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From the Editor

Welcome to the 35th volume of the MIDWEST LAW JOURNAL (MLJ), the official publication of the MIDWEST ACADEMY OF LEGAL STUDIES IN BUSINESS (MALSb). The mission of the MLJ is to publish articles of general interest to teachers of business law, the legal environment, and related fields of law.

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AI AND THE EUROPEAN UNION ARTIFICIAL INTELLIGENCE ACT: AN OVERVIEW

ALICE E. KEANE,* CARLOS FERRAN,** AND ROBERT GARCIA***

Artificial intelligence (“AI”) is transforming modern life. Its effects are being felt in nearly all areas of human endeavor, including art, medicine, education, employment, environmental protection, transportation, finance, crime fighting, and international conflicts.¹ Its growth, benefits, and harms are the subjects of innumerable news stories² and are only beginning to be understood as AI continues to develop at a rapid pace. Governments, businesses, and legal scholars worldwide are grappling with concerns about setting ethical and legal guardrails for this rapidly developing technology while balancing the importance of innovation.³ In a prescient move, the European Union spent roughly four years developing the first comprehensive AI law in the world, starting more than two years before AI exploded into the mainstream in November 2022 through the first widely available generative AI systems. On March 13, 2024, the European Parliament and the Council of the European Union approved the Artificial Intelligence Act (“EU AI Act” or “Act”).⁴ The Act uses a risk-based regulatory structure to ensure AI technology is transparent, safe, and aligned with fundamental human rights while working to maintain a competitive market for the digital economy. Through the EU AI Act, the European Union has set a precedent that is serving as a template for other jurisdictions in their attempts to regulate AI.

This article describes attempts to define AI, provides a history of its development, and discusses the reasoning for the need for AI regulation. It summarizes the EU AI Act, describing its risk-based regulatory framework, means of incentivizing AI development in safe places, AI sandboxes, and enforcement structure. For comparison, the status of AI law in the United States is examined at both the federal and state levels. The article then explores the future development of AI and the ability of the EU AI Act to address its growth.

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¹ Muhammad Tuhin, *The Pros and Cons of Artificial Intelligence*, SCI. NEWS TODAY, Apr. 23, 2025, <https://www.sciencenewstoday.org/the-pros-and-cons-of-artificial-intelligence/>.

² For a sampling of news stories covering AI, see, e.g., *Artificial Intelligence*, REUTERS, <https://www.reuters.com/technology/artificial-intelligence/>.

³ See, e.g., *Global AI Law and Policy Tracker*, IAPP, May 2025, <https://iapp.org/resources/article/global-ai-legislation-tracker/> (last visited Sept. 9, 2025); *AI Laws of the World: AI laws and proposed regulations across 40+ jurisdictions*, DLA PIPER, <https://intelligence.dlapiper.com/artificial-intelligence/>.

⁴ Renee Henson, *Bridging the Divide: Does the EU’s AI Act Offer Code for Regulating Emergent Technologies in America*, 89 MO. L. REV. 847, 849 (Summer 2024); Sharon Klein & Lisa M. Campisi, *From Over the Pond: The European Union’s Comprehensive AI Legislation Comes to America*, 54 THE BRIEF 22, 23 (American Bar Association) (Winter 2025). The EU AI Act was published in the EU’s Official Journal on July 12, 2024. See Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024, 2024 O.J. (L 202) 1, <https://eur-lex.europa.eu/eli/reg/2024/1689/oj/eng> (hereinafter “EU AI Act”).

I. BACKGROUND

A. WHAT IS AI?

Despite its widespread use, there is no agreed-upon definition of the term “artificial intelligence” or what specifically constitutes it.⁵ Part of the challenge with defining AI is that there is neither a formal definition of “intelligence” nor a theoretical basis for it that is not subjective.⁶ As computing devices grow in their ability to process vast amounts of data, the scientific community has sought a distinction between what is an actual intelligent system versus one that merely stores and retrieves data. In this sense, a distinction can be made between early views of intelligence as universal compression versus a more robust view of intelligence as the ability of comprehension.⁷

These distinctions on what an actual intelligent system is have led to a separation between what is termed strong and weak AI within the discipline.⁸ Some within the field maintain the goal of striving towards developing strong AI systems that mimic or surpass human capabilities of thought.⁹ While these goals of creating strong AI systems or even superintelligence have yet to be realized, progress towards them has led to many advancements within the field.

Among these advancements are Machine Learning (“ML”) algorithms that allow computers to learn from data and generate predictions or infer results.¹⁰ Research in ML is considered a subset of AI in which algorithms are designed around addressing domain-specific classes of problems.¹¹ Some of these, such as natural language processing and computer vision, among others, are believed to require some degree of intelligence.¹²

ML techniques attempt to realize this through a learning process where a machine is trained to recognize or learn patterns in data. The training can be done through supervised, unsupervised, and reinforcement learning approaches.¹³ Supervised approaches allow learning by example.¹⁴ In unsupervised approaches, an algorithm attempts to learn previously unknown patterns that exist within the data itself without relying on previous outcomes.¹⁵ Reinforcement learning uses a trial-

⁵ Christopher Collins, Denis Dennehy, Kieran Conboy & Patrick Mikalef, *Artificial Intelligence in Information Systems Research: A Systematic Literature Review and Research Agenda*, 60 INT’L J. INFO. MGMT. 102383, 2 (2021); LAURIE HARRIS, CONG. RESEARCH SERV., R48555, REGULATING ARTIFICIAL INTELLIGENCE: U.S. AND INTERNATIONAL APPROACHES AND CONSIDERATIONS FOR CONGRESS, R48555, at 1 (June 4, 2025).

⁶ BALAKRISHNAN CHANDRASEKARAN, *What Kind of Information Processing Is Intelligence?* in THE FOUNDATION OF ARTIFICIAL INTELLIGENCE—A SOURCEBOOK 14, 14 (Derek Partridge & Yorik Wilks eds., 1990).

⁷ José Hernández-Orallo & Neus Minaya-Collado, *A Formal Definition of Intelligence Based on an Intensional Variant of Algorithmic Complexity*, in PROC. INT’L SYMP. ENGINEERING INTELLIGENT SYS. (EIS98) (1998).

⁸ Paolo Bory, Simone Natale & Christian Katzenbach, *Strong and Weak AI Narratives: An Analytical Framework*, 40 AI & SOC’Y 2107, 2107 (2025).

⁹ DAVID J. GUNKEL, THE MACHINE QUESTION: CRITICAL PERSPECTIVES ON AI, ROBOTS, AND ETHICS 32 (MIT Press 2012).

¹⁰ GOPINATH REBALA, AJAY RAVI & SANJAY CHURIWALA, 2019 MACHINE LEARNING DEFINITION AND BASICS, AN INTRODUCTION TO MACHINE LEARNING 1, 2 (Springer 2019).

¹¹ *Id.*

¹² *Id.*

¹³ Niklas Kühl, Max Schemmer, Marc Goutier & Gerhard Satzger, *Artificial Intelligence and Machine Learning*, 32 ELECTRONIC MKTS. 2235, 2237-2238 (2022).

¹⁴ *Id.*

¹⁵ *Id.* at 2238.

and-error approach to perform actions that are rewarded to reinforce certain behavior.¹⁶ While each of these approaches is different, they all utilize some aspects of learning for their intelligence.

But learning methods are not the only aspects of intelligence that AI systems attempt to model. Some rule-based and expert system approaches attempt to mimic other aspects of intelligence. Unlike ML approaches, these algorithms can use inference or deductive reasoning for deriving answers. Other algorithms expand on what is learned. Evolutionary ML, for example, utilizes functions that mimic natural processes paired with ML to derive adaptive models that adjust to different conditions.¹⁷ Similarly, deep learning algorithms expand on existing learning algorithms by adding additional layers of abstraction, allowing the algorithms to understand more complex phenomena.¹⁸ However, like ML, these algorithms are limited to only specific intelligence functions.

Because of their limited intelligence capabilities and focus on specific classes of problems, these, along with ML, are often described as narrow or weak AI.¹⁹ Although the terms narrow or weak may imply a lesser role, these systems are currently the only realizable AI and have seen widespread use. Like the way research towards strong AI has informed ML in its early development, research on weak AI algorithms is being used to advance work towards strong AI.²⁰

Jory Schossau and Arend Hintze defined four stages towards realizing human cognition that expand upon strong and weak AI understandings; these include reactive machines, limited memory machines, theory of mind, and consciousness.²¹ Reactive machines include simple machines that take in input, process the input, and produce output.²² Limited memory machines, on the other hand, can retain and recall past information.²³ This is currently the limit of modern AI capabilities.²⁴ Expanding these abilities can form a theory of mind where the idea that others with different unexposed internal mental states exist, and a machine gains the ability to infer about these states. This can ultimately lead to consciousness or the realization of strong AI, where a machine acquires a sense of self-representation.²⁵

Whether they are reactive or limited memory, the current weak AI systems can perform a variety of different functions. Aside from ML, these also include machine vision, speech recognition, expert systems, robotics, and natural language processing.²⁶ Machine vision attempts to enable machines to analyze images, while speech recognition does the same for spoken words.²⁷ Expert systems attempt to simulate human problem-solving capabilities.²⁸ Robotics uses AI to generate

¹⁶ *Id.*

¹⁷ Akbar Telikani, Amirhessam Tahmassebi, Wolfgang Banzhaf & Amir H Gandomi, *Evolutionary Machine Learning: A Survey*, 54 ACM COMPUTING SURV. 1, 161:2 (2021).

¹⁸ Yann LeCun, Yoshua Bengio & Geoffrey Hinton, *Deep Learning*, 521 NATURE 436, 437 (2015).

¹⁹ HAROON SHEIKH, CORIEN PRINS & ERIK SCHRIJVERS, ARTIFICIAL INTELLIGENCE: DEFINITION AND BACKGROUND, MISSION AI: THE NEW SYSTEM TECHNOLOGY 15, 20 (Springer 2023).

²⁰ REBALA, *supra* note 10.

²¹ Jory Schossau & Arend Hintze, *Towards a Theory of Mind for Artificial Intelligence Agents*, in ARTIFICIAL LIFE CONF. PROC. 35, 21-22 (2023).

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 21.

²⁵ *Id.* at 22.

²⁶ Collins, *supra* note 5, at 3.

²⁷ *Id.*

²⁸ *Id.*

computer-controlled motion of physical and virtual objects. Natural language processing allows a machine to process language.²⁹ However, modern AI systems are not limited to these functions. Many AI functions have been adapted to other problem areas, such as audio recognition and the recent paradigm shift of content creation through generative AI.³⁰

These varying AI functions and their adaptations have enabled AI to be used across different domains. The ways in which AI is used can vary. Ida Merete Enholm, Emmanouil Papagiannidis, Patrick Mikalef, and John Krogstie identify two broad categories of AI usage—automation and augmentation.³¹ For automation, AI is used for completing tasks typically done by humans, whereas for augmentation, it is used to aid in decision-making.³² A 2018 Harvard Business Review by Thomas Davenport and Rajeev Ronanki showed how AI was being used in projects to enhance business capabilities using process automation, cognitive insight, and cognitive engagement with employees and customers.³³ At the time, executives were benefiting from AI use in enhancing products and business capabilities. However, since then, with the release of ChatGPT in 2022, AI has seen widespread public adoption.³⁴ A survey by McKinsey & Company of 2,854 businesses across industries showed growth in usage from 55% in 2023 to 71% in 2024.³⁵ AI is already considered a disruptive technology in various sectors, including education, business, healthcare, agriculture, and urban development.³⁶ Yet, AI usage is continuing to grow in other areas as well, with the impact and types of usage varying by sector.³⁷

The complex inter-relationship between these different systems, technologies, and use domains is such that they are often discussed and viewed as if they were the same type of systems.³⁸ Further, the views of AI are often informed by myths, misrepresentations, and overestimations of its capabilities.³⁹ As AI becomes more mainstream, this lack of coherent AI understanding has raised concerns among researchers.⁴⁰ Aside from the need to define research avenues, questions have

²⁹ *Id.*

³⁰ Sandeep Singh Sengar, Affan Bin Hasan, Sanjay Kumar & Fiona Carroll, *Generative Artificial Intelligence: A Systematic Review and Applications*, MULTIMEDIA TOOLS & APPLICATIONS 23661, 23661-23662 (2024).

³¹ Ida Merete Enholm, Emmanouil Papagiannidis, Patrick Mikalef & John Krogstie, *Artificial Intelligence and Business Value: A Literature Review*, 24 INFO. SYS. FRONTIERS 1709, 1720 (2022).

³² *Id.*

³³ Thomas H. Davenport & Rajeev Ronanki, *Artificial Intelligence for the Real World*, 96 HARV. BUS. REV. 108, 110-112 (2018).

³⁴ Weixin Liang, Yaohui Zhang, Mihai Codreanu, Jiayu Wang, Hancheng Cao & James Zou, *The Widespread Adoption of Large Language Model-Assisted Writing Across Society*, arXiv:2502.09747, Feb. 19, 2025, <https://arxiv.org/abs/2502.09747>.

³⁵ Nestor Maslej, Loredana Fattorini, Raymond Perrault, Yolanda Gil, Vanessa Parli, Njenga Kariuki, Emily Capstick, Anka Reuel, Erik Brynjolfsson & John Etchemendy, ARTIFICIAL INTELLIGENCE INDEX REP. 2025, 261, arXiv:2504.07139 (Apr. 15, 2025).

³⁶ Vasile-Daniel Păvăloaia & Sabina-Cristiana Necula, *Artificial Intelligence as a Disruptive Technology—A Systematic Literature Review*, 12 ELECTRONICS 1102, 2 (2023).

³⁷ Shafeeq Ahmed Ali, Ali Ateeq, Marwan Milhem, Mohammed Alzoraik, Mohammed Abdulrazzaq Alaghbari & Baligh Beshr, *The Impact of Artificial Intelligence on Job Markets: A Sector-by-Sector Analysis*, in 2 BIG DATA IN FINANCE: TRANSFORMING THE FINANCIAL LANDSCAPE 457, 461 (Springer 2025).

³⁸ Kühl, *supra* note 13, at 2238.

³⁹ Sheikh, *supra* note 19, at 21–22; Savannah Thais, *Misrepresented Technological Solutions in Imagined Futures: The Origins and Dangers of AI Hype in the Research Community*, in AAAI/ACM CONF. AI, ETHICS, AND SOC'Y 1455 (2024).

⁴⁰ Dagmar Monett & Colin W.P. Lewis, *Getting Clarity by Defining Artificial Intelligence—A Survey*, in THIRD CONF. PHILOSOPHY & THEORY ARTIFICIAL INTELLIGENCE (2017).

been raised about what this lack of understanding could mean for AI policy.⁴¹ As industry leaders push the bounds of AI and its uses, there is an increasing interest in AI policy, laws, and governance.⁴² However, care must be taken to ensure that these are not informed by misrepresented views but instead by a realistic understanding of their capabilities and limitations.⁴³

To address these misunderstandings, there is a need for more work in clarifying AI narratives and understanding.⁴⁴ In its simplest view, AI is really just the automation of cognition. As discussed, this automation can be complicated in that it can take on many different forms based on the level of cognition, functions, and has many different domains of usage. While the scientific community continues to expand on understandings of AI, government entities like the European Union Commission (“Commission”) are working to define AI.⁴⁵ According to the Commission:

Artificial intelligence (AI) systems are software (and possibly also hardware) systems designed by humans that, given a complex goal, act in the physical or digital dimension by perceiving their environment through data acquisition, interpreting the collected structured or unstructured data, reasoning on the knowledge, or processing the information, derived from this data and deciding the best action(s) to take to achieve the given goal.⁴⁶

The Organization for Economic Cooperation and Development (“OECD”) also incorporated a definition of AI in its OECD AI Principles, which states:

An AI system is a machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments. Different AI systems vary in their levels of autonomy and adaptiveness after deployment.⁴⁷

The AI Principles have been adopted by forty-seven countries as of May 2025, including the United States and the European Union.⁴⁸

⁴¹Sabkalp Bhatnagar, Anna Alexandrova, Shahar Avin, Stephen Cave, Lucy Cheke, Matthew Crosby, Jan Feyereis, Marta Halina, Bao Sheng Loe & Seán Ó hÉigeartaigh, *Mapping Intelligence: Requirements and Possibilities*, in THIRD CONF. PHILOSOPHY & THEORY ARTIFICIAL INTELLIGENCE 117, 119 (2017).

⁴²Huw Roberts, Emmie Hine, Mariarosaria Taddeo & Luciano Floridi, *Global AI Governance: Barriers and Pathways Forward*, 100 INT’L AFF. 1275, 1275 (2024).

⁴³Thais, *supra* note 39, 1455.

⁴⁴Bory, *supra* note 8, at 2107–08.

⁴⁵Hleg Ai, *High-Level Expert Group on Artificial Intelligence*, in ETHICS GUIDELINES FOR TRUSTWORTHY AI 1 (2019).

⁴⁶*Id.* at 6.

⁴⁷Organisation for Economic Co-operation and Development [OECD], *Explanatory Memorandum on the Updated OECD Definition of an AI System*, OECD Artificial Intelligence Papers No. 8 (Mar. 2024) https://www.oecd.org/content/dam/oecd/en/publications/reports/2024/03/explanatory-memorandum-on-the-updated-oecd-definition-of-an-ai-system_3e815e51/623da898-en.pdf.

⁴⁸Organisation for Economic Co-operation and Development [OECD], *Recommendation of the Council on Artificial Intelligence*, OECD/LEGAL/0449 (May 22, 2019; amended Mar. 5, 2024) <https://legalinstruments.oecd.org/en/instruments/oecd-legal-0449>.

While these definitions provide a good overview of the current state of AI understanding, it is likely that ideas of what AI is will continue to evolve with AI. To examine this further, it is important to understand the development of AI and its history.

B. THE DEVELOPMENT OF AI

The history of AI represents a complex trajectory of conceptual breakthroughs, technical advances, and periods of recalibration, punctuated by shifting societal and regulatory currents. While the ambition to create thinking machines is ancient, the scientific journey began in the mid-20th century with the convergence of mathematics, logic, and early computing theories. This evolution from symbolic reasoning to data-driven learning systems ultimately necessitated comprehensive regulatory frameworks like the EU AI Act.

1. FOUNDATIONAL PERIOD AND EARLY AI (1940s–1980s)

The mathematical groundwork emerged from Warren S. McCulloch and Walter Pitts⁴⁹ who introduced artificial neural networks and established foundations for understanding the brain as a computational system. Alan Turing’s landmark paper “Computing Machinery and Intelligence” introduced the “Imitation Game” (now the Turing Test), framing the fundamental question “Can machines think?” and providing a measure for machine intelligence.⁵⁰ Turing had conceptualized ML during World War II, envisioning computers that could “learn from experience” and modify their own instructions.⁵¹

The formal genesis of AI as a field is attributed to the 1956 Dartmouth Summer Research Project on Artificial Intelligence, where John McCarthy coined the term “artificial intelligence.”⁵² The workshop united researchers who believed that “every aspect of learning or any other feature of intelligence can in principle be so precisely described that a machine can be made to make it.”⁵³ This era was dominated by “Good Old-Fashioned AI” (GOFAI) or symbolic AI, which posited that intelligence could be replicated by manipulating symbols according to formal rules.⁵⁴

Early breakthroughs included Allen Newell and Herbert A. Simon’s Logic Theorist, capable of proving mathematical theorems, and the development of the first artificial neural network, SNARC (Stochastic Neural Analog Reinforcement Calculator), by Marvin Minsky and Dean Edmonds in 1951.⁵⁵ John McCarthy’s development of LISP in 1958 became a standard programming language

⁴⁹ Warren S. McCulloch & Walter Pitts, *A Logical Calculus of The Ideas Immanent in Nervous Activity*, BULL. MATHEMATICAL BIOPHYSICS 5(4), 115–133 (1943).

⁵⁰ Alan M. Turing, *Computing Machinery and Intelligence*, MIND 49(236), 433–460 (1950).

⁵¹ Alan M. Turing, *Lecture to the London Mathematical Society on 20 February 1947*, CHARLES BABBAGE INST. REPRINT SERIES HIST. COMPUTING 10 (1947).

⁵² John McCarthy, Marvin Minsky, Nathaniel Rochester & Claude Shannon, *A Proposal for the Dartmouth Summer Research Project on Artificial Intelligence*, AI MAG., 27(4), 12–14 (reprint of 1955 proposal) (2006).

⁵³ *Id.*

⁵⁴ JOHN HAUGELAND, *ARTIFICIAL INTELLIGENCE: THE VERY IDEA* (MIT Press 1985).

⁵⁵ Allen Newell & Herbert A. Simon, *The Logic Theory Machine—A Complex Information Processing System*, IRE TRANSACTIONS ON INFORMATION THEORY, 2(3), 61–79 (1956); Marvin L. Minsky, *Theory of Neural-Analog Reinforcement Systems and Its Application to the Brain-Model Problem* (1954) (Ph.D. dissertation, Princeton University) https://people.csail.mit.edu/brooks/idocs/Marvin_Minsky_PhD_Princeton_1953_1954.pdf.

for AI research, providing powerful tools for symbolic processing.⁵⁶ Concurrently, Arthur Samuel developed the world’s first self-learning program for checkers and coined the term “machine learning.”⁵⁷

The 1960s witnessed the creation of ELIZA, the first chatbot by Joseph Weizenbaum, which used natural language processing to simulate conversation.⁵⁸ This early system provided a prescient glimpse of human-machine interaction challenges that would later inform the EU AI Act’s provisions on AI systems that interact with natural persons, particularly regarding transparency obligations and the requirement to inform users when they are interacting with an AI system.⁵⁹ Another key development was Shakey the robot at Stanford Research Institute, the first mobile intelligent robot combining AI, computer vision, and navigation.⁶⁰

However, initial exuberance encountered significant challenges. Marvin Minsky and Seymour A. Papert’s *Perceptrons* highlighted limitations of simple neural networks, leading to reduced interest.⁶¹ Combined with insufficient computational power, limited data, and the immense difficulty of encoding common-sense knowledge, a period of reduced funding known as the first “AI winter” began, exacerbated by James Lighthill’s critical 1973 report that led to significant funding reductions.⁶²

2. THE AI RENAISSANCE AND THE RISE OF ML (1980s–2016)

The 1980s marked an AI renaissance with the commercialization of expert systems, driven by a paradigm shift from symbolic reasoning to ML, where systems learn patterns from data without explicit programming. The increasing availability of large datasets, advances in computing power, and new technical developments enabled this transformation.

The development of backpropagation algorithms gained prominence through David E. Rumelhart, Geoffrey Hinton, and Ronald J. Williams’ influential paper “Learning representations by back-propagating errors,” which enabled the training of multilayer neural networks and reinvigorated research interest.⁶³ John Hopfield’s proof that certain neural networks could learn and process information further advanced the field.⁶⁴ The shift toward mathematically rigorous

⁵⁶ John McCarthy, *Recursive Functions of Symbolic Expressions and Their Computation by Machine, Part I*, COMM. ACM, 3(4), 184–195 (1960).

⁵⁷ Arthur L. Samuel, *Some Studies in ML Using the Game of Checkers*, IBM J. RES. DEV., 3(3), 210–229 (1959).

⁵⁸ Joseph Weizenbaum, *ELIZA—A Computer Program for the Study of Natural Language Communication Between Man and Machine*, COMM. ACM, 9(1), 36–45 (1966).

⁵⁹ *Id.* at 36–45; EU AI Act, *supra* note 4.

⁶⁰ Nils J. Nilsson, *Shakey the Robot, Technical Note 323*, SRI INT’L, April 1984, <https://ai.stanford.edu/~nilsson/OnlinePubs-Nils/shakey-the-robot.pdf>.

⁶¹ MARVIN MINSKY & SEYMOUR A. PAPERT, *PERCEPTRONS: AN INTRODUCTION TO COMPUTATIONAL GEOMETRY* (MIT Press 1969).

⁶² James Lighthill, *Artificial Intelligence: A General Survey*, SCI. RES. COUNCIL, July 1973, https://rodsmith.nz/wp-content/uploads/Lighthill_1973_Report.pdf.

⁶³ David E. Rumelhart, Geoffrey E. Hinton & Ronald J. Williams, *Learning Representations by Back-Propagating Errors*, NATURE 323(6088), 533–536 (1986).

⁶⁴ John J. Hopfield, *Neural Networks and Physical Systems with Emergent Collective Computational Abilities*, PROC. NAT’L ACAD. SCI. 79(8), 2554–2558 (1982).

approaches continued with Judea Pearl’s work on probabilistic reasoning⁶⁵ and Lotfi Zadeh’s (1965) fuzzy logic systems.⁶⁶

The 1990s witnessed major practical breakthroughs. IBM’s statistical approach to machine translation in 1990 marked a pivotal shift from rule-based to probabilistic methods in natural language processing.⁶⁷ The defeat of chess champion Garry Kasparov by IBM’s Deep Blue in 1997 demonstrated the power of specialized, data-driven AI.⁶⁸

The modern era of AI was launched by Geoffrey Hinton’s 2006 publication of techniques for training deep neural networks,⁶⁹ enhanced by innovations in GPU computing.⁷⁰ The true inflection point arrived with the 2012 ImageNet competition, where AlexNet dramatically outperformed all other methods in image recognition, launching the current “AI spring.”⁷¹ This breakthrough unlocked unprecedented computer vision, speech recognition, and natural language processing capabilities, moving AI from the laboratory to mainstream applications.⁷²

This period of explosive growth directly created the technological conditions for deep learning technologies in critical domains:

- Biometric identification systems: The power of deep learning in facial recognition and real-time remote biometric identification led to its widespread use in surveillance, raising fundamental rights concerns.⁷³
- Algorithmic bias and discrimination: ML models trained on historical data began replicating and amplifying existing societal biases, leading to high-profile cases of discrimination in criminal justice risk assessment, hiring algorithms, and credit scoring.⁷⁴
- Lack of transparency and explainability: The complexity of deep learning models, often termed “black boxes,” made it difficult to understand their decision-making processes. This opacity became a central challenge, directly informing the development of explainable AI (“XAI”) as both a technical field and regulatory necessity.⁷⁵

⁶⁵ JUDEA PEARL, *PROBABILISTIC REASONING IN INTELLIGENT SYSTEMS: NETWORKS OF PLAUSIBLE INFERENCE* (Morgan Kaufmann ed., 1988).

⁶⁶ L.A. Zadeh, *Fuzzy sets*, *INFO. CONTROL* 8(3), 338–353 (1965).

⁶⁷ Peter F. Brown, et al., *A Statistical Approach to Machine Translation*, *COMPUTATIONAL LINGUISTICS* 16(2), 79–85 (1990).

⁶⁸ FENG-HSIUNG HSU, *BEHIND DEEP BLUE: BUILDING THE COMPUTER THAT DEFEATED THE WORLD CHESS CHAMPION* (Princeton University Press 2002).

