where the future "classroom" is headed. The phones we all carry today have more information readily available than probably all the information and knowledge available only decades ago.

The experience forced consideration of the fact that the most current (and past) views of "learning" and "teaching" have perhaps less than a decade of fuel left in them.

Today, in the early days of AI, will AI be somehow incorporated into the course “text”? Will testing as we know it today continue as the measure of student learning? Will we still assign grades based on some form of rote memory, or on use of AI and other tools to correctly problem solve up to a set benchmark, say 80% accuracy? Will "knowing" and "understanding" as we currently understand them be even recognizable in the future?

The only remaining constant will be one core question: What can *these* educators provide that is value added for *these* students at *this* time, given the availability of *all possible tools*, including the OER?

Summer 2025 Addendum

Current plans for including more business ethics in the Legal Environment of Business course call for a widely used commercial text for legal environment AND an open educational resource for the enhanced ethics portion of the content.

BLUE BELL V. LISTERIA: ICE CREAM, DEATH, AND FIDUCIARY DUTIES

MATTHEW D. MANGUM*

ABSTRACT

When teaching business law or business ethics, it is helpful to have cases that are approachable and multifaceted. Blue Bell Ice Cream's listeria outbreak in 2015 provides such a case. This case involves food safety and consumer protection, state and federal criminal enforcement, and the fiduciary duties of the board of directors to ensure a safe product. The following will provide a case study—including learning objectives and discussion questions—that is suitable for undergraduate business law or ethics courses.

I. THE CASE

For much of 2015, Blue Bell Ice Cream was unavailable after a recall, production shut down, and the destruction of 8 million pounds of sweet treats. During this time, the public showed support for Blue Bell as evidenced by school children at a Catholic school in San Antonio gathering near their playground to pray for the company and the approximately 1,450 employees who were out of work because of the shutdown (ABC13 Houston, 2015).

Blue Bell Creameries

Blue Bell traces its roots back to the Brenham Creamery Company which began making butter in 1907 in the east-central Texas town of Brenham. They began making ice cream in 1911 (Madan, 2023). By 1958, the business was focused solely on making ice cream. Their products were not available outside of Texas until the 1980s and are now available in 23 states (Blue Bell, n.d.). They continue to produce ice cream in Brenham and in facilities in the southern US and provide direct to store delivery to ensure freshness. Blue Bell had built a reputation as a company that supports many causes through generous donations and for treating their employees well, paying bonuses and having a stock ownership plan (Collette, 2015).

A Deadly Listeria Outbreak

In February of 2015, Texas government officials notified Blue Bell Creameries that two of their products tested positive for listeria. Listeria is a dangerous bacterium that can cause serious illness or death in those who consume food products contaminated with it. Although Blue Bell had their drivers pull the items from store shelves, they did not issue a recall or statement. Two weeks later, Texas officials found listeria in a third product and again Blue Bell did not issue a recall or public statement. In March, Food and Drug Administration (FDA) and Centers for Disease Control and Prevention (CDC) testing linked Blue Bell products made in Texas and Oklahoma to a strain of listeria that sickened people in a Kansas hospital. Recalls where issued on March 13 and March 23 of 2015 (US DOJ, 2020).

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The listeria contaminated ice cream sickened several people and three people died.

In April 2015, Blue Bell closed all its manufacturing plants after multiple sanitary issues were discovered. These included a lack of sufficient hot water needed to properly clean machines and unsanitary water dripping into the ice cream mix during production. During the shutdown, facilities were sanitized and updated (US DOJ, 2020). Some machinery was found to be so contained that it was permanently retired (Collette, 2015).

A History of Problems

In the aftermath of the outbreak, it became clear that there had been warning signs. Multiple government inspections of Blue Bell facilities found issues between 2009-2012. In 2013 and 2014, Blue Bell's own tests found listeria contamination (Collette, 2015).

