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ARTICLES

PEDAGOGY

ONLINE DEFAMATION RECOURSE

by

Bradford H. Buck*

I. INTRODUCTION

This article discusses the law of defamation (particularly the form of written defamation known as libel), the various types of online sites where libel could occur and the available recourse or remedies for the person who was libeled online.

II. THE LAW OF DEFAMATION

The Restatement (Second) of Torts, § 558 provides the following elements for defamation: "to create liability for defamation there must be:

(a) a false and defamatory statement concerning another;
(b) an unprivileged publication to a third party;
(c) fault amounting at least to negligence on the part of the publisher; and

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> (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication."[1].

The first element of defamation requires the that the statement must be a statement of fact and not opinion. It can be very difficult to sort out whether a statement is a statement of fact or opinion. "In determining whether a statement is merely an opinion and thus not subject to a cause of action for defamation as a matter of law, courts must take several considerations into account: "whether the statement has a precise and readily understood meaning; whether the statement is verifiable; and whether the statement's literary or social context signals that it has factual content.""[2]

The second element of defamation is publication to a third party. In the internet context, this is usually not a problem since the statement is typically published to at least one third person or available for anyone on the internet to see.

The third element of defamation involves the degree of liability. The notes for the Restatement (Second) of Torts Section 558 provides that this was added as a result of the US Supreme Court's constitutional decisions.[3] The most famous case is *New York Times Co. v Sullivan.*[4] In that case, the US Supreme Court held that in defamation actions by a public official, more than negligence is required and the plaintiff must prove actual malice which is that the statement was made with knowledge it is false or with reckless disregard of whether it was false or not.[5] Subsequently, the US Supreme Court extended this protection to "public figures".[6] In addition, there may be public figures for all purposes or public figures for a limited range of issues such a particular newsworthy event.

The fourth requirement element of defamation involves whether damage was proved or is assumed. There are two kinds of defamation: defamation per se; and defamation per quod. “A statement is defamatory *per se* if the resulting harm is apparent and obvious on the face of the statement ….If a statement is defamatory *per se*, the plaintiff is not required to plead actual damage to his reputation ….but, rather, the statement is considered to be so obviously and materially harmful that injury to the plaintiff's reputation is presumed. …. There are five categories of statements that are deemed to be defamation *per se*: (1) words imputing the commission of a criminal offense; (2) words that impute infections with a loathsome communicable disease; (3) words that impute an individual is unable to perform his employment duties or otherwise lacks integrity in performing those duties; (4) words that prejudice an individual in his profession or otherwise impute a lack of ability in his profession; and (5) words that impute an individual has engaged in fornication or adultery.”[7] “Statements are defamatory *per quod* where either: (1) the statement's defamatory character is not apparent on its face so that examining extrinsic circumstances is necessary to show its injurious meaning; or (2) the statement is defamatory on its face but does not fall within the enumerated categories of *per se* actions. Prejudice is not presumed, however, and the plaintiff must plead special damages.”[8] If a statement is not defamatory per se, it is defamatory per quod and the plaintiff must prove actual monetary damages.

The last item to mention is the category of the party who disseminated the defamation. Common law distinguished among three different types of liability regarding defamation: publisher liability, distributor liability, and common carrier liability. “Publishers generally experience the greatest amount of liability, while common carriers experience the least. Publisher liability may be attributed to any entity that exercises a high degree of editorial content control over the dissemination

of defamatory material. …Distributor liability may be attributed to any entity that distributes, but does not exercise editorial control over, defamatory material, such as a news vendor, bookstore, or library. A distributor can be characterized as an entity that transmits or delivers information that is created or published by a third party. Distributors are only held liable if they knew or had reason to know of the defamation. Lastly, common carrier liability applies to any entity that acts as a passive conduit for the transmission of defamatory material. Thus, even if it knew or had reason to know of the defamation, it may escape liability for defamation due to its lack of editorial control over the material."[9]

III. DIFFERENT TYPES OF INTERNET COMMUNICATION

There are many ways in which a person could be defamed in internet communications. Email is the first of those ways. A party would access his or her email through an internet service provider ("ISP"). An email would be sent to at least one other person. In addition, copies of the email could be sent to one or more than one other persons. All these communications should have at least the email address of the sender.

Instant messaging ("IM") is another mode of internet communication. This is similar to an email. Again, the party sending the IM would access go through an ISP or similar carrier. Typically, there may not another person copied on the IM. As with an email, there should be some number identifying the sender.

The third mode of internet communication is a blog, chatroom or forum. Typically, a party would access these forums through an ISP. However, there usually is another party involved in setting up the blog, chatroom or forum. Anyone can contribute to these sites gaining access to them though an ISP. Anyone having access to the blog, chatroom or forum can see the defamatory communication. Many parties may use another name and it may be difficult for anyone reading these comments to identify the contributor without obtaining information from the provider.

Another way to communicate via the internet is through social media. This category has sites such as Facebook, Twitter, Snapchat, LinkedIn and even other rating sites such as Yelp. Just like the previous category, usually someone is the provider and an individual then contributes comments to locations on the site gaining access through an ISP. Some of these such as Facebook and LinkedIn, may identify the person making a communication. Others, such as Yelp, may be like the previous category and it may be hard to identify the contributor.

Lastly, a party may find many sites on the internet by using search engine. There are many search engines such as Google and Bing. These search engines list various sites resulting from the search. There usually are excerpts taken from each actual site listed in the search results. A party would access a search engine through an ISP.

IV. THE COMMUNICATIONS DECENCY ACT AND INTERNET PUBLISHERS AND DISTRIBUTORS

Section 230(c) of the Communications Decency Act of 1996[10] ("CDA") provides as follows:

"(1) Treatment of publisher or speaker. No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability. No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1) [subparagraph (A)]."

Section 230(f) of the CDA provides the following key definitions:

"(2) Interactive computer service. The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider. The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."

The first quoted subsection of 230(c) above provides that a provider or user is not considered to be a publisher for content provided by an information content provider. The second subsection of Section 230(c) above provides that no provider or user of an interactive computer service is liable for restricting access to certain content the provider or user considers objectionable.

There have been numerous actions brought against providers or platforms for online defamation. Many of the providers or platforms who have been sued have raised the defense that Section 230 of the CDA makes them immune from any liability. One of the most famous and early cases was the case of *Zeran v America Online*[11]. The plaintiff Zeran was the victim of a vicious online prank. An unknown person put Zeran's name and telephone number in several notices on the electronic bulletin board of the defendant, America Online ("AOL") advertising T-shirts with slogans glorifying the bombing of the federal building in Oklahoma City. After these were posted, Zeran received numerous troubling and threatening telephone calls. Zeran notified AOL of these posts and demanded their removal. After AOL removed the first posts, other similar posts again appeared, and the process of notice and eventual removal again occurred. Zeran sued AOL claiming AOL was negligent for allowing these notices to remain and reappear. Specifically, Zeran claimed AOL was the distributor of the defamatory material and while publishers are immune under Section 230 of the CDA, distributors are not. The court held that Section 230 of the CDA preempted state law, a distributor is merely a subset of a publisher under that statute and AOL was immune from suit.

Other cases have also held that internet publishers and distributors are not liable. In *Schneider v Amazon.com, Inc.*[12], the plaintiff sued Amazon.com for alleged defamatory

comments posted about the plaintiff's book on Amazon's website. The court held that to have Section 230 immunity, the following three elements are required: the defendant must be a provider or user of an "interactive computer service"; the asserted claims must treat the defendant as the publisher or speaker; and the information must be provided by another "information content provider".[13] If the defendant was the information content provider, then the defendant would not be immune and would be held liable. The court found all three elements were present in that case so Amazon was not liable.

AOL was again sued in *Blumenthal v Drudge*[14]. The Drudge Report, hosted on AOL's website, had alleged defamatory statements about the plaintiff. Even though AOL had given Drudge a license agreement and even though under that license agreement, AOL could remove content that violated AOL's terms of service, the court held that AOL was a publisher, was not the information content provider and therefore was not liable. In yet another case against AOL[15], the court held AOL was not an information content provider for stock quotation information provided by two third parties even though AOL deleted some of the stock symbols.

In *Reit v Yelp!, Inc.*[16], the plaintiff dentist contacted the defendant Yelp to remove a derogatory post about the plaintiff's dental practice. After that contact, the plaintiff alleged that Yelp removed all 10 positive reviews and retained only the negative posting. The court held that if even Yelp's action was true, it did not make Yelp the information content provider and Yelp was immune under Section 230.

In *Klayman v Zuckerberg*[17], the alleged defamatory material was an anti-Semitic post on Facebook. The plaintiff demanded that Facebook remove the page from Facebook which it eventually did. The plaintiff claimed Facebook's conduct did

not arise from its being a publisher but rather from Facebook's contractual obligations in its Statement of Rights and Responsibilities. The court held that under Section 230, Facebook and its founder Mark Zuckerberg were immune.

As a result of Section 230 of the Communications Decency Act as interpreted by all these cases, providers or platforms are not liable for defamatory posts unless the platform itself created the content. It does not matter whether these platforms are publishers or distributors. Therefore, there is a difference between merely hosting a platform and providing content on that platform. Of course, the providers and platforms are known and are the deep pockets to sue for any online defamation. The internet service providers themselves are not liable either.

There are a few cases which hold that Section 230 did not bar recovery where the providers did contribute to the questionable content. In *Carafano v Metrosplash, Inc.*[18], the defendant was an information service that provided or enabled computer access by multiple users to a computer server. Through the internet, thousands of members were able to access and use a searchable database maintained on the service's computer servers. The court held that the service was also an "information content provider," as users of the service's website did not simply post whatever information they desired, but a profile was created from questions asked by the service and the answers provided and therefore, the service was not immune under Section 230. In *Hy Cite Corp. v Badbusinessbureau*[19], the defendant's operators' website allowed users to post and view complaints, so-called "rip-off-reports," about businesses. The plaintiff, among other things, alleged that the website included 35 reports involving its business and those reports contained false and defamatory statements. Among other things, the court held that the

operators were not entitled to immunity under Section 230 of the Communications Decency Act because the manufacturer's allegations (that the operators produced original content contained in the ripoff reports and solicited individuals to submit reports with the promise that they might ultimately be compensated) were sufficient to support a finding that the operators created or developed the wrongful content.

V. OTHER RECOURSE FOR ONLINE DEFAMATION

If the party defamed online cannot sue the provider or platform for the defamatory material, what other remedies does the party have?

Unmasking the Identity of an Anonymous Online Defamer

A party who is defamed has the right to sue the party who posted the defamatory material. With some forms of online communication (such as email, instant messaging, posts on a known person's Facebook page and tweets by a known person) the identity of the party who made the defamatory statement might be known or could be easily identified. However, the identity of a party posting defamatory material on blogs, chatrooms, forums, ratings sites and some social media may not be known. So how does the defamed party find out the identity of the party who posted the defamatory content? Usually, the ISP or the platform that hosted these vehicles probably has some information or can easily find out information about the identity of the defamer.

In the appellate case of *John Doe No.1 v Cahill*[20], the allegedly defamed party sought to obtain the identity of the defamer from the ISP. The appellant (the alleged defamer) , using an alias, had posted two statements on an internet website sponsored by a news agency stating the appellee councilman (the alleged defamed party) was paranoid, full of character flaws and had mental deterioration. The appellee obtained an order requiring the ISP, Comcast, to disclose the identity of the appellant. The appellant appealed from the lower court order. The Supreme Court of Delaware looked at the appropriate standard of proof required in a motion to dismiss the case considering the First Amendment right to speak anonymously. The court adopted the standard of the New Jersey appellate court in *Dendrite Intl., Inc. v Doe*[21]. The court in *Dendrite* put forth a test that had four parts requiring the party seeking disclosure: "(1) to undertake efforts to notify the anonymous poster that he is the subject of a subpoena or application for an order of disclosure, and to withhold action to afford the anonymous defendant a reasonable opportunity to file and serve opposition to the application. In the internet context, the plaintiff's efforts should include posting a message of notification of the discovery request to the anonymous defendant on the same message board as the original allegedly defamatory posting; (2) to set forth the exact statements purportedly made by the anonymous poster that the plaintiff alleges constitute defamatory speech; and (3) to satisfy the *prima facie* or "summary judgment standard."[22] After the court concluded a plaintiff has presented a prima facie cause of action, the court must "(4) balance the defendant's *First Amendment* right of anonymous free speech against the strength of the *prima facie* case presented and the necessity for the disclosure of the anonymous defendant's identity in determining whether to allow the plaintiff to properly proceed."[23] The court in *Cahill* held that the second and fourth prongs of the *Dendrite* test were not necessary. Since prong number 1 had occurred, the court looked at prong three of the *Dendrite* test. The court held

that under the summary judgement standard, no reasonable person would believe the appellant's statements had stated facts about the appellee.

The Maryland Court of Appeals in the case of *Independent Newspapers, Inc. v Brodie*[24] applied the *Dendrite* and *Cahill* standards as well as discussing two other cases with different standards. The first other case mentioned in *Brodie* was *Columbia Insurance Company v Seecandy.com*[25], which had the following test: "First, the plaintiff should identify the missing party with sufficient specificity such that the Court can determine that defendant is a real person or entity who could be sued in federal court. This requirement is necessary to ensure that federal requirements of jurisdiction and justiciability can be satisfied. Second, the party should identify all previous steps taken to locate the elusive defendant. This element is aimed at ensuring that plaintiffs make a good faith effort to comply with the requirements of service of process and specifically identifying defendants. Third, plaintiff should establish to the Court's satisfaction that plaintiff's suit against defendant could withstand a motion to dismiss. A conclusory pleading will never be enough to satisfy this element. Pre-service discovery is akin to the process used during criminal investigations to obtain warrants. The requirement that the government show probable cause is, in part, a protection against the misuse of *ex parte* procedures to invade the privacy of one who has done no wrong. A similar requirement is necessary here to prevent abuse of this extraordinary application of the discovery process and to ensure that plaintiff has standing to pursue an action against defendant. Lastly, the plaintiff should file a request for discovery with the Court, along with a statement of reasons justifying the specific discovery requested as well as identification of a limited number of persons or entities on whom discovery process might be served and for which there is a reasonable likelihood that the discovery process will lead to identifying information about

defendant that would make service of process possible."[26] Also, the second other case mentioned in *Brodie* was *In Re Subpoena Duces Tecum to America Online, Inc.*[27], where the Circuit Court of Virginia court put forth the lowest standard which only required that the party seeking the identity have a good faith basis for asserting a cause of action before permitting discovery of identifying information. The court in *Brodie* ended up adopting the *Dendrite* standard and ordered the lower court to grant the protective order/motion to quash preventing disclosure of the identifying information.