⁶⁹ Geoffrey E. Hinton, Simon Osindero & Y.W. Teh, *A Fast Learning Algorithm for Deep Belief Nets*, *NEURAL COMPUTATION* 18(7), 1527–1554 (2006).

⁷⁰ Rajat Raina, Anand Madhavan & Andrew Y. Ng, *Large-Scale Deep Unsupervised Learning Using Graphics Processors*, *PROC. 26TH ANN. INT’L CONF. MACHINE LEARNING* 873–880 (2009).

⁷¹ Alex Krizhevsky, Ilya Sutskever & Geoffrey E. Hinton, *Imagenet Classification with Deep Convolutional Neural Networks*, *ADVANCES NEURAL INFO. PROCESSING SYS.* 25 (2012).

⁷² IAN GOODFELLOW, YOSHUA BENGIO & AARON COURVILLE, *DEEP LEARNING* (MIT Press 2016).

⁷³ EU AI Act, *supra* note 4.

⁷⁴ Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, *Machine Bias*, *PROPUBICA*, May 23, 2016, <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>.

⁷⁵ Amina Adadi & Mohammed Berrada, *Peeking Inside the Black-Box: A Survey on Explainable Artificial Intelligence (XAI)*, 6 *IEEE ACCESS* 52138, Sept. 17, 2018, <https://ieeexplore.ieee.org/document/8466590>.

3. THE GENERATIVE AI BOOM AND REGULATORY ADAPTATION (2017–PRESENT)

The most profound recent shift has been the rise of generative AI, particularly Large Language Models (“LLMs”). The development of the Transformer architecture in “Attention Is All You Need”⁷⁶ was pivotal. Based on attention mechanisms, it enabled parallel processing and significantly improved the modeling of long-range dependencies, spawning major model lines like Google’s BERT and OpenAI’s GPT.⁷⁷

ChatGPT’s public release in November 2022 marked a significant turning point, demonstrating generative AI’s power to a global audience and reaching 100 million users within two months.⁷⁸ These models could generate coherent text, write code, and engage in complex conversation, showcasing their potential as general-purpose AI (“GPAI”) models with wide-ranging capabilities.⁷⁹ GPT-4’s release in March 2023 demonstrated even more sophisticated reasoning and multimodal understanding.⁸⁰

Since 2022, the pace of AI development has accelerated rather than slowed. The global AI market reached \$638.23 billion in 2024 and is projected to reach \$3,680.47 billion by 2034, highlighting the continued economic significance of AI technologies.⁸¹ Business adoption has accelerated, with 78 percent of organizations using AI in at least one function.⁸²

The development of AI from its mathematical foundations in the 1940s to today’s sophisticated LLMs represents one of the most significant technological transformations in human history. The journey from simple neural networks to transformer-based systems capable of human-like reasoning has been marked by periods of optimism, disappointment, and breakthrough innovation. As AI systems have become increasingly powerful and pervasive, the concurrent development of comprehensive regulatory frameworks demonstrates the critical importance of balancing innovation with safety, transparency, and respect for fundamental rights.

C. WHY REGULATE AI?

AI is capable of providing enormous benefits for humanity in a growing variety of areas of human endeavor, including environmental protection, food scarcity and poverty alleviation, healthcare, accessibility and accommodation for people with disabilities, employment, education,

⁷⁶ Ashish Vaswani, A., et al., *Attention is all you need*, ADVANCES NEURAL INFO. PROCESSING SYS. 30 (Dec. 4, 2017).

⁷⁷ Jacob Devlin, Ming-Wei Chang, Kenton Lee & Kristina Toutanova, *BERT: Pre-Training of Deep Bidirectional Transformers for Language Understanding*, ARXIV, May 24, 2019, <https://doi.org/10.48550/arXiv.1810.04805>; Alec Radford, Karthik Narasimhan, Tim Salimans & Ilya Sutskever, *Improving Language Understanding by Generative Pre-Training*, OPENAI (2018) https://cdn.openai.com/research-covers/language-unsupervised/language_understanding_paper.pdf.

⁷⁸ OPENAI, INTRODUCING CHATGPT (Nov. 30, 2022) <https://openai.com/blog/chatgpt>.

⁷⁹ *Id.*

⁸⁰ OpenAI, *GPT-4 Technical Report*, ARXIV, Mar 27, 2023, <https://doi.org/10.48550/arXiv.2303.08774>.

⁸¹ Aarti Dhapte, *Global Artificial Intelligence Market Research Report*, MKT. RES. FUTURE, Sept. 2025, <https://www.marketresearchfuture.com/reports/artificial-intelligence-market-1139>.

⁸² McKinsey & Company, *The state of AI in early 2024: Gen AI Adoption Spikes and Starts to Generate Value*, May 30, 2024, <https://www.mckinsey.com/capabilities/quantumblack/our-insights/the-state-of-ai-2024>; McKinsey & Company, *The State of AI: How Organizations are Rewiring to Capture Value*, Mar. 12, 2025, <https://www.mckinsey.com/capabilities/quantumblack/our-insights/the-state-of-ai>.

transportation, and law enforcement.⁸³ For example, AI is already being used to assist doctors in diagnosing diseases, predicting patient outcomes, and personalizing treatments.⁸⁴ It can also improve access to educational resources and offer personalized tutoring, preserve and teach endangered languages, significantly improve the efficiency of computer programming, and accelerate breakthroughs in science.⁸⁵ In addition, AI is important in helping maintain national and global security.⁸⁶

However, AI also has the potential to cause serious harm, either intentionally or unintentionally.⁸⁷ The parade of horrors listed as reasons for its regulation is long. For example, through the use of fake news and deep fakes, AI has the potential to ““endanger lives, fair elections and the course of history.””⁸⁸ It “can be used to fool security systems and people,” “mislead voters, spread false information about people, or sway public opinion.”⁸⁹ It can covertly manipulate consumer behavior, and the use of “biometric data may permit one to infer a person’s thoughts, intentions, emotions, or stress levels.”⁹⁰ Bias in AI systems can negatively impact certain groups in lending, employment, and admissions to universities.⁹¹ It can exacerbate income disparities and poverty, cybercrime, and climate change.⁹² And it poses serious risks to public safety, including being used to develop weapons and commit widespread fraud and other crimes.⁹³

Given the breadth of benefits and harms possible, scholars have asked how governments can promote the benefits of AI while limiting its potential for harm.⁹⁴ Two approaches to regulating AI and technology have been proposed—a “rights-based approach,” which focuses on providing rights to individuals, like privacy and freedom of expression, and a “risk-based approach,” which focuses on reducing harm by regulating AI depending on the risk that it poses to human rights and safety.⁹⁵ The EU AI Act takes a risk-based approach and attempts to limit harm through its risk-

⁸³ See Orly Lobel, *The Law of AI for Good*, 75 FLA. L. REV. 1073, 1094-1108 (2023); Keith E. Sonderling, Bradford J. Kelley & Lance Casimir, *The Promise and The Peril: Artificial Intelligence and Employment Discrimination*, 77 U. MIAMI L. REV. 1, 5 (Fall 2022).

⁸⁴ Hamsa Hassan & Hussain Aldawood, *Ensuring Data Protection, Security and AI Ethics in AI Systems*, PRIVACY DATA PROTECTION 25 (12) (Dec. 1, 2024).

⁸⁵ Maroussia Lévesque, *Smoke and Mirrors? Corporate Discretion in AI Regulation*, 2025 U. ILL. J.L. TECH. & POL’Y 33, 44 (Spring 2025).

⁸⁶ Steven Arango, *A Legislative Foundation for Foundation Models*, 41 GA. ST. U.L. REV. 531, 547 (Spring 2025), citing COMM’N ON A.I. COMPETITIVENESS, INCLUSION & INNOVATION, U.S. CHAMBER OF COMM., REPORT AND RECOMMENDATIONS 63 (2022).

⁸⁷ Stephen T. Black, *Weaponizing AI*, 16 HASTINGS SCI. & TECH. L.J. 117 (April 2025).

⁸⁸ *Id.* at 186, quoting The University of Queensland, *How AI Is Being Used to Fight Fake News*, CHRON. HIGHER EDUC. (2020), <https://sponsored.chronicle.com/how-ai-is-being-used-to-fight-fake-news/index.html>.

⁸⁹ Black, *supra* note 87, at 189-190.

⁹⁰ Henson, *supra* note 4, at 852-853.

⁹¹ Black, *supra* note 87, at 192; Sonderling, *supra* note 83, at 6-9; Natalie Sheard, *No Notice and No Explanation: The Incontestability of Hiring Discrimination by Algorithm*, 35 AUSTL. J. LABOUR L. 119 (Nov. 2022); see generally Chapter One: *Resetting Antidiscrimination Law in the Age of AI*, 138 HARV. L. REV. 1562 (April 10, 2025).

⁹² Josephine Wolff, William Lehr, & Christopher S. Yoo, *Lessons from GDPR for AI Policymaking*, 27 VA. J.L. & TECH. 1, 6 (Winter 2024).

⁹³ Lobel, *supra* note 83, at 1077-1078.

⁹⁴ Black, *supra* note 87, at 203; Lobel, *supra* note 83, at 1073.

⁹⁵ Daniel Leufer & Fanny Hidvegi, *The Pitfalls of the European Union’s Risk-Based Approach to Digital Rulemaking*, 71 UCLA L. REV. DISC. 156, 159-160 (May 21, 2024).

based structure of regulation, while allowing low-risk and no-risk AI systems to be developed with limited or no regulatory oversight.⁹⁶

II. WHAT THE EU AI ACT DOES

The EU AI Act is the most comprehensive AI law in the world.⁹⁷ It joins other regulations in the European Union in regulating technology and protecting fundamental human rights, privacy, and data, including the General Data Protection Regulation (“GDPR”),⁹⁸ the European Convention on Human Rights,⁹⁹ and the EU Charter.¹⁰⁰

The European Union took a risk-based approach in developing the EU AI Act, rather than a rights-based approach; thus, it is focused on regulating owners and operators of AI systems based on their risks rather than on providing individuals with rights to data protection, for instance.¹⁰¹ The Act regulates all types of AI based on each type’s risk to humans, rather than by attempting to predict how AI will grow and change.¹⁰² In this way, the EU AI Act provides “a holistic risk-based regulatory framework,”¹⁰³ rather than regulating types or sectors of AI specifically.

The purpose of the EU AI Act

is to improve the functioning of the internal market and promote the uptake of human-centric and trustworthy artificial intelligence (AI), while ensuring a high level of protection of health, safety, [and] fundamental rights enshrined in the Charter, including democracy, the rule of law and environmental protection, against the harmful effects of AI systems in the Union and supporting innovation.¹⁰⁴

The potential harms that the Act is designed to prevent include “creating disinformation, displacing workers, and harming national security,”¹⁰⁵ generating disinformation, cyberweapons, bioweapons, spearphishing emails, creating malware, committing financial fraud, and generating and disseminating child pornography.¹⁰⁶

⁹⁶ *Id.* at 166-167.

⁹⁷ Lévesque, *supra* note 85, at 105.

⁹⁸ EU AI Act, *supra* note 4.

⁹⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221.

¹⁰⁰ Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 391. For an analysis of these laws and their impact on privacy data protection, see Olga Kokoulina, *Towards Future-Proof, Rights-Respecting Automated Data Collection: An Examination of European Jurisprudence*, 26 VAND. J. ENT. & TECH. L. 707, 732-745 (Summer 2024); Iain Nash, DeBrae Kennedy-Mayo, Peter Swire & Annie Antón, *Legal Issues in Reconciling Data Protection, AI, and Cybersecurity under EU Law*, 89 MO. L. REV. 871, 884-903 (Summer 2024).

¹⁰¹ Wolff, *supra* note 92, at 20; Daniel J. Solove & Woodrow Hartzog, *Kafka in the Age of AI and the Futility of Privacy as Control*, 104 B.U.L. REV. 1021, 1040 (2024).

¹⁰² Pablo A. Iannello, *Trust But Verify ... As Long as You Can. Transparency, Consent Management and Their Limits in a Big Data-Machine Learning Environment*, 50 DAYTON L. REV. 329, 337; see *infra* Table 1: Risks explicitly regulated by the EU AI Act.

¹⁰³ Arango, *supra* note 86, at 545.

¹⁰⁴ EU AI Act, *supra* note 4, art. 1, 1.

¹⁰⁵ Arango, *supra* note 86, at 534.

¹⁰⁶ *Id.* at 542-543.

The EU AI Act has been described as “a four-tiered structure [that] bars systems with unacceptably high-risk, closely tracks high-risk systems, requires basic transparency for limited risk deployments, and encourages voluntary codes of conduct for minimally risky systems.”¹⁰⁷

In the EU AI Act, “AI system” is defined as

a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments.¹⁰⁸

The Act applies to all AI providers, deployers, importers, distributors, and product manufacturers whose AI systems are used within the European Union, authorized representatives of providers not established within the European Union, and affected persons located in the European Union.¹⁰⁹ Because of the extraterritoriality of the Act, its “broad scope will reverberate throughout other countries.”¹¹⁰

The Act contains specific exclusions from regulation. It expressly does not apply to AI systems that are put into service or used exclusively for military, defense, or national security purposes.¹¹¹ It does not apply to natural persons using AI systems in purely personal, non-professional activities or free and open-source AI systems.¹¹² Finally, it does not apply to research, testing, or development of AI systems or models before they are placed on the market or put into service, though research, testing, or development in real-world conditions within the European Union is regulated by the Act.¹¹³ Such research, testing, or development takes place in design spaces called “AI sandboxes” set up by member states and others.¹¹⁴

The Act categorizes AI systems based on risk level, where “risk” is defined as “the combination of the probability of an occurrence of harm and the severity of that harm.”¹¹⁵ AI systems are divided into risk categories, which are regulated differently: (1) unacceptable risk AI systems¹¹⁶; (2) high-risk AI systems¹¹⁷; and (3) GPAI systems, which may be determined to have systemic risk or not.¹¹⁸

A. UNACCEPTABLE RISK AI SYSTEMS

Certain highly risky AI systems are prohibited under the Act.¹¹⁹ The Act bans putting into service AI systems that:

¹⁰⁷ Lévesque, *supra* note 85, at 48.

¹⁰⁸ EU AI Act, *supra* note 4, art. 3, (1).

¹⁰⁹ *Id.* art. 2(1)(a)-(g).

¹¹⁰ Henson, *supra* note 4, at 851.

¹¹¹ EU AI Act, *supra* note 4, at art. 1, 3.

¹¹² *Id.* art. 1(10), (12).

¹¹³ *Id.* art. 1(8).

¹¹⁴ *Id.* art. 3(55).

¹¹⁵ *Id.* art. 3(2).

¹¹⁶ *Id.* art. 5.

¹¹⁷ *Id.* art. 6-27.

¹¹⁸ *Id.* art. 51-56.

¹¹⁹ *Id.* art. 5.

- deploy subliminal or purposefully manipulative or deceptive techniques¹²⁰;
- exploit users because of their age, disability, or social or economic situation¹²¹;
- evaluate or classify natural persons or groups based on social behavior or known, inferred, or predicted personal or personality characteristics leading to detrimental or unfavorable treatment of natural persons or groups¹²²;
- make risk assessments of natural persons to predict criminal behavior based on profiling or assessing personality traits and characteristics (not applicable to AI systems supporting human assessment of involvement of a person in criminal activity that is already based on objective and verifiable facts directly linked to criminal acts)¹²³;
- create or expand facial recognition databases through untargeted scraping from the internet or CCTV sources¹²⁴;
- infer emotions of natural persons in the workplace or educational institutions except for medical or safety reasons¹²⁵;
- categorize natural persons based on biometric data to deduce “race, political opinions, trade union membership, religious or philosophical beliefs, sex life or sexual orientation”¹²⁶;
- use real-time remote biometric identification systems in public areas for law enforcement, except as strictly necessary for
 - searches for victims of abduction, trafficking, sexual exploitation, or missing persons,
 - prevention of specific, substantial, and imminent threat to natural persons or genuine present or foreseeable threat of terrorist attack,
 - location or identification of specific suspects for serious crimes.¹²⁷

Noncompliance with the prohibitions in the EU AI Act on unacceptable risk systems is punished severely. It can result in fines of up to €35 million or up to 7 percent of a provider’s annual worldwide turnover for the preceding financial year, whichever is higher.¹²⁸

B. HIGH-RISK AI SYSTEMS

Certain AI systems are designated as high-risk in the EU AI Act based on their uses. These include AI systems used in:

- remote biometric identification, biometric categorization, and emotion recognition;
- safety components in digital infrastructure, road traffic, or supply of water, gas, heating, or electricity;
- education and vocational training admissions, learning outcomes, and other uses;
- employment, workers’ management, and access to self-employment;
- access to essential private and public services and benefits, including healthcare, credit scoring, life and health insurance, and dispatching of emergency first responders;

¹²⁰ *Id.* art. 5(1)(a).

¹²¹ *Id.* art. 5(1)(b),

¹²² *Id.* art. 5(1)(c).

¹²³ *Id.* art. 5(1)(d). The list of criminal behavior covered is included in annex II of the AI Act. *Id.* annex II.

¹²⁴ *Id.* art. 5(1)(e).

¹²⁵ *Id.* art. 5, 1(f).

¹²⁶ *Id.* art. 5, 1(g).

¹²⁷ *Id.* art. 5, 1(h).

¹²⁸ *Id.* art. 99(3); Henson, *supra* note 4, at 862.

- law enforcement;
- migration, asylum, and border control; and
- administration of justice by courts and in alternative dispute resolution, and democratic processes like voting.¹²⁹

However, the AI systems listed above are not categorized as high-risk if (1) they do not pose a significant risk of harm to health, safety, or fundamental rights of natural persons, including by not materially influencing decision-making, and (2) they are intended (a) for use in a narrow procedural task, (b) to improve a previously completed human activity, (c) to detect decision-making patterns or deviations and not meant to replace or influence the human assessment without human review, or (4) to prepare for an assessment relevant for the purposes of use cases listed in Annex III of the Act,¹³⁰ which contains a list of high-risk AI systems.¹³¹ Anytime an AI system listed in Annex III of the Act is engaged in profiling natural persons, however, it is always considered high-risk.¹³² High-risk AI systems also include those intended to be used as a safety component of a product and those covered by the EU harmonization legislation listed in Annex I of the EU AI Act.¹³³

High-risk AI systems must comply with the requirements listed in Section 2 of Chapter III of the EU AI Act.¹³⁴ This includes establishing and maintaining a risk management system¹³⁵ and establishing data governance and management practices,¹³⁶ technical documentation requirements,¹³⁷ and automatic recordkeeping over the lifetime of the system.¹³⁸ Such systems also must provide transparency and information, including “concise, complete, correct and clear” instructions to users¹³⁹ and human oversight of the system.¹⁴⁰ They must be designed with appropriate and measurable levels of accuracy and robustness and include cybersecurity measures.¹⁴¹ High-risk AI systems can be tested in real-world conditions outside AI regulatory sandboxes (see below), but only under the conditions set forth in the Act.¹⁴²

The EU AI Act includes detailed obligations for providers of high-risk AI systems, requiring implementation of quality management systems, automatically generated logs, and, in the event of non-conformity with the EU AI Act, notification to pertinent parties and immediate corrective action.¹⁴³ It also provides duties for authorized representatives of providers,¹⁴⁴ importers,¹⁴⁵

¹²⁹ EU AI Act, *supra* note 4, at annex III.

¹³⁰ *Id.* art. 6(3).

¹³¹ *Id.* annex III.

¹³² *Id.* art. 6(3).

¹³³ *Id.* art. 6(1); annex I.

¹³⁴ *Id.* art. 8.

¹³⁵ *Id.* art. 9.

¹³⁶ *Id.* art. 10.

¹³⁷ *Id.* art. 11.

¹³⁸ *Id.* art. 12.

¹³⁹ *Id.* art. 13.

¹⁴⁰ *Id.* art. 14.

¹⁴¹ *Id.* art. 15.

¹⁴² *Id.* art. 60-61.

¹⁴³ *Id.* art. 16-20.

¹⁴⁴ *Id.* art. 22.

¹⁴⁵ *Id.* art. 23.

distributors,¹⁴⁶ and deployers¹⁴⁷ of high-risk AI systems. It requires EU member states to establish notifying authorities to evaluate conformity with the Act and make reports to the Commission and other member states.¹⁴⁸

The EU AI Act requires the Commission to set up and maintain an EU database of high-risk AI systems in collaboration with the member states.¹⁴⁹ Providers of high-risk AI systems or their authorized representatives must register in the EU database¹⁵⁰ and comply with conformity assessment procedures to receive a certificate allowing that AI system to be used in the European Union.¹⁵¹ The majority of the information in this database is publicly available, including the names and contacts of the natural persons responsible for registering each AI system and those who have legal authority to represent the provider or deployer of the system.¹⁵²

Providers must draft and maintain a declaration of conformity with the EU AI Act,¹⁵³ and they must use a “CE marking” to show that it conforms to the Act.¹⁵⁴ They also must develop a post-market monitoring plan designed to actively and systematically collect, document, and analyze data throughout the AI system’s lifetime, which must be included in the technical documentation under Article 11 and Annex IV.¹⁵⁵

After the use of the system begins, data on compliance must be monitored continuously.¹⁵⁶ Any serious incidents, defined as the death of a person, serious harm to a person’s health, a serious and irreversible disruption of the management or operation of critical infrastructure, the infringement of fundamental rights under EU law, or serious harm to property or the environment,¹⁵⁷ that occur must be reported by providers to market surveillance authorities in the member states where the incident took place.¹⁵⁸ The report must be made immediately after a causal link or a reasonable likelihood of such a link between the AI system and the serious incident is determined or, at the latest, within fifteen days after the provider or deployer became aware of the incident.¹⁵⁹ If there is a serious and irreversible disruption of the management or operation of critical infrastructure, the report must be provided immediately, or at the latest within two days after the provider or deployer became aware of the incident.¹⁶⁰ In the event of the death of a person, reporting is required within ten days.¹⁶¹ National competent authorities are required to immediately notify the Commission of any serious incident.¹⁶²

¹⁴⁶ *Id.* art. 24.

¹⁴⁷ *Id.* art. 26-27.

¹⁴⁸ *Id.* art. 28-39.

¹⁴⁹ *Id.* art. 71.

¹⁵⁰ *Id.* art. 49, 71.

¹⁵¹ *Id.* art. 43-44.

¹⁵² *Id.* art. 71.

¹⁵³ *Id.* art. 47.

¹⁵⁴ *Id.* art. 3(24).

¹⁵⁵ *Id.* art. 72(8), 11; annex IV (9).

¹⁵⁶ *Id.* art. 72(2).

¹⁵⁷ *Id.* art. 3(49).

¹⁵⁸ *Id.* art. 73.

¹⁵⁹ *Id.* art. 73(8).

¹⁶⁰ *Id.* art. 73(3).

¹⁶¹ *Id.* art. 73(4).

¹⁶² *Id.* art. 73(11).

C. GPAI MODELS

The Act defines “general-purpose AI model” as a system “that displays significant generality and is capable of competently performing a wide range of distinct tasks regardless of the way the model is placed on the market and that can be integrated into a variety of downstream systems or applications.”¹⁶³ This includes AI models “trained with a large amount of data using self-supervision at scale,” but not those “used for research development or prototyping activities before they are placed on the market.”¹⁶⁴ Thus, GPAI models include what is commonly known as “generative AI.”¹⁶⁵

GPAI models are also referred to as “foundation models.”¹⁶⁶ “Because foundation models can be modified to numerous downstream uses, ‘no organization can fully anticipate all potential risks (or foresee all potential benefits).’”¹⁶⁷ Because of this, the risk of any particular GPAI model is difficult to predict, even if it is designed for an innocent purpose.

Early drafts of the EU AI Act did not contain any significant regulation of foundation models or generative AI.¹⁶⁸ However, ChatGPT’s release in November 2022, as discussed above, appears to have changed the understanding of regulators of the potential for risk from GPAI models.¹⁶⁹ The development of widely available generative AI models presented unprecedented regulatory challenges that fundamentally shaped the EU AI Act during its legislative process. The initial 2021 draft of the Act focused primarily on specific-use AI applications within defined sectors, but the emergence of powerful GPAI models with broad capabilities caused the introduction of an entirely new regulatory tier during the Act’s finalization.¹⁷⁰

For this reason, the EU AI Act designates GPAI models as those with or without “systemic risk.”¹⁷¹ A model will be classified as having “systemic risk” if it has “high impact capabilities,” which will be presumed “when the cumulative amount of computation used for its training measured in floating point operations [FLOPs] is greater than 10^{25} .”¹⁷² If an AI model does not meet the presumption, the Commission may also determine that it has systemic risk based on the model’s impact using the factors included in Annex XIII of the EU AI Act,¹⁷³ which contains the criteria for the designation of GPAI models with systemic risk referred to in Article 51.¹⁷⁴

Providers of GPAI models with “systemic risk” have certain obligations under the Act.¹⁷⁵ Once a model reaches the threshold for high-impact capabilities, its provider must notify the

¹⁶³ *Id.* art. 3(63).

¹⁶⁴ *Id.*

¹⁶⁵ Henson, *supra* note 4, at 858-861; Wolff, *supra* note 92, at 10.

¹⁶⁶ Arango, *supra* note 86, at 546.

¹⁶⁷ *Id.* at 553, quoting Percy Liang, Rishi Bommasani, Kathleen Creel & Rob Reich, *The Time Is Now to Develop Community Norms for the Release of Foundation Models*, STAN. U. HUM.-CENTERED A.I., May 17, 2022, <https://hai.stanford.edu/news/time-now-develop-community-norms-release-foundation-models>.

¹⁶⁸ Wolff, *supra* note 92, at 3.

¹⁶⁹ *Id.* at 4-5.

¹⁷⁰ Tambiama Madiega, *Artificial Intelligence Act*, EUROPEAN PARLIAMENTARY RSCH. SERV. (Apr. 2024).

¹⁷¹ EU AI Act, *supra* note 4, art. 51.

¹⁷² *Id.* This threshold can be written more succinctly as computational power of 10^{25} -FLOPs.

¹⁷³ *Id.* annex XIII.

¹⁷⁴ *Id.* annex I.

¹⁷⁵ *Id.* art. 55.