After interviewing more than a dozen Blue Bell employees, the *Houston Chronical* reported on serval concerning sanitation and safety lapses over the years. These included a lack of proper cleaning, introduction of contamination into the production facility, and a lack of safety procedures. A long-term issue was insufficient hot water for cleaning. One employee interviewed by the newspaper said that there was limited access to hot water for sanitizing the equipment. This led employees to race to clean the equipment before the hot water ran out. They allege this resulted in machines that were not fully cleaned. The employee stated that sometimes after a machine had been cleaned, there would still be the remains of nuts and fruit that were mixed into certain flavors, even on the days when vanilla ice cream had been made. Some long-time employees reported that this issue persisted for a decade or more (Collette, 2015).

Other employees reported dripping water (condensation) from pipes and air vents into machines and products. FDA inspections noted the problem in 2009 and 2015. Employees also noted that reused cardboard sleaves brought into the factory introduced dirt and debris into the food production area (Collette, 2015).

Further, there were reports of employee injuries. In 2011, an employee lost multiple fingers while clearing debris from a machine. An OSHA investigation found that Blue Bell was lacking a lockout procedure—a way of preventing machines from turning on when workers are inside them. OSHA issued a $27,000 fine for the lack of this important safety practice (Collette, 2015).

Criminal Penalties

In 2016, Blue Bell Creameries reached an enforcement agreement with the Texas Department of State Health Services. They agreed to pay $175,000 and implement increased safety precautions. This included testing products for listeria before shipping. Further, if they failed to meet the safety standards during an 18-month period, they would be required to pay $675,000 in additional penalties (TX DSHS, 2016).

In 2020, Blue Bell Creameries pleaded guilty to federal criminal charges for distributing adulterated food products. They were sentenced to pay a fine of $17.25 million (US DOJ, 2020).

In 2023, Paul Kruse, the CEO of Blue Bell from 2004 to 2017 pleaded guilty to federal misdemeanor charges after his trial on felony charges had ended in a mistrial. His plea agreement included paying a $100,000 fine (Tokar, 2023).

Shareholder Lawsuit

In 2019, a shareholder derivative lawsuit reached the Supreme Court of Delaware. Blue Bell, like many corporations, is incorporated in Delaware. The lawsuit alleged that the Blue Bell directors, the CEO, and the Vice President of Operations breached their fiduciary duties and in doing so diluted the values of their shares. In the aftermath of the outbreak, Blue Bell was forced to accept a private equity investment that caused the alleged dilution of shareholders' ownership interests (*Marchand*).

Under earlier rulings, the Supreme Court of Delaware had ruled that "directors have a duty 'to exercise oversight' and to monitor the corporation's operational viability, legal compliance, and financial performance." Further, they have held that "A board's 'utter failure to attempt to assure a reasonable information and reporting system exists' is an act of bad faith in breach of the duty of loyalty" (*Marchand*). Writing specifically about the situation in this case, they court said, "As a monoline company that makes a single product—ice cream—Blue Bell can only thrive if its consumers enjoyed its products and were confident that its products were safe to eat. That is, one of Blue Bell's central compliance issues is food safety" (*Marchand*).

The Blue Bell board of directors did not have a committee overseeing food safety and there was no process requiring food safety concerns be reported to the board. Although they did not make a final ruling on the facts, the Delaware Supreme Court held "that the complaint alleges particularized facts that support a reasonable inference that the Blue Bell board failed to implement any system to monitor Blue Bell's food safety performance or compliance" (*Marchand*) The court made it clear that this lack of oversight of the central aspect of the business could constitute a breach of the duty of care.

II. LEARNING OBJECTIVES

When using this case in a business law course, it can be used to demonstrate criminal liability for a corporation[1] and criminal liability for corporate officers. It is also an excellent and understandable example of the fiduciary duties—loyalty and care—of the board of directors to provide meaningful oversight. For more in-depth discussions, it can be used as an example of a shareholder derivative lawsuit.