The Illinois Appellate Court in *Maxon v Ottawa Publishing Company*[28], discussed *Dendrite* and *Cahill* but came to a different result. In Illinois, Supreme Court Rule 224 provides how a party can determine the identity of a party they may have a claim against. That Rule provides as follows: "(i) a person or entity who wishes to engage in discovery for the sole purpose of ascertaining the identity of one who may be responsible in damages may file an independent action for such discovery. (ii) The action for discovery shall be initiated by the filing of a verified petition in the circuit court of the county in which the action or proceeding might be brought or in which one or more of the persons or entities from whom discovery is sought resides. The petition shall set forth: (A) the reason the proposed discovery is necessary and (B) the nature of the discovery sought and shall ask for an order authorizing the petitioner to obtain such discovery. The order allowing the petition will limit discovery to the identification of responsible persons."[29] The court held that this rule provided the appropriate standard and granted the petition for disclosure.

The Virginia Court of Appeals in *Yelp, Inc. v Hadeed Carpet Cleaning, Inc.*[30] stated that a Virginia has a statute which provides an unmasking standard. That statute provides as follows: "At least thirty days prior to the date on which

disclosure is sought, a party seeking information identifying an anonymous communicator shall file with the appropriate circuit court a complete copy of the subpoena and all items annexed or incorporated therein, along with supporting material showing: a. That one or more communications that are or may be tortious or illegal have been made by the anonymous communicator, or that the party requesting the subpoena has a legitimate, good faith basis to contend that such party is the victim of conduct actionable in the jurisdiction where the suit was filed. A copy of the communications that are the subject of the action or subpoena shall be submitted. b. That other reasonable efforts to identify the anonymous communicator have proven fruitless. c. That the identity of the anonymous communicator …. is …. needed to advance the claim, relates to a core claim or defense, or is directly and materially relevant to that claim or defense. d. That no motion to dismiss, motion for judgment on the pleadings, or judgment as a matter of law, demurrer or summary judgment-type motion challenging the viability of the lawsuit of the underlying plaintiff is pending. The pendency of such a motion may be considered by the court in determining whether to enforce, suspend or strike the proposed disclosure obligation under the subpoena. e. That the individuals or entities to whom the subpoena is addressed are likely to have responsive information."[31] In that case, the appellate court stated there are at least nine standards for unmasking not including the standard in Virginia and including *Columbia Insurance*, *Cahill*, *Brodie* and *Dendrite*. The appellate court also upheld the order of the trial court enforcing a subpoena on Yelp to disclose the identifying information.

In summary, trying to find out the identity of the defamer from ISP's, platforms or providers will depend upon the state in which the party is filing the proceeding. Some states require a much more substantial showing than the other states.

Possible Actions Against the Provider

It is noteworthy that the Digital Millennium Copyright Act[32] does require that if providers or platforms receive a notice from a third party that a user has infringed on its intellectual property, the provider or platform must take action leading to the ultimate removal of the infringing material. Many of the terms and conditions of providers or platforms allow a request to take down material or give the provider or platform the right to remove material that the provider or platform consider to be objectionable. Facebook's terms of service more or less provide a user with the ability to notify Facebook of defamatory material and certainly give Facebook the right to remove objectionable material.[33] If a victim makes such a request of the provider or platform, the provider or platform may agree to remove the defamatory content. However, even if the defamatory post is removed from the site where it appeared, the defamatory post may still show up in internet searches using a search engine. To remove the defamatory material completely, the victim would need to get the search engines, such as Google or Bing, to remove it as well. This could be extremely difficult.

The case of *Barnes v Yahoo!, Inc.*[34] provides a possible recourse concerning a provider's agreement to remove objectionable content and the failure to do so. In that case, a former boyfriend of the plaintiff posted nude photographs and other sexually explicit content on Yahoo. The plaintiff requested Yahoo to remove the content, Yahoo agreed but did not do so. The plaintiff sued Yahoo alleging negligence and promissory estoppel. The court concluded that Section 230 of the Communications Decency Act barred the negligence claim but did not bar the promissory estoppel claim. So, such a claim is a possible recourse against a provider or platform if a defamed

party requests removal, the provider or platform agrees and fails to do so.

Possible Actions Against the Defamer

Some businesses have used a way to combat negative online comments using anti-disparagement clauses in their online agreements. "At present, the agreements take two forms…. In the first format, the customer agrees to a contract that prohibits [the customer] …. from making or posting any negative remarks, criticisms, or comments about a business, its goods or services. The second anti-disparagement clause involves transferring copyright ownership of any online review from the customer to the business."[35] Once this copyright ownership is transferred, the business can demand removal under the Digital Millennium Copyright Act noted above.

The case of *Palmer v Klearegear.com*[36] involved the use of such a disparagement clause. The customer made statements about the defendant's poor-quality customer service practices. The defendant levied a $3,500 fine against the plaintiff. When the plaintiff did not pay the fine, the defendant reported the unpaid fine to the credit bureau. The court found that this clause was unenforceable. Pursuant to the federal Consumer Review Fairness Act[37] and many state laws, including California[38], these clauses are unenforceable.

Another possible course of action is to respond to the content directly. A victim should carefully consider this option. The victim may end up in an online war with the perpetrator. Also, this action could further highlight the defamatory post.

CONCLUSION

Before the advent of the internet, the possibilities of being defamed occurred primarily in print media such as newspapers or magazines, but there were some journalistic standards exercised by the publishers. Now, there are much greater possibilities of being defamed online and there are fewer, if any, journalistic standards.

There are challenges with legal recourse for online defamation. The providers and platforms are mostly immune. Also, it may be difficult to unmask the identity of anonymous defamers through the providers or the ISP. Even if the defamatory content is removed, there still may be references to that content in searches performed by search engines. It is difficult to get those search engines to remove any reference to the content also. Other remedies such as the use of anti-disparagement clauses by online businesses are unenforceable. Even if the defamers are identified and not immune, there can be difficulties proving the required elements of a defamation case. A comment could be deemed to be an unactionable opinion or the defamed party could be a limited public figure and would therefore have to show malice. Also, even if those defamers are unmasked, they may not have sufficient assets to satisfy any judgement.

The best possible outcome would be to amend the Communications Decency Act to have a similar notice and removal provision as the Digital Millennium Copyright Act. Many authors have advocated that very change[39]. While the providers cannot be expected to police every posting on their sites, this notice and removal procedure would take into

account the logistical dilemma of the providers while giving some recourse to the defamed parties as well.

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[1] Restatement (Second) of Torts, §558 (Am. Law Inst. 1977).
[2] Maxon v Ottawa Publishing, 402 Ill. App. 3d 704, 929 N.E. 2d 666, 2010 Ill. App. LEXIS 505 (2010).
[3] See Restatement, supra note 1 at reporter's notes.
[4] New York Times v Sullivan, 476 U.S. 254 (1964)
[5] *Id* at 279-280.
[6] Gertz v Robert Welch, 418 U.S. 323 (1974).
[7] Stone v Paddock, 961 N.E. 2d 380, 391, 2011 Ill. App. LEXIS 1181 (2011).
[8] *Id* at 393.
[9] Sewali K. Patel, *Note: Immunizing Internet Service Providers from Third-Party Internet Defamation Claims: How Far Should Courts Go?*55 Vand. L. Rev. 647, 651 (2002).
[10] 47 USC Section 230 (2020).
[11] Zeran v America Online, 958 F. Supp. 1124 (E.D. Va., 1997).
[12] Schneider v Amazon.com, Inc., 108 Wn. App. 454, 31 P.3d 37, 2001 Wash. App. LEXIS 2086 (2001).
[13] *Id* at 460.
[14] Blumenthal v Drudge, 992 F. Supp. 44 (D.C., 1998).
[15] Ben Ezra, Weinstein, & Co. v America Online, Inc., 206 F. 3d 980 (10th Cir., 2000).
[16] Reit v Yelp!, Inc., 29 Misc. 3d 713, 907 N.Y.S 2d 411, 2010 N.Y. Misc. LEXIS 4259 (2010).
[17] Klayman v Zuckerberg, 753 F. 3d 1354 (2014).
[18] Carafano v Metrosplash, Inc., 339 F., 3d 1119 (9th Cir. 2002).
[19] Hy Cite, Corp. v Badbusinessbureau, 418 F. Supp. 2d 1142 (D. Az., 2005).
[20] John Doe No. 1 v Cahill, 884 A. 2d 451, 2005 Del. LEXIS 381 (2005).
[21] Dendrite Intl., Inc. v Doe No. 3, 342 N.J. Super. 134, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).
[22] John Doe No. 1, *supra* at 460.
[23] *Id*.
[24] Independent Newspapers, Inc. v Brodie, 407 Md. 415, 966 A.2d 432, 2009 Md. LEXIS 18 (2009).
[25] Columbia Insurance Company v Seescandy.com, 185 F.R.D. 573 (N.D. Cal. 1999).

[26] *Id* at 578-580.
[27] In Re Subpoena Duces Tecum to America Online, Inc., 52 Va. Cir. 26 (2000).
[28] Maxon v Ottawa Publishing Company, *supra* at note 2.
[29] *Id* at 710.
[30] Yelp, Inc. v Hadeed Carpet Cleaning, Inc., 62 Va. App. 678, 752 S.E. 2d 554, 2014 Va. App. LEXIS 1 (2014).
[31] *Id* at 698.
[32] 17 U.S.C. Section 512 (2020).
[33] Facebook Terms of Service, https://www.facebook.com/terms.php (last visited July 15, 2020).
[34] Barnes v Yahoo!, Inc., 570 F.3d 1096 (9th Cir. 2008).
[35] Ryan Garcia & Thaddeus Hoffmeister, Social Media Law in a Nutshell, (2017).
[36] Palmer v Kleargear.com, no 13-cv-00175 (D. Utah filed Dec. 18, 2013).
[37] 15 U.S.C.. 45b (2020).
[38] California Civil Code § 1670.8 (2014).
[39] Ryan King, *Online Defamation: Bringing the Communications Decency Act of 1996 in Line with Sound Public Policy*, 2003 Duke L. & Tech. Rev. Volume: 2, Issue:1, pages 1-11.

EXPLORING VIRTUAL CURRENCIES: HOW DO YOU TAX THE CLONES IN THE CLOUDS?

by

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I. INTRODUCTION

The emergence of virtual currencies has posed several tax questions. There must be a clear understanding of what virtual currency is for tax purposes. Is it property, currency, a service or something else? When do virtual currency transactions give rise to income? Since virtual currency can be cloned, how do we tax the clones? This article will attempt to answer these questions.

The digital economy has changed the way we consume, interact and do business.[1] This means that the tax system must change in order to keep up with the new environment. If the tax system cannot keep up with the shift from the physical world to the digital world, it will give rise to uncertainty for taxpayers and tax administrations.[2]

The current tax systems are unable to adequately tax the transactions conducted in the digital clouds[3] and this can impose financial burdens on society in the form of lost government tax revenues, distorted competition, international trade burdens and

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even criminal activities.[4] Cloud computing constitutes a significant part of the digital economy; therefore, it magnifies many of the problems the digital economy creates for tax systems.[5]

The use of the clouds generally eliminates the physical transfer of any physical items; therefore, border controls cannot apply to cloud transactions as they do to physical goods.[6] Since many cloud transactions are quite small in amount and are often concluded between parties in places unknown to all of the participants, it is difficult for suppliers, purchasers and tax authorities to acquire the information needed for efficient tax collection.[7]

II. UNITED STATES VIRTUAL CURRENCY REGULATIONS

A. TAXATION ISSUES

In its 2013 Annual Report to Congress, the United States Taxpayer Advocate (USTA) considered the need for more guidance on the tax treatment of virtual currencies to be one of the most serious problems the Internal Revenue Service (IRS) faces.[8] This report noted that since the use of virtual currencies is growing, it is the government's responsibility to inform the public about the rules they are legally required to follow. The USTA recommended that the IRS answer a number of questions including the following:[9]

1. What kind of virtual currency use triggers gains or losses?
2. Will virtual currency gains be treated as ordinary income or capital gains?