Commission within two weeks.¹⁷⁶ The Commission can also determine on its own or based on a qualified alert from a scientific panel that a model has high impact capabilities and, thus, has systemic risk.¹⁷⁷ In either case, if the provider disagrees that its model presents systemic risk, it can present arguments to refute the determination of systemic risk to the Commission.¹⁷⁸

The EU AI Act imposes duties on providers of all GPAI models, whether or not they include systemic risk, including maintaining technical documentation and other information on the model, compliance with codes of practice and an EU harmonized standard, and cooperation with the Commission and national authorities on the EU AI Act requirements.¹⁷⁹ Providers are also required to designate an authorized representative in the European Union.¹⁸⁰

The obligations for providers of all GPAI models, including detailed transparency about training data composition, computational resources, and energy consumption,¹⁸¹ along with the stricter requirements for large GPAI models deemed to pose “systemic risk” due to their potential widespread impact,¹⁸² specifically address the novel challenges posed by generative AI:

- Disinformation and manipulation risks: The capability to generate convincing but false content prompted rules requiring AI-generated content to be clearly identifiable, along with obligations for model providers to implement safeguards against misuse for creating deepfakes or synthetic media intended to deceive.
- Intellectual property and data governance: The practice of training models on vast datasets scraped from the internet, often without explicit consent, led to requirements that foundation model providers publish detailed summaries of copyrighted data used for training and implement appropriate licensing frameworks.
- Systemic risk and dual-use concerns: The general-purpose nature of these models, capable of both beneficial and harmful applications, brought about new risk assessment frameworks and ongoing monitoring obligations that extend beyond traditional sectoral AI regulations.

The AI Office is responsible for encouraging and facilitating the development of codes of practice for providers of GPAI models, both with and without systemic risk, at the EU level.¹⁸³

D. AI SANDBOXES

The EU AI Act encourages AI providers to experiment with new technology in safe spaces established throughout the EU called “AI regulatory sandboxes,” defined in the Act as

a controlled framework set up by a competent authority which offers providers or prospective providers of AI systems the possibility to develop, train, validate and test, where appropriate in real-world

¹⁷⁶ *Id.* art. 52(1).

¹⁷⁷ *Id.* art. 51(1)(b).

¹⁷⁸ *Id.* art. 5(1).

¹⁷⁹ *Id.* art. 53.

¹⁸⁰ *Id.* art. 54.

¹⁸¹ *Id.*

¹⁸² *Id.* art. 52d.

¹⁸³ *Id.* art. 56.

conditions, an innovative AI system, pursuant to a sandbox plan for a limited time under regulatory supervision.¹⁸⁴

AI sandboxes are design spaces within a controlled environment to allow for innovation without significant risk.¹⁸⁵ They are also intended to give regulators a clear understanding of whether existing regulations are sufficient for the new systems being developed in them.¹⁸⁶ The EU AI Act gives the Commission the authority to adopt additional acts that regulate AI sandboxes.¹⁸⁷ It contains protections and limitations on the use of personal data lawfully collected for other purposes in the AI sandboxes.¹⁸⁸

The EU AI Act requires all member states, either alone or jointly, to establish at least one AI sandbox at the national level by August 2, 2026.¹⁸⁹ Member states can also establish AI sandboxes at regional or local levels.¹⁹⁰ The European Data Protection Supervisor is also authorized to establish a sandbox at the EU level.¹⁹¹

E. SUPPORT FOR PROVIDERS AND DEPLOYERS, INCLUDING SMALL AND MID-SIZE ENTERPRISES AND START-UPS

The Act includes additional support for small and mid-sized enterprises (“SMEs”) and microenterprises. Member states are required to provide SMEs, including start-ups, with priority access to AI sandboxes.¹⁹² In addition, their needs must be considered when member states establish fees for conformity assessments under Article 43.¹⁹³ The Commission must also develop simplified guidelines for microenterprises to comply with the requirements of the qualified management system required by Article 17.¹⁹⁴

F. TRANSPARENCY REQUIREMENTS

The EU AI Act establishes transparency as a general principle.¹⁹⁵ Transparency requires “that AI systems are developed and used in a way that allows appropriate traceability and explainability ...”¹⁹⁶ For all AI systems that interact directly with natural persons, it must be clear to the natural

¹⁸⁴ EU AI Act, *supra* note 4, at art. 3(55)); *see also* Henson, *supra* note 4, at 861; Lévesque, *supra* note 85, at 47.

¹⁸⁵ U.S. Chamber of Commerce Technology Engagement Center, Commission on Artificial Intelligence, Competitiveness, Inclusion, and Innovation, Report and Recommendations 87 (2023), https://www.uschamber.com/assets/documents/CTEC_AICommission2023_Report_v6.pdf (“Regulatory sandboxes are an important way for regulators and the industry to collaborate in controlled environments to test and learn how to best harness these innovations with a view toward shaping regulatory frameworks.”); Arango, *supra* note 86, at 554.

¹⁸⁶ Arango, *supra* note 86, at 554.

¹⁸⁷ EU AI Act, *supra* note 4, at art. 8.

¹⁸⁸ *Id.* art. 59.

¹⁸⁹ *Id.* art. 57(1).

¹⁹⁰ *Id.* art. 57(2).

¹⁹¹ *Id.* art. 57(3).

¹⁹² *Id.* art. 62(1).

¹⁹³ *Id.* art. 62(2).

¹⁹⁴ *Id.* art. 63.

¹⁹⁵ Iannello, *supra* note 102, at 337.

¹⁹⁶ *Key Issues: Transparency Obligations*, EU AI ACT, <https://www.euaiact.com/key-issue/5>.

person that the system is an AI system rather than another human being.¹⁹⁷ Audio, images, videos, or text content generated by an AI system, including deep fakes, must be marked as such.¹⁹⁸

G. THE REGULATORY STRUCTURE IMPLEMENTING AND ENFORCING THE EU AI ACT

The EU AI Act creates several government entities tasked with implementing the Act. The AI Office is used by the Commission to develop EU expertise and capabilities in AI, and member states are required to facilitate the AI Office's tasks.¹⁹⁹ The Commission must also establish a scientific panel of independent experts to support enforcement activities.²⁰⁰ Member states can seek support for enforcement activities from the scientific panel.²⁰¹

The European Artificial Intelligence Board ("Board") is composed of representatives from each member state, with the European Data Protection Supervisor and the AI Office serving as non-voting observers.²⁰² The Board is designed to work with the Commission and the member states to facilitate the application of the EU AI Act.²⁰³

The Act also establishes an advisory forum that includes members of industry, SMEs, start-ups, civil society, and academia, along with representatives from the Fundamental Rights Agency, ENISA, the European Committee for Standardization, the European Committee for Electrotechnical Standardization, and the European Telecommunications Standards Institute.²⁰⁴

Member states must designate internal "national competent authorities," including at least one notifying authority and one market surveillance authority.²⁰⁵ These authorities can provide guidance and advice on the EU AI Act implementation within the member state's boundaries, particularly to SMEs and start-ups.²⁰⁶ In doing so, however, they must take into account the Board's and the Commission's guidance and advice, and consult national competent authorities under other EU laws that are impacted.²⁰⁷

H. ENFORCEMENT

Violations of the AI Act are subject to steep financial penalties.²⁰⁸ For example, as discussed above, failure to comply with the unacceptable risk provisions in Article 5 can subject providers to fines up to €35 million or 7 percent of their "total worldwide annual turnover for the preceding financial year, whichever is higher."²⁰⁹ Noncompliance with certain other provisions can subject the offender to administrative fines of up to €15 million or up to 3 percent of its total worldwide annual turnover for the prior financial year, whichever is higher.²¹⁰ Providing incorrect,

¹⁹⁷ EU AI Act, *supra* note 4, art. 50.

¹⁹⁸ *Id.* art. 50; Henson, *supra* note 4, at 861; Iannello, *supra* note 102, 338-344.

¹⁹⁹ EU AI Act, *supra* note 4, art. 64.

²⁰⁰ *Id.* art. 68.

²⁰¹ *Id.* art. 69.

²⁰² *Id.* art. 65.

²⁰³ *Id.* art. 66.

²⁰⁴ *Id.* art. 67.

²⁰⁵ *Id.* art. 70.

²⁰⁶ *Id.* art. 70(8).

²⁰⁷ *Id.*

²⁰⁸ *Id.* art. 99(3); Henson, *supra* note 4, at 862.

²⁰⁹ *See* EU AI Act, *supra* note 4, at art. 99(3); Henson, *supra* note 4, at 862.

²¹⁰ EU AI Act, *supra* note 4, at art. 99(4).

incomplete, or misleading information to notified bodies or national authorities in reply to a request is subject to fines of up to €7.5 million or up to 1 percent of its total worldwide annual turnover for the preceding financial year, whichever is higher.²¹¹ Some commentators have opined that these penalties may impact small businesses and keep them out of the market or suppress investment and innovation in AI.²¹² However, penalties are proportional, and the amount imposed must take into account the “economic viability” of the provider.²¹³

1. MARKET SURVEILLANCE OF HIGH-RISK AI SYSTEMS

Member states’ market surveillance authorities are responsible for market surveillance of many types of high-risk AI systems, including those contained in machinery, toys, recreational watercraft, elevators, radio equipment, personal protective equipment, and medical devices.²¹⁴ They must make annual reports to the Commission and national competition authorities to assist in the application of EU law on competition.²¹⁵ Market surveillance authorities also must report any prohibited practices to the Commission.²¹⁶

For high-risk AI systems for the provision of financial services used in or by financial institutions regulated by EU law, the relevant member state’s authority supervising those institutions serves as the market surveillance authority responsible for those AI systems.²¹⁷ Member states can designate the duties of these market surveillance authorities over these high-risk AI systems to other entities at their discretion, as long as coordination with the Commission and financial laws is assured.²¹⁸

For high-risk AI systems used in law enforcement and border management, and for justice and democracy purposes, market surveillance activities must be conducted by specific supervisory authorities under other EU laws and directives.²¹⁹ Market surveillance activities for systems used by EU institutions, bodies, offices, or agencies are handled by the European Data Protection Supervisor or the EU Court of Justice.²²⁰

Surveillance activities can be coordinated between the authorities, and joint activities can be conducted.²²¹ Providers must give full access to market surveillance authorities to documentation, training, validation, and testing data sets used for the systems’ development, including application programming interfaces (“API”) and other relevant technical means and tools enabling remote access.²²² In certain circumstances, providers will be required to provide access to the source code so that the authority can assess the conformity of the system with requirements in the EU AI Act.²²³

²¹¹ *Id.* art. 99(5).

²¹² Henson, *supra* note 4, at 863.

²¹³ EU AI Act, *supra* note 4, at art. 99(1)-(2).

²¹⁴ *Id.* art. 74; annex I § A.

²¹⁵ *Id.* art. 74.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

Market surveillance authorities are required to treat the information received from providers as confidential under the Act.²²⁴

2. MARKET SURVEILLANCE OF GPAI SYSTEMS

AI systems based on a GPAI model developed by the same provider are monitored and supervised by the AI Office, rather than the member states' market surveillance authorities.²²⁵ However, if national market surveillance authorities have reason to believe that a GPAI system can be used directly by deployers for at least one purpose classified as high-risk and is non-compliant, they must coordinate with the AI Office to investigate and notify the Board and other market surveillance authorities.²²⁶ The AI Office can share confidential information about the GPAI system with the market surveillance authorities if the authorities are unable to obtain it on their own.²²⁷

III. REGULATION OF AI IN THE UNITED STATES

As the first law of its kind in the world, the EU AI Act is likely to have a significant impact on both AI systems across the world and on the development of new AI laws in other countries.²²⁸ Companies developing AI systems that plan to market these systems within the European Union, which is one of the world's biggest markets, will need to comply with these rules.²²⁹ In addition, the "Brussels Effect" is likely to result in other jurisdictions basing their AI regulations on the EU AI Act, in whole or in part.²³⁰ As the first major governmental body to regulate this area, the European Union has likely set the standard for the rest of the world.²³¹ However, commentators have opined that other jurisdictions "could gain second-mover advantage by further improving on the EU enforcement model."²³²

Now that the European Union has established a comprehensive law governing AI, the regulatory structure of AI in the United States has become a big question, especially for AI developers and commercial users. While the EU AI Act obviously has no direct impact on regulating AI in the United States, it has been put forward as a model by many supporters of AI regulation in the United States.²³³ Currently, there is a wide variety of AI regulations in the United States from local governments, cities, and states in areas such as biometric and facial recognition, traffic technology, use of AI in employment decisions, and consumer protection; however, the

²²⁴ *Id.* art. 78.

²²⁵ *Id.* art. 75.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ Sandra Wachter, *Limitations and Loopholes in the EU AI Act and AI Liability Directives: What This Means for the European Union, the United States, and Beyond*, 26 YALE J.L. & TECH., 671, 676; Klein, *supra* note 4, at 23.

²²⁹ Wachter, *supra* note 228, at 676 ("From a business perspective, and in the interest of streamlining, it will make sense for businesses to adapt their operations to comply with the strictest laws rather than to have fragmented standards across operations.").

²³⁰ ANU BRADFORD, *THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD* (Oxford Univ. Press 2020); Wachter, *supra* note 228, at 676.

²³¹ Lévesque, *supra* note 85, at 105.

²³² *Id.*

²³³ Henry H. Perritt, Jr., *Undressing AI: Transparency Through Patents*, 33 TEX. INTELL. PROP. L.J. 137, 159 (2025), *citing* John Hillman, *Smart Regulation: Lessons from the Artificial Intelligence Act*, 37 EMORY INT'L L. REV. 775, 822 (2023) (calling for U.S. to catch up to Europe and to use EU Act as a model for regulating AI).

federal government has not enacted overarching AI legislation.²³⁴ While this article’s focus is the EU AI Act, a brief discussion of how the federal and state governments in the United States are regulating AI is appropriate as a comparison.

A. UNITED STATES’S REGULATION OF AI

President Joseph Biden issued Executive Order 14110 in October 2023, titled “Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence.”²³⁵ This order provided direction on regulating the impact of AI on a wide variety of topics, including immigration, diplomacy, housing, and education.²³⁶ It required federal agencies to implement over one hundred actions, “from rulemaking to developing standards to submitting reports on an AI model’s safety.”²³⁷ Private sector actors were expected to provide input into the federal agencies’ actions and regulations.²³⁸ The order provided requirements in “eight overarching policy areas”: (1) safety and security; (2) innovation, competition, and collaboration; (3) worker support; (4) AI bias and civil rights; (5) consumer protection; (6) privacy; (7) federal use of AI; and (8) international leadership.²³⁹

President Donald Trump rescinded Executive Order 14110 on January 20, 2025, the first day of his second term.²⁴⁰ However, commentators have found that “many of its requirements trickled down to the private sector through regulation by federal agencies such as the Federal Trade Commission (FTC), Food and Drug Administration (FDA), Department of Health and Human Services (HHS), and Department of Defense (DOD)” before the executive order was rescinded.²⁴¹

The U.S. Congress has not yet enacted any comprehensive AI laws.²⁴² While there have been hundreds of bills introduced in Congress that contained the term “artificial intelligence” since 2017, fewer than 30 of these bills have been enacted.²⁴³ In nearly half of those bills, the AI-focused portions related to either appropriations or national defense authorization.²⁴⁴ The most extensive of the other bills related mostly to AI activities within federal agencies and federal programs, rather than regulating or prohibiting activities in the development, use, or commercialization of AI.²⁴⁵

A debate has emerged as to whether comprehensive federal regulations “would lead to less legal uncertainty for AI developers and improve the public’s trust in AI systems, thus supporting AI innovation” or whether such legislation “would stifle innovation and competitiveness at a time

²³⁴ Lévesque, *supra* note 85, at 40.

²³⁵ Exec. Order No. 14110, 88 Fed. Reg. 75191 (Oct. 30, 2023); Arango, *supra* note 86, at 534-540; Klein *supra* note 4, at 23.

²³⁶ Exec. Order No. 14110, 88 Fed. Reg. 75191 (Oct. 30, 2023).

²³⁷ Arango, *supra* note 86, at 538, *citing* Exec. Order No. 14110, 88 Fed. Reg. 75191 (Oct. 30, 2023); Henson, *supra* note 4, at 866-868.

²³⁸ Exec. Order No. 14110, 88 Fed. Reg. 75191 (Oct. 30, 2023).

²³⁹ LAURIE HARRIS AND CHRIS JAIKARAN, CONGRESSIONAL RESEARCH SERVICE, R47843, HIGHLIGHTS OF THE 2023 EXECUTIVE ORDER ON ARTIFICIAL INTELLIGENCE FOR CONGRESS, at 1 (Apr. 3, 2024); Klein, *supra* note 4, at 24-25.

²⁴⁰ The White House, Initial Rescissions of Harmful Executive Orders and Actions (Jan 20, 2025) (<https://www.whitehouse.gov/presidential-actions/2025/01/initial-rescissions-of-harmful-executive-orders-and-actions/>).

²⁴¹ Klein, *supra* note 4, at 23.

²⁴² HARRIS, *supra* note 5, at 40.

²⁴³ *Id.* at 4; *see also* Arango, *supra* note 86, at 543-544 (discussing two recently proposed bills in Congress attempting to regulate AI).

²⁴⁴ HARRIS, *supra* note 5, at 4.

²⁴⁵ *Id.* at 4-6, 10.

when international competition is accelerating, which could lead to negative economic and national security outcomes.”²⁴⁶ This debate will undoubtedly continue as AI develops and the impact of the EU AI Act is felt by AI developers and EU inhabitants. Some scholars have opined that the lack of a comprehensive AI law in the United States is not as problematic as others have made it seem, suggesting that existing laws and legal frameworks provide protection from many potential individual and societal harms, whether that harm is from a digital or analog cause.²⁴⁷

No matter how this debate is resolved, the EU’s AI Act will have a major impact on the development of the AI industry in the United States, as the companies developing and marketing these products in the United States will likely also market them in the European Union.²⁴⁸ When and if the federal government decides to regulate AI, it may find that coordinating U.S. regulation with the EU AI Act provides more standardization and easier implementation, at least for commercial developers and users of AI.

B. STATES’S REGULATION OF AI

Like the federal government, many states have considered legislation on AI in recent years. During the 2024 legislative session, forty-five states, Puerto Rico, the U.S. Virgin Islands, and Washington, DC introduced AI bills.²⁴⁹ The National Conference of State Legislatures tracked over 450 bills on AI in twenty-three different categories during 2024 and determined that most of this legislation focused on three areas—consumer protection, deepfakes, and government use of AI.²⁵⁰ Thirty-one states, Puerto Rico, and the U.S. Virgin Islands enacted legislation or resolutions on AI that year,²⁵¹ though only one state, Colorado, has enacted comprehensive AI legislation so far.

On May 17, 2024, Colorado passed the Colorado AI Act, which will take effect on February 1, 2026.²⁵² The Colorado AI Act includes many of the regulatory concepts included in the EU AI Act.²⁵³ It applies to legal entities doing business in Colorado that are involved in AI development or deployment.²⁵⁴ It requires the developers and deployers of high-risk AI systems to use reasonable care to avoid algorithmic discrimination and requires disclosures to consumers.²⁵⁵ Colorado also enacted a new law on June 6, 2024, that created an AI task force to recommend changes to the Colorado AI Act prior to its implementation in 2026.²⁵⁶

While not comprehensive legislation, Utah and California have also enacted important legislation on AI in 2024. On March 13, 2024, Utah enacted the Artificial Intelligence Policy Act

²⁴⁶ *Id.* at 1.

²⁴⁷ Lévesque, *supra* note 85, at 41.

²⁴⁸ Wachter, *supra* note 228, at 676.

²⁴⁹ NATIONAL CONFERENCE OF STATE LEGISLATURES, ARTIFICIAL INTELLIGENCE 2024 LEGISLATION (Sept. 9, 2024) <https://www.ncsl.org/technology-and-communication/artificial-intelligence-2024-legislation>.

²⁵⁰ Chelsea Canada, *3 Trends Emerge as AI Legislation Gains Momentum*, NAT’L. CONF. ST. LEGIS. (Jan. 23, 2025) <https://www.ncsl.org/state-legislatures-news/details/3-trends-emerge-as-ai-legislation-gains-momentum>.

²⁵¹ NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 239.

²⁵² S.B. 24-205, 74th Gen. Assemb., 2d Reg. Sess. (Colo. 2024), (https://leg.colorado.gov/sites/default/files/2024a_205_signed.pdf); Colo. Rev. Stat. §§ 611701 to 1707.

²⁵³ See Klein *supra* note 4, at 25.

²⁵⁴ S.B. 24-205, *supra* note 247.

²⁵⁵ NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 244.

²⁵⁶ S.B. 24-205, *supra* note 247.

on March 13, 2024.²⁵⁷ This law focuses on consumer protection from AI and requires certain entities to disclose the use of generative AI.²⁵⁸

California enacted the Artificial Intelligence Training Data Transparency Act on September 28, 2024.²⁵⁹ This law requires developers of generative AI systems to share the data that was used to train the system starting in 2026.²⁶⁰ The California Governor vetoed a separate bill that would have set training, safety, and enforcement standards for AI.²⁶¹

Given the growing influence of AI, state legislatures will continue to consider and enact AI legislation. This may result in a patchwork of AI laws across the United States that may stifle innovation and yet fail to provide sufficient protection. Developing uniform standards for AI across states should be considered.

IV. EXPECTATIONS FOR FURTHER DEVELOPMENT OF AI

Since the finalization of the EU AI Act, the increasing pace of AI development has validated its forward-looking regulatory approach. The increasing interest in AI, along with technological advances, many of which are now AI-enhanced, has led to rapid increases in its capabilities. This makes predicting future AI advances almost impossible. Nevertheless, there is early-stage work in research and industry that provides some indication of the direction of future AI advances and their applications.

Continued work towards developing strong AI, along with advances in weak AI modelling improvements, will undoubtedly advance AI capabilities. AI reasoning models that improve LLM performance by introducing logical reasoning have already demonstrated vast improvements in tests designed to gauge human intelligence.²⁶² Meanwhile, new algorithmic approaches have allowed AI systems to work autonomously with limited human interaction via what is termed agentic AI.²⁶³

AI processing will likely continue to become more efficient. The eventual realization of quantum and bio-computing will not only improve the efficiency of AI through optimization but also allow for new algorithmic approaches that are infeasible using classical computers.²⁶⁴ Even

²⁵⁷ S.B. 149, 2024 Gen. Sess. (Utah 2024) <https://le.utah.gov/~2024/bills/sbillenr/SB0149.pdf>; Klein, *supra* note 4, at 26-27.

²⁵⁸ Canada, *supra* note 250.

²⁵⁹ A.B. 2013, 2023-2024 Reg. Sess. (Cal., Sept. 28, 2024) <https://legiscan.com/CA/text/AB2013/id/2910882>; Klein, *supra* note 4, at 26-27 (Winter 2025).

²⁶⁰ A.B. 2013, *supra* note 254; Canada, *supra* note 250.

²⁶¹ S.B. 1047, 2023-2024 Reg. Sess. (Cal., vetoed Sept. 29, 2024) <https://legiscan.com/CA/text/SB1047/id/2919384>; Canada, *supra* note 250.

²⁶² Fengli Xu, et al., *Towards Large Reasoning Models: A Survey of Reinforced Reasoning with Large Language Models*, 14 ARXIV:2501.09686 (Jan. 14, 2025).

²⁶³ Deepak Bhaskar Acharya, et al., *Agentic AI: Autonomous Intelligence for Complex Goals—A Comprehensive Survey*, IEEE ACCESS, 18912, 18917 (2025); Xu, *supra* note 252.

²⁶⁴ Hafiz Md Hasan Babu, *Biocomputing Quantum Biocomputing in Quantum Biology Volume I: Arithmetic and Combinational Circuits*, BIOCOMPUTING QUANTUM BIOCOMPUTING 1, 6–7 (Springer 2025); Matthias Klusch, et al., *Quantum Artificial Intelligence: A Brief Survey*, 38 KI-KÜNSTLICHE INTELLIGENZ 257, 262–63 (2024).

without these advances, researchers are creating smaller, more efficient models along with streamlining AI performance with the goals of green sustainability and real-time processing.²⁶⁵

The breadth of AI functions and applications will continue to expand. As new AI methods are introduced, so are new ways in which AI can be used. AI algorithms used for image generation, for example, have led to advances in video and 3D model generation.²⁶⁶ Further advances allow for multimodal AI capable of processing multiple different types of data sources, which will allow for systems that can simultaneously examine audio, video, and text data to derive novel insights.²⁶⁷

AI enhancements will encourage adoption across non-technical industries. As of 2024, the most common use of AI has been in the technology industry for information technology support, marketing and sales, and product and service development.²⁶⁸ AI usage for manufacturing, risk, legal, and compliance, strategy, corporate finance, and supply chain and inventory management has generally been much lower across industries. This may change with newer enhancements in AI privacy, security, and explainability. For example, the development of smaller models that can be run locally on devices can aid in addressing some privacy and security concerns with using cloud-based AI for manufacturing and supply chain management.²⁶⁹ Similarly, work towards explainable AI models that allow for an understanding of exactly how answers are derived can allow for their usage for compliance in highly regulated environments.²⁷⁰ Further work is also being done to mimic the success that large foundation models have had on language by applying similar techniques to other areas, such as geography, time series, and robotics problems.²⁷¹ These can enable applications in a variety of sectors, including public, manufacturing, and decision-making domains, where location, time, and automation are desirable.

Regulation of AI will impact its growth and development. In September 2024, the EU Commission signed the Council of Europe Framework Convention on Artificial Intelligence, the first legally binding international agreement on the topic, demonstrating the Act's role in establishing international standards.²⁷² The EU AI Office has begun developing the technical standards and codes of practice that will operationalize the Act's requirements, signaling the

²⁶⁵ Lihu Chen & Gaël Varoquaux, *What Is the Role of Small Models in the LLM Era: A Survey*, 1, 2, ARXIV:2409.06857 (Sept. 12, 2024); Abdulaziz Tabbakh, et al., *Towards Sustainable AI: A Comprehensive Framework for Green AI*, 5 DISCOVER SUSTAINABILITY 408, 409 (2024).

²⁶⁶ Shamin Yazdani, et al., *Video Generative Adversarial Networks: A Review*, 55 ACM COMPUTING SURVEYS 1, 2 (2022); C. Li, et al., *Generative AI Meets 3D: A Survey on Text-to-3D in AIGC Era*, ARXIV:2305.06131 (2023).

²⁶⁷ Andrew Ng, *The Evolution of Multimodal AI: Creating New Possibilities*, 1 INT'L J. ARTIFICIAL INTELLIGENCE FOR SCI. 1, 1-2 (2025).

²⁶⁸ Maslej, *supra* note 35, at 262.

²⁶⁹ Sai Dhires Kilar, *The Implementation of Artificial Intelligence in the Manufacturing Industry: Manufacturing Execution Systems and Supply Chain Integration*, 25 WORLD J. ADVANCED RSCH. & REVS. 2568, 2569 (2025); Xubin Wang, et al., *Empowering Edge Intelligence: A Comprehensive Survey on On-Device AI Models*, 57 ACM COMPUTING SURVEYS 1, 8(2025).

²⁷⁰ Andrew Nii Anang, et al., *Explainable AI in Financial Technologies: Balancing Innovation with Regulatory Compliance*, 13 INT'L J. SCI. & RSCH. ARCHIVE 1793,1794 (2024).