In an ethics course, the case can be used to discuss many different approaches to business ethics. When discussing the Shareholder Model, students can explore if Blue Bell acted in the best interests of its shareholders. This is particularly relevant because of the shareholder derivative lawsuit. If discussing Stakeholder Model, students can consider the many stakeholders impacted by Blue Bells actions or inactions. These include employees, consumers, shareholders, and others. If discussing sustainability, students can question if proper emphasis was placed on people, planet,

[1] As a privately held business, the legal structure of Blue Bell is nebulous. Although Blue Bell Creameries is a limited partnership based in Brenham, Texas, Blue Bell Creameries USA is a Delaware corporation.

and profit. Additionally, the case can be used to practice the application of normative theories. For example, students could be asked if Blue Bell's actions produced the greatest good for the greatest number (Utilitarianism), if Blue Bell acted in accordance with their moral duty (Deontology), if Blue Bell acted in a virtuous manner (Virtue Ethics), or if Blue Bell demonstrated concern for the well-being of those it has business relationships with (Care Ethics).

III. DISCUSSION QUESTIONS

The following discussion questions could be provided to students to facilitate in-class discussions, used for online discussion board assignments, or used as part of a paper assignment:

- How should Blue Bell have acted when they received notice of the positive tests in February?
- Should Blue Bell have waited as long as they did to issue a recall?
- How should Blue Bell have responded to earlier government inspections and employee reports of trouble?
- What should Blue Bell's management have done differently?
- What should Blue Bell's directors have done differently?
- Did Blue Bell properly consider shareholder interests when making decisions regarding the contamination?
- Did Blue Bell properly consider stakeholder interests when making decisions regarding the contamination?
- Did Blue Bell practice sustainable business practices in this case?
- Did Blue Bell's directors breach their duties of loyalty and care?
- Could the deaths have been prevented?

IV. TEACHING NOTES

I have found this case to be an effective teaching tool. This is in part because the product at issue is ice cream and is therefore not overly complicated or foreign. Further, as Blue Bell is a famous Texas and southern brand, students in Texas or the South are likely familiar with it. In fact, many students remember when the recall happened even if they were children at the time.

To keep the example current, instructors may compare the case to more recent cases. For example, in 2024, Boar's Head had a (very) similar situation. They also suffered a listeria outbreak likely due to poor sanitation (Schneider, 2025). In contrast, an outbreak of E. Coli at McDonald's in 2024 was handled my quickly and directly. The outbreak began in October and by December, the government determined there was no longer a safety risk (Durbin & Aleccia, 2024).

In the end, this case can serve as the basis of an approachable and insightful discussion of important business law and business ethics topics.

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CASE STUDY IN AFFIRMATIVE ACTION: THINGS ARE NOT ALWAYS WHAT THEY SEEM

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Introduction to the Exercise

Virtually all (text)books on Human Resource Management include a portion on affirmative action and a segment on its history, compliance, and rationale. However, there is little attention given to the debate of whether affirmative action programs should continue. This can be a tenuous discussion for class while simultaneously having potential for a heated exchange. Students are aware of this potential and thus are fearful of sharing their thoughts. As a result, the first author developed an in-class exercise that has nothing to do with race and gender's historical inequities, but the students immediately assume that it does. Their identification of the need for affirmative action goals becomes lofty, sometimes comical, and almost never realistic. Once the actual demographics of the exercise are revealed, students are surprised and realize their private views for or against affirmative action have been pierced at a fundamental level.

Learning Goals

The learning goal of this exercise is simple: To get learners to think critically about affirmative action as a process, and its overall effectiveness. In support of this endeavor, students learn about public views versus private views.

Approximate Timing for Exercise and Debrief

This exercise will take about 30 minutes for a class of 25. Ten mini cases to support a class of up to 50 are provided in the Appendices herein. These mini-cases provide statements with blanks to be filled in by the students. For smaller class sizes, the professor can offer only five mini-cases or assign two mini-cases to each group. If you do not use all of them, the authors recommend keeping the mini-cases that use percentages—the mini-cases in this exercise with any statistical information is typically better received by students as having more validity.

Materials and Technology

You will need MS Word, paper, and an overhead projector with PowerPoint. Each group receives one (or two) sheets of paper, each with its own mini-case. Withhold the "big" answer until the end.