3. What are the virtual currency requirements for information reporting, withholding and recordkeeping?

In 2013, the Government Accountability Office (GAO) issued a report that explored the tax compliance risks associated with virtual currencies.[10] The GAO recommended that the IRS find relatively efficient ways to provide information to taxpayers on the various issues regarding virtual currencies.[11]

In 2014, the IRS issued a notice, *Virtual Currency Guidance*, to describe how the existing tax principles apply to virtual currency transactions. The IRS defines virtual currency as:

"……a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value. In some environments, it operates like "real" currency – i.e., the coin and paper money of the United States or of any other country that is designated as legal tender, circulates, and is customarily used and accepted as a medium of exchange in the country of issuance – but it does not have legal tender status in any jurisdiction."[12]

So according to the IRS, virtual currency is treated as property for federal tax purposes – not a currency. This means that the same tax principles that apply to property transactions now apply to virtual currencies. A taxpayer who "mines" or receives virtual currency as payment for rendering goods and/or services must include the fair market value of the virtual currency when computing gross income. Furthermore, if virtual currency is paid as wages, the fair market value of the virtual currency is subject to federal income tax withholding, Federal Insurance Contributions Act tax and Federal Unemployment Tax Act tax.[13]

In 2016, the United States Treasury Inspector General for Tax Administration (USTIGTA) released a report recommending additional actions the IRS should take to address income produced through virtual currencies.[14] The USTIGTA Report stated that although the IRS issued Notice 2014-21 with guidance on virtual currency transactions, there has been little evidence of the IRS identifying and addressing potential taxpayer non-compliance issues for such transactions.[15]

B. MONEY LAUNDERING ISSUES

There are concerns that decentralized and untraceable virtual currencies (DUV) are a channel for tax evasion, money laundering and illicit financing. DUV may be used by terrorists to transfer money across national borders and by those who conduct illegal activities online anonymously. In response to these concerns, the United States Financial Crimes Enforcement Network (FinCEN), the regulatory agency charged with preventing money laundering and terrorist financing, started investigating DUV in order to prevent criminals from taking advantage of DUV for illegal and dangerous purposes.[16]

In 2013, FinCEN published a report, *Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies*, which addressed the relevance of the Bank Secrecy Act (BSA).[17] This report provides guidance to help taxpayers determine whether their virtual currency activities classifies them as a Money Service Business (MSB), which are non-bank financial institutions regulated by the BSA. According to the FinCEN guidance, a user who obtains virtual currency and then purchases real or virtual goods/services with that virtual currency is not an MSB. Furthermore, the FinCEN guidance states that an administrator/exchanger that accepts, transmits, buys or sells virtual currency for any reason is a

money transmitter (MSB) and therefore subject to BSA monitoring and reporting requirements.[18]

In 2014, the FinCEN issued two rulings on virtual currency miners and investors.[19] Under the first ruling, a user or miner is not an MSB if this user creates or mines a virtual currency for the user's own purposes. Under the second ruling, an entity purchasing and selling virtual currencies only as investments for the entity's own benefit is not an MSB.[20]

FinCEN has taken action against companies that haven't complied with their registration and reporting guidelines. In 2015, FinCEN assessed a $700,000 penalty against Ripple Labs, a San Francisco virtual exchange service, for: (1) violating the BSA by not registering with FinCEN; and (2) failing to implement an adequate anti-money laundering program.[21] Ripple Labs agreed to take actions to ensure compliance with the anti-money laundering regulations – such as having regular, independent compliance reviews and monitoring all future transactions for suspicious activities.[22]

In the case of *Florida v. Espinoza*, the judge dismissed the state's money laundering claims against Mitchell Espinoza, who was charged with illegally laundering $1,500 worth of bitcoins.[23] Espinoza sold bitcoins to undercover police who told him they wanted to use the money to buy stolen credit card numbers. The Court found that virtual currencies cannot be the object of money laundering because under Florida law, virtual currencies are not included as a category in the definition of a monetary instrument.[24]

In *Florida v. Espinoza*, the judge set forth the reasons why bitcoin cannot be considered "money" under the Florida statutes:

"Bitcoin may have some attributes in common with what we commonly refer to as money, but differ in many important aspects. While Bitcoin can be exchanged for items of value, they are not a commonly used means of exchange. They are accepted by some but not by all merchants or service providers. The value of Bitcoin fluctuates wildly and has been estimated to be eighteen times greater than the U.S. dollar. Their high volatility is explained by scholars as due to their insufficient liquidity, the uncertainty of future value and the lack of a stabilization mechanism. With such volatility, they have a limited ability to act as a store of value, another important attribute of money. Bitcoin is a decentralized system. It does not have any central authority, such as a central reserve, and Bitcoins are not backed by anything. They are certainly not tangible wealth and cannot be hidden under a mattress like cash and gold bars. This Court is not an expert in economics; however, it is very clear, even to someone with limited knowledge in the area, that Bitcoin has a long way to go before it is the equivalent of money."[25]

It appears that this Florida court agrees with the IRS in that virtual currency is not a currency. On the other hand, FinCEN believes that virtual currency may be a currency if an administrator/exchanger uses virtual currency for any reason – otherwise, virtual currency is not a currency.

The Florida Statute defines a "monetary instrument" as "coin or currency of the United States or any other country, travelers' checks, personal checks, bank checks, money orders, investment securities in bearer form or otherwise in such form that title thereto passes upon delivery."[26] So do virtual currencies meet the definition of money under Florida law? Not according to Florida's appeals court.

On January 30, 2019, Florida's Third District Court of Appeal reversed the trial court's decision in *Florida vs.*

Espinoza, instead holding that a Bitcoin business was a money transmitter according to Florida law.[27] The Court determined that Bitcoin meets the Florida statute's definition of a "payment instrument" as well as the its definition of "monetary value."[28]

C. SECURITIES REGULATIONS ISSUES

In 2014, the United Stated District Court in Texas decided the first case involving virtual currency with *Securities and Exchange Commission (SEC) vs. Trendon T. Shavers and Bitcoin Savings and Trust.*[29] Shavers established and operated Bitcoin Savings and Trust (BST) and solicited lenders to invest in Bitcoin-related investment opportunities.[30]

Shavers allegedly offered BST investments for approximately one year, during which time Shavers gave fraudulent assurances to bring in more investments and dissuade investors from questioning BST's strategies and dealings. He represented online that BST's risk was low, profits were high and orders were in high demand.[31] Shavers even claimed that when he sells his clients' Bitcoins, "anything not covered is hedged or I take the risk personally."[32]

The SEC brought claims against Shavers and BST under Section 17(a) of the Securities Act of 1933, Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, and Sections 5(a) and 5(c) of the Securities Act of 1933.[33] The basis of the claims was that Shavers defrauded investors by making false statements of material fact. The SEC sued under Section 5 on the basis that an investment in a fund holding Bitcoin is a security and this security was unregistered and not sold pursuant to a registration exemption.[34] It should be noted that the SEC did not regard Bitcoin as a security per se; rather, it was the interests in the Shavers fund that the SEC regarded as a security.[35] The court ruled in favor of the SEC on all of its claims; furthermore,

the court ruled that Shavers and BST were jointly and severally liable for a total of $40,404,667, representing the illicit profits from the fraudulent offering.[36]

D. COMMODITIES ISSUES

In *Commodity Futures Trading Commission (CFTC) vs. My Big Coin Pay*, the first enforcement action alleged that defendants My Big Coin Pay, Randall Carter and Mark Gillespie fraudulently offered a virtual currency called My Big Coin (MBC) for sale and raised $6 million from at least 28 customers.[37] According to the complaint, the defendants: (1) misrepresented that MBC was being traded on a number of currency exchanges; (2) falsely reported the daily trading price; and (3) fraudulently claimed that MBC was backed by gold.[38]

On September 26, 2018, the U.S. District Court for Massachusetts held that the CFTC had sufficiently alleged that MBC was a commodity under the Commodity Exchange Act (CEA).[39] The Court found that the CEA defines "commodity" generally and categorically, "not by type, grade, quality, brand, producer, manufacturer, or form." The Court gave an example: "……the Act classifies "livestock" as a commodity without enumerating which particular species are the subject of futures trading."[40]

E. PROPERTY, SECURITY, MONEY OR COMMODITY?

As a basic survey of the U.S. regulations reveals, different agencies and courts define virtual currencies in different ways depending on their own agendas. Apparently,

virtual currencies can be property, security, money or commodities depending on the nature of the transactions.

If virtual currencies can be defined in different ways, then how would one classify the gains or losses realized from virtual currency transactions? Again, the IRS concluded that "virtual currency is treated as property for U.S. federal tax purposes."[41] The IRS also said that:

- Wages paid using virtual currency to employees are taxable to the employee and must be reported by an employer on Form W-2.
- Virtual currency payments made to independent contractors and other service providers are taxable and self-employment tax rules apply – payers must issue Form 1099.
- The nature of gain or loss from the virtual currency sales or exchanges depends on whether the virtual currency is a capital asset in the hands of the taxpayer.
- A virtual currency payment is subject to information reporting to the same extent as any other payment made in property.[42]

Although the IRS issued its *Virtual Currency Guidance*[43] in 2014, virtual currency investors weren't quick to report their trading gains. In 2014 and 2015, only 893 and 802 individuals, respectively, reported their Bitcoin-related transactions according to an affidavit filed by an IRS agent.[44]

So, the IRS will determine the tax category of a virtual currency based on the associated transaction. But if the transaction isn't reported, how will the IRS determine the tax category of the virtual currency, especially when the virtual currency exists in the cloud? How will the IRS even know about

the virtual currency at all? And what if the virtual currency is cloned?

III. THE CLONES IN THE CLOUDS

A. *THE BITCOIN CLONE*

While there may be some uncertainty as to what exactly virtual currency is, this uncertainty is compounded by the fact that virtual currency can be cloned.

In 2017, Bitcoin produced an offshoot currency called Bitcoin Cash. Bitcoin Cash was not created out of nothing; rather, Bitcoin was cloned as it existed on August 1, 2017.[45] Why was Bitcoin cloned? Because the members of the Bitcoin community disagreed on how Bitcoin should change in response to its growing popularity. Bitcoin and virtual currencies like it are controlled by "communities" and "consensus."[46] So, the community members who wanted more structural changes left the Bitcoin community and created a new community – Bitcoin Cash.[47]

When Bitcoin Cash cloned the Bitcoin system, it produced a jackpot for Bitcoin owners. Those who owned Bitcoin units on August 1, 2017 became the owners of an equal number of Bitcoin Cash units.[48] The Bitcoin owners did nothing to earn this jackpot as their Bitcoin "private keys" (similar to passwords) allowed them to transfer and control equal amounts of Bitcoin cash whenever they wished.[49] On August 28, 2020, the market capitalizations for Bitcoin and Bitcoin Cash were $212, 477,896,445 and $4,965,541,238, respectively.[50]

B. *CLOUDY CLONE TAXATION*

This created a serious income tax problem. Did the Bitcoin owners have gross income as a result of the Bitcoin Cash jackpot? According to the IRS *Virtual Currency Guidance*, cryptocurrencies are property but not foreign currency. Since they are property, cryptocurrencies can produce capital gains and losses. Since they are not foreign currency, cryptocurrencies do not qualify for de-minimis exclusions.[51]

The IRS Code defines gross income as "all income from whatever source derived."[52] The U.S. Supreme Court has stated that gross income should be interpreted broadly.[53] The U.S. Treasury Regulations enforce the expansive definition of gross income: "Gross income includes income realized in any form, whether in money, property or services. Income may be realized, therefore, in the form of services, meals, accommodations, stock, or other property, as well as in cash."[54]

Despite its name, Bitcoin Cash isn't cash and some academics have claimed that non-cash profits aren't gross income unless specifically included as such by the IRS.[55] The IRS has claimed the virtual currencies are property.[56] But what kind of property is Bitcoin? If one clones Bitcoin to form Bitcoin Cash, what kind of property is Bitcoin Cash?

Bitcoin is "notional" property, which means that it exists only as a type of recordkeeping.[57] Owners may transfer their interests in notional property but they cannot occupy or use notional property in the way they would occupy or use real property. While Bitcoin may appreciate in value, it is not backed by any property and it offers no dividends, interest, rents or royalties.[58] So how does one tax notional property and how does one tax the clone of notional property?

C. *HARD FORKS AND AIRDROPS*

In response to the issues brought about by the cloning of Bitcoin, the IRS issued Rev. Ruling 2019-24 (the Ruling) in 2019.[59] The Ruling 2019-24 discusses two issues:

- Does a taxpayer have gross income under § 61 of the Internal Revenue Code as a result of a "hard fork" of a cryptocurrency if the taxpayer doesn't receive units of a new cryptocurrency?
- Does a taxpayer have gross income under § 61 as a result of an "airdrop" of a new cryptocurrency following a "hard fork" if the taxpayer receives units of new cryptocurrency?[60]

A hard fork occurs when a cryptocurrency undergoes a protocol change on a distributed ledger, which results in a permanent diversion from that distributed ledger[61] – in other words, a clone. An airdrop is a means of distributing cryptocurrency units to the distributed ledger addresses of multiple taxpayers[62] – in other words, a delivery of the clones to the taxpayers' clouds.

The Ruling takes the position that cryptocurrencies created by a hard fork that is followed by an airdrop are taxed immediately upon the creation of the new cryptocurrency. Basically, the IRS is saying that a hard fork followed by an airdrop is taxable as gross income under § 61 but a hard fork with no following airdrop is not taxable.[63]

D. *PROBLEMS WITH RULING 2019-24*

One problem with the Ruling is that it appears to treat the Bitcoin Cash hard fork as being created at a specific date and time.[64] This is not the case. Bitcoin Cash may have been created at 3:20 p.m. on August 1, 2017 when Bitcoin and Bitcoin Cash ceased having a common transaction history.[65] Or it may have been created at 8:30 p.m. on August 1, 2017 when miners validated new blocks on the Bitcoin Cash blockchain.[66]

This time difference is important because the prices fluctuated from $200 to $400 per Bitcoin Cash unit over the initial five hours.[67] Furthermore, these prices may not be reliable because trading volumes were quite low. Bitcoin Cash wasn't even supported by a cryptocurrency exchange until more than four months after August 1, 2017.[68] Some taxpayers may make a protective § 83(b) election and report the value of their Bitcoin Cash units as zero.[69]

Another problem with the Ruling is that it taxes a hard fork only when it is followed by an airdrop.[70] The IRS maintains that it will tax a clone when the clone is deposited in some account. But that is not the way Bitcoin Cash worked. The Bitcoin Cash units (the clones) were created by the hard fork – no new transactions were created.[71] The Bitcoin Cash developers or cloners simply released software that recognized Bitcoin owners as the owners of Bitcoin cash. These Bitcoin owners did not receive any formal notice that they would become Bitcoin Cash owners and they didn't have to do anything to accept their Bitcoin Cash units – in other words, there was no airdrop.[72] Even though the Bitcoin owners now own Bitcoin Cash, since there was no airdrop of the Bitcoin Cash, there is no taxable transaction according to the Ruling.

IV. RECOMMENDATIONS AND CONCLUSION

It is quite clear that the current U.S. legal system is struggling with the definition and treatment of virtual currencies, especially the clones in the digital clouds. Virtual currencies appear to be treated as currencies, properties, securities and commodities depending on the various transactions and legal jurisdictions that deal with virtual currencies. Since virtual currencies have moved from the fringes of the financial markets to an over $300 billion asset class traded on exchanges, the definition and tax treatment of virtual currencies must be clarified.[73] Any loss of tax revenue due to an inconsistent and inadequate legal system can be devastating to society especially in troubled economic times.[74]

Perhaps a separate enforcement agency specializing in the study and regulation of virtual currencies should be established. Virtual currency exchanges would be required to register with this enforcement agency and their transactions would be monitored. Before cloning a particular virtual currency, the actors would need the guidance and/or supervision of this enforcement agency. As we saw with Bitcoin, the cloning of Bitcoin was done by the "communities" who wanted more structural changes.[75] The Bitcoin owners did not receive any formal notice that they would become Bitcoin Cash owners – it just happened because the "communities" decided it should be done.[76] This is not the way the operation of an asset class worth billions should be conducted.