²⁷¹ Yuxuan Liang et al., *Foundation Models for Time Series Analysis: A Tutorial and Survey* (30th ACM SIGKDD CONF. KNOWLEDGE DISCOVERY & DATA MINING 2024); Gengchen Mai, et al., *On the Opportunities and Challenges of Foundation Models for GeoAI (Vision Paper)*, 10 ACM TRANSACTIONS SPATIAL ALGS. & SYS. 1 (2024); Zhiyuan Xu, et al., *A Survey on Robotics with Foundation Models: Toward Embodied AI*, ARXIV:2402.02385 (2024).

²⁷² Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law, Council of Europe Treaty Series No. 225 (2024) <https://rm.coe.int/1680afae3c>.

transition from legislative drafting to practical implementation and enforcement. This ongoing evolution ensures that the EU AI Act will serve not as a static regulatory endpoint but as the dynamic foundation for governing AI development and deployment in an era of rapid technological change. The EU AI Act's influence is already extending beyond the European Union's borders, catalyzing global discourse on AI governance and inspiring other jurisdictions to develop their own regulatory approaches, which will impact future AI development.

V. CONCLUSION

The European Union's release of the first comprehensive regulatory framework for AI on March 12, 2024, was a groundbreaking development. The Act's risk-based focus will help ensure that fundamental human rights are protected and AI is transparent and safe, while at the same time providing support for a competitive and innovative market for AI. The Act is also serving as a template for the development of other jurisdictions' regulation of this rapidly developing technology. AI's benefits and its potential for harm are only beginning to be understood as its effects are being seen in business, education, healthcare, art, transportation, law enforcement, and international conflicts. While there is no way to accurately predict where this transformative technology will lead, the EU AI Act provides a flexible tool to help ensure that AI's development serves as a benefit to society and humanity.

Table 1: Risks explicitly regulated by the EU AI Act.

Concern	Mechanism / why it matters	Primary domains affected	Representative mitigations (EU AI Act)	Where in the EU AI Act
Deceptive manipulation and “subliminal” techniques	AI systems can materially distort behavior, leading to physical, psychological, or financial harm.	Advertising, persuasive tech, political messaging	Outright prohibition of such systems.	Art. 5(1)(a). (EUR-Lex)
Exploiting vulnerabilities (children, disability, socio-economic)	Targeting vulnerable groups undermines autonomy and amplifies harm.	Ed-tech, toys, services for vulnerable users	Outright prohibition of systems that exploit vulnerabilities.	Art. 5(1)(b). (EUR-Lex)
Social scoring	Long-term scoring leads to discriminatory or harmful treatment.	Public sector services, policing	Outright prohibition of social scoring by public authorities.	Art. 5(1)(c). (EUR-Lex)
Predictive criminal risk based on profiling/personality	Infers criminality or recidivism from traits, enabling discriminatory policing.	Law enforcement	Outright prohibition where based solely on profiling, personality traits, or past behavior.	Art. 5(1)(d). (EUR-Lex)
Building facial recognition databases via untargeted scraping	Mass scraping of faces creates de facto mass surveillance and privacy harms.	Surveillance tech vendors, data brokers	Outright prohibition on creating/expanding FR databases through untargeted scraping.	Art. 5(1)(e). (EUR-Lex)
Emotion recognition in the workplace and education	Pseudoscientific claims risk coercion and discrimination.	HR tech, schools	Outright prohibition of emotion inference in workplace and education.	Art. 5(1)(f). (EUR-Lex)
Biometric categorization by sensitive attributes	Infers race, religion, sexual orientation, etc., enabling discrimination.	Policing, border control, marketing	Outright prohibition of sensitive-attribute biometric categorization.	Art. 5(1)(g). (EUR-Lex)
Real-time remote biometric identification in public spaces (law enforcement)	Enables pervasive surveillance and chilling effects.	Law enforcement	General prohibition with narrow, enumerated exceptions for serious crimes and search for victims; strict authorization conditions.	Art. 5(1)(h), 5(2)–(7); Annex II (listed offences). (EUR-Lex)
Algorithmic bias and discrimination in high-risk AI	Biased data and design choices lead to discriminatory outcomes.	Employment, education, essential services, law enforcement, justice	Mandatory risk management and data governance (bias examination and mitigation), documentation, testing, human oversight.	Arts. 9–10 (bias controls), 14 (human oversight); high-risk areas in Annex III. (EUR-Lex , Artificial Intelligence Act)
Lack of disclosure when interacting with AI	People can be unknowingly subject to machine interactions.	Consumer services, chatbots	Providers must inform users they are interacting with AI unless obvious.	Art. 50(1). (EUR-Lex)
Deepfakes and synthetic media deception	AI-generated media can mislead and erode information integrity.	Media platforms, political communication	Machine-readable marking of AI-generated outputs by providers; deployers must disclose deepfakes and AI-	Art. 50(2), 50(4). (EUR-Lex)

Concern	Mechanism / why it matters	Primary domains affected	Representative mitigations (EU AI Act)	Where in the EU AI Act
Transparency around emotion recognition/biometric categorization (where permitted)	Covert use infringes privacy and consent.	Retail analytics, public venues	generated text used to inform the public. Deployers must inform natural persons when such systems are used (subject to limited exceptions).	Art. 50(3). (EUR-Lex)
Automation bias and over-reliance	Humans over-trust automated outputs, degrading judgment.	All high-risk domains	Human oversight features and procedures to keep operators aware of automation bias and able to override/stop systems.	Art. 14(4)(b), 14(4)(d)–(e). (EUR-Lex)
Security vulnerabilities and model exploitation	Adversarial attacks, data/model poisoning, and evasion can cause harm.	Critical infrastructure, finance, healthcare, public services	Accuracy, robustness, and cybersecurity requirements; measures against data/model poisoning and adversarial examples.	Art. 15(1), 15(5). (EUR-Lex)
Traceability and auditability gaps	Without logs and documentation, accountability fails.	All high-risk domains	Technical documentation, logging, instructions for use; access for authorities; registration of high-risk systems.	Arts. 11–13, 12(1), 49, 71. (EUR-Lex)
Democratic harms from AI-driven political influence	Manipulative systems can distort elections and referenda.	Democratic processes, political campaigns	Classification as high-risk; attendant obligations (risk management, documentation, oversight); plus content-labeling duties where applicable.	Annex III(8)(b); Art. 50(2), 50(4). (Artificial Intelligence Act , EUR-Lex)
Education harms	High-stakes uses can entrench bias and harm learners.	Education and vocational training	Classified high-risk: admissions, outcome evaluation, level placement, exam-proctoring; general high-risk controls apply. Emotion recognition in education is prohibited.	Annex III(3)(a)–(d); Art. 5(1)(f). (Artificial Intelligence Act , EUR-Lex)
Workplace surveillance and algorithmic management	Monitoring and automated decisions affect livelihoods and rights.	Employment and worker management	Classified high-risk for recruitment, evaluation, monitoring; general high-risk controls and oversight apply. Emotion recognition at work is prohibited.	Annex III(4)(a)–(b); Art. 5(1)(f). (Artificial Intelligence Act , EUR-Lex)
Discrimination in essential services	AI can exclude people from benefits, credit, or insurance.	Public benefits, credit scoring, insurance, emergency response	Classified high-risk; deployers in banking/insurance must perform Fundamental Rights Impact Assessments (FRIAs); general high-risk controls apply.	Annex III(5)(a)–(d); Art. 27(1) (points 5(b)–(c)). (Artificial Intelligence Act , EUR-Lex)
Law-enforcement harms (risk scoring, evidence assessment, profiling)	Opaque tools can undermine due process and fairness.	Policing, criminal justice	Many uses are high-risk with strict controls; several practices are outright prohibited (see Art. 5).	Annex III(6)(a)–(e); Art. 5(1)(d)–(h). (Artificial Intelligence Act , EUR-Lex)

Concern	Mechanism / why it matters	Primary domains affected	Representative mitigations (EU AI Act)	Where in the EU AI Act
Migration, asylum, and border-control harms	High-stakes assessments can affect fundamental rights, including non-refoulement.	Border management, asylum processing	Classified high-risk; strict controls and, for certain uses, prohibitions/registration and FRIA requirements.	Annex III(7)(a)–(d); Art. 27; Art. 49. (Artificial Intelligence Act, EUR-Lex)
Copyright and training-data opacity in GPAI	Use of copyrighted works without compliance and opaque training corpora create legal and ethical risk.	General-purpose models, generative AI	GPAI providers must adopt copyright-compliance policies and publish a sufficiently detailed summary of training data; provide documentation to downstream providers. Additional obligations: model evaluation and adversarial testing, continuous systemic-risk assessment and mitigation, incident reporting, and cybersecurity.	Art. 53(1)(c)–(d), 53(1)(a)–(b). (EUR-Lex)
Systemic risks from frontier models (GPAI with systemic risk)	Capabilities and scale can create cross-sector harms and cascading failures.	Cross-sector	Right to lodge complaints; right to an explanation when a decision is mainly based on high-risk AI output and significantly affects the person.	Arts. 51–55 (esp. 55(1)(a)–(d)). (EUR-Lex)
Lack of recourse for affected persons	Individuals need actionable remedies when decisions lean on high-risk AI.	All high-risk domains		Arts. 85–86. (EUR-Lex)

**STRIPPING DOWN THE LAW:
TEACHING WORKER CLASSIFICATION THROUGH
EXOTIC DANCER LITIGATION**

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I. INTRODUCTION

Exotic “[d]ancers are the original gig workers—before Lyft, Uber and GrubHub—and corporate America loves it....They say, ‘We can take these workers, and we don’t have to give them any benefits; we don’t have to follow regulatory laws, and we can make more money.’”¹ This article uses a case study of an exotic dancing club to teach the legal, business, and ethical consequences of classifying the dancers as employees or independent contractors.

Exotic dance clubs (also known as “strip clubs” and “gentlemen’s clubs”) are venues where the entertainers (“strippers,” “exotic dancers”) provide adult entertainment by dancing in various stages of undress.² These clubs are typically structured in a nightclub, bar, or cabaret setting in which the entertainers dance fully or partially nude on stage, in a one-on-one setting in an open seating area, and one-on-one in semi-private or private areas.

The United States exotic dance club industry revenue exceeded \$4.2 billion per year in 2024.³ Clubs vary from single-unit operations to

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¹ Jenny B. Davis, *Why Exotic Dancers and Other Gig Workers are Seeing Employment Law Gains, COVID-19 Losses*, A.B.A. J. (May 12, 2020) (quoting Michael P. Maslanka), <https://www.abajournal.com/web/article/exotic-dancers-are-seeing-employment-law-gains-and-covid-19-losses> (last visited Aug. 23, 2025).

² This article will refer to the entertainers as “dancers” or “exotic dancers” and to the businesses as “clubs” or “strip clubs.”

³ Jack Curran, *Strip Clubs in the US – Market Research Report (2015-30)*, IBISWORLD, (Updated Jun. 2025), <https://www.ibisworld.com/united-states/industry/strip-clubs/4409/> (last visited Aug. 23, 2025) (\$4.2 billion); *Analysis of the U.S. Strip Clubs Market, 2014-2029-Strip Clubs Rely Heavily on Food and Alcohol Sales, VIP Services Drive Revenue for High-End Establishments*, GLOBAL NEWSWIRE (May 1, 2024) (\$7.7 billion in 2024), <https://finance.yahoo.com/news/analysis-u-strip-clubs-market-140400895.html> (last visited Aug. 23, 2025); BERNADETTE BARTON, STRIPPED: MORE STORIES FROM EXOTIC DANCERS NYU PRESS 31-32 (2107) (“The Bureau of Labor Statistics

national and multinational franchises.⁴ The vast majority of dancers in the United States are female, which is the focus of this article.⁵ They earn most of their money through tips for dancing on stage and in one-on-one settings. Clubs earn most of their money through entry fees, alcohol sales, and shared revenue with the dancers.⁶ As sexual-related businesses, clubs are subject to a host of state and municipal regulations involving dancer and club licensing, business location, the level of nudity, touching restrictions, and the sale of alcohol.⁷

Clubs in the United States have historically treated dancers as independent contractors because it is more profitable and avoids employer obligations and liabilities. They typically require dancers to sign independent contractor agreements, often called “lease agreements,” “performer agreements,” or “house fee agreements,” which generally require the dancer to pay the club for the right to work on a daily or monthly basis, to “tip out” club employees for various services, and to split money earned from their individual dances with the club.⁸ The clubs also typically set prices for individual and private dances, establish procedures for scheduling shifts, and impose fines on dancers for failing to comply with the club’s rules.

The impact of classifying dancers as independent contractors is significant. By law, independent contractors have more flexibility to

estimates that there are 4,000 strip bars in the United States employing approximately 4000,000 exotic dancers, generating upward of \$3 billion.... The U.S. has more strip bars than all the rest of the world combined.”).

⁴ *Id.*; Robert T. Jones Urban Research and Outreach-Engagement Center, WORKPLACE PERSPECTIVES ON EXOTIC DANCING: A BRIEF REPORT ON COMMUNITY-BASED RESEARCH WITH ENTERTAINERS IN MINNEAPOLIS STRIP CLUBS, 7 (Mar. 27, 2017), <https://lims.minneapolismn.gov/Download/RCAV2/285/UROC-Strip-Club-Report-3.26.17-Final-FINAL.pdf> (last visited Aug. 19, 2025).

⁵ Yuliana Zaikman & Jassmine Sanchez, *Evaluations of Female and Male Strippers and Strip Club Attendees*, 25 SEXUALITY & CULTURE 455, 456 (Oct. 12, 2020) (ratio of female to male dancers is nine to one).

⁶ Eric D. Kelly & Connie B. Cooper, *Everything You Always Wanted to Know About Regulating Sex Businesses*, PLANNING ADVISORY SERVICE REPORTS, Am. Plan. Ass’n, Nos. 495-496 (2000).

⁷ Clay Calvert & Robert D. Richards, *Stripping Away First Amendment Rights: The Legislative Assault on Sexually Oriented Businesses*, 7 N.Y.U. J. LEGIS. & PUB. POL’Y 287, 292-93 (2003/04) (identifying regulations); Sheerine Alemzadeh, *Baring Inequality: Revisiting the Legalization Debate Through the Lens of Strippers’ Rights*, 19 MICH. J. GENDER & L 339, 348 (2013) (arguing that regulations are presently structured to empower “employers, allowing them to evade legal obligations concerning wages, collective bargaining, protection from harassment and workers’ compensation.”).

⁸ The tip-outs, house fees and fines are often burdensome, with dancers often being pressured to tip from 10-30% of their earnings to managers, bouncers, DJs, and other staff on top of dance commission fees. After house fees, commissions, and tipping, dancers often take home about half of their actual earnings. WORKPLACE PERSPECTIVES ON EXOTIC DANCING, *supra* note 4 at 18-19.

conduct their work with less oversight and control. For the dancers, this should theoretically allow them to set their own work schedule, move between clubs, negotiate and control their earnings and profits, and maintain control over how they perform their work.⁹ These purported benefits, however, come with a steep price. Independent contractors must pay employer-side Social Security, Medicare, and state taxes.¹⁰ They are also excluded from laws that protect employee rights covering minimum wage and overtime, workers' compensation, unemployment, discrimination and harassment, labor organizing, and family and medical leave.¹¹

Despite clubs treating dancers as independent contractors, the courts have almost uniformly found them to be employees. Clubs have faced waves of litigation for the past few decades, with the dancers winning or the parties settling the vast most of the cases. Exotic dancers brought over 400 wage and hour lawsuits between 2015 and 2019, and the lawsuits continued throughout the 2020s.¹² Despite this, most clubs continue to treat their dancers as independent contractors and treat the risk of litigation as a cost of doing business.¹³

This article sets forth an activity to teach undergraduate and graduate students about the law governing employment classifying workers in the

⁹ Roman J. Hoyos, *Sex Workers as Workers: Evaluating the Impact of California's A.B. 5 on Erotic Dancers Summer*, UC DAVIS SOCIAL JUSTICE L. REV. 205, 212 (2024) ("The primary set of concerns with the classification of dancers as employees concerns 'privacy, flexibility, and profits.'") (quoting DeMarr Moulton, *The Unexpected Consequences of Classifying Exotic Dancers as Employees or Independent Contractors Under the FLSA*, 95 N.C. L. REV. ADD'M 83, 89 (2016)); Barton, *supra* note 3 at 37-38.

¹⁰ 26 U.S.C. § 3101; 26 U.S.C. § 3111; 26 U.S.C. § 3301.

¹¹ *See, e.g.*, 29 C.F.R. § 825.102 (Family Medical Leave Act eligibility); EQUAL EMP'T. ENFOR. COMM'N, COVERAGE, <https://www.eeoc.gov/employers/coverage-0> (last visited Aug. 23, 2025) ("People who are not employed by the employer, such as independent contractors, are not covered by the anti-discrimination laws."); 29 U.S.C § 152(3) (National Labor Relations Act coverage).

¹² Kati L. Griffith & Leslie C. Gates, *Milking Outdated Laws: Alt-Labor as Litigation Catalyst*, CHI.-KENT L. REV. 245, 267 (2020) (citing Patricio Chile, *Exotic Dancers Push for Employee Status*, BNA DAILY LAB. REP. (Oct 21, 2019); *see, e.g.*, *Department of Labor Sues Wichita Adult Gentlemen's Club in Violation of Federal Laws to Recover Back Wages, Damages for 80 Dancers*, EEOC DEPART. OF SOLICITOR NEWS RELEASE No. 24-2057-KAN (Jan 13, 2025), <https://www.dol.gov/newsroom/releases/sol/sol20250113> (last visited Aug. 23, 2025).

¹³ Veena B. Dubal, *Winning the Battle, Losing the War: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 2017 WIS. L. REV. 739, 748 (2017); Samuel Braslow, *L.A.'s Exotic Dancers Are Launching a Labor Movement*, L.A. MAG. (Mar. 4, 2019), <https://www.lamag.com/citythinkblog/soldiers-of-pole-stripper-union/> (last visited Aug. 23, 2025); WORKPLACE PERSPECTIVES ON EXOTIC DANCING, *supra* note 4 at 6.

context of exotic dancing. Section II identifies the learning outcomes, outlines the teaching format, and describes the case study. Section III provides detailed guidance to teach the activity. It introduces the six-factor “Economic Realities Test” used by the Department of Labor, applies those factors to the case, and evaluates the arguments in favor of the club and dancers. It then examines the consequences of miscategorizing dancers as independent contractors and discusses the legal remedies available to the dancers. Section IV considers options to move forward and alternative models for employee classification. Section V concludes the article. The case study handout for students is attached as Exhibit 1.

II. THE TEACHING ACTIVITY

A. LEARNING OUTCOMES

By the end of this activity, students should be able to accomplish the following:

1. Articulate and apply the applicable legal standard to determine whether a worker is an employee or an independent contractor.
2. Analyze the law and facts of the case to determine whether a worker is an employee or an independent contractor.
3. Identify and explain the business, legal, and ethical consequences of misclassifying an employee as an independent contractor.
4. Articulate the pros and cons of characterizing the dancers as employees or independent contractors from the perspective of the businesses and workers.
5. Identify and recommend sound options to move forward.
6. Recognize conflicting business, legal, and ethical interests at issue.

This activity follows the line of articles using case studies to teach business and employment law.¹⁴

¹⁴Wade S. Davis, “*That’s What She Said: Using “The Office” to Teach Sexual Harassment Law*,” 34 SOUTHERN L. J., 157 (Fall 2024); Justin Blount & Kristen Waddell, *Smithereen, Incorporated—An Employment Negotiation Exercise*, 40 J. OF LEGAL STUD. IN BUS. 195 (2023); Kristal L. Bruce & Augree Walton, *Using Gig Cases to Teach Worker Classification: A New Model Ignites an Old Problem*, 13 J. HUMAN RESOURCES ED. 23 (Winter 2019); Wade S. Davis, *Employee Raiding: A Teaching Case Study on Claims and Remedies*, 7 ROCKY MOUNTAIN L. J., 20 (Fall 2018); Leila Lawlor & Susan Willey, *Are Your Workers Employees or Independent Contractors? Three Exercises to Help Students Accurately Classify Workers* 34 J. LEGAL ST. EDUC. 167 (2017); Paul J. Brennan & Todd S. Lundquist, *Independent Contractor or Employee: The Exotic Dancer Cases*, 31(2) J. OF CASE STUD. 77 (2013); Darren Charters, Sally Gunz, & Vivian Schoner, *Using the Case Study Approach to Challenge Students in an Introductory Business Law Course*, 26 J. OF LEGAL STUD. EDUC. 47 (Win. 2009); Margo E.K. Reder, *Case Study of Apple, Inc.*

B. SETTING UP AND LEADING THE DISCUSSION

This activity can be completed in a 50–75 minute class period. The instructor can briefly introduce the concept of employee/independent contractor classifications before the activity or have students read short introductions to the topic beforehand.¹⁵

Students should be instructed to closely read the case study before class or for the first 10-15 minutes of class. It might help to prompt students to identify key facts and arguments in favor of or against each employment classification as they read.

We recommend debriefing the case in one of two ways. First, the instructor can pose the questions raised in this article and lead the class discussion through each question. During this process, the instructor may consider having students think-pair-share; that is, to take a few minutes to personally write on the topic, pair with a peer to informally discuss their positions, and then to share their thoughts with the group.¹⁶

Alternatively, the teacher can divide the students into two groups, one of which identifies the facts and arguments in support of employment status and the other in support of independent contractor status. The groups can then present their competing positions during the class discussion.

For either approach, we recommend that the instructor lead the discussion by addressing each factor of the economic realities test at a time. This helps students fully consider each factor in isolation and recognize how they fit within the broader picture. It also illustrates that

for Business Law Students: How Apple's Business Model Controls Digital Content Through Legal and Technological Means, 26 J. OF LEGAL STUD. EDUC. 185 (Win. 2009); Lucien J. Dhooge & Cynthia F. Eakin, *Integrating Tax Law into the Business Law Classroom: A Corporate 'Cradle to Grave' Case Study* 19 J. OF LEGAL STUD. EDUC. 131 (2008); Robert C. Bird, *This Bud's For You: Understanding International Intellectual Property Law Through the Ongoing Dispute Over the Budweiser Trademark*, 23 J. OF LEGAL STUD. EDUC. 53 (Win. 2006).

¹⁵ See, e.g., U.S. DEP'T OF LABOR, FACT SHEET 13: EMPLOYEE OR INDEPENDENT CONTRACTOR CLASSIFICATION UNDER THE FAIR LABOR STANDARDS ACT (FLSA), (Rev. Mar. 2024), <https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship> (last visited Aug. 23, 2025); U.S. DEP'T OF LABOR, WAGE AND HOUR DIVISION, Op. Letter FLSA2025-2 (May 2, 2025) (applying the economic realities test to gig workers).

¹⁶ Mubashara Akhtar and Muhammad Saeed, *Assessing the Effect of Agree/Disagree Circles, Exit Ticket, and Think-Pair-Share on Students' Academic Achievement at Undergraduate Level*, 42 BULL. ED. RSCH. 2 (Aug. 31, 2020).

the ultimate binary conclusion (whether the worker is an employee or independent contractor) requires a weighing of several factors.

At each stage, the instructor should also ask students to consider and identify alternative facts or working arrangements that would make the relationship more or less likely to be an employee or independent contractor. It might also help to consider other similarly situated workers who often lease out space to work at a common work site including tattoo artists,¹⁷ hairdressers and cosmetologists,¹⁸ and physical fitness trainers.¹⁹

Finally, we recommend that the instructor conclude the discussion by focusing on issues of strategy and ethics. Students should consider how the business should proceed. They should also be encouraged to reflect on whether the law adequately protects the rights and interests of the dancers, the businesses, and society at large. This discussion can happen at a narrow level (in a particular club or the exotic dancing industry) and at a broader level (whether the current legal protections and frameworks should be changed).

C. CONSIDER THE SENSITIVE NATURE OF SEX-RELATED WORK

This activity is not a good fit for every college-level course. Teaching about sex-related work can be difficult due to stigma, incomplete and inaccurate information, and pre-existing beliefs on the topic.²⁰ Students may hold strong opinions about erotic dancing and sex work, which are often associated with shame, judgment, and negative stereotypes.²¹

¹⁷ *Creative Designs Tattooing Assocs. v. Estate of Parrish*, 56 Va. App. 299 (Va. Ct. App. May 25, 2010) (holding that tattoo artist who was killed in a shooting while at work was an independent contractor and therefore not eligible to receive workers' compensation); Timothy C. Bradley, *The Copyright Implications of Tattoos: Why Getting Inked Can Get You Into Court*, 29 ENTMT AND SPORTS LAWYER, 1, 29 (Fall 2011) (whether a tattoo artist is an employee or independent contractor affects whether they own a copyright for their work).

¹⁸ Tina Alberino, *The 20 Factor IRS Test: Independent Contractors in the Salon*, THIS UGLY BEAUTY BUSINESS (May 10, 2014), <https://thisuglybeautybusiness.com/2014/05/the-20-factor-irs-test-why-independent.html> (last visited Aug. 23, 2025).

¹⁹ Aaron Vanek, *Why Unions Belong in Climbing Gyms* (Mar. 13, 2025), <https://convergencemag.com/articles/why-unions-belong-in-climbing-gyms/> (last visited Aug. 20, 2025); Mike Jesowhek, *How to Successfully Manage Taxes as a Freelance Fitness Trainer*, CLUB INDUS. (Jul. 23, 2019), <https://www.americanspa.com/step-by-step/how-to-successfully-manage-taxes-as-a-freelance-fitness-trainer> (last visited Aug. 23, 2025).

²⁰ Yuliana Zaikman & Jassmine Sanchez, *supra* note 5 at 457.

²¹ This paper uses the term "sex work" is a broad umbrella term for anyone who provides sexual services for money which can include, prostitution, escort services,

Although exotic dancing is a regulated legal business, it is commonly associated with criminal and untowardly behavior such as prostitution, drug use, human trafficking, and exploitation of dancers.²² Many students may view exotic dancing within a “frozen discourse” that characterizes the dancers as victims or criminals.²³

Exotic dancing is a complex topic. It is simultaneously a way for people who might otherwise be marginalized from the workforce to make money, often much more than other options, in a relatively flexible fashion.²⁴ Dancing is often a viable choice for many women:

The [dancer’s] flexible schedules accommodate women who are mothers, students, actors, or employees in need of additional income. In many cases, the income a woman makes from dancing is the difference between work and welfare.²⁵

The work can also be exploitive and risky. Dancers routinely report that, while they may enjoy aspects of the work, the work environment is often “exploitive and harmful, including perceived economic exploitation by the club itself, pervasive verbal harassment and derogatory language, pressure to perform commercial sex acts, unwanted touching and groping, and sexual harassment and assault.”²⁶

phone sex, sensual massage, pornography, and stripping. WORKPLACE PERSPECTIVES ON EXOTIC DANCING, *supra* note 4 at 32.