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Preparation Needed for Students and Instructor

The students do not need to prepare. Ideally, if they have read ahead and know the chapter includes affirmative action, it makes for an easy sell. To prepare for this exercise, the professor is encouraged to read about birth order. One scholar who is regarded as a national expert on the topic is Dr. Kevin Leman. Dr. Leman's book *The Birth Order Book* is recommended reading.

Instructions

First, it is important that the students learn to simply and privately vote in class. This is something used throughout the semester and taught well before the class gets to this exercise. Tell the students that you are going to ask a question. If they vote "yes," do so by holding their index and middle finger (shape of a Y) against their chest. If they vote "no," do so by holding a fist against their chest. Two rules must be followed: 1) Everyone votes and 2) no one looks around at their neighbors. By holding their vote against their chest, they are casting a private vote and avoiding group think or judgment. If someone does not vote, you can call on them directly and ask them to vote. Then, share the results with the class such as, "About 75% are in favor and 25% are not." This is a wonderful tool, quite simple to do, and does not require any technology. Assuming the class has been taught how to vote, it is time to begin the exercise on Critically Thinking About Affirmative Action. The following is the dialogue used to begin the exercise:

> "Today we are going to discuss affirmative action, how it works, and why it exists. First, however, I would like to start with a vote. Please vote Yes or No on the following question by holding your hand to your chest as taught."
>
> *"Should affirmative action exist?"*

Pause and do a quick estimate and share the results with the class such as, "This class is about 60% in favor of" or sometimes "All but three students support (oppose) affirmative action." Then, continue with, "Let's have a quick discussion on what affirmative action is intended to accomplish." Then, call on students for answers that typically include historical inequities, leveling the playing field, providing equal opportunities, etc. The professor can contribute to students' answers, but not much, and respond with: "Yes, that is pretty much what the textbook says too. So, let's take another vote."

> *"Do affirmative action programs work? That is, do they reach the goals and correct the issues you identified?"*

Pause and do another quick estimate and share the results with the class. Normally, the vote yields about 25% yes and 75% no. Rarely, the vote will be 50/50, but the no votes are otherwise the majority. Mention this to the class and ask, "Why do you support something if you think it does not work?" The students struggle to provide an answer, and the answers provided are not well-framed. Also ask, "How would things have changed if instead of voting with our hands against our chests, you would have been asked to put your hand up to vote?" Students typically reply, "The number of students supporting would probably increase if others knew how we were

voting." Respond by explaining how privately held views and publicly shared views are not always congruent.

Continue by telling the students, "The class is going to look at various inequities based on demographics, determine if an affirmative action program should be made, and come up with ways to reach those goals." Then the students get into groups of four or five. Once settled in tell the students, "Some students may find these discussions difficult. In fact, you will probably be uncomfortable sharing which demographic represents the data set. As such, we are going to agree to give each other a break, not take anything personally, and realize that we are all trying to improve things, and that may require and include some challenging discussions. Be respectful. Last, the case studies have support from various experts in the field. If you like, we can discuss how accurate they are afterward."

Note: It is particularly important to state this. The first author has not dealt with contentious discussions, but he has had students sit there in silence, scared to talk. The third author has had students become very heated in similar discussions before, particularly in Graduate level classes.

At this point, give each group a different issue of historical inequities. A concise version of what the author distributes to the groups is provided in the Appendix herein.

Then, include the following questions:

> *Which demographic or demographics do you think is being mentioned?*
> *Do you think the statement about that demographic is accurate?*
> *Should this be adjusted/influenced by an affirmative action?*
> *If so, how?*
> *If not, why not?*

Students typically cringe at the uncomfortable discussion they have, so reassure them that we will give each other a break and pursue this for academic purposes. Students will sometimes ask if one or two word(s) go in the blank. Pause, function as though you are thinking it over, and say "Well, it depends on which mini-case your group received."