Central banks could play a role in by granting licenses, under supervision, to virtual currency providers.[77] The central banks could hold virtual currency providers responsible for customer screening, transaction monitoring and reporting suspicious activity in accordance with financial regulations.

Since virtual currencies are a recent phenomenon, their market value is subject to significant short-term fluctuations when new information is revealed.[78] The regulatory uncertainty is at the very least, partly responsible for the volatility observed in the virtual currency markets[79] and will lead to the loss of massive amounts of tax revenue as virtual currencies continue to grow in size. A better regulatory system is needed if we are to tax the clones in the clouds.

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[2] See CHRIS SKINNER, DIGITAL HUMAN: THE FOURTH REVOLUTION OF HUMANITY INCLUDES EVERYONE (2018); *Five Trends Reshape Indirect Tax Landscape*, EY TAX INSIGHTS, http://taxinsights.ey.com/archive/archive-articles /five-trends-reshape-indirect-tax-landscape.aspx (last visited August 13, 2020).

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[9] *Id.*
[10] GAO, *Report to the Committee on Finance, U.S. Senate: Virtual Economies and Currencies, Additional IRS Guidance Could Reduce Tax Compliance Risks* (May 2013).
[11] *Id.*
[12] IRS, *Virtual Currency Guidance*, Notice 2014-21 (March 25, 2014).
[13] *Id*., Notice 2014-21 also directs taxpayers to Publication 15, (Circular E), *Employer's Tax Guide*; Publication 334, *Tax Guide for Small Businesses*; Publication 515, Withholding of Tax on Non-Resident Aliens and Foreign Entities; Publication 525, *Taxable and Non-Taxable Income*, Publication 535, *Business Tax Expenses*; Publication 544, *Sales and Other Disposition of Assets*; Publication 551, *Basis of Assets*; and Publication 1281, *Backup Withholding for Missing and Incorrect Name/TINs*, for more guidance on virtual currencies.
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[23] *Florida v. Espinoza*, Fla. Cir. Ct., F14-2923, 7/25/16.

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[25] *Id.*
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[30] *Id.*
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PUTTING IT IN NEUTRAL: HOW SEQUENCE, SEVERITY, AND SINCERITY OF INFORMATION PRESENTATION AFFECT STUDENT OPINIONS

by

Michael Conklin*

I. INTRODUCTION

This article presents the findings of a study designed to measure how variations in the way college professors present information can affect students' interpretation of the information. The topic analyzed involves two competing theories of constitutional interpretation, originalism and living constitutionalism.[1] Variations on how the information was presented include the following: 1) informing the student which theory typically aligns with which political party; 2) making salient the student's political philosophy; 3) including a short argument in favor of the two theories of constitutional interpretation; 4) altering the sequence in which these two arguments appear; and 5) informing the student as to which theory of constitutional interpretation the professor allegedly prefers. These changes resulted in stark differences in which theory of constitutional interpretation the student elected to support. This is consistent with existing literature on cognitive biases, such as anchoring and the serial-position effect.[2]

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The results of this study serve as a valuable reminder to professors of the significance of how they present information as it pertains to biasing student beliefs.

This article also addresses effective strategies that can be implemented to minimize the anchoring effect and create a more neutral and conducive learning environment. Cognitive anchoring can also be utilized as a highly engaging topic for class discussion. Students educated on the wide-reaching effects of cognitive anchoring will be better equipped to acquire better outcomes in their academic, professional, and personal lives. This article provides pedagogical best practices for how to present the topic in a Legal Environment of Business course, as well as an interactive classroom activity to spark interest in the subject among students.

II. BACKGROUND

Accusations of Bias in Academia

There is a long history in academia of recognizing the importance of presenting controversial material in a neutral manner. In the landmark 1915 *Declaration of Principles on Academic Freedom and Academic Tenure*, the American Association of University Professors explicitly stated that when discussing "controversial matters," professors should present "the divergent opinions of other investigators" and "above all" should "remember that [the professor's] business is not to provide his students with ready-made conclusions, but to train them to think for themselves, and to provide them access to those materials which they need if they are to think intelligently."[3]

American university professors are disproportionately liberal,[4] but this does not *per se* prove that they are presenting information in a biased manner.[5] Measuring the stated political

ideologies of professors is objective and straightforward. But measuring ideological bias in class lectures is a highly subjective endeavor.[6] Someone from the far right is likely to view a moderate statement as biased because of how far it deviates from his position, and likewise with someone from the far left. This perception issue can be exacerbated when those on the extreme right and left associate exclusively with like-minded people and only consume news from like-minded media outlets.[7]

The amorphous nature of measuring classroom bias and its effects on student populations results in uncertainty as to whether it is a significant problem in modern academia. A 2008 attempt to study how faculty political ideology affects student ideology concluded that there is no causal relationship.[8] However, this study did not directly compare the ideologies of the students to those of their professors. A 2016 study whose methodology allowed for such analysis found that professor ideology does affect student ideology.[9] The study measured political self-identity of over 1,000 students before and after either an "Introduction to American Politics" or "Introduction to Economics" course. The results were then compared to the political ideology of the faculty who taught the courses.[10] The study found:

> Despite attempts to veil instructor ideological preference, and to present both sides of common ideological divides in a manner consistent with available evidence, instructors who self-identify as conservative are associated with a shift to the right amongst their students while instructors who self-identify as liberal have a similar effect in the opposite direction.[11]

In recent years, college professors' abilities to present information in an unbiased manner has received increased attention due to politically charged accusations that colleges function as liberal "indoctrination mills."[12] College professors have been accused of "behav[ing] as political advocates in the

classroom, express[ing] opinions in a partisan manner on controversial issues irrelevant to the academic subject, and even grad[ing] students in a manner designed to enforce their conformity to professorial prejudices."[13]

Cognitive Anchoring

The methodology of this research allows for the effects of cognitive anchoring to be measured as a potential factor in how information presentation affects student perceptions. Cognitive anchoring was first researched in the 1974 landmark paper by Nobel Prize-winning psychologists Daniel Kahneman and Amos Tversky.[14] Since then, numerous papers have confirmed the effects of cognitive anchoring in a variety of settings. Cognitive anchoring is a heuristic whereby the timing and type of information improperly affects how it is perceived.[15] This is accomplished because the anchor changes the point of reference used in making decisions.[16] Cognitive anchoring is a well-documented phenomenon. However, there is a gap in the research pertaining to how it would affect student perceptions in a classroom setting.

A 1990 study found that cognitive anchoring plays an incredibly significant role in juror decision-making. The study assigned mock jurors to one of three different groups. They all heard an identical case summary. The only difference was that the plaintiff's attorney's request for damages was altered.[17] The requests were either $10,000, $75,000, or $150,000.[18] Mock jurors who received the $10,000 request awarded $18,000. The ones who heard the $75,000 request awarded $62,800. And the ones who heard the $150,000 request awarded $101,400.[19] The disparity between an $18,000 award and a $101,400 award for the same factual case may be hard to believe, but a later, similar study produced similar results.[20]

Judges are also susceptible to the effects of cognitive anchoring despite their high educational and professional attainment and their familiarity with legal judgments. Sentencing recommendations by probation officers heavily

influence judges' rulings.[21] In a hypothetical survey of German judges, a two-month sentencing recommendation resulted in an average sentence of 18.78 months, while a recommendation of thirty-four months resulted in an average sentence of 28.7 months.[22]

A 2019 study found that cognitive anchoring is so powerful that it even affects legal decisions when the anchor is subtle and irrelevant.[23] The study presented mock jurors with a criminal case study that contained either subtle anchors to high numbers (the defendant was on Eighty-First Street on March 31st and was apprehended forty-five minutes after the alleged crime) or subtle low numbers (the defendant was on First Street on March 2nd and was apprehended three minutes after the incident).[24] Despite all relevant facts of the case remaining constant, mock jurors in the high group returned sentences that averaged thirty-one percent higher than those in the low group.[25]

People may also be anchored to act in accordance with stereotypes, such as those involving their race and gender. In a 1999 study, Asian-American female college students were given a math test that began with either questions about their ethnicity, their gender, or control questions irrelevant to ethnicity and gender.[26] Participants who were given questions about their Asian heritage—and therefore primed to consider their Asian ethnicity—outperformed the other two groups on the math test.[27] Participants who were given questions about their female gender—and therefore primed to consider their gender—underperformed the other two groups.[28] The survey therefore found that even subtle reminders of one's identity in a group may cause them to act in accordance with the stereotypes—both positive and negative—regarding that group.[29]

While cognitive anchoring has been identified as "one of the most reliable results of experimental psychology,"[30] it is not equally as effective on everyone. Individuals with extreme political beliefs are not as susceptible to cognitive anchoring regarding political topics. A 2015 study found that individuals

with self-professed extreme political leanings often provided estimates and responses that were well outside of the range expected with cognitive anchoring.[31] Those with more moderate beliefs followed the more expected cognitive anchoring cues.[32] The study found that "belief superiority" was in large part responsible for the lack of effectiveness of cognitive anchoring for those with extreme beliefs.[33] These more "extreme" individuals typically consume more political information than their more moderate counterparts.[34] These individuals "consume more political media, . . . are more willing to discuss contentious issues with opponents, and have more self-confidence in general . . . ."[35]

Serial-Position Effect

The methodology of this research also allows for the results of the serial-position effect to be measured as a potential factor in how information presentation affects student perceptions. The serial-position effect occurs when the sequence of information presented affects perceptions of the information.[36] In the landmark 1974 Tversky and Kahneman study, participants were randomly assigned one of two math problems and given only five seconds to answer.[37] The problems were either "$8 \times 7 \times 6 \times 5 \times 4 \times 3 \times 2 \times 1$" or "$1 \times 2 \times 3 \times 4 \times 5 \times 6 \times 7 \times 8$."[38] Despite the product of these questions being the same, 40,320, the median answer for the latter problem was 512, while the median answer for the former problem was 2,250.[39]

The serial-position effect is not just limited to numerical estimates. A 2013 study presented participants with two texts regarding a life story, one rich in details and the other poor in details.[40] Participants who were given the detailed text first were more likely to believe the story when compared to participants who were given the less-detailed text first.[41] A 1998 study found that initial impressions of job interview candidates had unjustifiably high effects on how the applicant was perceived compared to later impressions.[42] A 2005 study found that

because defense attorneys give their sentencing recommendation after the prosecutor does, the decision maker is more heavily swayed by the first recommendation heard, i.e., the prosecutor's.[43] The serial-position effect also plays a part in political elections, as being listed first on the ballot has been proven to increase a candidate's success in winning office.[44]

However, the serial-position effect does not always place undue weight on the earlier information someone is exposed to. Sometimes the most recent information has a disproportionate effect. For example, a 1999 study found that witness testimony heard later in the trial was given more weight than earlier witness testimony.[45] In the medical field, a 1996 study found that when medical doctors are presented with a list of patient symptoms, their diagnosis places more emphasis on the symptoms presented last.[46]

As with traditional cognitive anchoring, the impact of the serial-position effect can be mitigated by the intensity of an individual's confidence in his beliefs.[47] A 1969 study found that mock jurors were more likely to return an innocent verdict if their opinion throughout the case was innocent than if they went back and forth between innocent and guilty during the trial process.[48] When individuals felt a commitment to an internal opinion as to the defendant's guilt or innocence, that commitment mitigated any serial-position effect.[49] Similar to how those with strongly held political beliefs are more resistant to cognitive anchoring, when jurors reach a point at which they have made up their minds as to the defendant's guilt, they are less susceptible to the order in which information is presented.

III. METHODOLOGY

The data for this study were gathered in undergraduate Legal Environment of Business courses at two regional universities. The vast majority of students in these classes were business majors. During the first week of each semester—before any

revealed preferences from the professor would have occurred—a survey was given whereby students were asked about their political affiliation and their opinion on two theories of constitutional interpretation (the living Constitution view and the originalism view). There were eight different versions of the survey. The variations were:

- Whether or not arguments were presented for each of the two theories of constitutional interpretation and in what order they were presented
- Whether it was pointed out that Democrats generally favor the living Constitution view and Republicans generally favor the originalism view
- Whether the political affiliation of the survey participant was asked about at the beginning or end of the survey
- Whether the survey stated the professor's personal opinion on which theory of constitutional interpretation is best and whether that stated opinion was the living Constitution view or the originalist view

After surveys were excluded for being either illegible or incomplete, 314 usable surveys remained.

The political affiliation question instructed participants to "Select which one option best describes your political philosophy." The options were "Strongly liberal," "Liberal," "Somewhat liberal," "Somewhat conservative," "Conservative," and "Strongly conservative."

The brief definition of each view, which was included in every survey, was: "The two main views of constitutional interpretation are living Constitution and originalism. The living Constitution view says that judges can alter the meaning of the Constitution to adapt with the times. The originalist view says that judges should adhere to the original meaning of the Constitution."

At at least one point in each survey, the student was asked to select which option best describes his or her preferred view of

constitutional interpretation. The answer selections were "Definitely living Constitution," "Living Constitution," "Maybe living Constitution," Maybe originalism," "Originalism," and "Definitely originalism."

The prompts presenting the case for each theory—when used—were as follows:

> The case for the living Constitution:
>
> The Constitution was written in the 1700s by an agrarian, slave-owning society. There have been vast changes in technology and public opinion since then. Determining what was meant by a document written in the 1700s is not only difficult, but would often lead to disastrous results if that intent was followed today. Therefore, judges must be allowed to alter the meaning of the Constitution.
>
> A case involving the right of people to acquire contraceptives such as the birth control pill illustrates why the living Constitution view is best. In this case the originalists on the Court applied their rigid interpretation of the Constitution and held that there was no right to contraceptives (and therefore voted to allow states to ban contraceptives). Luckily, they were outnumbered by the living Constitution justices on the Court who read into the Constitution a newly discovered right to contraception. Thanks to this living Constitution view, people now have a right to contraception, along with other rights that weren't originally intended.
>
> The case for originalism:
>
> The Supreme Court should faithfully apply the Constitution in their cases. What's the point of having a Constitution if unelected judges can

> change its meaning based on their personal preferences?
>
> There is already a system in place for changing the meaning of the Constitution, the amendment process. It has been effectively used to amend the Constitution to give women the right to vote, end slavery, set term limits on the president, and allow 18-year-olds to vote.