²² Dan O’Bryant, *Inextricably Bound: Strip Clubs, Prostitution, and Sex Trafficking*, 2(3) DIGNITY: A J. OF ANALYSIS OF EXPLOITATION AND VIOLENCE 1 (2017). It is important to not conflate erotic dancing with prostitution. While prostitution involves direct sexual services, exotic dancing typically involves dancers working in adult-only clubs where they do not provide direct sexual services. Katherine Fustich, *Sex Work is Real Work: The Implications of U.S. Strippers Winning the Right to Unionize, An International Comparative Study*, 5 CARDOZO INT’L COMPAR., POL’Y & ETHICS L. REV. 921, 924 (Spr. 2022).

²³ Hoyos, *supra* note 9 at 240.

²⁴ Holly Wilmet, *Naked Feminism: The Unionization of the Adult Entertainment Industry*, 7 AM. U. J. GENDER SOC. POL’Y & L. 465, 491 (1999); Barton, *supra* note 3 at 32 (“Students, artists, and especially single mothers explained that the ability to make in eight hours what used to take forty offered them much valuable free time to spend with their children, on their studies and/or on creating art.”).

²⁵ *Id.*; see also WORKPLACE PERSPECTIVES ON EXOTIC DANCING, *supra* note 4 at 13 (reporting that scheduling flexibility is a critical reason for many entertainers to start dancing).

²⁶ *Id.* WORKPLACE PERSPECTIVES at 1; Barton, *supra* note 3 at 82-111. It is particularly concerning that many clubs encourage women to drink alcohol with their guests throughout their shifts. “Virtually every dancer discussed alcohol as an occupational hazard... [M]anagement expects the dancers to accept drinks from the customers because alcohol purchases make up the bulk of their profits.” *id.* Barton at 133-34. Dancers are also repeatedly propositioned for sex throughout their shifts. *Id.* at 67-70.

The students' and instructors' understanding of, and experience with, strip clubs will undoubtedly be varied, biased, and incomplete. It is unlikely that students have meaningfully addressed this topic in their earlier education. Some may have been in a club as patrons, know someone who has worked in a club, or worked in a club themselves. Most students' understanding will be shaped by depictions of erotic dancing in mainstream culture.²⁷ The instructor, therefore, needs to be prepared to focus the discussion on the business, legal, and ethical issues at hand while keeping the discussion from devolving into stereotypes or sensationalism.

One way to ground the discussion is to acknowledge that exotic dancing is a business (for the dancer and club) and recognize that the work is extremely hard - both physically and emotionally.²⁸ In other words, the instructor should try to shift the focus from *sex worker* to *worker*. Roman Hoyos explains:

A full complement of rights and conditions making it possible for dancers to ply their trade as safely as possible can be achieved only by addressing the specific problems that dancers face in their workplace directly, such as safety, cleanliness, and wage and earnings protections, not by treating them as victims or criminals-in-waiting.²⁹

The instructor also needs to consider their own biases and position before teaching this activity. They should consider how they can create a safe and inclusive learning environment where the students can productively and safely engage in the discussion. They should explicitly

²⁷ Some of the more high-profile movies and television shows include *Hustlers*, *Magic Mike*, *Showgirls*, and *P-Valley*. Popular culture's depiction of exotic dancing is complex and evolving. It addresses themes of promiscuity, empowerment v. exploitation, humanization of multifaceted individuals (mothers, students, and entrepreneurs), spectacle and sexualization, class survival, morality, and feminist and queer reclamation. See, e.g., Jen Chaney, *P-Valley Understands That Stripping Is Labor*, VULTURE (July 24, 2020), <https://www.vulture.com/article/p-valley-stripping-labor-analysis.html> (last visited Aug. 23, 2025); Melena Ryzik, *The Sly Superpower of "Hustlers"*, N.Y. TIMES (Sept. 6, 2019), <https://www.nytimes.com/2019/09/06/movies/the-sly-superpower-of-hustlers.html> (last visited Aug. 17, 2025); Leigh H. Edwards, *Striptease: The Art of Spectacle and Transgression*, 34 J. OF POPULAR CULT. 65 (2004).

²⁸ Barton, *supra* note 3 at 65-111 (chronicling the physical and emotional abuse that exotic dancers endure on a day-to-day basis); Bernadette Barton, *Managing the Toll of Stripping Boundary Setting among Exotic Dancers*, 36:5 J. OF CONTEMPORARY ETHNOGRAPHY 580-82, 590-91 (2007).

²⁹ Hoyos, *supra* note 9 at 246; see also Chi Adanna Mgbako, *The Mainstreaming of Sex Workers' Rights as Human Rights*, 43 HARV. J. L. & GENDER 92 (2020) (addressing the larger picture or seeing sex workers' rights as human rights).

tell students that they are not expected to discuss their individual experiences.³⁰ The primary focus of this activity is to consider the legal, business, and human aspects of the job.

While this topic presents some unique difficulties, it is an opportunity to discuss meaningful legal, business, and ethical concepts in a context that might otherwise be overlooked or ignored.

D. THE CASE STUDY³¹

The student handout is attached below as Exhibit 1.

The Centerfold Club—Employee or Independent Contractor

The owner of the Centerfold Club (herein after “Club”) recently received a letter from an attorney of two former exotic dancers (also referred to as “strippers”) who worked at the Club over the previous three years. The letter states that the Club “misclassified the dancers as independent contractors in violation of state and federal law” and, as a result, is “collectively underpaying its dancers more than \$500,000 a year.” It also states that the dancers are considering filing a class action lawsuit seeking damages and equitable relief in federal court but would “consider a settlement if the Centerfold Club agrees to make a fair payment and change its ways.”

The Centerfold Club

The Club operates an exotic dance club near the Columbus, Ohio, airport that features topless female dancers. The Club has two elevated stages (one with a dancing pole), a full-service alcoholic bar, a kitchen, customer seating areas, a dressing room, and private “VIP” back rooms.³² In addition to the dancers, the Club employs managers,

³⁰ Whether someone talks publicly about their or their relations’ stripping experiences involves “a complicated set of social, professional, cultural, or other factors,” and may cast a long shadow on how they are perceived. Carrie Jo Coaplen-Anderson, *A Stripped Classroom: Exotic Dancers, Sexuality, University Teaching, and Community Engagement*, 9 REFLECTIONS 44, 45 (Sp. 2010); People who work in legal sexual-related settings may also face retaliation and discrimination in their non-sex employment. Laura Boone, “*Because of Sex*”: Title VII’s Failures Leave Legal Sex Workers Unprotected, N. CAROLINA L. REV. 883, 891-92 (2022).

³¹ This case study is largely based on the National Labor Relations Board order in the case of *Nolan Enterprises, Inc. d/b/a Centerfold Club and Brandi Campbell*, 370 NLRB No. 2 (2020); *aff’d Nat’l Labor Relations Bd. v. Nolan Enter., Inc.*, 2021 U.S. App. LEXIS 40483 (6th Cir. Mar. 10, 2021) (entering summary enforcement of the NLRB’s order). *Centerfold Club* is unique because it arose in the context of dancers seeking the right to unionize before the NLRB which applies a different, but parallel independent contractor test. *id.* 370 NLRB No. 2 at 14.

³² *Id.* at 6.

security guards, bartenders, kitchen staff, servers, disc jockeys, and backroom attendants.³³ These non-dancing workers are classified as employees of the Club.

The Club is open seven days a week. The afternoon shift for dancers runs from 4 p.m. to 10 p.m. and the evening shift runs from 8 p.m. to 2:30 a.m.³⁴ Depending on the shift, 7-12 dancers work the weekday shifts, 12-18 work the weeknight shifts and weekend day shifts, and 18-35 work the weekend night shifts. In total, the Club has about 65 active or semi-active dancers. Several dancers work one to two shifts a week. Most work three shifts a week. A few work up to five shifts a week.

The Performer Lease Contract

When the dancers start to work at the Club, they are required to sign a “Performer Lease Agreement” (“Contract”) which allows dancers a “non-exclusive right to lease space to perform live seminude dance and associated activities for patrons at the Club.”³⁵ The Contract does not prohibit dancers from working at other clubs. The Contract lasts for one year and automatically renews unless terminated by one of the parties.

The Contract states that dancers may lease a space to dance on any day they wish but must notify the Club of her dates one week in advance. The daily rental rate is \$50 per shift.³⁶ Dancers also pay “assistance fees” (e.g., a portion of their tips) to employees who help the dancer (the DJ, floor workers, security, and “house moms”).³⁷ They also pay a fee each time they use a back room to perform a private dance. They are charged a \$50 cancellation fee if they miss a scheduled day and penalties ranging from \$5 to \$50 for showing up late, leaving early, sitting out “up time” dances, and other policy violations.³⁸

The Contract states that the dancer is an “independent contractor” and the Club has “no right to direct or control the nature, content, character, or means of the dancer’s performance.”³⁹ The dancer has full discretion to choose her costumes and apparel so long as they comply with state laws governing exotic dancing.⁴⁰ Dancers are also allowed to

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 7.

³⁶ *Id.* (the *Centerfold Club* house fee was \$14 a night). In other clubs, as of 2017, the “house fee” varied from \$10 to \$100 a shift depending on the club and shift.

WORKPLACE PERSPECTIVES ON EXOTIC DANCING, *supra* note 4 at 16.

³⁷ *Id.* at 8.

³⁸ *Id.* at 7.

³⁹ *Id.* at 8.

⁴⁰ *Id.*

pick the songs they dance to as long as they fall within the rock or country music genres.⁴¹

The Contract states that the Club is not responsible for any liability related to employers, such as recordkeeping, payment of wages, or deduction of employer-side taxes. Dancers are required to pay their own taxes and carry their own liability insurance.⁴² They also agree to comply with Ohio laws regulating nudity (nipples and genitals must be covered at all times) and the touching of patrons while semi-nude.⁴³

Unwritten Rules and Expectations

The Club requires dancers to comply with a series of unwritten rules. They must wear high-heeled shoes. The Club's employees make suggestions about their appearances and how they can better approach the patrons. When on stage, they must dance for two songs and remove their top within the first minute. The dancers cannot leave the stage during their two-song set. Twice an hour, every dancer must participate in "up-time" dance promotions, in which the DJ calls all dancers on stage, introduces them, and announces a limited-time two-song private dance special. Following the announcement, the dancers must approach each patron to try to sell a private dance. They must also sit with patrons who buy them drinks and stay longer for more expensive drinks.⁴⁴

Dancer's Compensation

Dancers have four sources of income at the Club: tips, dance performance fees, drink commissions, and a guaranteed shift amount. Tips include cash given to dancers when they perform on stage and are not shared with the Club or staff.

Dance performance fees are the fees for individual "lap dances" and one-on-one dances in the more secluded private rooms. The Club sets the minimum price dancers may charge for private dances and sets a fee/split that the dancer pays for use of back rooms.⁴⁵ The charge for a 3 song/10-minute "lap dance" is \$25 on weekdays and \$30 on weekends.⁴⁶ Private VIP backroom dances are set at \$200 for 30 minutes during weekdays and \$250 for 30 minutes during weekends.⁴⁷ These

⁴¹ *Id.* at 9.

⁴² *Id.* at 8.

⁴³ *Id.*

⁴⁴ *Id.* at 9.

⁴⁵ *Id.* at 8.

⁴⁶ *Id.* at 8.

⁴⁷ As of 2017, clubs in Minneapolis charged from as low as \$75 for a half hour to \$400 for a full hour of a semi-private dance. WORKPLACE PERSPECTIVES ON EXOTIC DANCING, *supra* note 4 at 21. It is worth noting that, with the expense and privacy

charges are split with 65% going to the dancer and 35% to the Club. While dancers are allowed to negotiate higher prices with the customers for VIP dances, the Club/dancer split remains the same.

Dancers also receive a 50% “commission” for every drink that a customer buys for them—they get credited half of the drink price.⁴⁸

Dancers’ earnings vary widely, from \$0 a shift to over \$1,500 on rare occasions. Most dancers earn between \$150-\$350 on a day shift, \$200-\$450 on a weeknight and weekend day shift, and \$250-\$700 on weekend night shifts.⁴⁹ Some dancers regularly earn more, and others regularly earn less.

Finally, the lease includes an “entertainer-tenant guarantee” in which the Club agrees to ensure that the entertainer will earn a minimum amount each day they lease the space. If the dancer earns less than \$100 a shift, the Club will pay the difference to ensure that dancers make at least \$100.⁵⁰

A few dancers maintain an active online presence. They use social media (*e.g.*, Instagram and TikTok) to promote their brand, dancing, and dance locations. Some dancers use online pay platforms such as OnlyFans to charge viewers to watch them perform pornographic-related content.⁵¹ The Club does not regulate these activities and does not earn a percentage of this income.

associated with VIP dances, there is often an expectation that dancers will engage in more physical contact and sexual touching. These dances also present the most risk of sexual or physical assault. *id.* at 21 – 23 (“The VIP space is inherently a grey zone where the lines are deliberately blurred and expectations are vague in order to convince customers to spend more money.”).

⁴⁸ *Id.* at 8-9.

⁴⁹ *Id.* at 6 (reporting that entertainers earn from \$700 over a full week of day shifts to \$1,000 for one nightshift); Barton, *supra* note 3 at 27 (reporting that, as of 2017, most entertainers averaged around \$200 a shift and may make much more depending on the club and shift).

⁵⁰ *Id.* at 9.

⁵¹ OnlyFans acts as a video hosting service that allows content creators to upload videos and charge their subscribers. Subscribers pay creators through pay-per-view, monthly instalments, and one-time tips, with the company taking a percentage of the fees. OnlyFans is largely used by amateur and professional pornographic creators. Jacob Bernstein, *How OnlyFans Changed Sex Work Forever*, N.Y. TIMES (Feb. 9, 2019), <https://www.nytimes.com/2019/02/09/style/onlyfans-porn-stars.html> (last visited Aug. 23, 2025); Jessica Newman, *OnlyFans Owner in Talks to Sell Site for \$8bn*, THE TIMES.CO.UK (May 24, 2025), <https://www.thetimes.com/business-money/companies/article/onlyfans-owner-in-talks-to-sell-site-for-8bn-hz7w2xdc> (last visited Aug. 23, 2025) (reporting that the site generated \$6.6 billion in revenue in 2023 and is priced to sell at over \$8 billion, and is also mired in controversy involving non-consensual pornography, child abuse, and exploitation).

The Law Governing Employee Classification

State and federal laws draw a distinction between employees and independent contractors. The Department of Labor and courts use the six factor economic realities test to determine whether, under the Fair Labor Standards Act (herein after referred to as “FLSA”), a worker is an employee *or* an independent contractor. The central question is whether the worker is economically dependent on an employer for work or is instead in business for themselves. Each of the following factors needs to be considered and weighed when making this decision:

1. Opportunity for profit or loss depending on managerial skill,
2. Investments by the worker and the employer,
3. Permanence of the work relationship,
4. Nature and degree of control,
5. Whether the work performed is integral to the employer’s business, and
6. Skill and initiative. (29 C.F.R. § 797.110)

You need to help determine whether the dancers are employees or independent contractors and decide what the Club should do next.

III. TEACHING AND DEBRIEFING THE ACTIVITY

The classification of a worker as an independent contractor or an employee is a binary decision. A worker is either an employee *or* an independent contractor. The classification process is not straightforward because it involves a fact-specific and individualized analysis of several factors to determine whether the worker is economically dependent on the company.⁵²

With this said, *almost every court* across the United States has found exotic dancers to be employees and not independent contractors, and many of these decisions have been at the summary judgment stage.⁵³

⁵² See *Barrantine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981).

⁵³ See, *c.f.*, *Gilbo v. Agment, LLC*, 831 Fed. Appx. 772 (6th Cir. 2020); *Verma v. 3001 Castor, Inc.*, 937 F.3d 221 (3rd Cir. 2019); *McFeeley v. Jackson St. Entm’t, LLC*, 825 F.3d 235 (4th Cir. 2016); *Hart v Rick’s Cabaret Int’l, Inc.*, 967 F. Supp. 2d 901 (2d Cir. 2013); *Reich v. Circle C Invs.*, 998 F.2d 324 (5th Cir. 1993); *Clifton v. Famous Bourbon Mgmt. Grp., Inc.*, 762 F. Supp. 3d 480 (E.D. La. 2025); *Haile v. 566 Nostrand Ave. Inc.*, 2024 U.S. Dist. LEXIS 57835 (E.D.N.Y. 2024); *Powell v. Kloss*, 2024 U.S. Dist. LEXIS 37519 (W.D. Ark. 2024); *Holandez v. Ent., LLC*, 2023 U.S. Dist. LEXIS 215399 (C.D. Cal. 2023); *Land v. Centerfold Ent. Club, Inc.*, 2023 U.S. Dist. LEXIS 171906 (W.D. Ark. 2023); *Manasco v. Best in Town, Inc.*, 2023 U.S. Dist. LEXIS 162313 (N.D. Ala. 2023); *Tassy v. Lindsay Entm’t Enters.*, 591 F. Supp. 3d 191 (W.D. Ky. 2022); *Johnson v. N. Tex. Dancers, LLC*, 2021 U.S. Dist. LEXIS 97389 (N.D. Tex. 2021); *Mays v. Rubiano, Inc.*, 560 F. Supp. 3d 1230 (N.D.I.N. 2021); *Roldan v. PSLA LLC*, 2021 U.S. Dist. LEXIS 196596 (C.D. Cal. 2021); *Gilbo*

There are two notable outliers. In 2020, the Fifth Circuit affirmed a jury verdict from a Texas District Court finding that the dancers were independent contractors.⁵⁴ And in 2000, an Oregon Federal District Court granted summary judgment in favor of the employer, concluding that the dancers were independent contractors.⁵⁵

A. ARE THE DANCERS EMPLOYEES OR INDEPENDENT CONTRACTORS UNDER THE DEPARTMENT OF LABOR'S ECONOMIC REALITIES TEST?

The economic reality test uses six factors to determine if an employment relationship exists for the FLSA.⁵⁶ The test's overarching goal is to determine whether workers are economically dependent on their employer for work or are instead in business for themselves. While all factors should be considered, no single factor alone determines a worker's status, and no single factor is more important than the others.⁵⁷ Instead, the totality of the circumstances of the working relationship should be considered.⁵⁸

Different multifactor tests are used for other legal regimes. The National Labor Relations Board (hereinafter referred to as the "NLRB") applies a ten-factor common law agency test.⁵⁹ The Internal Revenue Service (hereinafter referred to as the "IRS") uses a common law test that focuses on the degree of control and independence between the worker and business.⁶⁰ The primary IRS considerations are behavioral

v. Agment LLC, 2020 N.D. Tex. U.S. Dist. LEXIS 26031 (N.D. Ohio 2020), *aff'd* 831 Fed. Appx. 772; *Jones v. Shac LLC*, 2019 U.S. Dist. LEXIS 151888 (D. Nev. 2019); *Hurst v. Youngelson*, 354 F. Supp. 3d 1362 (N.D. Ga. 2019); *Levi v. Gulliver's Tavern, Inc.*, 2018 U.S. Dist. LEXIS 231884 (D.R.I. 2018); *Miller v. Centerfold Entm't Club, Inc.*, 2017 U.S. Dist. LEXIS 125945 (W.D. Ark. 2017) (post-trial order); *Degidio v. Crazy Horse Saloon & Rest., Inc.*, 2015 U.S. Dist. LEXIS 132558 (D.S.C. 2015); *Thompson v. Linda and A., Inc.*, 779 F. Supp. 2d 139 (D.D.C. 2011); *Clinicy v. Galardi South Enterprises, Inc.*, 808 F. Supp. 2d 1326 (N.D. Ga. 2011); *Morse v. Mer Corp.*, 2010 WL 2346334 (S.D. Ind. 2010); *Harrell v. Diamond A Entertainment, Inc.*, 992 F. Supp. 1343 (M.D. Fla. 1997); *Lewis v. L.B. Dynasty*, 770 S.E.2d 393, 396 (S.C. 2015); *Terry v. Sapphire Gentlemen's Club*, 336 P.3d 951 (Nev. 2014); *Milano's, Inc. v. Kansas Dep't of Labor*, 293 P.3d 707, 709 (Kan. 2013).

⁵⁴ *Nelson v. Tex. Sugars, Inc.*, 838 Fed. Appx. 39, 43 (5th Cir. 2020).

⁵⁵ *Matson v. 7455, Inc.*, 2000 U.S. Dist. LEXIS 23013, *14 (D. Or. Jan. 14, 2000); *but see Hurst*, 354 F. Supp. 3d 1362 at 1369 (characterizing *Matson's* analysis of the economic realities test as "scant" and rejecting *Matson's* reasoning).

⁵⁶ 29 C.F.R. § 795.110.

⁵⁷ *Id.*; *McFeeley*, 825 F.3d at 241.

⁵⁸ 29 C.F.R. § 795.110(a).

⁵⁹ *The Atlanta Opera, Inc., and Make-Up Artists and Hair Stylist Union, Local 798, IATSE*, 372 NLRB No. 95, 2-3 (2023).

⁶⁰ I.R.S. PUB. 15-A, EMPLOYER'S SUPPLEMENTAL TAX GUIDE (2025); I.R.S. PUB., INDEPENDENT CONTRACTOR (SELF-EMPLOYED) OR EMPLOYEE?, <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee> (last visited Aug. 23, 2025); I.R.S. TOPIC NO.

control, financial control, and the type of relationship.⁶¹ In Title VII cases, courts may apply a hybrid economic realities test.⁶²

The label used by the parties to describe the work relationship is not relevant to the legal classification of the worker.⁶³ The fact that the parties sign a contract designating the worker as “independent contractor,” that the worker will not be paid hourly or salaried wages, or that the worker will receive a 1099 form does not make the worker an independent contractor under the FLSA.⁶⁴ What matters is the nature of the relationship. The ultimate decision is made by weighing the factors, considering the totality of the circumstances, and asking whether the “worker is economically dependent on the potential employer for work or is in business for themselves.”⁶⁵

The following factors should guide the classroom discussion on the application of the economic realities test.

1. Opportunity for Profit or Loss Depending on Managerial Skill

The first factor considers “whether the worker has opportunities for profit or loss based on managerial skill (including initiative or business acumen or judgment) that affect the worker's economic success or failure in performing the work.”⁶⁶ Relevant facts include whether the worker negotiates their pay, decides to accept or decline work, hires their own workers, purchases material and equipment, or engages in other efforts to expand a business or secure more work, such as marketing or advertising.⁶⁷ If the worker is unable to make a profit or loss based on their own managerial skills, they are likely an employee.⁶⁸

When approaching this factor, start by asking your students, “What can a Centerfold Club dancer do to make more money and be more profitable?” Students might answer with the following:⁶⁹

762, INDEPENDENT CONTRACTOR VS. EMPLOYEE, <https://www.irs.gov/taxtopics/tc762> (last visited Aug. 23, 2025).

⁶¹ *Id.*, I.R.S. TOPIC NO. 762.

⁶² *See, e.g., Doe v. Mia Gardens Square One, Inc.*, 2025 U.S. Dist. LEXIS 6051, *19-20 (S.D. Fla. 2025) (considering dancer’s Title VII sexual harassment claim).

⁶³ FACT SHEET 13, *supra* note 15 (“What the worker is called is not relevant—a worker may be an employee under the FLSA regardless of the title or label they are given.”).

⁶⁴ *Verma*, 937 F.3d at 229 (“The whole point of the FLSA and the PMWA is to protect workers by overriding contractual relations through statute.”).

⁶⁵ 29 CFR § 795.110(a)(1).

⁶⁶ 29 C.F.R. § 795.110(b)(1).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *See* Susannah Breslin, *This Veteran Stripper Coaches Dancers on How to Maximize Their Hustle*, FORBES (Jun. 22, 2017),

- Work more hours.
- “Hustle.” The more tips they get while on stage, the more they will make. Their income will depend on how many three-song dance sets they do and how many private VIP dances they perform. This requires endurance, adaptability, and persistence.
- Improve their craft and stay in physical shape. Develop dance skills and choreography. Dancers need to be physically fit and have endurance.
- Invest in physical appearance. The job rewards dancers who meet beauty and fitness standards. Dancers will also need to invest in their clothing, makeup, and appearance.
- Be strategic. Consider work shifts and locations that attract more customers with money to spend. This might include considering large events in the community that might drive traffic such as conventions, sporting events, and festivals. Choose which clubs to work at. Identify and cultivate customers who are willing to pay for private dances.
- Good branding. Develop a distinctive image to stand out. Choose a strong stage name, develop dance styles, and focus on a particular look that resonates with customers.
- Develop an interpersonal approach and navigate customers. Dancers need to navigate distinct types of customers, many of whom are drinking alcohol, and some will have difficult personalities for dancers to deal with. Determine how to navigate the uniquely sexualized atmosphere and work.
- Establish and cultivate repeat customers.
- Use digital platforms for online and other marketing.

Each of these efforts will help a dancer make more money and profits.

The next critical question is, “Are these efforts managerial in nature?” When pressed, the students should recognize that most of these activities are based on the dancers’ “hustle” and not their managerial skills. Nearly every court has rejected the argument because hustling is neither managerial nor entrepreneurial.⁷⁰ The reasoning is as follows:

<https://www.forbes.com/sites/susannahbreslin/2017/06/22/strip-er-tips/> (last visited Aug. 23, 2025); *How to Increase Your Stripper Income*, WIKIHOW (Mar. 10, 2025), <https://www.wikihow.com/Increase-Your-Stripper-Income> (last visited Aug. 23, 2025) (explaining strategies to maximize profits as an exotic dancer).