The groups will need about 5 to 10 minutes to discuss their given mini-case, and then normally wince at "filling in the blank" and struggle to produce solutions. At that point, put each question (individually) on the overhead projector/screen, and call on groups such as "Group One: You had '80% of pilots are _____.' What did you put in the blank?" The answer is invariably: Males. Reply with, "Huh… I suppose that might be true, but it is not the answer I am looking for. Any other guesses?" This is often met with: "White males." The professor laughs, the class laughs, and the tide breaks a little for further discussion that the class is dreading. Then continue, "Nope. Still not what I am looking for, but I will give you a hint: It's a demographic that you are provided with at birth. I suppose some demographics can change such as religion or disability. Likewise, transgender people should be included, but males and 'white males' as you stated is not it. Huh." Then spend a little bit of time discussing the questions about "Should anything be done? If so, what?" The answers tend to be limited and of low value or likelihood, so instead, move to Group 2.

Once we get to the last group, they realize that nobody got the fill-in-the-blank correct. They tend to be dumbfounded. The professor can comment at times, "Well, that might be a demographic that applies sometimes too, but what's another demographic that fits?" Normally, this exercise evolves into a comical discussion as one gender is scared to call out another gender's stereotype, and the mini-cases sometimes feed off each other. Keep a lighthearted approach. Then, reveal this answer.

"Each one of these is about birth order. That's right, just like race, gender, age, veteran status, etc. may have historical inequities, they do not hold true 100% of the time. Similarly, your birth order may not agree with the experts' claims, but they are not claimed to be absolute; rather, general tendencies. These tendencies are related to stereotypes, which frankly, is exactly how your groups answered these questions." Then, reveal an answer key on the overhead projector/screen that gives the answer to each issue. For example, "90% of clergy are first-born children," and how research indicates that "a disproportionate number of last-born children go into professions such as acting, comedy, and live performance." This is when the students realize they got hoodwinked. After a few moments, continue with,

> "As for those other questions on your form – now that you know it's about birth order, let's do another vote. 'How many of you think we should have affirmative action programs based on birth order?"

The class vote is invariably: 90%. No, in fact, they laugh at the idea. Provide insight to birth order, why it is an "inexact science" and how the generalities can tighten up if a few variables are controlled. Likewise, explain how these historical inequities of birth-order have existed for thousands of years and are likely to continue (Lehman, 2015).

From there, the class has a discussion on affirmative action that is more relaxed, more open, and up for more challenges, and support.

Debriefing

After conducting the exercise on Critically Thinking About Affirmative Action, the first author provides a lecture on affirmative action plans as well as examples of the policies and inspections he was involved with in his corporate days. It is recommended that the professor using this exercise includes this and/or have a guest speaker who has practical direct knowledge of affirmative action in the workplace. That is, students are surprised to learn about the contrast of implementation in the real world versus theoretical ideas in a textbook. Once the lecture on affirmative action nears the end, the professor should encourage students to read contrasting viewpoints to further their critical thinking on the issues. In particular, the professor might choose to recommend *Affirmative Action Around the World* by Thomas Sowell and *Reflections of an Affirmative Action Baby* by Stephen Carter. These two authors have very contrasting insights, data and perceptions of affirmative action and its implementation and effectiveness.

Changing the Exercise for Different Delivery Methods

This exercise is best used in a face-to-face course but could easily be translated into a high flex or Zoom course with a few changes to allow anonymity in the voting process. For example, if the students turned off their cameras, and renamed their Zoom identity a random word rather than their name, the professor could ask that students type in the chat "yes" or "no," then on the count of three, everyone hits the enter key. Answers would cascade in the chat, and the professor could do a quick count of the votes. Further, the exercise could be used in strictly online courses by switching the voting process to Qualtrics or Poll Everywhere, or a similar mechanism.

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APPENDIX A: Introductory Fill-In-The-Blanks

1. _____ tend to be high achievers, self-motivated, cannot bear to fail, and have very high expectations for themselves.

   Answer: Only Children, Page 133

2. _____ tend to believe they do not get the same special treatment and privileges that _____ get; nor the reduced punishment that _____ _____ receive.