Student responses were quantified by attributing a number to each potential answer. For political affiliation, the responses were given a one through six, with one being "Extremely liberal" and six being "Extremely conservative." The constitutional theory answer selections were also assigned a one through six, with one being "Definitely living Constitution" and six being "Definitely originalism." This scale allowed for more nuanced differences to be analyzed when compared to the binary response options of only liberal/conservative or living Constitution / originalism.

Hypothesis One

It was hypothesized that in the surveys in which students were first asked to provide their political affiliation—and informing them of which theory of constitutional interpretation is aligned with which political party—there would be higher correlations between political affiliation and chosen constitutional interpretation theory. Meaning, liberals would be more likely to choose the living Constitution theory and conservatives more likely to choose the originalism theory. It was hypothesized that this would be due to the anchoring effect, because being reminded of their political affiliation up front would cause students to act consistently with that belief in their response to which theory they support.

Hypothesis Two

It was hypothesized that when arguments in favor of the two theories were presented, the arguments for the theory presented

first would be disproportionately favored due to the serial-position effect.

Hypothesis Three

It was hypothesized that when the professor's alleged opinion was stated, students would disproportionately choose the theory they believe the professor agrees with, either because the students trust the professor's subject-matter expertise or because the students believe that agreeing with the professor will in some way be advantageous.[50]

IV. RESULTS

Overall

The data supported hypothesis one, supported hypothesis two in part, and did not support hypothesis three. The average political ideology for all students was 3.67, which, on a six-point scale, is only a slight 0.17 favoring of conservatism. The average response as to which constitutional theory is preferred was 3.11, which is closest to the "Maybe living Constitution" response.

The r^2 coefficient was used to measure the relationship between each student's political affiliation and chosen theory. An r^2 of 1 would mean there is a perfect correlation between political affiliation and theory selected (every "Strongly liberal" would have selected "Definitely living Constitution," and every "Strongly conservative" would have selected "Definitely originalism"). An r^2 of 0 would mean there is no correlation between political affiliation and theory selected. And an r^2 of 0.5 would mean that the model explains 50% of the variability of the response data around its mean.

Hypothesis One

When students were first asked about their political affiliation and informed of which theory correlates with each political affiliation before being asked about which theory they

prefer, they were more likely to choose the theory that typically aligns with their political affiliation. For surveys that first asked about political affiliation and identified which political affiliation is associated with which theory, the r^2 was a strong 0.71. For surveys that did not, the r^2 was still significant but only 0.51. Therefore, the practice of reminding students of their political affiliation and which theory of constitutional interpretation it aligns with resulted in a 39% increase in the students' chosen theory corresponding to their political affiliation.

Hypothesis Two

The results partially supported hypothesis two. For surveys that presented the case for the living Constitution view before the case for the originalism view, there was a 13% increase in support for the living Constitution (the average response initially was 2.75 and went to 2.38 after hearing the case for the living Constitution). The effect on participants who were exposed to the argument for originalism first was only negligible, increasing support for originalism less than 2% (the average response initially was 3.04 and went to 3.08 after hearing the case for originalism).

However, in both instances when the argument for the alternative theory was then presented, students were more significantly persuaded. After being told the argument for the living Constitution last, support for it increased 14% (from 3.08 to 2.65). And when the argument for originalism was presented last, support for it increased 25% (from 2.38 to 2.97).

Hypothesis Three

This hypothesis was not only unsupported by the evidence, but the inverse conclusion was supported. When the students were told that the professor subscribed to originalism, they were more likely to favor the living Constitution view (an average of 2.83 compared to the overall average of 3.08). And when the students were told that the professor subscribed to the living

Constitution view, they were more likely to favor originalism (an average of 3.48 compared to the overall average of 3.08).

V. DISCUSSION

Hypothesis One

This hypothesis predicted that when students were first asked about their political affiliation and informed of which theory correlates with each political affiliation before being asked about which theory they prefer, they would be more likely to choose the theory that typically aligns with their political affiliation. The 0.51 r^2 value for the group that was not reminded of their political affiliation nor told which political philosophy aligns with each theory—while significantly less than the 0.71 r^2 value from the group that was—still demonstrates a significant correlation. The limitations of this study render it unable to determine if this is a result of conservatives and liberals naturally being drawn to originalism and living constitutionalism, respectively, or if many students were already aware of which theory aligns with which political ideology. The results could also be due, in small part, to the veracity of the students' beliefs.[51] Based on this author's experience teaching students at this level, it is unlikely that a significant number of the students surveyed were familiar with these two theories at the time they took the survey—the first week of class.

As illustrated in the Asian-American female math test study,[52] people can become anchored to a given trait, belief, or association even when it is pointed out in a subtle manner. This new, anchored mindset then affects the way in which they interpret newly presented information. This is an important principle for college professors to learn and adapt their teaching styles to accommodate. Students may be anchored to a number of preexisting traits, beliefs, or associations that affect their class performance. Some students may enter class with the preexisting anchor that the study of law is boring. Others may be anchored

to notions that the law is anti-business, anti-black, anti-conservative, anti-poor, or a number of other preconceived notions.[53] These anchors are not only hard to overcome because of how powerful they are as a cognitive heuristic[54] but also because they are difficult to identify. Students are unlikely to recognize that their prior political leanings function to bias the way they interpret information. And even if they did, they would be unlikely to share such information with their professors.

College professors are well-advised to consider the importance of political ideology when deciding the way controversial topics are presented. For example, pointing out which Supreme Court opinions are written by conservative justices and which are written by liberal justices may do more harm than good if it causes students to be either hypercritical or undiscerning before first considering the merits of the case. The practice of a conservative student discovering that he agrees with some liberal positions and a liberal student discovering that he agrees with some conservative positions is a valuable experience that could lead to greater tolerance of opposing views. This also enhances the students' critical thinking skills, which is a common learning objective for a Legal Environment of Business class. This is because dismissing positions outright without consideration is a poor method of fostering critical thinking skills.

Additionally, professors should be mindful to present controversial topics by utilizing a mix of different teaching methods to accommodate the various learning methods of the students.[55] This is consistent with the other findings of this research, as this type of flexible learning is associated with more democratic and less authoritarian teaching styles.[56] College professors should also be mindful of how their own traits, beliefs, and associations may bias their teaching pedagogy. Judging a student's paper in light of a poor performance on his or her previous paper, apparent inattentiveness in class, or

perceived lack of respect for the professor is also a manifestation of cognitive bias.

The mindfulness required to foster an unbiased learning environment also extends beyond just monitoring the subtle ways in which the professor presents information. It also requires attention to the chosen textbook, required readings, guest speakers, etc.[57] Professors should consider if these resources were chosen because they present certain controversial information consistent with the professor's personal beliefs or because they provide the best arguments for both sides, thereby allowing the students to arrive at their own conclusions.

Professors should also be upfront with students about how dissenting voices are welcome in class.[58] This way, even if students feel the professor's personal bias is on display in the manner in which the professor presents information, they will be more likely to offer counterpoints that will hopefully serve as a reminder to the professor to present alternative views. Also of note is how professors—consciously or otherwise—can incentivize or disincentivize dissenting views from students based on the way they respond. If the professor attacks and dismisses dissenting opinions from students, then the students will quickly learn to keep these views to themselves. Conversely, if the professor excitedly praises dissenting opinions, then the class will feel more encouraged to present them.[59]

Hypothesis Two

This hypothesis predicted that when arguments in favor of the two theories were presented, the theory presented first would be disproportionately favored due to the serial-position effect. While the opposite outcome was observed—the theory presented last was disproportionately favored—this is still an example of the serial-position effect. This unpredicted result is not entirely surprising because, as illustrated in the literature review, the serial-position effect can sometimes result in the

highest significance being placed on the last piece of information one is exposed to.[60]

For legal topics that are up for debate, such as which method of constitutional interpretation is best, are overseas tax shelters ethical, or should businesses be required to offer paid maternity leave, the professor's bias could be limited by intentionally ordering the sequence of the information presented for both sides. For example, if a professor were a strong originalist, he could choose to present the arguments in favor of originalism first and the arguments for the living Constitution last. This would prevent an occurrence where the professor—consciously or otherwise—sets up the living Constitution arguments to be dismantled immediately afterward.

Combating the effects of anchoring is no easy task. Cognitive anchoring is so highly prevalent that "it has proved to be almost impossible to reduce . . . ."[61] However, two studies have produced potential mitigation strategies. One found that the implementation of a procedural priming task can reduce the magnitude of the anchoring effect.[62] The study randomly assigned participants into two groups.[63] The first group was instructed to find similarities between two images, while the other group was instructed to find differences.[64] Both groups were then given an anchoring test.[65] While both groups ultimately fell prey to the anchoring bias, the group that was given the procedural priming task of finding differences fared better than their counterparts who looked for similarities.[66] A second study showed that implementing a "consider-the-opposite" strategy, in which one actively generates reasons why the anchor is inappropriate, also minimized anchoring bias.[67] This "consider-the-opposite" strategy is an excellent pedagogical tool for a Legal Environment of Business course because it coincides nicely with critical thinking, which is a common learning objective for that course.

Another way to combat the impact of the serial-position effect on a professor's bias is to teach the concept of anchoring

and the serial-position effect early in the semester. Students who are more aware of the phenomenon may be better equipped to combat it in their own recall of information.[68] Students with training in the concept of the serial-position effect may also serve to bring attention to instances of the phenomenon when the teacher and other students may be unaware it is happening.[69]

Hypothesis Three

This hypothesis predicted that when the professor's alleged opinion was stated, students would disproportionately choose the theory they believe the professor agrees with. Informing students of the professor's alleged opinion did affect responses, but in the opposite direction than predicted. It is challenging to provide a definitive explanation for this result. Perhaps the students felt pressured and were demonstrating a rebellious nature by disagreeing with the professor. Perhaps students felt the professor would respect their willingness to advocate for the alternative position. Regardless, professors should strive to embody a neutral disposition in which both sides to controversial topics are presented in such a convincing manner that students are left unclear what the professor personally believes.

The finding that students were not persuaded to adopt the professor's point of view should not be interpreted as contradictory to the results in the Baxter study, in which student political ideology shifted to be more in line with professor ideology.[70] In the present study, students were simply told what the personal belief of the professor was. This level of professor bias falls far short of what would likely occur in a semester-long American Politics course, which is what was used in the Baxter study.[71]

Living Constitution Favored over Originalism

Although outside the scope of this research, it is interesting to note that the students in these surveys—despite being more conservative than liberal—demonstrated an overall preference for the living Constitution theory over originalism. This finding

remained constant in the survey versions when the arguments for each side were presented. Perhaps among college students the word "originalism" is associated with old-timey notions such as antiquation, intolerance, and dogmatism.

Natural Check Against Biased Teaching

The results of this survey should not be interpreted as calling for increased surveillance and disciplinary measures for potentially biased teaching pedagogy. The practice is difficult to quantify objectively, and the harm to academic freedom would likely outweigh any benefits incurred. Additionally, there is evidence to suggest that a naturally occurring check against proselytizing in the classroom already exists. A 2006 study found that the larger the perceived ideological divide between the student and professor, the worse the student's end of course evaluation of the professor will be.[72] Since these evaluations are frequently linked to professor promotions and career opportunities, this creates an incentive for professors to limit how far they are willing to go in promoting their own opinions at the expense of welcoming alternative views.

Difficulty of Pedagogical Implementation

The suggestions for professors in this article are easier said than done. A professor who strongly subscribes to the living Constitution theory may view all the arguments for originalism as blatantly weak and believe that the implementation of originalism would lead to severe harm to the judicial system. Such a person may find it difficult to present both sides with a neutral disposition. Additionally, such a person may find it difficult to fight the urge to actively promote the living Constitution theory over originalism. As the Supreme Court has emphasized, "the overriding importance [of higher education is] preparing students for work and citizenship."[73] And being a good citizen clearly entails not causing harm to the judicial system.

Another difficulty in implementing the suggestions of this article is that it is not a simple, binary endeavor. Instructional

bias must be differentiated from the act of challenging students' positions with criticism.[74] This can be a highly nuanced distinction and is made increasingly difficult by the subjective nature of identifying the distinction. A strongly conservative student and a strongly liberal student may define the difference between instructional bias and the healthy challenge of ideas very differently in a variety of circumstances.

An additional challenge is the inherent line-drawing exercise involved in identifying which topics should be presented in a neutral manner inviting dissent and which should not. Most would likely agree that the different theories of constitutional interpretation should be presented neutrally, encouraging students with different viewpoints to voice arguments for their beliefs. And most would likely agree that a topic such as women being barred from the practice of law need not be presented in a manner suggesting that both sides have equal merit. But between these two extremes lie issues that some would view as open for debate and others would view as settled issues inappropriate to encourage disagreement with.

There is a danger in not recognizing that some ideas—such as women being allowed to practice law—are settled issues that should not be up for debate. The following quote from Stanley Fish serves as an example of the thought process that can flow from failing to recognize this:

> The moment a teacher tries to promote a political or social agenda, mold the character of students, produce civic virtue, or institute a regime of tolerance, he or she has stepped away from the immanent rationality of the enterprise and performed an action in relation to which there is no academic freedom protection because there's nothing academic going on.[75]

What is so immanently irrational about professors utilizing their course subjects to produce civic virtue? And by what mechanism is such behavior barred from the realm of academia? And if

tolerance is not to be promoted, on what grounds is a professor justified in stopping a student acting to silence a fellow student from voicing a given belief?

To add to the difficulty professors face when considering the dangers of presenting controversial topics in a biased manner, they are in essence given mixed messages regarding the issue. Basic teaching pedagogy trains professors on how to present information in a manner that leads to the desired student-learning result. Faculty members who excel at this are praised for their effective teaching skills. But this same behavior, when used on an undefined category of topics, is labeled indoctrination and is forbidden.