⁷⁰ *McFeeley*, 825 F.3d at 243 (“It is natural for an employee to do his part in drumming up business for his employer, especially if the employee’s earnings depend on it. An obvious example might be a salesperson in a retail store who works hard at drawing foot traffic into the store. The skill that the employee exercises in that context is not managerial but simply good salesmanship.”); *Pizzarelli v. Cadillac Lounge, L.L.C.*, 2018 U.S. Dist. LEXIS 117338, *13-14 (D.R.I. Apr. 13, 2018) (citing cases, “Plaintiff choosing which work shifts to work is not “initiative” in the

That a dancer may increase her earnings by increased 'hustling' matters little. As is the case with the zealous waiter at a fancy, four-star restaurant, a dancer's stake, her take and the control she exercises over each of these are limited by the bounds of good service; ultimately, it is the restaurant that takes the risks and reaps the returns.⁷¹

In this case, the dancers cannot negotiate the terms of the Club's Performer Lease Agreement to make more profit. The agreement dictates the terms of their compensation. Dancers cannot negotiate the rate charged for private dancing, the split between the dancers and the Club, or alternative models for charging customers. While they can negotiate a higher price with the customer for private dances, the Club establishes the primary economic model. At best, the dancers' ability to make more profit is limited to their ability to generate more tips from customers.⁷²

In comparison, the Club controls the stream of clientele by setting club hours. It controls the prices for dances. It manages the atmosphere in the Club. It coordinates and pays for all Club advertising, which is far more impactful on driving customers to the Club than individual dancer advertising. Courts routinely find that this factor weighs in favor of an employee status.⁷³

Some students may argue in favor of an independent contractor status by pointing out that some dancers use online platforms to develop and market their stripping, cultivate their brand, and earn money from other online performances.⁷⁴ Some of these actions, such as independent marketing for their personal dance appearances, are more managerial in nature. To the extent that a few dancers use their exotic dancing work to cross-promote their online work, their online work is likely insufficient to transform their employment classification with the Club.

business sense of the word); *but see Nelson*, 838 Fed. Appx. 39, 40 (affirming jury verdict in favor of club); *Matson*, 2000 U.S. Dist. LEXIS 23013 at *14 (granting summary judgment to the dancer and stating: "[T]he plaintiff was paid exclusively through fees and tips for table dances, income which was largely dependent on the plaintiff's own skill to attract customers and not on any salary or hourly wage set by the defendants. Through this method of compensation, the plaintiff was in control of her opportunity for profit.").

⁷¹ *Harrell*, 992 F. Supp. at 1252.

⁷² *Hurst*, 354 F. Supp. 3d 1362 at 1376.

⁷³ *See Gilbo*, 831 Fed. Appx. at 777; *Verma*, 937 F.3d at 230-31; *Reich*, 998 F.2d at 328.

⁷⁴ OnlyFans model is largely a pornographic site where the performers charge for viewings and subscriptions.

The instructor should then ask how the relationship could be changed to give a dancer more managerial control. The Club could allow the dancers to individually set the terms of their private dances – how long they dance, how much they charge, and the terms for private backroom dances. Clubs could allow the dancers to keep all of the money they earn throughout their shift. Clubs could rent out different spaces in the club and allow the dancers to establish their own dance fees, which would be more akin to hairdressers renting a chair in a salon.

Likewise, dancers who travel the regional or national circuit as short-term featured guest artists are more likely able to negotiate the terms of their contracts with each club. These dancers may also work with independent talent agencies or touring companies to book one-night or short-term engagements.

2. Capital and Entrepreneurial Investments Made by the Worker and Employer

“This factor considers whether any investments by a worker are capital or entrepreneurial in nature.”⁷⁵ In addition to considering the nature of the investments, the worker’s investments should be compared to those of the employer in the overall business.⁷⁶ The NLRB test similarly asks whether the worker has an “entrepreneurial opportunity.”⁷⁷

The typical costs for a worker’s tools at a specific job are generally not the type of “capital or entrepreneurial investments” that establish an independent contractor status.⁷⁸ Dancers do invest in their jobs. They buy their own outfits, footwear, cosmetics, and hair products. They pay gym fees and may have plastic surgery to modify their bodies.⁷⁹ They

⁷⁵ 29 C.F.R. § 795.110(b)(2).

⁷⁶ *Id.*

⁷⁷ *Atlanta Opera*, 372 NLRB No. 95 at 56 (entrepreneurial opportunities factors include: whether “the putative contractor (a) has a realistic ability to work for other companies; (b) has proprietary or ownership interest in their work; and (c) has control over important business decisions, such as the scheduling of performance; the hiring, selection, and assignment of employees; the purchase and use of equipment; and the commitment of capital.”)

⁷⁸ *Id.*

⁷⁹ While a taxpayer may deduct all the ordinary and necessary expenses paid to carry on a trade or business, no deduction is allowed for personal, living, or family expenses. 26 U.S.C.S. § 262. The cost to enhance one’s health or personal appearance, even if paid for business reasons, are not deductible business expenses. *Hess v. Comm’r of Internal Revenue*, 1994 U.S. Tax Ct. LEXIS 88, *6 (U.S.T.C. 1994). In exceedingly rare instances, the IRS has allowed radical breast implants to be deducted where they are so large that they are detrimental to the worker’s health and so large that they are unnatural that they “contort her body into a grotesque appearance.” *id.* at 9.

pay to travel to different clubs. The question is whether these expenses are capital or entrepreneurial in nature. Dancers may prefer to be categorized as independent contractors to deduct some, but not all, of these expenses.⁸⁰

Courts often find that most of these expenses are comparable to other employees' who need to buy work-appropriate attire (*e.g.*, professionals may need to buy suits) or equipment. They generally do not rise to the level of capital or entrepreneurial investment.⁸¹ From a tax perspective, clothing is only deductible if it is "useful only in a business environment," such as theatrical costumes and work uniforms.⁸²

One applicable capital or entrepreneurial expense is the liability insurance that each dancer must maintain. Students may also point to the costs of developing a personal online presence and business. These expenses may be relevant to the extent that they are focused on advertising the dates and locations of their dancing and therefore suggest some independent entrepreneurial activity.

In contrast, clubs provide the primary capital and entrepreneurial investments for the business, including the building and related maintenance, furniture, kitchen, lighting, sound equipment, stages, food, alcohol, and other beverages. Clubs also pay for permits, building and property insurance, security, DJs, bartenders, servers, and staff.⁸³ Comparing these investments, Courts routinely find that this factor weighs heavily in favor of an employee status.⁸⁴

⁸⁰ For instance, an employee cannot deduct travel expenses to a workplace, but an independent contractor can. 26 U.S.C. § 162(a) (trade or business expense deduction); 29 U.S.C. § 254(a) (employees not paid to travel to primary workplace).

⁸¹ By way of example, a graphic designer who purchases drafting tools would be more akin to an employer where a designer that purchase their own design software, computer, drafting tools, and rents their own space, spends money on marketing would be the type of investment to support an independent contractor status. DEP'T. OF LABOR, *Fact Sheet 13*, *supra* note 15.

⁸² *Hess*, 1994 U.S. Tax Ct. LEXIS 88 at *10-11.

⁸³ *McFeeley*, 825 F.3d at 243 (affirming finding of employment status where club paid rent for the clubs, business liability insurance, advertising, and wages of non-performing staff).

⁸⁴ *Centerfold Club*, *supra* note 26 at 86; *see also Gilbo*, 831 Fed. Appx. at 777; *Verma*, 937 F.3d at 18 (quoting *Verma*, 2014 WL 2957453 at *8) ("Castor owns and maintains the Club's premises, pays its licensing fees, purchases alcohol for it, and manages, pays and trains its personnel. As Judge Brody noted, courts that have considered similar economic arrangements have all concluded that "a dancer's investment is minor when compared to the club's investment."); *McFeeley*, 825 F.3d at 243; *Reich*, 998 F.2d at 327-328 ("A dancer's investment in costumes and a padlock is relatively minor to the considerable investment Circle C has in operating a nightclub.... Circle C owns the liquor license, owns the inventory of beverages and refreshments, leases fixtures for the nightclub (*e.g.*, the stage and lights), owns sound equipment and music, maintains and renovates the facilities, and advertises

3. Permanence of the Work Relationship

This factor considers whether a working relationship is permanent or more short-lived. The longer, more continuous, and exclusive the relationship is, the more likely the workers will be employees.⁸⁵ Independent contractor relations are, on the contrary, more “definite in duration, non-exclusive, project-based, or sporadic-based on the worker being in business for themselves and marketing their services or labor to multiple entities.”⁸⁶

Many exotic dancers choose the work because they can control when and where they work and can step in and out of the industry.⁸⁷ Many work at different clubs during the same time period and regularly move between their primary clubs.⁸⁸ In the case at hand, the Club’s dancers choose the days and shifts they work and can work at other clubs. This mobility is consistent with independent contractor status, but it will depend on the actual habits of the dancers.

The dancers’ ability to work at other clubs does not necessarily mean that their working relationship is impermanent. Again, a worker is more likely an independent contractor when the work relationship is “definite in duration, non-exclusive, project-based, or sporadic based on the worker being in business for themselves and marketing their services or labor to multiple entities.”⁸⁹ In the *Centerfold Club*, the NLRB held that the dancers’ “ability to work elsewhere, or in other lines of work, does not materially distinguish them from countless other workers, particularly those in the service sector, who perform the same work for multiple employers in order to make a living.”⁹⁰

Students may point out that the dancers sign one-year leases that automatically renew if not terminated, which may point to a longer-term relationship. And, in fact, the former dancers who were the

extensively.”); *Clincy*, 808 F. Supp. 2d at 1345-1347 (“Defendants are primarily responsible for attracting customers to the Club, as decisions about marketing and promotions for the Club, its location, its maintenance, aesthetics, and atmosphere, and food and alcohol availability and pricing are made by Defendants,” whereas dancers spent on average about \$14,000 per year on costumes, makeup, grooming, and the like); *Morse*, 2010 WL 2346334 at *12; *Harrell*, 992 F. Supp. at 1350.

⁸⁵ 29 C.F.R. § 795.110(b)(3).

⁸⁶ *Id.*

⁸⁷ Wilmet, *supra* note 24 at 491; WORKPLACE PERSPECTIVES ON EXOTIC DANCING, *supra* note 4 at 13; Barton, *supra* note 3 at 58.

⁸⁸ *McFeeley*, 825 F.3d at 244; *Clincy*, 808 F. Supp. 2d at 1348 (“[C]ourts have found . . . that nude entertainers tend to be transient or itinerant.”).

⁸⁹ 29 C.F.R. § 795.110(b)(3).

⁹⁰ *Centerfold Club*, *supra* note 31 at 18.

complainants in the *Centerfold Club* case both worked at the Club for several years.⁹¹

In this case situation, the permanence factor weighs in favor of independent contractor status or, arguably, is inconclusive.⁹²

4. *Nature and Degree of Control*

This factor considers the employer's potential and actual control over the performance of the work and the economic aspects of the working relationship.⁹³ The more control that a company has over a worker, the more likely there is an employment relationship.⁹⁴

The dancers have some control over the work. They can work a flexible schedule and choose which days and shifts to work.⁹⁵ They can also choose the music they dance to and negotiate higher private dance charges with their customers.⁹⁶ Otherwise, the Club controls the dancer's day-to-day work.

In *Nolan Enterprise, Inc. d/b/a Centerfold Club and Brandi Campbell* (hereinafter *Centerfold Club*), on which this activity is based, the NLRB concluded that the club substantially controlled the work relationship:

In addition to controlling the dancers' day-to-day activities, the club controls the hours of operation, the maintenance of the building, the aesthetics and decor, the sound system and music, and the inventory and pricing of food and beverages. It controls the customers coming into the Club through advertising, promotions, and determining and enforcing the cover charge. Finally, it is responsible for hiring and employing the bartenders, servers, DJs, security, and other staff—all of whom the dancers rely upon to earn their income.⁹⁷

⁹¹ *Id.* (dancers worked at the club between 1.5 and 4 years).

⁹² *Haile*, 2024 U.S. Dist. LEXIS 57835 at *10-11 (finding factor in support of independent contractor status); *Holandez*, 2023 U.S. Dist. LEXIS 215399 at *37 (finding factor inconclusive); *Levi*, 2018 U.S. Dist. LEXIS 231884 at *17 (finding this factor in favor of independent contractor status).

⁹³ 29 C.F.R. § 795.110(b)(4).

⁹⁴ See *McFeeley v. Jackson Street Entertainment, Inc.*, 47 F. Supp. 3d 260, 269 (D. Md. 2014) ("degree of control" depends on club's "potential power ... to enforce its rules and manage dancers' conduct").

⁹⁵ *Wilmet*, *supra* note 24 at 491.

⁹⁶ *Holandez*, 2023 U.S. Dist. LEXIS 215399 at *33-35 (C.D. Cal. 2023) (finding extensive control is not offset by dancers' ability to charge more for dances).

⁹⁷ *Centerfold Club*, *supra* note 26 at 17.

Courts routinely find that this factor weighs strongly in favor of employment status.⁹⁸

5. *Skill and Initiative*

This factor considers whether the worker uses specialized skills to perform the work and whether those skills contribute to a businesslike initiative.⁹⁹ The less a worker relies on specialized skills and the more they depend on training from the potential employer, the more likely an employment relationship exists.¹⁰⁰

The analysis for this factor is similar to the first factor relating to entrepreneurial skills. Here, specialized skills are not required for dancers to join the Club. This is not to say exotic dancing is without skill. It is rather to say that “[s]trip clubs do not require entertainers to have prior experience or know how to dance, although it can be a plus for getting hired.”¹⁰¹ A dancer would benefit by having strong dance and performance skills, but these skills are generally not considered specialized. Similar to the first factor, the relevant interpersonal and sales skills are more akin to waiters, bartenders, or commission-based salespeople who are all generally considered to be employees, and not independent contractors.¹⁰² As such, this factor weighs in favor of an employee status.

6. *Whether the Work Performed is Integral to the Employer’s Business*

This factor considers whether the work performed is an integral part of the potential employer's business. The more central the work is, the more likely it is to be an employment relationship.¹⁰³ This factor does not depend on whether individual workers are integral to the business,

⁹⁸ See *McFeeley*, 825 F.3d at 242 (“The many ways in which defendants directed the dancers rose to the level of control that an employer would typically exercise over an employee. To conclude otherwise would unduly downgrade the factor of employer control and exclude workers that the FLSA was designed to embrace.”); *Reich*, 998 F.2d at 327; *Clifton*, 762 F. Supp. 3d at 491 (granting summary judgment on independent contractor status where club required a house rental fee for each day of work, set room rent fee charges, monitored tips, charged a fee if dancers left before end of shift, and retained the right to terminate dancers at will); *Haile*, 2024 U.S. Dist. LEXIS 57835 at *7; *Johnson*, 2021 U.S. Dist. LEXIS 97389 at *10-11.

⁹⁹ 29 C.F.R. § 795.110(b)(6).

¹⁰⁰ *Id.*

¹⁰¹ WORKPLACE PERSPECTIVES, *supra* note 4 at 13; *Verma v. 3001 Castor, Inc.*, 2014 U.S. Dist. LEXIS 88459, *31 (E.D. Pa. 2014), *aff’d* 937 F.3d 221 (3rd Cir. 2019) (“None of the skills evaluated in the Defendant's audition process rise to the level of a special skill set that would distinguish Defendant's dancers from the multitude of entertainers that courts have held to be employees in analogous actions.”).

¹⁰² *Centerfold Club*, *supra* note 31 at 17.

¹⁰³ 29 C.F.R. § 795.110(b)(5)

but rather “whether the function they perform is an integral part of the business.”¹⁰⁴

Courts have long “scoffed at the idea that exotic dancers are anything less than integral to 'gentlemen's clubs'.”¹⁰⁵ Gentlemen’s clubs are, by definition, intrinsically reliant on erotic dancing. Without the dancers, the club would be a bar or out of business. The primary purpose of the Club is for customers to watch exotic dancing. This factor weighs heavily in favor of an employee status.¹⁰⁶

This is a good opportunity for instructors to talk about other gig work, such as Uber, Lyft, and DoorDash, in which the drivers are arguably the core of the business model.

7. *Weighing All of the Factors*

Because some aspects of a particular work arrangement may favor independent contractor status and others may favor employment status, courts will weigh all the factors and consider the totality of the circumstances to determine the proper classification. The Supreme Court explains, “all the incidents of the relationship must be assessed and weighed with no one factor being decisive.”¹⁰⁷ In this case, all but one of the factors (permanence of work) weigh in favor of employment status. And the factors of control, investment, and centrality to the business strongly weigh in favor of employment status. The dancers are therefore almost certainly employees.

B. WHAT ARE THE CONSEQUENCES OF CLASSIFYING DANCERS AS EMPLOYEES INSTEAD OF INDEPENDENT CONTRACTORS?

The stakes are high when dancers are classified as independent contractors. Independent contractors lack minimum wage and anti-

¹⁰⁴ *Id.*

¹⁰⁵ *Hart*, 967 F. Supp. 2d 901 at 921 (“Rick’s NY argues that the presence of entertainers was only one aspect of the Club’s facilities and was not integral to the Club. [...] It argues that the Club’s restaurant, bar, and televisions served to attract customers. [...] This argument is totally unpersuasive. No reasonable jury could conclude that entertainers were not integral to the success of a club that marketed itself as a club for entertainers”); *Butler v. PP&G, Inc.*, 2013 U.S. Dist. LEXIS 159417, *14 (D. Md. 2013) (“[A]ny contention that the exotic dancers were not integral to the operation of Norma Jean’s flies in the face of logic”).

¹⁰⁶ *Centerfold Club*, *supra* note 31 at 89; *see also*, *Gilbo*, 831 Fed. Appx. at 778; *Verma*, 937 F.3d at 232; *McFeeley*, 825 F.3d at 244; *Reich*, 998 F.2d at 327; *Clifton*, 762 F. Supp. 3d at 491.

¹⁰⁷ *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 451 (2023) (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 (1982), quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968)).

discrimination protections, workplace safety protections, and the right to organize and collectively bargain. They lack employment security if they are injured, miss work due to pregnancy and birth, as well as personal or family health problems. Finally, they must personally pay employer-side Social Security, Medicare, and state taxes. Meanwhile, clubs can avoid these costs and regulations.

Considering this, the instructor should ask students, “What legal exposure do clubs face for misclassifying their dancers?”

1. Wage Theft

The FLSA and accompanying state laws require employers to pay non-exempt employees a minimum hourly wage and overtime if they work more than 40 hours a week.¹⁰⁸ The federal minimum wage has been at \$7.25 an hour from 2009 through the date of this article’s publication.¹⁰⁹ State minimum wages range from as low as \$7.25 an hour to as high as \$16.66 an hour in Washington, as of 2025.¹¹⁰

Because the Centerfold Club is in Ohio, it is subject to the Ohio minimum wage, which adjusts for inflation each year. The hourly minimum rate in Ohio was \$9.30 in 2022, \$10.10 in 2022, \$10.45 in 2024, and \$10.70 in 2025.¹¹¹ The FLSA and Ohio law both allow employers to use a “tip credit” to reach minimum wage. For the FLSA, tips received can make up to \$5.12 an hour of the \$7.25 minimum wage when calculating minimum wage.¹¹² In Ohio, employers can use tips to meet 50% of the minimum wage requirement.¹¹³ Therefore, in 2025, the employer must pay tipped employees at least \$5.05 an hour (half of \$10.10) plus any extra needed in addition to the earned tips to ensure the employees meet the \$10.10 minimum wage.

The FLSA also prohibits mandatory policies requiring employees to share their tips with managers and non-service employees, such as DJs and security guards.¹¹⁴ It is also illegal in some states to require tipped employees to share their tips without their freely given consent.¹¹⁵

¹⁰⁸ 29 U.S.C. § 206 (FLSA minimum wage); 29 U.S.C. § 207 (FLSA overtime); Ohio Const. Art. 2, §34a (Ohio minimum wage); Oh. Rev. Code § 4111.03 (Ohio overtime).

¹⁰⁹ 29 U.S.C. § 206.

¹¹⁰ Rev. Wa. Code § 49.46.020.

¹¹¹ Ohio Const. Art. 2, §34a; Ohio Rev. Code § 4111.02

¹¹² 29 C.F.R. § 531.59(a).

¹¹³ Ohio Const. Art. 2, §34a.

¹¹⁴ 29 C.F.R § 531.54.

¹¹⁵ See, e.g., Minn. Stat. §177.24, subd. 3.

Miscategorized employees can receive all backpay for the hours worked for the preceding two years before filing a lawsuit, and for three years if the misclassification was willful.¹¹⁶ Dancers can also be awarded liquidated damages that double the unpaid wages if the miscalculation was willful.¹¹⁷ Finally, dancers will be awarded their attorney fees and costs if they prevail in their lawsuit.¹¹⁸

Although the Centerfold Club likely miscategorized the dancers as employees, it is doubtful that the dancers will be able to recover unpaid minimum wages because they were guaranteed \$100 a shift in compensation which exceeds minimum wage. Because the shifts were 6 hours long, the dancers would need to receive \$64.20 (6 hours x \$10.70) to meet the Ohio minimum wage requirements and \$43.50 (6 hours x \$7.25) to meet the federal requirement. They would also be ineligible for overtime pay because they did not work over 40 hours a week.

The Department of Labor also takes the position that the clubs violate the FLSA when they require dancers to (1) pay the club for the right to work, (2) share tips with managers and non-service employees, and (3) penalize employees for policy violations.¹¹⁹ If applicable, these damages might include the charge for \$50 a shift, the shared tips with DJs and other non-service employees, and penalties for policy violations.¹²⁰ If each dancer pays between \$25-\$100 in “shared tips” each workday, these damages add up quickly.

The cases where clubs have been subject to significant wage liability did not provide workers with a minimum guaranteed payment for each shift worked. It is easy to see how wage damages might stack up, particularly in high wage states, when dozens or hundreds of dancers join a suit. For instance, a dancer working in Washington was entitled to \$16.66 an hour as of 2025, which would amount to \$399.84 for a 24-hour week.¹²¹ Washington does not allow a tip credit, so the dancer’s

¹¹⁶ 29 U.S.C. § 255(a). A willful violation includes “circumstances where the agency knew that its conduct was prohibited by the Act or showed reckless disregard of the requirements of the Act.” 29 C.F.R. § 551.104. A club has reckless disregard when it “fail[s] to make adequate inquiry into whether conduct is in compliance with the Act.” *id.*

¹¹⁷ 29 U.S.C. § 260.

¹¹⁸ 29 U.S.C. § 216(b).

¹¹⁹ EEOC DEPART. OF SOLICITOR NEWS RELEASE No. 24-2057-KAN, *supra* note 11; Complaint, *Julie A. Sue v. Mother’s Finest, LTD d/b/a Pleasures*, No. 6:25-cv-01002, ¶ 10 (D. Kan. Jan. 6, 2025) (alleging FLSA violations of 29 U.S.C. §§ 203(m)(2)(B), 206(a)(1), 215(a)(2)).

¹²⁰ Under the FLSA, employees must receive their wages “free and clear,” meaning they cannot be subject to most deductions or “kickbacks” to the employer. 29 C.F.R. § 531.35.

¹²¹ Wash. Rev. Code § 49.46.46.020.

tips would not offset the employer's minimum wage obligations.¹²² Assuming a dancer worked 900 hours a year (18 hours per week for 50 weeks), they would be owed almost \$15,000 in minimum wages for one year, \$30,000 for two years, and \$45,000 for three years. If these damages are doubled for willful violations, the dancer would be entitled to up to \$90,000 in damages, plus attorney fees.¹²³ If 30 dancers worked this amount, the club's liability would be \$2.7 million in addition to other damages arising from illegal tip sharing.

This is a good lesson to illustrate the power of a class action, where larger numbers of plaintiffs join a lawsuit. The legal exposure is radically different when there are two plaintiffs versus an entire workforce. For instance, in 2017, an Arkansas court found that a club that willfully misclassified three dancers and failed to pay them minimum wages in the amounts of \$7,830 (1,080 hours x \$7.25), \$13,345.80 (1,840 hours X \$7.25), and \$14,215.80 (1,960.8 hours x \$7.25).¹²⁴ These amounts were doubled because the misclassification was deemed willful, and the total judgment was \$70,783.20.¹²⁵ A large class action lawsuit changes the math. For instance, in 2015, a class of 2,208 dancers settled a lawsuit against Déjà vu-affiliated clubs for \$6.87 million in damages to the dancers plus an additional \$5.5 million to the plaintiff's attorneys.¹²⁶ In that case, the average class member received about \$4,255.¹²⁷

Some clubs view the risk of litigation as worth it.¹²⁸ Those clubs "simply paid the damages and continued business as usual."¹²⁹ Furthermore, standalone wins may be ineffective to create larger change "because employee status for workers in a 'grey zone' cannot address their vast structural and political inequality with [the clubs]."¹³⁰

The individuals who control the clubs may also be held independently liable as joint employers if they independently exercise control over the workplace.¹³¹ Four factors are used to determine individual control; they include whether the person (1) hires or fires employees, supervises and controls the work schedule and conditions of

¹²² *Id.*

¹²³ Wash. Rev. Code § 49.52.070.

¹²⁴ *Miller*, 2017 U.S. Dist. LEXIS 125945 at *33-34.

¹²⁵ *Id.*

¹²⁶ *Hart v. RCI Hospitality Holdings*, 2015 U.S. Dist. LEXIS 126934, *52 (S.D.N.Y. Sept. 22, 2015). The plaintiff's agreed to put \$9,395,000 into a trust fund to fund judgment. *id.* at *14.

¹²⁷ *Id.* at 14.

¹²⁸ Hoyos, *supra* note 9 at 210.

¹²⁹ *Id.* at 217.

¹³⁰ Dubal, *supra* note 13 at 748.

¹³¹ 29 U.S.C. §§ 206-207; *Reich*, 998 F.2d at 329; *Gilbo*, 2020 N.D. Tex. U.S. Dist. LEXIS 26031 at *16-17; *Miller*, 2017 U.S. Dist. LEXIS 125945 at *18-19.

employment to a substantial degree, (3) determines the rate and method of pay, and (4) maintains the employment records.¹³²

The Department of Labor may also issue fines if employers fail to comply with employee recordkeeping requirements.¹³³ Employers who willfully or repeatedly violate the minimum wage or overtime pay requirements are also subject to a civil money penalty.¹³⁴ As of 2025, the fines amount to \$2,515 per violation under the FLSA.¹³⁵

2. Taxes

Another area of liability is taxes. Employers must withhold taxes from employee wages, including tips received.¹³⁶ Categorizing dancers as independent contractors shifts this responsibility to the dancers, who must then report and pay their employer-side taxes.

Students who are employed will recognize that federal (Social Security and Medicare) and state taxes are withheld from their paychecks. Many do not know that their employer must also pay Social Security and Medicare taxes along with other taxes (*e.g.*, unemployment).¹³⁷ Employers and employees each pay 7.65% (or 15.3% combined) for Federal Insurance Contributions Act (FICA) taxes on wages and tips include Social Security and Medicare.¹³⁸ This amount may be substantial because tips are considered taxable income.¹³⁹

3. Workers' Compensation Insurance

Exotic dancing can be a dangerous business, and dancers are often injured.¹⁴⁰ To account for the possibility of getting injured on the job, every state, including Ohio, requires employers to have workers'

¹³² 29 C.F.R. § 781.2.

¹³³ 29 C.F.R. § 516.

¹³⁴ 29 U.S.C. §216.

¹³⁵ WAGE AND HOUR DIV., CIVIL MONEY PENALTY INFLATION ADJUSTMENTS, U.S. DEP'T OF LABOR, <https://www.dol.gov/agencies/whd/resources/penalties> (last visited Aug. 23, 2025).

¹³⁶ 29 C.F.R. § 31.2402(k)-1.

¹³⁷ 26 U.S.C. § 3101; 26 U.S.C. § 3111; 26 U.S.C. § 3301 (unemployment).

¹³⁸ *Id.*, 26 U.S.C. § 3101.