   Answers: Middle children, older siblings, younger siblings. Page 150

APPENDIX B: Mini-Cases

1. The clergy in America is approximately 80% _____.

2. Evidence suggests that a disproportionate amount of _____ go into professions such as acting, comedy, and live performance.

3. _____tend to be rebellious because they feel they do not fit in which may make them suspicious, cynical, and bitter. Additionally, they tend to hate confrontation and may fail to admit when they need help.

4. _____ tend to believe they are always right. Additionally, they put too much pressure on themselves or those they work with under too much stress. Further, they tend to criticize themselves and others too much and tend to never be satisfied.

5. _____tend to have strong leadership traits, are more likely to take charge, yet may undermine the initiative of those who lean on them too much or may come off as too overbearing or aggressive.

6. Research bears that _____ are more highly motivated to achieve than their counterparts.

7. 88% of airline pilots are _____.

8. _____tend to be "straight thinkers" and can be counted on not to be compulsive or go off "half-cocked." On the other hand, they spend too much time gathering facts when there are other things that need to be done.

9. _____learned not to be spoiled and may fail to admit when they need help because it is too embarrassing.

10. _____tend to "read others well and know how to relate and work well one-on-one or in small groups.

Mini-Cases Answer Key

1. First born
2. Last born (Zupek)
3. Middle child (Richardson, page 164)
4. Only child (Richardson, page 97)
5. First born (Richardson, page 97)
6. First born (Richardson, page 21)
7. First born or only child (Richardson, page 89)
8. First born or only child (Richardson, page 147)
9. Middle child (Richardson, page 165)
10. Last born (Richardson, page 187)

Book Review: AT THE INTERSECTION: UNDERSTANDING AND SUPPORTING FIRST GENERATION STUDENTS edited by Robert Longwell-Grice and Hope Longwell-Grice. Routledge Publishing (Taylor & Francis Group), copyright 2021, 348 pages, $31. ISBN 978-1642670615

As higher education professionals, we know that First-Generation students have a more difficult time adapting to and succeeding in college. Simplified, they have no one at home who can support them and the challenges of higher education. While true, this is very simplistic reduction of a very complicated set of scenarios. In AT THE INTERSECTION, the editors have amassed a wealth of information about the special challenges facing this unique population of students. This compendium has the input of forty authors on a host of topics.

The first mistake most academics make is assuming all First-Generation students are alike. We really don't even have a uniform definition across the academic community and what is and is not a First-Gen student.

First-Generation students are not a monolithic group. In fact, once you examine the first few chapters, you will have to expand your definition of being a First-Generation student. It is a complex identifier with multiple definitions, each of which includes some and excludes others. If you are in higher education and you are not clear on a comprehensive description of First-Generation students, you should read AT THE INTERSECTION. This book will make you examine and question your understanding of students who struggle to adapt and have no one in their family to seek for advice.

Is First-Gen status the same as socio-economic status? No. While there is a lot of overlap as most First-Gen students are struggling financially, but this is not universally true. It is also true that a higher percentage of First-Gen students are minorities, but this status extends to all ethnic groups.

In part two, AT THE INTERSECTION examines the intersection of students' identities (socio-economic status, gender, ethnicity, and sexuality among others) and how being a First-Generation student affects those students as they strive for success in higher education. While being First-Gen is difficult, some students have further difficulties based on the intersections of other identities. When addressing the concerns of First-Gen students, there is no "one size fits all" strategy. There are many different issues within the First-Gen population, so a higher education professional should be aware of these variations.

In part three, AT THE INTERSECTION explores the myriads of programs and practices which attempt to aid First-Gen students, including college prep, admissions, career development, and follows the needs of those special students from intake at a community college through transfer to a four-year institution, graduate school and beyond.

My highest praises are for the contributors of AT THE INTERSECTION as they attempt to enlighten all of us on the difficult path some students have as they proceed through higher education. All faculty and admissions officers should read AT THE INTERSECTION.

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