Application for Legal Environment of Business Courses

The topic of cognitive anchoring is highly relevant to many business courses, including both undergraduate and graduate Legal Environment of Business courses. Furthermore, students find the topic highly engaging due to the expansive real-world applicability. Students are often surprised to learn how much cognitive anchoring affects juror decision-making and judges' verdicts. This realization sparks passionate discussion in the classroom regarding judicial fairness, the ethics of manipulating outcomes through cognitive anchoring, and how cognitive anchoring could apply to the students' personal lives. The topic of cognitive anchoring and the examples available in the legal field also help dispel the frequent misconception that the law is more of an objective, exact science rather than the subjective endeavor that it often is. And as previously stated, the strategy of "consider-the-opposite" for combating the cognitive anchoring bias aligns with the common Legal Environment of Business learning objective of critical thinking.[76]

Beginning a lesson on cognitive anchoring with an in-class demonstration is a powerful way to build interest in the subject and avoid the inevitable claim from students that surely they would not fall prey to the cognitive anchoring demonstrated in the research. An easy way to do this is by randomly distributing

one of two surveys to each student in the class. Each survey contains only two questions. The second question in each survey is the same: "What is your best estimate as to the population of France?" The first question is either "Is the population of France more or less than 30 million?" or "Is the population of France more or less than 150 million?"[77] Provided that you have at least twenty students participating,[78] there is a high probability that the average estimate on the second question will be significantly higher in the latter group than in the former.[79]

Class discussions on cognitive anchoring are beneficial to students' success in their academic, professional, and personal lives. For example, these discussions can illustrate:

- The importance of viewing contested political issues with a neutral and open mindset
- The importance of students making a positive first impression with their professors, bosses, and dating partners
- Conversely, the importance of being amiable to changing opinions about others
- The positive effect of an attorney mentioning a colleague who charges $500 an hour before explaining that he charges "only" $300 an hour
- The importance of immediately controlling the narrative during a workplace conflict or when addressing a public relations issue

Simply put, cognitive anchoring is a highly engaging topic to discuss in class, and students benefit immensely from not only learning how to effectively use this tool but also to be aware of the ways it can be used against them.

VI. CONCLUSION

The findings of this research emphatically demonstrate how necessary it is for professors to be mindful of the manner in

which they present information. The careful implementation of the suggestions in this article will be no easy task, but given that even slight variations can result in significant biases in student response, this is something of utmost importance. Professors must diligently strive to present information in a neutral manner regardless of their personal beliefs. The lack of ideological diversity in academia[80]—and recent accusations of "indoctrination mills"[81]—further emphasizes the need for controversial topics to be presented in a neutral manner.

The results of this study also call attention to the nuanced and underdeveloped topic of addressing potential biases in information presentation, therefore encouraging replication with variation in future research. Such variations could include measuring how demographic factors such as age, gender, and GPA affect responses. Additionally, a future study done in a less polarizing political environment could help inform how much the results are attributable to partisanship. Finally, similar studies conducted at flagship universities could be conducted to measure any variation between institution type.

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[1] Originalism was chosen instead of strict constructionism because it was determined to be less confusing to students who were unfamiliar with the concepts.

[2] For ease of reading, the term "serial-position effect" is used throughout this article. However, it should be noted that the primacy effect and the recency effect are both manifestations of the serial-position effect. The former is when the first pieces of information in a list are given disproportionate relevance and the latter is when the last pieces of information in a list are given disproportionate relevance. Henry L. Roediger, III & Robert G. Crowder, *A Serial Position Effect in Recall of United States Presidents*, 8 BULL. PSYCHONOMIC SOC'Y 275, 275 (1976).

[3] AM. ASS'N OF UNIV. PROFESSORS, DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM AND ACADEMIC TENURE 298 (1915),

https://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf.

[4] Colleen Flaherty, *Evidence of 'Liberal Academe,'* INSIDE HIGHER ED (Oct. 3, 2016), https://www.insidehighered.com/news/2016/10/03/voter-registration-data-show-democrats-outnumber-republicans-among-social-scientists (reporting an average university ratio of 11.5:1 for liberal to conservative professors and a ratio of only 8.6:1 for the subject of law specifically).

[5] Scott Jaschik, *Liberal Indoctrination? Not So Much*, INSIDE HIGHER ED (Feb. 5, 2018), https://www.insidehighered.com/news/2018/02/05/research-suggests-colleges-broaden-students-political-views.

[6] Joseph P. Mazar, *Teachers, Students, and Ideological Bias in the College Classroom*, 67 COMMC'N EDUC. 245, 245–47 (2018).

[7] Alan Greenblatt, *Political Segregation Is Growing and 'We're Living with the Consequences,'* GOVERNING (Nov. 18, 2016), https://www.governing.com/topics/politics/gov-bill-bishop-interview.html.

[8] *See, e.g.*, Mack D. Mariani & Gordon J. Hewitt, *Indoctrination U.? Faculty Ideology and Changes in Student Political Orientation*, 41 POL. SCI. & POL. 773, 779 (2008) (concluding that, although students' ideologies do shift to the left through their time at college, upon graduation students' ideologies are "not significantly different from the population at large [of a similar age].").

[9] Corbett Baxter, Brian Forester & Rachel Milstein Sondheimer, The Effects of Faculty Ideology on Changes in Student Ideology (2016) (Master Teacher Program paper, United States Military Academy), https://www.westpoint.edu/sites/default/files/inline-images/centers_research/center_for_teching_excellence/PDFs/mtp_project_papers/Baxter-Forester-Sondheimer_16.pdf.

[10] *Id.* at 1–2.

[11] *Id.* at 2.

[12] Neal Gross, *The Indoctrination Myth*, N.Y. TIMES: GRAY MATTER (Mar. 3, 2012), https://www.nytimes.com/2012/03/04/opinion/sunday/college-doesnt-make-you-liberal.html (pointing out that then presidential candidate Rick Santorum called colleges and universities "indoctrination mills" for liberal thought).

[13] David Horowitz, *Why an Academic Bill of Rights Is Necessary to Ensure That Students Get a Quality Education*, *in* THE ACADEMIC BILL OF RIGHTS DEBATE: A HANDBOOK 187, 188 (Stephen H Aby ed., 2007).

[14] Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics & Biases*, 185 SCIENCE 1124 (1974).

[15] Tversky & Kahneman, *supra* note 14, at 1128.

[16] *Id.*

[17] Allan Raitz, Edith Greene, Jane Goodman & Elizabeth F. Loftus, *Determining Damages: The Influence of Expert Testimony on Jurors' Decision Making*, 14 L. & HUM. BEHAV. 385, 387 (1990) (citing J.J. Zuehl, The Ad Damnum, Jury Instructions, and Personal Injury Damage Awards (1982) (unpublished manuscript)).
[18] *Id.*
[19] *Id.*
[20] Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask for, the More You Get: Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCH. 519, 526 (1996).
[21] *Id.* at 521.
[22] Birte Englich & Thomas Mussweiler, *Sentencing Under Uncertainty: Anchoring Effects in the Courtroom*, 31 J. APPLIED SOC. PSYCH. 1535, 1538–40 (2001).
[23] Michael Conklin, *Combating Arbitrary Jurisprudence by Addressing Anchoring Bias*, 97 WASH. U. L. REV. ONLINE 1 (2019).
[24] *Id.* at 4. The case summary was constructed so that the differences in apprehension time were irrelevant. *Id.*
[25] The high group average sentence was 9.7 months, while the low group average was 7.4 months. *Id.*
[26] Margaret Shig, Todd L. Pittinsky & Nalini Ambady, *Stereotype Susceptibility: Identity Salience and Shifts in Quantitative Performance*, 10 PSYCH. SCI. 80, 80 (1999).
[27] *Id.* at 81.
[28] *Id.*
[29] *Id.* 82–83.
[30] Ljijana Lazarevic & Iris Zezelj, *Individual Differences in Anchoring Effect: Evidence for the Role of Insufficient Adjustment*, 15 EUROPE'S J. PSYCH. 8, 8 (2019).
[31] Mark J. Brandt, Anthony M. Evans & Jarret T. Crawford, *The Unthinking or Confident Extremist? Political Extremists Are More Likely Than Moderates to Reject Experimenter-Generated Anchors*, 26 PSYCH. SCI. 189, 189–90 (2015).
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] Galit Nahari & Gershon Ben-Shakhar, *Primacy Effect in Credibility Judgments: The Vulnerability of Verbal Cues to Biased Interpretations*, 27 APPLIED COGNITIVE PSYCH. 247, 247 (2013).
[37] Tversky & Kahneman, *supra* 14, at 1128.
[38] *Id.*

[39] *Id.*
[40] Nahari & Ben-Shakhar, *supra* note 36.
[41] *Id.* at 250.
[42] Daniel M. Cable & Tom Gilovich, *Looked Over or Overlooked? Prescreening Decisions and Postinterview Evaluations*, 83 J. APPLIED PSYCH. 501 (1998).
[43] Birte Englich, Thomas Mussweiler & Fritz Strack, *The Last Word in Court—A Hidden Disadvantage for the Defense*, 29 LAW & HUM. BEHAV. 705 (2005).
[44] Patrick F.A. van Erkel & Peter Thijssen, *The First One Wins: Distilling the Primary Effect*, 44 ELECTORAL STUD. 245, 250 (2016).
[45] Jose H. Kerstholt & Janet L. Jackson, *Judicial Decision Making: Order of Evidence Presentation and Availability of Background Information*, 12 APPLIED COGNITIVE PSYCH. 445 (1999).
[46] Gretchen B. Chapman, George R. Bergus & Arthur S. Elstein, *Order of Information Affects Clinical Judgment*, 9 J. BEHAV. DECISION MAKING 201, 201 (1996). This recency effect remained constant in both experienced and less experienced physicians. *Id.*
[47] For examples of traditional cognitive anchoring mitigation see *infra* notes 62–69 and accompanying text.
[48] Vernon A. Stone, *A Primacy Effect in Decision-Making by Jurors*, 19 J. COMMC'N 239, 239 (1969).
[49] *Id.*
[50] While there was no subjectivity in the grading—any student who answered all the questions received full credit—the survey was not anonymous.
[51] *See, e.g.*, Brandt, Evans & Crawford, *supra* note 31.
[52] Shig, Pittinsky & Ambady, *supra* note 26.
[53] Note that this does not *per se* mean that any of these pre-conceived notions are false. Rather, it just means that professors should be aware of what biases their students possess.
[54] *See, e.g.*, Thomas Mussweiler, *The Malleability of Anchoring Effects*, 49 EXPERIMENTAL PSYCH. 67, 71 (2002) ("[The anchoring effect] has proved to be almost impossible to reduce.").
[55] Carmen Zita Lamagna & Sheikh Tareq Selim, *Heterogeneous Students, Impartial Teaching and Optimal Allocation of Teaching Methods*, (University Library of Munich, Germany, General Economics and Teaching Working Paper No. 0503011), https://ideas.repec.org/p/wpa/wuwpgt/0503011.html.
[56] *Id.* at 2.
[57] Baxter, Forester & Sondheimer, *supra* note 9, at 1.

[58] Through personal experience, this author has found that sincerely emphasizing the importance of dissenting opinions on the first day of class has a positive effect throughout the semester. For example:

> Dissenting opinions are the most important to share. If two students have voiced their support for a given position, we really don't need a third person to echo the sentiments already expressed. We need someone to share an alternative view so that the class can hear both sides. Providing alternative views to the topics we will discuss keeps the class interesting. And the more unique the opinion, the more we benefit from hearing it.

[59] In order to gain the reputation of a professor who excitedly encourages dissenting views instead of one who attacks and dismisses them, it is sometimes necessary to help out students who present dissenting views by slightly altering their comment into the strongest version possible. For example, after presenting a strong case for originalism, if a student provides the rudimentary critique, "Why should we care so much what people from the 1700s thought?" the professor could respond, "That's an excellent point. Many leading scholars on the subject present a similar objection to originalism. What did the Founding Fathers know about GPS tracking, greenhouse gas pollution, and the internet?" Depending on the quality of the dissent a student provides, it can be challenging to develop the dissent into a quality objection, but the more effort that is put into the practice, the better a professor will become.

[60] *See, supra* notes 45–45 and accompanying text.

[61] Mussweiler, *supra* note 54, at 71.

[62] *Id.* at 69–70.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] Thomas Mussweiler, Fritz Strack & Tim Pfeiffer, *Overcoming the Inevitable Anchoring Effect: Considering the Opposite Compensates for Selective Accessibility*, 26 PERSONALITY & SOC. PSYCH. BULL. 1142 (2000).

[68] Lloyd (Chad) Jones, Patterns of Error Perceptual and Cognitive Bias in Intelligence Analysis and Decision-Making 5 (Dec. 2005) (M.S. thesis, Naval Postgraduate School), https://apps.dtic.mil/dtic/tr/fulltext/u2/a443214.pdf.

[69] *Id.*

[70] Baxter, Forester & Sondheimer, *supra* note 9.

[71] *Id.*

[72] April Kelly-Woessner & Matthew C. Woessner, *My Professor Is a Partisan Hack: How Perceptions of a Professor's Political Views Affect Student Course Evaluations*, 39 POL. SCI. & POL. 495 (2006).
[73] Grutter v. Bollinger, 539 U.S. 306, 331 (2003).
[74] Kenneth L. Marcus, *Academic Freedom and Political Indoctrination*, 39 J. COLL. & U.L. 725, 740 (2013).
[75] STANLEY FISH, SAVE THE WORLD ON YOUR OWN TIME 81 (2008).
[76] *See supra* note 67 and accompanying text.
[77] This is the same experiment conducted on the audience in the author's TED Talk. *See supra* note *.
[78] Even in classes of fewer than twenty, there is a greater than 50% probability that the results will be consistent with the anchoring effect. But the more participants involved, the more likely this result will occur. This author has personally performed this exact class activity about fifteen times. Every time, the students who received the questionnaire with the first question that anchors them to a high number return higher estimates on average than the students who received the questionnaire that anchors them to the low number.
[79] While students will inevitably inquire, it is ultimately irrelevant that the actual population of France is around 68 million. *France*, CENT. INTEL. AGENCY: WORLD FACTBOOK (last updated Apr. 2020), https://www.cia.gov/library/publications/the-world-factbook/attachments/summaries/FR-summary.pdf.
[80] Flaherty, *supra* note 4. If there were more ideological diversity in academia, the consequences of professors presenting information in a biased manner would be less severe, because a student could be exposed to both sides of controversial issues from different professors.
[81] *See supra* note 12.