¹³⁹ In 2025, Congress passed a law that allows qualifying workers to deduct up to \$25,000 in cash tips from 2025-2028. The deduction phases out as the taxpayer's gross income exceeds \$150,000. Victoria L. Vish & Stephen Kenney, *It's Official – No Tax on Tips, No Tax on Overtime Through 2028*, OGLETREE DEAKINS (Jul. 9, 2025), <https://ogletree.com/insights-resources/blog-posts/its-official-no-tax-on-tips-no-tax-on-overtime-through-2028/> (last visited Aug. 23, 2025).

¹⁴⁰ WORKPLACE PERSPECTIVES ON EXOTIC DANCING, *supra* note 4 at 14 (“Entertainers described frequent workplace injuries, such as twisted ankles, broken or bruised ribs, torn nails, and falling on one’s head.”).

compensation insurance to cover work-related injuries or illnesses.¹⁴¹ Self-employed individuals may be exempt from these laws.

Workers' compensation provides benefits to employees who are injured or become ill due to their job, regardless of who is at fault. Workers' compensation typically pays for medical care, wage replacement, partial or total disability, and work training. Employers pay premiums for workers' compensation insurance based on the industry, size, and payroll of the companies, and their claims history. Employees lose their right to sue their employer for work-related injuries in exchange for these benefits.¹⁴²

Because self-employed independent contractors are not required to have workers' compensation insurance, they may be at significant economic risk. For example, if an employee dancer slips, trips, or falls, or otherwise injures herself while dancing, her medical bills and wage loss would not be covered by workers' compensation. She would need to separately insure and pay for these injuries.

Ohio law protects misclassified workers by allowing them to be eligible for workers' compensation benefits, even if they were initially categorized as independent contractors.¹⁴³ In those instances, the club could be held liable for workers' compensation benefits and other potential penalties.¹⁴⁴

4. *Unemployment Insurance*

Employers are required to pay unemployment insurance, which provides some wage replacement when an employee's work is terminated for no fault of the employee.¹⁴⁵ This is a significant benefit for dancers who are terminated for no fault of their own. For instance, in Ohio, workers who are eligible for unemployment will receive weekly payment of 50% of their average weekly rate, with a cap, for up to 26 weeks (approximately 6.5 months).¹⁴⁶

¹⁴¹ Ohio Rev. Code, Ch. 4123 (Ohio workers' compensation statute).

¹⁴² Julia Kagan, *Workers' Compensation: What it is, How it Works, and Who Pays*, INVESTOPEDIA (Jul. 31, 2024), <https://www.investopedia.com/terms/w/workers-compensation.asp> (last visited Aug. 23, 2025).

¹⁴³ Ohio Rev. Code § 4123.01. The employee might initially be denied workers' compensation and need to appeal their denial.

¹⁴⁴ *Id.*

¹⁴⁵ *Yard Bird, Inc. v. Virginia Empl. Comm'n*, 503 S.E.2d 246, 252 (Va. Ct. App. 1998) (finding that dancers were entitled to unemployment insurance because they were employees and not independent contractors); Hoyos, *supra* note 9 at 237-38 (addressing the impact of unemployment compensation for dancers during COVID-19); Ohio Rev. Code § 4141.01.

¹⁴⁶ Oh. Rev. Code Ch. 4141; Christina Hambleton, *Unemployment Benefit Eligibility Amount*, 134 MEMBERS BRIEF, Issue 49, 6-7 (Aug 11, 2022),

5. Labor Law

The National Labor Relations Act (hereinafter “NLRA”) protects the right of private sector employees to organize themselves in a union.¹⁴⁷ The NLRA does not protect “any individual having the status of independent contractor.”¹⁴⁸ Unionization allows workers to collectively negotiate the terms and conditions of their work. Many argue that reclassification unionization is a critical tool to empower dancers and transform the industry into a more humane, fair, and just model.¹⁴⁹

This teaching activity builds off the NLRB’s 2020 *Centerfold Club* case that clearly establishes that exotic dancers are employees and have the legal right to unionize.¹⁵⁰

As of 2025, only two exotic dance clubs in the United States have unionized.¹⁵¹ Some clubs have threatened to close down the business location if the dancers organize, and some followed through with their threat.¹⁵² If a club prefers, in good faith, to shut down instead of having a unionized workforce, it can legally do so.¹⁵³ And, after dancers unionize, they still need to reach a negotiated collective bargaining

<https://www.lsc.ohio.gov/assets/organizations/legislative-service-commission/files/unemployment-benefit-eligibility-and-benefits.pdf> (last visited Aug. 23, 2025).

¹⁴⁷ 29 U.S.C. § 152(3).

¹⁴⁸ 29 U.S.C. § 152(3).

¹⁴⁹ Fustich, *supra* note 22 at 952 (“If sex workers are allowed to form unions and collective bargain on their own terms, they can revolutionize the future of labor as we know it.”); Wilmet, *supra* note 24; Hoyos, *supra* note 9 at 212; *see also* Adrienne Couto, *Clothing Exotic Dancers with Collective Bargaining Rights*, 38 OTTAWA L. REV. 37, 49-53 (2006) (considering comparative international examples to advocate for exotic dancer labor protections in Canada).

¹⁵⁰ For an extensive discussion on the *Centerfold Club* decision, *see* Fustich, *supra* note 31 at 952.

¹⁵¹ Noam Scheiber & Ava Sasani, *Strippers Unionize at California Club After Long Fight*, N.Y. TIMES (May 16, 2023), <https://www.nytimes.com/2023/05/16/business/strippers-union-labor.html> (last visited Aug. 23, 2025); Wyatt Grantham-Phillips, *Dancers at Las Angeles Bar to Become Only Unionized Strippers in US After 15-Month Battle*, ASSOCIATED PRESS (May 18, 2023), <https://apnews.com/article/strippers-union-los-angeles-star-garden-4069df93b149076dc2e23a0bff16438b> (last visited Aug. 23, 2025); Rachel Saslow, *Magic Tavern Becomes the Second Unionized Strip Club in the U.S.*, WILLAMETTE WEEK (Sept. 8, 2023), <https://www.wweek.com/news/business/2023/09/08/magic-tavern-becomes-the-second-unionized-strip-club-in-the-us/> (last visited Aug. 23, 2025).

¹⁵² Bryce Covert, *The Strippers’ Union Faces Employers’ Trump Card*, THE NATION (Jul. 31, 2024), <https://www.thenation.com/article/economy/star-gardens-union/> (last visited Aug. 23, 2025)

¹⁵³ *Id.*

agreement, which took 17 months for the first U.S. club that unionized.¹⁵⁴

6. Workplace Safety

The Occupational Safety and Health Act requires employers to maintain safe working environments, but OSHA regulations generally apply to employees and not independent contractors.¹⁵⁵

7. Family and Medical Leave

Employees are entitled to a wide range of work protections for family and medical leave. The Family Medical Leave Act (hereinafter referred to as the “FMLA”) does not cover independent contractors because they are not eligible employees.¹⁵⁶ At the federal level, the FMLA allows employees of larger employers to take up to 12 weeks of leave each year for various reasons such as having or adopting a child, having a serious health condition, or caring for a close family member with a serious health condition.¹⁵⁷ Employers are prohibited from denying such leave and retaliating against employees who seek or take the leave.¹⁵⁸ The remedies include lost wages, reinstatement, liquidated damages, and attorney fees.¹⁵⁹

This financial exposure would be much higher in states with paid family medical leave laws. Those states require employers to pay employer-side taxes and withhold employee-side taxes to cover the benefits.¹⁶⁰ For example, in Washington, the total tax as of 2025 is .92% of the employee’s gross wages (excluding tips) up to \$176,100 (the

¹⁵⁴ The first exotic dance club to unionize faced a 17-month long strike before the dancers and club entered their first collective bargaining agreement. Emma Alabaster & Natalie Chudnovsky, *What Happened after the Nation’s Only Unionized Strip Club Reopened in North Hollywood — 6 Months Later*, LAIST (Jul. 4, 2024), <https://laist.com/news/arts-and-entertainment/the-nations-only-unionized-strip-club-reopens-in-north-hollywood> (last visited Aug. 23, 2025).

¹⁵⁵ Sandy Smith, *OSHA Investigating the Death of an Exotic Dancer in Cleveland*, EHS TODAY (Jan. 11, 2013) (investigating railing and safety issues when a dancer died after falling “head first over a railing at the club while performing a move in her lap dance routine”); Heather Berg, *Porn Work, Independent Contractor Misclassification, and the Limits of the Law*, 52 COL. HUM. RTS. REV. 1159, 1174-1177 (2021).

¹⁵⁶ 29 C.F.R. § 825.102 (defining eligible employee).

¹⁵⁷ 29 U.S.C. § 2612.

¹⁵⁸ *Id.*; 29 C.F.R. § 825.220.

¹⁵⁹ 29 U.S. Code § 2617.

¹⁶⁰ As of March 2025, there are 14 states with current or pending paid family leave laws. Some states also provide paid leave based on a medical/serious health condition. CONGRESSIONAL RESEARCH SERVICE, R44835 v. 31, PAID FAMILY AND MEDICAL LEAVE IN THE UNITED STATES (2025).

Social Security taxable maximum).¹⁶¹ Employers with more than 50 employees must pay at least 28.48% of this tax.¹⁶² In these states, independent contractors might not automatically be qualified for the state's paid family and medical leave, but could choose to opt-in. So, a dancer in Washington who works as an independent contractor and gives birth to a child would lose the right to take 12 weeks of paid parental leave.

8. *Discrimination Laws*

Federal antidiscrimination law prohibits discrimination based on sex, race, color, religion, and national origin (Title VII), disability (Americans with Disability Act), age (Age Discrimination in Employment Act), and other protected classes apply to employer-employee relationships.¹⁶³ Dancers who are independent contractors are generally not directly covered under these laws.¹⁶⁴

9. *Privacy Considerations*

Given the stigma associated with erotic dancing and the concerns about sketchy club management, many dancers prefer to be categorized as contractors because it allows them to control the publicity of their work. They do not trust clubs to maintain the confidentiality of their personnel and tax documentation, and they prefer that their exotic dancing work does not show up on their employment record.¹⁶⁵

IV. WHAT SHOULD HAPPEN NEXT?

Now that the students have applied the economic realities test to the case, the instructor can conclude the discussion by focusing on practical and policy questions.

¹⁶¹ WASHINGTON PAID FAMILY & MEDICAL LEAVE UPDATES, <https://paidleave.wa.gov/updates/> (last visited Aug. 23, 2025).

¹⁶² *Id.*

¹⁶³ 29 U.S.C. 2000e-2 (Title VII); 42 U.S.C. §§ 12101 (ADA), 29 U.S.C. § 623 (ADEA).

¹⁶⁴ See EQUAL EMP'T. ENFOR. COMM'N, *Coverage*, (<https://www.eeoc.gov/employers/coverage-0> (last visited Aug. 23, 2025)) ("People who are not employed by the employer, such as independent contractors, are not covered by the anti-discrimination laws."); *McCabe v. Mut. Aid Ambulance Serv., Inc.*, 2015 U.S. Dist. LEXIS 103766, *15 (W.D. Pa. 2015) (granting motion to dismiss claims under Title VII and the ADA because the ambulance driver was an independent contractor); *Ashkenazi v. S. Broward Hosp. Dist.*, 607 Fed. Appx. 958, 961, 967 (11th Cir. 2015) (affirming grant of summary judgment on Title VII and age discrimination claims because worker was an independent contractor).

¹⁶⁵ Hoyos, *supra* note 9 at 221; Moulton, *supra* note 9 at 89; WORKPLACE PERSPECTIVES ON EXOTIC DANCING, *supra* note 4 at 20.

A. HOW SHOULD THE CLUB'S OWNER RESPOND TO THE DEMAND LETTER?

When deciding how to assess threatened litigation, parties need to assess their likelihood of success, their possible exposure, and the expense of litigation. If the Club is being objective, it should recognize that it has likely been miscategorizing its dancers and would ultimately lose the lawsuit if it moved forward to trial. Because it pays its dancers a daily rate that exceeds the minimum wage, the Club's exposure to minimum wage liability should be minimal. It may, however, be exposed to unlawful tip sharing, unpaid taxes, unemployment insurance, and the dancers' attorney fees.

If the dispute moves forward, the club's largest expense may come from attorney fees. In 2024, the average hourly rate for an employment law attorney across the U.S. was \$362 an hour.¹⁶⁶ This Club may be able to pay less if it hires a local attorney; the average hourly rate is between \$255 and \$268 an hour in Ohio.¹⁶⁷ If the Club uses a large national law firm, the rates could be much higher.¹⁶⁸ And, if the dancers prevailed with a wage and hour lawsuit, the Club would be required to pay for the dancers' attorneys' fees because the FLSA and other employment statutes include fee-shifting provisions.¹⁶⁹ Regardless of the consideration, the cost of defending a lawsuit may quickly eclipse the damages the two dancers would likely be entitled to.

The Club also needs to consider the operational disruption and possible reputational damage if the dispute is made public. Ask the students, "How much is it worth to the Club to keep the dispute out of the courts and the news?"

It is worth noting that some dancers who sue clubs are advocates for dancers' rights. For instance, Brandi Campbell, the lead complainant in the *Centerfold Club* case, is a serial plaintiff who works for several clubs and repeatedly filed FLSA and NLRA lawsuits against them. Campbell is a labor activist who also maintained a website to provide dancers with information about their labor rights.¹⁷⁰ It is likely that she would widely publicize the lawsuit and try to convince other dancers to join her cause.

¹⁶⁶ Clio, LEGAL TRENDS REPORT, 132, 2024.

¹⁶⁷ *Id.* at 131.

¹⁶⁸ Ashley Merryman, *What Does Hiring a Lawyer Cost?*, U.S NEWS & WORLD REPORT (Mar. 1, 2024), <https://law.usnews.com/law-firms/advice/articles/what-does-hiring-a-lawyer-cost> (last visited Aug. 23, 2025) (reporting that in 2024 the partners at the largest firms charge, on average, \$1,400 an hour and senior associates charge \$900).

¹⁶⁹ *See, e.g.*, 29 U.S.C. § 216(b) (FLSA).

¹⁷⁰ *Centerfold Club*, *supra* note 31 at 18 (Campbell filed unfair labor actions against clubs in Nevada, Minnesota, Wisconsin, and Ohio); STRIPPERLABORRIGHTS.COM;

Given the weakness of the Club's position and the costs of litigating, most students will decide that the Club's best response to the demand letter is not to fight it out in court, but instead to seek an early settlement and resolution. This is consistent with most employment lawsuits which do not go to trial.¹⁷¹ Indeed, more than 95% of employment lawsuits are settled or dismissed before or during litigation.¹⁷²

B. HOW SHOULD THE WORK RELATIONSHIP BE STRUCTURED?

The next set of questions for the students is broader and involves how the clubs should structure their work relationships with the dancers. Some probing questions for the students include:

- Should the clubs stick with the independent contractor model but adjust how they treat and pay the dancers to mitigate potential legal exposure?
- Should the club treat the dancers as employees? If so, how should they structure the employment relationship?
- Do these policy changes address the ethical concerns that dancers are exploited and subject to dangerous and harassing workplaces?

Eric Stock, *Exotic Dancer Sues Kappa Kabanna Over Job Classification and Pay*, NPR Ill. (Aug. 22, 2022), <https://www.nprillinois.org/illinois/2022-08-02/exotic-dancer-sues-kappa-kabanna-over-job-classification-and-pay> (last visited Aug. 23, 2025); Kristine Goodrich, *Former Dancer Suing Mettler's Over Compensation, Alleged Harassment*, MANKATO FREE PRESS (Apr. 3, 2018), https://www.mankatofreepress.com/news/local_news/former-dancer-suing-mettlers-over-compensation-alleged-harassment/article_8bc83c02-378d-11e8-99fa-bffd7a268750.html (last visited Aug. 23, 2025); Emma Nelson, *Dancer's Suit May Spur New Labor Rules for Minneapolis Strip Club*, START TRIBUNE (Dec. 19, 2017), <https://www.startribune.com/dancer-s-suit-may-spur-new-labor-rules-for-minneapolis-strip-clubs/461855453> (last visited Aug. 23, 2025); Jon Hyman, *Labor and Employment Lessons From the World's Most Combative Stripper*, WORKFORCE.COM (Jul. 30, 2019), <https://workforce.com/news/labor-and-employment-lessons-from-the-worlds-most-combative-stripper> (last visited Aug. 23, 2025); *How Do Strip Clubs Act When Sued for Misclassification? Brandi's Story and History of Dancing at Shakers*, NAT'L INJURY HELP (Feb. 1, 2019), <https://www.nationalinjuryhelp.com/strip-clubs-act-sued-misclassification/> (last visited Aug. 23, 2025).

¹⁷¹ Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?* 3 HARV. L. & POL'Y REV. 103, 123 (2009) (finding that 2.4% of employment discrimination cases went to trial in 2006).

¹⁷² Charles A. Brown, *Employment Discrimination Plaintiffs in the District of Maryland*, 96 CORNELL L. REV. 1247, 1252 (2011) (reporting that 95% of employment discrimination claims settle and the trial rate for civil court findings is 1.2% of cases); Brian Spitz, *All Employment Cases Should Eventually Settle, But For What?* (Jun. 14, 2022), <https://www.calltherightattorney.com/blog/2022/06/all-employment-cases-should-eventually-settle-but-for-what/> (last visited Aug. 23, 2025) (reporting that over 95% of the author's firm's employment lawsuits settle).

The safest approach from an employee classification perspective is to simply hire the dancers as employees. This may present some difficulties because many dancers prefer to work as independent contractors. The Club would also need to consider how it would deal with scheduling, pay, and other human resources matters.

Should the Club decide to create a defensible independent contractor model, it needs to modify its lease agreement. The agreement would need to continue to give the dancers freedom to select the days they work, to work at other clubs, and to control their dance routines, costumes, props, or music. The Club would also need to allow the dancers to negotiate and establish the economic terms of their work and the terms between the dancers and customers (*e.g.*, charges and length of one-on-one and private dances). Other models might also be available. Individual dancers could possibly lease out a section or few tables, like hairdressers and tattoo artists, and separately book their own customers and dances. In this situation, the dancers might negotiate a split with the Club for the Club's patrons who sit in the dancers' section.

Finally, the Club should closely scrutinize and minimize tip-out obligations and penalties. The Club makes money from the sale of alcohol, food, customer cover charges, and lease payments from the dancers. It may be well-served to allow dancers to control their private dance money and tips. While these changes weigh in favor of classifying the dancers as independent contractors, they may not be sufficient. After all, dancers are still integral to the business.

C. SHOULD EMPLOYMENT CLASSIFICATION LAW BE CHANGED?

Near the end of the discussion, students should be asked to consider the limitations of the current binary law governing employee classification. Many critics argue that the current employee/independent contractor law is flawed and does not work well with non-traditional work and the gig economy.¹⁷³ Students should consider whether lawmakers should create specific legislation to regulate the working relationships of exotic dancing.

Instructors can also ask their students if they agree with Roman Hoyos' argument:

¹⁷³ Michael Nadler, *Independent Employees: A New Category of Workers for the Gig Economy*, 89 U. COL. L. REV. 249 (2018); Miriam A. Cherry & Antonio Aloisi, *Dependent Contractors in the Gig Economy: A Comparative Approach*, 66 AM. U. L. REV. 635 (2017).

There is no categorical approach that will adequately protect dancers as employees or as human beings. As some scholars have suggested, dancers would probably best be served by abandoning the independent contractor-employee distinction/discourse and rethinking employment law on altogether new terms.¹⁷⁴

This opens up an interesting conversation as to whether new categories should be created for gig or nontraditional workers, such as a “dependent contractor” or “independent employee,” and what these models might look like.¹⁷⁵

V. CONCLUSION

The decision by exotic dance clubs to classify their dancers as independent contractors has significant consequences for the clubs and dancers. Clubs regularly misclassify employees to avoid legal obligations and additional financial burdens that arise from a formal employment relationship. This article illustrates how the exotic dance industry’s longstanding misclassification of dancers affects the workplace and workforce. Through examination of this case study, students can gain an understanding of the nuances of employee classification law and the significant impact that it has on a business and its workers’ lives.

¹⁷⁴ Hoyos, *supra* note 9 at 245-246.

¹⁷⁵ Cherry & Aloisi, *supra* note 173.

APPENDIX 1
CENTERFOLD CLUB CASE STUDY AND
STUDENT HANDOUT¹⁷⁶

The Centerfold Club—Employee or Independent Contractor

The owner of the Centerfold Club (“Club”) recently received a letter from an attorney of two former exotic dancers (also referred to as “strippers”) who worked at the Club over the previous three years. The letter states that the Club “misclassified the dancers as independent contractors in violation of state and federal law” and, as a result, is “collectively underpaying its dancers more than \$500,000 a year.” It also states that the dancers are considering filing a class action lawsuit seeking damages and equitable relief in federal court but would “consider a settlement if the Centerfold Club agrees to make a fair payment and change its ways.”

The Centerfold Club

The Club operates an exotic dance club near the Columbus, Ohio airport that features topless female dancers. The Club has two elevated stages (one with a dancing pole), a full-service alcoholic bar, a kitchen, customer seating areas, a dressing room, and private “VIP” back rooms. In addition to the dancers, the Club employs managers, security guards, bartenders, kitchen staff, servers, disc jockeys, and backroom attendants. These non-dancing workers are classified as employees of the Club.

The Club is open seven days a week. The afternoon shift for dancers runs from 4 p.m. to 10 p.m. and the evening shift runs from 8 p.m. to 2:30 a.m. Depending on the shift, 7-12 dancers work the weekday shifts, 12-18 work the weeknight shifts and weekend day shifts, and 18-35 work the weekend night shifts. In total, the Club has about 60 active or semi-active dancers. Several dancers work one to two shifts a week. Most work three shifts a week. A few work up to five shifts a week.

The Performer Lease Contract

When the dancers start to work at the Club, they are required to sign a “Performer Lease Agreement” (“Contract”) which allows dancers a “non-exclusive right to lease space to perform live seminude dance and associated activities for patrons at the Club.” The Contract does not

¹⁷⁶ This case study is based on the National Labor Relations Board order in *Nolan Enterprises, Inc. d/b/a Centerfold Club and Brandi Campbell*, 370 NLRB No. 2 (2020); *aff’d Nat’l Labor Relations Bd. v. Nolan Enter., Inc.*, 2021 U.S. App. LEXIS 40483 (6th Cir. Mar. 10, 2021).

prohibit dancers from working at other Clubs. The Contract lasts for one year and automatically renews unless terminated by one of the parties.

The Contract states that dancers may lease a space to dance on any day they wish but must notify the Club of her dates one week in advance. The daily rental rate is \$50 per shift. Dancers also pay “assistance fees” (e.g., a portion of their tips) to employees who help the dancer (the DJ, floor workers, security, and “house moms”). They also pay a fee each time they use a back room to perform a private dance. They are charged a \$50 cancellation fee if they miss a scheduled day and penalties ranging from \$5 to \$50 for showing up late, leaving early, sitting out “up time” dances, and other policy violations.

The Contract states that the dancer is an “independent contractor” and the Club has “no right to direct or control the nature, content, character, or means of the dancer’s performance.” The dancer has full discretion to choose her costumes and apparel so long as they comply with state laws governing exotic dancing. Dancers are also allowed to pick the songs they dance to as long as they fall within the rock or country music genres.

The Contract states that the Club is not responsible for any liability related to employers, such as recordkeeping, payment of wages, or deduction of employer-side taxes. Dancers are required to pay their own taxes and carry their own liability insurance. They also agree to comply with Ohio laws regulating nudity (nipples and genitals must be covered at all times) and the touching of patrons while seminude.

Unwritten Rules and Expectations

The Club requires dancers to comply with a series of unwritten rules. They must wear high-heeled shoes. The Club’s employees make suggestions about their appearances and how they can better approach the patrons. When on stage, they must dance for two songs and remove their top within the first minute. The dancers cannot leave the stage during their two-song set. Twice an hour, every dancer must participate in “up-time” dance promotions, in which the DJ calls all dancers on stage, introduces them, and announces a limited-time two-song private dance special. Following the announcement, the dancers must approach each patron to try to sell a private dance. They must also sit with patrons who buy them drinks and stay longer for more expensive drinks.

Dancer’s Compensation

Dancers have four sources of income at the Club: tips, dance performance fees, drink commissions, and a guaranteed shift amount.

Tips include cash given to dancers when they perform on stage and are not shared with the Club or staff.

Dance performance fees are the fees for individual “lap dances” and one-on-one dances in the more secluded private rooms. The Club sets the minimum price dancers may charge for private dances and sets a fee/split that the dancer pays for use of back rooms. The charge for a 3-song/10-minute “lap dance” is \$25 on weekdays and \$30 on weekends. Private VIP backroom dances are set at \$200 for 30 minutes during weekdays and \$250 for 30 minutes during weekends. These charges are split with 65% going to the dancers and 35% going to the Club. While dancers are allowed to negotiate higher prices with the customers for VIP dances, the Club/dancer split remains the same.

Dancers also receive a 50% “commission” for every drink that a customer buys for them—they get credited half of the drink price.

Dancers’ earnings vary widely, from \$0 a shift to over \$1,500 on rare occasions. Most dancers earn between \$150-\$350 on a day shift, \$200-\$450 on a weeknight and weekend day shift, and \$250-\$700 on weekend night shifts. Some dancers regularly earn more, and others regularly earn less.

Finally, the lease includes an “entertainer-tenant guarantee” in which the Club agrees to ensure that the entertainer will earn a minimum amount each day they lease the space. If the dancer earns less than \$100 a shift, the Club will pay the difference to ensure that dancers make at least \$100.

A few dancers maintain an active online presence. They use social media (*e.g.*, Instagram and TikTok) to promote their brand, dancing, and dance locations. Some dancers use online pay platforms such as OnlyFans to charge viewers to watch them perform pornographic-related content. The Club does not regulate these activities and does not earn a percentage of this income.

The Law Governing Employee Classification

State and federal laws draw a distinction between employees and independent contractors. The Department of Labor and courts use the six factor economic realities test to determine whether, under the Fair Labor Standards Act, a worker is an employee *or* an independent contractor. The central question is whether the worker is economically dependent on an employer for work or is instead in business for themselves. Each of the following factors needs to be considered and weighed when making this decision:

1. Opportunity for profit or loss depending on managerial skill,
2. Investments by the worker and the employer,
3. Permanence of the work relationship,
4. Nature and degree of control,
5. Whether the work performed is integral to the employer's business, and
6. Skill and initiative. (29 C.F.R. § 797.110)

You need to help determine whether the dancers are employees or independent contractors and decide what the Club should do next.