YO HO HO AND A BOX FULL OF CASH EXPLORING THE LAW OF FOUND PROPERTY IN YOUR BUSINESS LAW CLASS

by

Judy Gedge, J.D. *

I. INTRODUCTION

An old house was bought by a wrecking and salvaging company. In the process of demolishing the house, one of the workers found a metal box behind the kitchen wall. He opened it and discovered $12,700 in cash inside. Is he legally entitled to keep the money or not? This example is based on an actual case of found property, [1] one of many fascinating cases of buried treasure, shipwrecks, jewels found in the street, and hidden money discovered. 'Treasure trove' - the very name evokes images of adventure, excitement, possibly even of pirates' plunder.

Who is legally entitled to found property? This is a fascinating area of property law full of exciting cases of money, jewels and other treasure that somehow got separated from its rightful owner. When that rightful owner makes no claim to the property, who then has the legal right to the property?

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These teaching materials introduce students to the common law principles governing abandoned, mislaid, lost, and treasure trove property. The students apply these legal principles by participating in an informal trial to determine which of three possible claimants is legally entitled to $182,000 of old currency discovered by a building contractor in a box hidden behind a wall in a nearly one-hundred-year-old house.

Following the Introduction, Part II provides a description of the teaching materials and scaffolded homework assignments which help students gain an understanding of the common law principles of found property. Part III provides details of the in-class trial of the Case of the Found Money including practical teaching tips. Part IV provides a Teaching Note describing the learning objectives and the benefits of using role-playing exercises like this to help build critical thinking skills while actively engaging students in the learning process. Part V contains the conclusion and is followed by a summary of principles of found property and the Case of the Found Money.

II. TEACHING MATERIALS

A. The Law of Found Property

The author has prepared a summary of the law of found property with concrete examples to help students understand the different categories of property: abandoned, mislaid, lost, and treasure trove property.[2] Not all business law/legal environment of business textbooks do a thorough job on this legal topic so this summary may be useful. These teaching materials include a summary of an actual case, *Benjamin v. Lindner*, which deals with money found hidden inside the wing of an airplane.[3] In the *Benjamin* case, the court's well-

reasoned opinion provides an effective illustration of the application of the principles of found property to discovered cash.

In this case, a Bank was the owner of a small airplane which it had obtained through foreclosure of its secured loan. The bank brought the plane for a routine inspection to a hangar owned and operated by an airplane Servicing Company. In the course of this inspection, a Mechanic (employed by the Servicing Company) unscrewed some rusty screws to access the panels under the aircraft wings. Inside one of those wings the Mechanic found two packets wrapped in aluminum foil which contained approximately $18,000. Not surprisingly, this resulted in multiple claimants to the money (except by the 'true' owner of the cash who never presented himself). The claimants to this found money are the Mechanic, the Servicing Company and the Bank.

The Iowa Supreme Court in the *Benjamin* case provides a detailed and careful legal analysis concluding that the cash is mislaid property and therefore belongs to the owner of the premises on which the mislaid property was found. Each of the Bank (as owner of the aircraft) and the Servicing Company (as owner of the real estate on which the aircraft was then housed) claimed to be the owner of the premises for purposes of determining the rights to the cash. The Court held that the Bank was entitled to the cash relying on the policy rationale underlying mislaid property – that the true owner of the mislaid property would seek out the aircraft (not an aircraft hangar) if he sought to locate his cash. There is also a well-reasoned dissenting opinion which argues that the cash is clearly abandoned property, not mislaid property and so the three dissenting justices would award the cash to the finder of the property – the Mechanic.[4]

The teaching materials include assignments designed to help prepare students for the in-class trial, the Case of the Found Money.[5] These homework problems help students to master the common law principles of found property using a scaffolding technique. The homework assignments are intentionally designed to help students through a series of exercises of increasing difficulty. Using this effective pedagogical method, students are able to gain a thorough understanding of these complex concepts.[6]

B. The Case of the Found Money

Once the students understand the general principles of found property and can identify the differences between abandoned, mislaid, lost and treasure trove property, they are ready to participate in an in-class trial based on an actual dispute in which more than $180,000 was found behind the walls of a Cleveland house undergoing renovation.[7]

In this assignment, the students are provided a brief summary of the facts based roughly on the actual Cleveland house dispute. The owner had recently purchased a house in Cleveland, Ohio which was built in the 1920's. The owner brought in a contractor to remodel the bathroom. While doing the demolition, the contractor discovered a rusty metal box hanging from a wire inside a wall behind the medicine cabinet. The box contained an envelope (discolored from age) in which the contractor found cash totaling $182,000. The bills were old and brittle and dated from 1927 to 1937. There was nothing in the box to identify the original owner of the cash. Not surprisingly, there are several claimants to this cash: the contractor, the homeowner and the surviving heirs of the family who owned and lived in this house from 1934 through 2003.

In preparation for our in-class trial, students complete as homework a chart summarizing each of the three claimants by identifying: (i) the category of found property this claimant will rely on; (ii) the specific facts this claimant will rely on to support his/her claim to the money; and (iii) the student's opinion of the strength of this claimant's argument. In addition, the students explain who they think is legally entitled to the $182,000 under the common law principles of found property.

III. THE CASE OF THE FOUND MONEY MINI TRIAL

Prior to this class, the instructor seeks six student volunteers to serve as the lead actors in this trial of the Case of the Found Money. This is one of many cases in which students volunteer to be lead actors/presenters during the semester. In this instructor's course, all students are required to volunteer for one such activity during the semester so there are always willing volunteers.[8] Volunteers do not know which side of the case they will be arguing until the day of the trial. That way they are sure to fully prepare for the trial, knowing the strengths and weaknesses of each of the claimant's positions.

At the beginning of class, the volunteers come to the front of the classroom (which is set up as much as possible like a courtroom) and the six student volunteers are divided into three pairs, one for each of the three claimants. (If desired, a seventh student can be given the role of the presiding judge.) Then the students have 10-15 minutes to prepare for the trial. During this time each pair decides which of the two students will act as the claimant and which as the attorney. They discuss the claimant's direct and (likely) cross examination. While the volunteers are doing this, the instructor confirms with each pair of students that they have correctly identified the category of found property on which their claimant will rely.

While the student volunteers are preparing for the trial, the rest of the class is meeting in groups to go over the homework assignments.

The instructor may want to use this time to write a chart on the board describing in general the common law principles of found property identifying the priority of various categories of claimants to found property. This chart can be reviewed with the class by the instructor just before the trial starts.

The in-class trial then takes place. (Note that the trial is very informal with a focus on helping students understand and apply these legal principles. As such, in this instructor's class, a trial like this does not address rules of evidence.) The witnesses are brought up in turn. The attorney for the witness draws out his/her story through direct examination which is then followed by cross-examination by the other two attorneys. Questioning can also be opened up to the class in general, by asking the class what question any of them would like to pose to the witness. If there's time, each student-attorney can be given the opportunity to make a closing argument summarizing their position (or the instructor can do this on behalf of each claimant). Then the other members of the class, fulfilling the role of the jury, vote to determine which claimant is entitled to the cash. In the remaining class time, students can share their thoughts about the legal claims and the trial in general. The instructor can then tell the students the outcome of the actual dispute. Not surprisingly, the students are very interested to hear what happened in the real-life case.[9]

In this activity, the instructor's primary role is behind-the-scenes. This includes checking with the volunteers before the trial to make sure they are on the right track and gently facilitating their presentation in the mini trial. This activity is appropriate for a business law or a legal environment of

business course. It is best used later in the semester by which time the students are more skillful at applying common law principles to fact patterns. It works well in a class period of 75-minutes, but this instructor has successfully used these materials in a class period of 50 minutes (by placing a short time limit on the examination of each witness).

The student volunteers submit their homework for the Case of the Found Money and their grade for this work is based solely on this written work. The student's grade for this work is not impacted by how well or how poorly he/she role-played his/her part in the trial. All of the student presentations during the semester are graded without regard to the quality of the student's in-class presentation for the following reasons: (i) This encourages the student volunteers to put significant effort into the homework which is the basis for their in-class presentation/trial; (ii) Some students are naturally outgoing or naturally shy which should not impact the student's grade on this in-class activity; and (iii) Not all parties in a dispute have equally compelling arguments and the strength of a party's legal claim should not affect a student's grade who has no control over which side of the case he/she presents.

IV. TEACHING NOTE

A. Student Learning Objectives

The Case of the Found Money helps promote students' critical thinking skills including thinking in principle and applying logical reasoning to support one's legal conclusion. This in-class exercise encourages all students in the class to be active participants in the learning process. The students who role-play the lawyers/litigants in the trial take center-stage in the classroom and clearly are actively engaged in the learning process. But the rest of the students are also actively engaged

in their role as jurors in the case. In their jury deliberation, these students discuss the relative strengths underlying each of the claims and then cast their vote for the winning claimant.[10]

The specific learning objectives of these materials are:

1. To help students understand the legal treatment of found property.
2. To help students appreciate that the common law principles governing found property are rational; that they are not a set of arbitrary rules.
3. To help students improve their critical thinking skills including thinking in principle, analyzing a case by recognizing the strengths and weaknesses of all sides, and making well-reasoned logical arguments supporting one's legal conclusion.
4. To provide students the opportunity to practice their oral presentation skills in a low-stakes, non-threatening environment.
5. To promote active student-centered learning.
6. To engage students with the drama of the law through student role-playing.

B. Actively Engaging Students in the Learning Process with Role-Playing Exercises

Combining role-playing with problem-based learning such as in the Case of the Found Money helps students build their problem-solving skills while they are actively engaged in the learning process.[11] Problem-based learning provides the needed skills and valuable encouragement to help prepare students to become self-directed, lifelong learners.[12] Furthermore, an exercise like this helps promote a collaborative approach to learning where students are co-facilitators in the learning process and are thus more actively engaged.[13] Students who are actively

engaged in the learning process are more likely to gain a deeper understanding of the subject matter.[14] The importance of incorporating active learning methods in the classroom is highlighted by the AACSB Curriculum Standards which address the importance of student engagement through active involvement in the learning process.[15]

Student role-playing in an informal trial such as the Case of the Found Money creates a vibrant active student-centered learning environment. In this mini trial, it is the students, not the teacher taking center stage in the classroom. Students are much more receptive to 'instruction' by their peers than by their teacher.[16] Role-playing exercises such as this produce more meaningful and lasting learning.[17] And exercises based on actual cases are effective in making the stories more relevant to students encouraging them to do more than simply memorize and apply abstract rules.[18] Participating in a mini-trial where the claimants are presented as real people telling their own story helps bring the drama of the law into the classroom. It also helps students gain insight about the law and about the human side of legal disputes.[19] Undergraduate business law courses are particularly well-suited to promoting such critical thinking skills as legal reasoning and logical argument as well as communication skills.[20] In-class exercises such as this mini-trial, can help enhance students' analytical and reasoning skills.[21]

Using this in-class trial activity helps engage student interest, encourages their active participation in the learning process and promotes valuable critical thinking skills. Students gain a deeper understanding of the concepts and legal principles when they participate actively in a student-centered learning activity like this.

This exercise provides not only an enjoyable method for teaching business law content. It promotes valuable critical

thinking skills and encourages students to become self-directed life-long learners.

V. CONCLUSION

Money found hidden inside an airplane wing. Cash found in a box hidden behind a wall in an old house. Is there any truth to the old adage "finders' keepers – losers' weepers?" Stories like these capture the imagination, especially when they're true. These materials encourage students to ask questions, to draw distinctions, to understand the rationale behind legal principles that may initially seem arbitrary. In other words, these materials provide an opportunity for students to think critically about the topic. The in-class trial in the Case of the Found Money actively engages students in the learning process. It is an effective learning tool and it is a fun activity for all involved (students and instructors!).

APPENDIX A
SUMMARY OF PRINCIPLES OF FOUND PROPERTY & THE CASE OF THE FOUND MONEY

1. ABANDONED PROPERTY

a. What is Abandoned Property? Property is deemed abandoned when the owner voluntarily relinquishes all right, title, claim and possession to the property with the intention of terminating ownership. Actual intent to abandon must be shown but intent can be inferred from the acts of the owner.

b. Who Has Rights in Abandoned Property? The first person who finds abandoned property and reduces it to possession acquires absolute ownership of the property. The finder's rights are superior even to that of the original owner of such property.

c. Rationale. Abandoned property is analogous to property in its 'natural condition' such as a wild animal, which according to long-established common law, belongs to the first person taking possession of such animal. Note, the true owner can't be heard to complain of this result, as he has intentionally and voluntarily given up his ownership/legal right to the property.

2. MISLAID PROPERTY

a. What is Mislaid Property? Mislaid property is property which is intentionally put in a certain place and later forgotten. Note, if property is dropped or left by accident, inadvertence, negligence or carelessness, it is not mislaid property; it is lost property. (See 'Lost Property' below).

b. Who Has Rights in Mislaid Property? The right of possession to mislaid property belongs to the owner of the premises upon which the property is found, as against all persons other than the true owner. Note if the true owner of misplaced property is deceased then the heirs of the true

owner are entitled to the property. The finder of mislaid property acquires no ownership rights in it.

c. Rationale. Mislaid property is entrusted to the owner of the premises where it is found rather than to the finder of the property because it is assumed that the true owner may eventually recall where she has mislaid her property and will return there to reclaim it.

3. LOST PROPERTY

a. What is Lost Property? Property is considered lost when the owner has involuntarily parted with it through neglect, carelessness or inadvertence and the owner does not know its whereabouts. Note, if property is deliberately placed somewhere and then forgotten, it is not lost property; it is mislaid property. (See 'Mislaid Property' above.)

b. Who Has Rights in Lost Property? The finder of lost property acquires the right to it over all but the rightful owner. Note if the true owner of lost property is deceased then the heirs of the true owner are entitled to the property. (In contrast to mislaid property, the finder of lost property has rights superior to the person who owns the real estate where the item has been found.)

c. Rationale. Lost property belongs to the finder subject only to the rights of the true owner. Unlike the case of mislaid property, with lost property, there is no policy reason why anyone else (other than the owner) should be provided a claim superior to the finder of the property.

Lost Property Statutes. In a number of states, lost property statutes have been enacted which require the finder of lost property to deliver it to the local authorities. Notice is published regarding the found property and the true owner has a period of time (generally 12 months) to make a claim to the property. If no such claim is made, the finder is legally entitled

to keep the property and the finder becomes its rightful owner. A lost property statute such as this abrogates (i.e. overrides) the common law treatment of lost property. Under the common law, the true owner never loses his ownership interest in his lost property. Under a lost property statute, publication of the statutory notice essentially creates a statute of limitations within which the true owner must make a legal claim to recover the property. Note that many courts in interpreting lost property statutes have limited its application solely to lost property and do not apply it to mislaid or abandoned property.

4. TREASURE TROVE

a. What is Treasure Trove? Treasure Trove is any gold or silver found concealed in the earth, in a house or in another private place. Note that some cases have extended the principle of treasure trove to include paper currency. To constitute treasure trove the property must have been concealed for so long a time that the owner is unknown and is probably long-since dead.

b. Who Has Rights in Treasure Trove? Title to treasure trove belongs to the finder against all the world except the true owner (but it was lost/hidden so long ago there is presumed to be no true owner any longer). The person owning the real estate does not have a claim to it.

c. Rationale. There is no way of determining the true owner of treasure trove so it is treated the same way as Abandoned Property. There is no one alive who can claim to be harmed by awarding ownership of the treasure trove to its finder. However, some courts and commentators reject the common law approach to treasure trove as encouraging trespassing and frustrating the expectations of the owners of real property on which treasure trove is found.

THE CASE OF THE FOUND MONEY
(YOU BE THE JUDGE)

Background. In 2005, Bobby bought a good solid house in Cleveland, Ohio that had been built in the 1920's. It needed some fixing up and the first project Bobby decided to take care of was the upstairs bathroom. Bobby figured the bathroom hadn't been updated for at least 50 years based on the worn tile and outdated wallpaper. Bobby hired an old school friend Chris, a contractor, to handle the remodeling project. When Chris ripped out the old bathroom wall, Chris discovered a rusty metal box hanging from a wire inside the wall below the medicine cabinet. Chris removed the box from the wall, opened it and found an unmarked envelope (apparently discolored from age) containing what looked like a large amount of U.S. currency. Chris immediately called Bobby to tell the homeowner to come straight home and see what was behind the wall. Bobby and Chris counted up the contents of the envelope and were absolutely astounded to learn that it totaled $182,000. (The bills were old and brittle and dated from 1927 to 1937.) They agreed to replace the cash in the wall until they could figure out what to do. No one's quite sure how the news got out, but in short order the whole city was buzzing with news of the cash Chris had found. Lo-and-behold, a number of people notified the police that this was their money. The police impounded the cash pending a determination of the persons entitled to the money.

Claimants. The following persons are making a claim to the entire $182,000:

- **Chris the Contractor**
- **Bobby the Homeowner**
- **Jamie Jones-** Douglas Jones had owned and lived in the house with his wife Mary from 1934 till he died in 2003. (Mary had died several years earlier.) The Jones had one child, Jamie, who inherited all of his parents'

assets. Jamie sold the house to Bobby in 2005 when the probate of the estate was completed.

Assignment. Complete the attached chart showing your analysis of the arguments each of the claimants can make to the found money as well as **who you think** is legally entitled to the money. This will help you prepare for our in-class mini-trial: "The Case of the Found Money." See explanation of the common law principles of found property above as well as your homework answers regarding the black letter law of found property. You should assume that the common law principles of found property govern in this case (meaning that there is no overriding or conflicting statute that has been adopted by the Ohio legislature dealing with found property).

	What category of found property will this claimant seek to rely on?	What facts will this claimant use to support his/her argument	In your opinion, does this claimant have a strong argument? Explain.
Chris Contractor			
Bobby Homeowner			
Jamie Jones' Son			

Who do you think is legally entitled to the found money under the common law principles of found property? Explain.

[1] State *ex rel.* Scott v. Buzzard, 144 S.W. 2d 847 (Mo. 1940).

[2] *See* excerpt from teaching materials attached as Appendix A. A complete set of these teaching materials is available from the author (including a

summary of the *Benjamin* case and scaffolding homework assignments on found property).

[3] Benjamin v. Lindner Aviation, Inc., 534 N.W. 2d 400 (Iowa 1995).

[4] *Id*. The underlying facts of the case and the Court's legal analysis are detailed in the Court's opinion (including an interesting dissenting opinion).

[5] A complete set of the teaching materials described in this article is available upon request of the author.

[6] *See, e.g.*, Debbie Kaminer, *The Meaning of "Sex": Using Title VII's Definition of Sex to Teach About the Legal Regulation of Business*, 35 J. LEGAL STUD. EDUC. 83, 88 (2018) (addressing, in general, the benefits of using scaffolding as a pedagogical tool); Leila G. Lawlor & Susan L. Willey, *Are Your Workers Employees or Independent Contractors? Three Exercises to Help Students Accurately Classify Workers*, 34 J. LEGAL STUD. EDUC. 167, 178 (2017) ("An effective method of guiding students through challenging material with minimal frustration is a teaching technique called scaffolding. Scaffolded assignments take students through a series of exercises increasing in difficulty, with intentionally designed support structures—or scaffolds—at each step.") (internal citations omitted).

[7] A dispute like this was described in Volume 1, Issue 6 (January 2010) Business Law Newsletter published by McGraw-Hill) and loosely forms the basis for the Case of the Found Money mini-trial.

[8] *See* Judy Gedge, *Bringing the Drama of the Law into your Classroom with Student-Led Case Presentations*, 27 S.L.J. 367 (2017) (describing the author's use of student case presentations in a business law/legal environment of business course).

[9] In the actual case, the house had been owned for many years by the Dunne family. When the money was found, the original owners had long since died but their heirs made claims to the cash. The court concluded that the heirs were entitled to that portion of the cash which was found in envelopes with the Dunne's return address. As to the rest of the cash, since the homeowner gave up her claim to it, the court awarded it to the contractor. However, by that time there was only $25,230 left to be distributed, the balance having been spent (or otherwise disappeared). *See* Erick Trickey, *Found and Lost*, Cleveland Magazine, May 2010, http://clevelandmagazine.com/in-the-cle/the-read/articles/found-and-lost.

[10] *See* Susan Park & Denise Farag, *Transforming the Legal Studies Classroom: Clickers and Engagement*, 32 J. LEGAL STUD. EDUC. 47, 68 (2015) (identifying that when students are placed in the position of voting as decision makers, they are much more interested in the outcome).

[11] *See, e.g.* Tanya M. Marcum & Sandra J. Perry, *Flips and Flops: A New Approach to a Traditional Law Course*, 32 J. LEGAL STUD. EDUC. 255, 257 (2015) ("Active student learning is a pedagogical approach engaging

students in behaviors and activities in the classroom rather than just listening to the instructor.") (internal citations omitted); Peter Prescott, Hilary Buttrick & Debora Skinner, *A Jury of Their Peers: Turning Academic Dishonesty into Classroom Learning*, 31 J. LEGAL STUD. EDUC. 179, 183 (2014) ("The experiential model, where students learn through active engagement with relatable material, presents a more effective way to teach legal and ethical concepts…") (internal citations omitted); Lucille M. Ponte, *The Case of the Unhappy Sports Fan: Embracing Student-Centered Learning and Promoting Upper-Level Cognitive Skills Through an Online Dispute Resolution Simulation*, 23 J. LEGAL STUD. EDUC. 169, 169-70 (2006) (supporting the view of many legal experts that "effective legal education needs to encourage active or student-centered learning, rather than passive teacher-centered instruction … [as] students learn best when they are actively involved in and responsible for their own learning.") (internal citations omitted).

[12] *See, e.g.*, Wilbert J. McKeachie & Marilla Svinicki, MCKEACHIE'S TEACHING TIPS: STRATEGIES, RESEARCH, AND THEORY FOR COLLEGE AND UNIVERSITY TEACHERS 306 (14th ed. 2014) (stating that learner-centered teachers regularly turn to active learning exercises to engage the learner, and cognitive scientists report that when students think about material in more meaningful ways, it promotes more enduring learning).

[13] *See e.g.* Konrad. Lee & Matthew I. Thue, *Teaching the Fair Debt Collection Practices Act to Legal and Ethical Environment of Business Undergraduate Students Through a Role-Play Experiential Learning Exercise*, 34 J. LEGAL STUD. EDUC. 207, 218-19 (2017) ("[R]esearch has shown that role-play experiential learning exercises show better cognitive, affective, and interactive learning than other, often favored techniques … [and] have been successfully used to create an active learning experience in a wide range of disciplines.") (internal citations omitted); Robert C. Bird, Lucille M. Ponte, Gerald R. Ferrera, & Stephen D. Lichtenstein, *Troubled Times at Upturn Records: Getting Traditional Legal Concepts to Dance to the New Online Beat*, 22 J. LEGAL STUD. EDUC. 1, 3 (2004) (crediting the use of case studies, with their connection to real-world situations, with improving student retention of materials and increasing student-based, rather than instructor-focused, learning).

[14] *See, e.g.*, Susan J. Marsnik & Dale B. Thompson, *Using Contract Negotiation Exercises to Develop Higher Order Thinking and Strategic Business Skills*, 30 J. LEGAL STUD. EDUC. 201, 203 (2013) (describing that the primary goal of PBL is to prepare students to be self-directed, lifelong learners, and practical problem solvers moving students beyond knowledge and comprehension of content to higher forms of learning.

Problem-based learning methods cast students in the role of active participants, learning at a deeper level).

[15] *See* AACSB Int'l—The Ass'n to Advance Collegiate Sch. of Bus., 2013 Eligibility Procedures and Accreditation Standards for Business Accreditation (revised July 1, 2018), https://www.aacsb.edu/-/media/aacsb/docs/accreditation/business/standards-and-tables/2018-business-standards.ashx?la=en&hash=B9AF18F3FA0DF19B352B605CBCE17959E32445D9 (last visited March 9, 2020) (addressing the value of "teaching and learning activities … that highlight the importance of student engagement and experiential learning [through] "approaches that actively engage and include all students in learning [which can include] problem-based learning, projects, simulations, etc." (Standard 13 at p. 40).

[16] McKeachie, *supra* note 12, at 5 ("Students can learn more in talking to one another than in listening to us, if we prepare them for such interaction.").

[17] *See* Peter J. Shedd, *Perspectives on Teaching, Teaching is Our Calling: Do Something Worthwhile!*, 29 J. LEGAL STUD. EDUC. 363, 366 (2012) (identifying from his personal teaching experience that students who participate in interactive role-play simulations are actively engaged in the learning environment which produces "more meaningful and lasting learning").

[18] *See e.g.*, Lawlor & Willey, *supra* note 6, at 189 ("When students form mental images of the characters and scenarios involved in the case studies, rather than just reading the legal rule and hearing a traditional lecture about its application, they become more interested and involved in applying the appropriate legal rule."); Patricia Pattison, *Outrage and Engage: A Story of Eminent Domain*, 31 J. LEGAL STUD. EDUC. 55, 66, 71 (2014) (identifying that by demonstrating the connection between ideas and real life, stories can make material more concrete and memorable and that using actual cases makes the stories more relevant); Shelley McGill**,** *The Social Network and the Legal Environment of Business: An Opportunity for Student-Centered Learning*, 30 J. LEGAL STUD. EDUC. 45, 54 (2013) ("[L]earning is most likely to occur when instructors present primary experiential opportunities that are relevant, reality based, and connected to the student's world… thereby increas[ing] the likelihood of student engagement.") (internal citations omitted)**;** Marsnik & Thompson, *supra* note 14, at 206 (describing one of the benefits of problem-based learning as moving students "beyond memorization of black letter law by requiring mastery of legal content.").

[19] *See* Pattison, *supra* note 18, at 77 (concluding that storytelling is particularly powerful by allowing the parties to speak for themselves in the

first person thus enabling students to identify with the parties to the litigation and gain insight into how and why the parties made the decisions as they did) (internal citations omitted); Donna M. Steslow & Carolyn Gardner, *More than One Way to Tell a Story: Integrating Storytelling into Your Law Course*, 28 J. LEGAL STUD. EDUC. 249, 257 (2011) (describing one of the benefits of storytelling as the "re-humanization" of the parties involved in the cases underscoring "the reality that there are actual people involved in these disputes and that the outcome affects their lives.") (internal citations omitted).

[20] *See, e.g.*, Marianne M. Jennings, *In Defense of the Sage on the Stage: Escaping from the "Sorcery" of Learning Styles and Helping Students Learn How to Learn*, 29 J. LEGAL STUD. EDUC 191, 228 (2012) ("The continuation of the flash card method for learning will not help the student in a class, such as business law or legal environment, because of the analytical nature of the law, its reliance on cases and precedent, and the effect of slight variations in facts.").

[21] *See, e.g.*, Christine Neylon O'Brien, Richard E. Powers, & Thomas L. Wesner, *Benchmarking and Accreditation Goals Support the Value of an Undergraduate Business Law Core Course*, 35 J. LEGAL STUD. EDUC. 171, 184 (2018) (highlighting that business law courses are well suited to developing skill to communicate, analyze and frame problems and solutions as well as to evaluate, reason, defend positions and marshal opposing arguments); Robert J. Landry, III, *Ethical Considerations in Filing Personal Bankruptcy: A Hypothetical Case Study*, 29 J. LEGAL STUD. EDUC. 59, 63 (2012) ("Applied learning through the case study benefits students because it may provide an opportunity to enhance students' decision-making and critical-thinking skills.") (internal citation omitted); Tammy W. Cowart & Wade M. Chumney, *I Phone, You Phone, We All Phone with iPhone: Trademark Law and Ethics from an International and Domestic Perspective*, 28 J. LEGAL STUD. EDUC. 331, 332 (2011) ("Cases can enhance student's analytical and reasoning skills as they are realistic scenarios that bridge the gap between theory and fact.") (internal citations omitted); Ponte, *supra* note 11, at 174 (describing that through the use of case studies "students develop effective written and oral communication abilities and strong critical thinking and reasoning skills") (internal citations omitted).