DECONSTRUCTING DEFAMATION DAMAGES: A THREE-RING LOOK AT REPUTATION

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INTRODUCTION

Defamation law occupies a unique space at the intersection of personal dignity, economic interest, and public discourse. Unlike property losses or contractual forfeitures, harm to reputation is notoriously difficult to quantify, yet the outcomes can be devastating: ending careers, unravelling relationships, and changing the way individuals or institutions are perceived. Courts and juries are regularly called upon to put a price tag on reputation, but in this regard, the law offers minimal guidance besides a series of general principles codified by landmark court decisions. The result is a body of case law filled with astronomical awards, contentious appeals, and ongoing debates about how best to value what is ultimately an intangible asset.

The digital age has increased these challenges. Online platforms and social media have created a means of spreading falsehoods at an unprecedented pace and scale, propagating false information across one's social circles, professional networks, and even to strangers across the globe. Unlike the days when defamatory statements were limited to the circulation of a newspaper or the audience of a local broadcast, today's reputational damage can unfold exponentially, taking on a life of its own with ripple effects that are hard to predict and even harder to contain.

This helps explain why recent defamation verdicts and settlements have captured such intense public attention. High-profile and high-value defamation cases against politicians and celebrities have garnered significant media attention, thrusting the topic of defamation into the news headlines. In January 2024, for instance, a jury found Donald J. Trump guilty of sexual abuse and defamation, awarding Jean Carroll \$18.3 million in compensatory damages and an additional \$65 million in punitive damages, totaling \$83.3 million.¹ This followed a 2023 case by Carroll, which had also resulted in damages. In 2023, Rudy Giuliani was ordered to pay \$148 million in damages to two Georgia election workers whom he falsely accused of voter fraud—part of efforts that also have Giuliani facing criminal charges.²

In other politically sensitive cases, Alex Jones—who peddled conspiracy theories and misinformation about the tragic 2012 Sandy Hook school shooting in Connecticut—was found liable for \$1.5 billion in damages.³ The media network Fox News Channel and its corporate parent,

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¹ Carroll v. Trump, No. 23-CV-1045 (S.D.N.Y. 2023).

² Freeman v. Giuliani, No. 1:23-cv-03754 (D.D.C. 2023).

³ Heslin v. Jones, No. D-1-GN-18-001835, 261st Dist. Ct., Travis Cnty., Tex. (Jan. 13, 2023).

Fox Corp., recently settled a defamation case brought by Dominion Voting Systems, agreeing to pay \$787.5 million in one of the largest ever publicly disclosed monetary settlements in the United States.⁴ Fox admitted it had broadcast factually incorrect statements about Dominion's voting machines following the 2020 presidential election. Dominion had previously sought \$1.6 billion in damages.

Of course, Hollywood and the film industry have seen similar cases. Johnny Depp and his ex-wife Amber Heard sued each other for defamation, with Depp prevailing and receiving a \$15-million defamation award in a case that grabbed and held public attention on the news and social media.⁵ The suit placed the two on a growing list of actors and other celebrities who have sued individuals and publications for defamation, including Meghan Markle and Prince Harry, Tom Cruise, Sharon Stone, Cameron Diaz, and Scarlett Johansson.

Such overwhelming verdicts reflect a sea change in defamation law. Whereas previously, damages from reputational harm were based on tangible factors that could be easily calculated (such as newspaper circulation numbers), courts today struggle to value compensatory damages for viral reputational harm in the digital age. Social media algorithms can propagate material that agrees with a user's opinions and contribute to the spread of false information. Because misinformation is repeated and quickly shared, it can increase reputational damage at geometric levels.⁶

The compensatory and punitive damages awarded as a result of proven defamation can seem astronomical, and at first glance, there may appear to be little rhyme or reason for such titanic valuations. Of course, given varying laws across multiple jurisdictions, there is no simple, cookie-cutter formula for assessing damages in defamation cases. Nonetheless, the legal industry is striving to achieve answers. In the absence of a concrete, universal formula, plaintiff attorneys often go to elaborate efforts to detail damages in cases: assessing the spread of defamatory statements, calculating economic damages such as lost wages and business opportunities, and pushing for punitive damages aimed at discouraging repeated defamatory behavior.⁷ Legal teams are also bringing in expert witnesses who are able to explain the technical details of these assessments in expert reports and testimony to judges and juries.

In this context, the staggering awards of recent cases speak to more than just celebrity drama—they highlight a fundamental question: how can the courts define damage to one's reputation in a way that is principled, consistent, and just? This Article proposes a conceptual tool to bring a greater degree of clarity to this task: the three rings of reputational damage. By identifying reputational harm as occurring on a layering principle of three concentric rings: (1) an inner ring of family and close associates, (2) a middle ring of acquaintances and professional

⁴ U.S. Dominion, Inc. v. Fox News Network, LLC, Nos. N21C-03-257, N21C-11-082 (Del. Super. Ct. 2023).

⁵ John C. Depp v. Amber Laura Heard, No. CL-2019-0002911 (Va. Cir. Ct. 2022).

⁶ Vishika Dhaliya & Raghwender Vasisth, *Defamation in Digital Crossfire: Algorithms, Social Media, Blockchain and Global Jurisdiction*, TJLT (Sept 13, 2025), <https://www.thelegaljournalontechnology.com/post/defamation-in-digital-crossfire-algorithms-social-media-blockchain-and-global-jurisdiction>.

⁷ R Pegler, *Punitive Damages in Defamation Litigation: A Clear and Present Danger to Freedom of Speech*, 64 YALE L.J. 607, 610–16 (1955).

networks, and (3) an outer ring of the general public and strangers. Using such a construct, courts and litigants can more clearly frame the nature and scope of the harm suffered. This framework does not intend to offer a universal formula, but rather a structured way of deconstructing the problem, with the clear message that reputation is not monolithic, but relational, varying according to proximity, trust, and exposure.

Ultimately, reputation is still a form of social currency that is fragile, invaluable, and central to one's identity and livelihood. As defamation cases go on to define public discourse and legal precedence, the need for coherent approaches to valuing reputational harm will only increase. Courts that appreciate and integrate this layered reality of reputational injury will not only make the individual judgments fairer but will also serve to enhance the integrity of defamation law as a whole.

JUSTICE FOR INSULTS: A BRIEF HISTORY OF REPUTATIONAL DAMAGES

An individual's reputation within the larger context of one's social environment has long been regarded as a vital asset, an abstract form of personal property essential to one's core identity and dignity in society. The societal desire to seek justice for public damage to an individual's reputation traces back to the earliest human civilizations, with the most well-documented accounts of formal prosecution of defamation appearing in ancient Rome as early as the second and first centuries BCE.⁸ Concerned with the free flow of bawdy language in public dramas performed at the Twelve Tables, the Roman government outlawed popular satirical songs that criticized public figures as slanderous and punishable by death.⁹ By this time, books and pamphlets had become more common, but since they were written and read primarily by members of the educated upper class, the government was concerned more with spoken words from stages than written words in books.¹⁰ As R. E. Smith documents in scholarship on the subject, in the process of ruling over injurious insults, the later Roman Empire helped identify a "sharp distinction between the spoken and written word" with respect to defamation.¹¹

Thus began the formal division of defamation law into its two broad forms: *slander* for oral statements and *libel* for written statements, with interpretations and reparations evolving over the ensuing centuries.¹² However, Roman laws on defamation differed from those of today not only in their emphasis on spoken words over written words. Whereas modern defamation regards the truth of a statement as an absolute defense against defamation, Roman law did not consider the truth as any justification for the insulting manner in which a statement was presented and therefore was inclined to regard any public insult as slanderous, with early punishments including allowance of personal revenge.¹³ Under tribunals of the Roman Empire, the law began punishing perpetrators of slander with financial losses, perhaps the first instances of formal compensatory damages for defamation.¹⁴

⁸ R.E. Smith, *The Law of Libel at Rome*, 1 CLASS. Q. 169, 169-179, (1951).

⁹ *Id.* at 169.

¹⁰ *Id.* at 172.

¹¹ *Id.*

¹² Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 546-573 (1903).

¹³ *Id.* at 564.

¹⁴ *Id.*

In Anglo-Saxon England in the ninth century A.D., King Alfred took a more barbaric stance, demanding that a person found guilty of slander “should have his tongue cut out, unless he could redeem it with the price of his head.”¹⁵ Throughout the Middle Ages, the Church rooted out and punished defamation as a sin, with penance for minor offenses including acknowledgement of the offense in front of an ecclesiastical court as well as a public apology to the victim.¹⁶ Later, English law grappled with determining which kinds of defamation are actionable—written or spoken, public or private—and the complications that arise when these dimensions intersect. As legal historian and scholar Van Vechten Veeder detailed in 1903, a modern interpretation of defamation law tends to view written defamation as having “a *de facto* permanence,” with an understanding that “written defamation operates against reputation largely by becoming in its course spoken slander,” since published claims often spread by word of mouth, and thus injury to the victim must be measured as proportionate not only to the gravity of the statement but also to the scope of its reach throughout the victim’s social circles.¹⁷

THE RIGHT TO REPUTATION: SOCIAL FOUNDATIONS OF DEFAMATION LAW

As defamation law has evolved, courts and juries have struggled to place a value on something as amorphous as a person’s reputation—not to mention how to quantify its losses, which can be whole or partial, isolated or widespread, and permanent or temporary. To understand this, courts are forced to consider the nature of reputation itself because, as Robert C. Post points out, the purpose of defamation law is to take action on society’s “pervasive and strong interest in preventing and redressing attacks on reputation.”¹⁸ Nearly four decades ago, Post’s seminal work on the social foundations of defamation law attempted to understand how courts view reputation, a “mystifying thing” which common law has never attempted to define, and in the process he identified three main views that courts have adopted—reputation as a matter of honor, property, or dignity—which has helped form the modern tripartite concept of reputation but fails to adequately explain the precise relationship between its public and private components.¹⁹

The property concept, which is embedded into defamation law, views reputation as an intangible form of private property—similar to intellectual property—that represents the culmination of an individual’s own personal labor or exertion.²⁰ A person builds their reputation through consistent actions and behaviors over a lifetime, similar to building creditworthiness, and defamation cases therefore amount to public legal protection of private goods.²¹ Valuing the damages to that property, then, becomes a matter of determining its value in the market, whether through direct economic losses or loss of potential opportunities: “the concept assumes that the worth of a person’s reputation will vary with market conditions.”²²

¹⁵ 67 QUADRIPARTITUS (Felix Liebermann, ed., 1892).

¹⁶ Veeder, *supra* note 13, at 550–51.

¹⁷ *Id.* at 572.

¹⁸ *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966).

¹⁹ Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 677 (1986).

²⁰ *Id.* at 694.

²¹ *Id.* at 702.

²² *Id.* at 696.

The property view is appealing in its simplicity, yet it fails to account for the larger cause of restoring a victim's honor, which points to a view of reputation more as a public good rather than merely a private possession.²³ According to this concept of reputation, a person's honor is determined by social perceptions, not just their role as private property, and therefore courts must also consider the social status of the parties involved, and the harm caused to it by defamation.²⁴ In fact, one's social status is an honor-based view that may not even result from personal exertion, in the way that a king enjoys the benefits of the honor that society affords his position despite his contributing no effort to achieve it.²⁵ To reconcile this view in a market economy, some have recently argued a social status theory of defamation law that distinguishes status from reputation, advancing the notion "that good name reflects two distinct but interrelated human pursuits—*reputation* and *status*."²⁶ This view has been echoed in Supreme Court decisions, such as the essential *Gertz v. Robert Welch* decision, in which the Court describes defamation law's purpose of protecting individuals from loss of "standing in the community."²⁷ In *New York Times v. Sullivan*, however, the Court exempted public figures from defamation claims unless there is actual malice, but by leaving open a defense against malicious personal attacks, there remains potential to vindicate the honor of government officials or celebrities, raising questions about whether such vindication equates to a quantifiable amount of compensation. Although considerations of social standing with respect to defamation will remain an area of debate, the idea of reputation in defamation law as synonymous with one's standing within the community remains part of the equation, implicitly pointing to nonpecuniary vindications, sometimes called "noncompensatory" damages, separate from the market value of reputation as private property.²⁸

Finally, the concept of reputation as a matter of public dignity remains at the root of defamation law, particularly with respect to U. S. Supreme Court decisions. This "dignity" language in describing reputation appears most prominently in Justice Stewart's concurring opinion in *Rosenblatt v. Baer*, in which he wrote, "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."²⁹ The immediate problem with this more egalitarian view of reputation as an individual human right to dignity and worth is the implicit assumption that every individual possesses essentially an equal degree of dignity. Human dignity exists for all individuals regardless of social status or market value. A company CEO, therefore, theoretically possesses the same right to reputational dignity as the janitor who cleans his office. It is an inherent right afforded to all individuals in a free society, resulting in a paradoxical concept of reputation as both private and public in nature. Weighing a view of reputation as social and public—as in a "common or general estimate of a person"—against a view of reputation as a private property asset, Post writes, "The gulf that appears to separate reputation from dignity can be spanned only if

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 700.

²⁶ Yonathan A. Arbel, *A Social Status Theory of Defamation Law*, 14 U.C. IRVING L. REV. 786, (2024).

²⁷ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

²⁸ David A. Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747, (1984).

²⁹ *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

defamation law contains an implicit theory of relationship between the private and public aspects of self.”³⁰

MODERN DEFAMATION LAW: GENERAL PRINCIPLES

The result is an increasingly complex—and largely ambiguous—idea of what defamation aims to protect at the potential expense of First Amendment rights. Moreover, this ambiguity in terms of defining reputation contributes to the intricacy of defamation law, which some have characterized as being riddled with “anomalies and absurdities for which no legal writer ever has had a kind word.”³¹ These complexities have led to a patchwork of federal and state laws and interpretations, and though the nuances vary somewhat by jurisdiction, the essence involves a handful of general principles. Almost any case of defamation must establish four essential elements:

1. The defendant made a false statement of material fact about the plaintiff.³²
2. The false statement was made or published to a third party.³³
3. The statement is not subject to privilege.³⁴
4. The statement caused damage or harm to the defendant’s reputation.³⁵

In summary, a statement is defamatory “if it tends to so harm the reputation of [the plaintiff] as to lower him in the estimation of the community or deter third persons from associating or dealing with him.”³⁶ The false statement transmitted to a third party must be presented as one of material fact rather than a mere expression of opinion. It must have caused verifiable damage to a person’s reputation, and its content cannot fall into a legally protected category. For example, in the Illinois case of *Solaia Technology LLC v. Specialty Publishing Co.*, the plaintiff alleged defamation over infringement claims regarding a patent dispute.³⁷ In its analysis, the Supreme Court of Illinois stated that “a defamatory communication violates an individual’s right to a good reputation and gives rise to a cause of action to recover damages for the violation.” The opinion added, “A defamatory statement becomes actionable when it is communicated to a third party and understood by that person as being defamatory.”

DEFAMATION *PER QUOD* AND DEFAMATION *PER SE*

³⁰ Post, *supra* note 20, at 707.

³¹ WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS 737 (4th ed. 1971).

³² Restatement (Second) of Torts § 585-612, 1977.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 559.

³⁷ *Solaia Technology, LLC v. Specialty Publishing Company*, 221 Ill. 2d 558, 852 (Ill. Sup. Ct. 2006).

(For the sake of convenience, we cite Illinois cases, as Illinois generally reflects the basic principles of defamation, though nuances exist, especially when the defamation victim is a public figure.)

To understand how damages are calculated, it's important to consider the basic types of statements the law covers: defamation *per se* and defamation *per quod*. The fundamental difference lies in the severity of the false defamatory statements.

Defamation *per se* is defamation “on its face,” that is, false statements that are obviously harmful, such as claiming a person committed a serious and heinous crime, cannot perform their job, or is an adulterer. Ultimately, as expressed in *Owen v. Carr*, a statement is defamatory *per se* if it is “so obviously and naturally harmful to the person to whom it refers that a showing of special damages is unnecessary.”³⁸ Conversely, defamation *per quod* involves slander or libel that is less obvious, meaning the plaintiff must prove the false statement(s) caused damage. This includes less injurious statements, such as claiming one’s neighbor never cuts his grass or fails to pay his church tithes, or statements in which the plaintiff is unable to prove actual malice on the part of the defendant. An example of this is *Barteck v. Personal Finance Co. of Toledo*.³⁹ The plaintiff alleged that she had been defamed by the defendant and claimed damages. Here, the court observed: “It is not claimed to be a cause of libel *per se*, but libel *per quod*. Special damages must be and are alleged.”⁴⁰

The primary difference between statements that are defamation *per quod* and those that are defamation *per se* involves the assessment of damages. In short, for statements that are deemed defamation *per quod*, the plaintiff must prove tangible damages by providing concrete evidence in the form of records detailing actual harm.⁴¹ The U. S. Supreme Court has emphasized that plaintiffs must provide proof of actual damages in *per quod* cases to avoid creating a chilling effect on the free expression of ideas in public discourse.⁴² In contrast, when statements are so egregious that they are categorized as defamation *per se*, damages do not need to be proven. For defamation *per se* plaintiffs, most states allow presumed damages, meaning damages are presumed without evidentiary requirements. The court in *Winters v. Greeley*⁴³ explained, “Although there is no scale by which to measure the monetary value of reputation, goodwill, or loss of esteem, the law nevertheless recognizes the impairment of reputation and community standing, loss of esteem, personal humiliation, and anguish as actual injuries that necessarily flow from a *per se* defamatory statement.”⁴⁴

Especially for *per se* rulings that involve presumed damages, courts have defined distinctions between actual malice and a negligence standard, and between public figures and private individuals.⁴⁵ According to *Gertz* decision and others, public figures are generally more

³⁸ *Owen v. Carr*, 113 Ill. 2d 273, 277, 497 N.E.2d 1145 (Ill. Sup. Ct. 1986); *see also Costello v. Capital Cities Commc’ns, Inc.*, 125 Ill. 2d 402, 414 (Ill. Sup. Ct. 1988); *see also Green v. Rogers*, 234 Ill. 2d 478, 491–92 (Ill. Sup. Ct. 2009); *see also Bryson v. News America Publications, Inc.*, 672 N.E.2d 1207, 174 Ill. 2d 77, 220 Ill. Dec. 195 (Ill. 1996).

³⁹ *Barteck v. Personal Finance Co. of Toledo*, 60 Ohio App. 197, 20 N.E.2d 259 (1938).

⁴⁰ *Id.*

⁴¹ *Economic Damages in Defamation*, 42 AM. JUR. 2D DAMAGES 45 (2023).

⁴² *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

⁴³ *Winters v. Greeley*, 189 Ill. App. 3d 590, 598 (1989).

⁴⁴ *Id.*

⁴⁵ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

limited in making claims of defamation, as their position naturally opens them to public criticism, but courts continue to interpret an evolving definition of what constitutes a “public figure.”⁴⁶

THE THREAT OF ONLINE DEFAMATION

The internet has created a new landscape in which opinions can be shared with abundant ease, leading to a rise in defamation and damages caused. Social media complicates that landscape further, adding a new dimension to the problem. By allowing an outlet for expression in which users can publish statements without the traditional oversight of editors, digital speech itself presents new challenges to the conventional definition of defamation and the role of social media companies in monitoring content. Given its tendency toward a casual and hyperbolic tone, particularly on social media pages, some state courts have tended to regard the conversational nature of “internet speech” on some platforms as unable to be treated as actionable statements of fact, thereby distinguishing it from statements issued by traditional media outlets.⁴⁷ However, some rulings have sought to apply conventional defamation principles to online statements. In *SI03, Inc. v. Bodybuilding.com*, for instance, a U.S. District Court in Idaho emphasized that users must ensure the accuracy of their online statements to avoid defamation charges.⁴⁸

Confounding the issue further is the fact that many online defamatory statements are expressed anonymously or pseudonymously, and though courts have long upheld a person’s right to anonymous speech, the anonymous nature of online posts presents challenges in bringing perpetrators to court.⁴⁹ On social media, an anonymous user can make false, defamatory statements in seconds with the click of a mouse, and the claims can spread around the world instantly, often causing considerable reputational harm before the victim even learns of the situation.⁵⁰ In a book on anonymity and online speech, Jeff Kosseff offers a detailed analysis of the case of Ryan S. Lin, who was sentenced to 17.5 years in federal prison for an anonymous cyberstalking campaign against his former roommate.⁵¹ Although federal and state laws allow courts to force internet platforms to expose the identities of anonymous users in order to issue warrants and subpoenas, people like Lin often rely on “VPNs, Tor, and other anonymity technology to at least temporarily evade law enforcement,” which complicates investigations.⁵²

Online defamation includes social media posts and comments on sites such as Facebook, Instagram, X (Twitter), or LinkedIn. Both public figures and private individuals have been defamed by factually incorrect or incomplete information regarding alleged infidelity, criminal activities, or other embarrassing behavior. This harm may be caused by malicious intent, but *N.Y. Times v. Sullivan*—decades before the onset of the digital age—decided that defamation can also

⁴⁶ *Id.*

⁴⁷ *Feld v. Conway*, 16 F. Supp. 3d 1, 4 (D. Mass. 2014); *Jacobus v. Trump*, 51 N.Y.S.3d 330, 339 (N.Y. Sup. Ct. 2017).

⁴⁸ *SI03, Inc. v. Bodybuilding.com, LLC*, No. CV 07-6311-EJL (D. Idaho 2008).

⁴⁹ *Talley v. California*, 362 U.S. 60 (1960).

⁵⁰ DANIEL KEATS CITRON, *HATE CRIMES IN CYBERSPACE* 61–62 (Harvard Univ. Press 2014).

⁵¹ JEFF KOSSEFF, *THE UNITED STATES OF ANONYMOUS: HOW THE FIRST AMENDMENT SHAPED ONLINE SPEECH* 214–232 (Cornell Univ. Press 2022).

⁵² *Id.* at 215.

occur from simple negligence resulting from failure to fact-check information.⁵³ Online, some instances of this kind of defamation are shared and re-shared on multiple platforms and media, including by traditional media outlets as well as chat forums, podcasts, and others, often by anonymous users. Forums on sites like Reddit and 4Chan are particularly prone to anonymous statements from bad actors: “Anonymity has been key to the benefits that the forum provides to its posters.”⁵⁴ For example, in 2019, the Federal Bureau of Investigation designated QAnon as a “dangerous extremist group,” which began with a series of pseudonymous posts on 4Chan, a testament to the power of such communications to spread false statements.⁵⁵

Users may post false or malicious negative reviews of businesses or individuals on sites such as Yelp and Amazon, and courts have generally considered traditional websites and online review sites as more serious sources of factual information than chat rooms, blogs, and bulletin boards.⁵⁶ Moreover, negative posts and reviews can impose a secondary negative impact on an entity’s search engine results, potentially leading to additional damages.⁵⁷ In a business-related case, a Texas jury awarded Orix Capital Markets LLC \$12.5 million in damages in a defamation case involving negative reviews on a “gripe site.”⁵⁸ As other scholars have commented, businesses “have significant financial interests in their online reputation among consumers” and often have the financial resources to defend defamation claims.⁵⁹ Even the anonymity of platforms like Wikipedia is susceptible to defamation suits, as seen in *Office Space* actor Rob Livingston’s 2009 lawsuit against Wikipedia for repeated false claims about his sexual orientation.⁶⁰

Other online cases involve impersonation, in which the perpetrator assumes another person’s identity for the purpose of attracting negative attention or committing fraud. This can range from creating a fraudulent social media account under another’s name and then using the account to share content designed to harm the person’s reputation, or using “deepfake” technology to imitate the likeness or voice of a person to achieve similar goals.⁶¹ This has led to a multibillion-dollar industry of internet platform manipulation in the U. S. alone, with fraud accounting for more than \$137 billion stolen from Americans.⁶² Moreover, as one scholar noted, scams involving deepfakes, such as artificial intelligence (AI)-generated nude images, “can also create long-lasting

⁵³ N.Y. Times Co. v. Sullivan, 376 U.S. 254, 267 (1964).

⁵⁴ Kosseff, *supra* note 54, at 232.

⁵⁵ *Id.* at 229-231.

⁵⁶ Hadley M. Dreibelbis, *Social Media Defamation: A New Legal Frontier Amid the Internet Wild West*, 16 DUKE J. L. & PUB. POL’Y 273, (2021).

⁵⁷ SIVA VAIDHYANATHAN, *THE GOOGLIZATION OF EVERYTHING (AND WHY WE SHOULD WORRY)* 20–21 (University of California Press 2011).

⁵⁸ Orix Capital Mkts., L.L.C. v. Super Future Equities, Inc., No. 3:06-CV-0271-B, 2008 WL 4820767, at 1 (N.D. Tex. 2008).

⁵⁹ Hannah Rogers Metcalfe, *Libel in the Blogosphere and Social Media: Thoughts on Reaching Adolescence*, 5 CHARLESTON L. REV. 486, 486-487 (2011).

⁶⁰ *Id.* at 496.

⁶¹ Sarah H. Jodka, *Manipulating Reality: The Intersection of Deep Fakes and the Law*, Reuters (Sept. 13, 2025), <https://www.reuters.com/legal/legalindustry/manipulating-reality-intersection-deepfakes-law-2024-02-01>.

⁶² FTC, *Protecting Older Consumers 2022–2023* (October 2023), <https://www.ftc.gov/reports/protecting-older-consumers-2022-2023-report-federal-trade-commission>.

reputational and psychological harm to victims.”⁶³ While courts and legislatures struggle to piece together patchworks of legislation to address these problems, some social media platforms have imposed limited measures to prevent platform manipulation, but it remains difficult for victims to contact customer service personnel to assist them.⁶⁴

The result of online defamation is twofold: The damage spreads much farther and wider than ever before in the long history of defamation, and the process of assessing and proving damages in court becomes more technical and complex, forcing courts to examine the particular platform or website on which the statement was published, as well as the statement’s overall purpose and context.⁶⁵ To help quantify the level of damage inflicted on a victim, courts are now tasked with considering factors such as geographic spread or virality metrics, as the number of shares and engagement rates may help determine the degree of a message’s influence.⁶⁶

ELEMENTS OF DEFAMATION DAMAGES

Regardless of whether a case is *per quod* or *per se*, similar damage elements and categories apply. Generally, there are five types of potential defamation damages:

1. Economic Damages
2. Physical Harm Damages
3. Emotional Harm Damages
4. Rehabilitation Repair Damages
5. Loss of Reputation Damages

The first four are relatively straightforward, at least conceptually:

1. ECONOMIC DAMAGES

Economic damages compensate plaintiffs for financial losses caused by defamatory statements, which may include lost income, diminished future income, or lost business opportunities. If defamation causes someone to lose their job, the loss of income is considered economic damage. Though the concept is straightforward, calculating or estimating the loss is often not. For instance, calculating how long someone’s earnings may be diminished in the future because of defamation requires complex estimation and certain assumptions, often leading to a range of values. Likewise, even if the victim does not lose employment as a result of defamation, the victim’s future opportunities for promotion or new positions may be limited; that, too, is subject to calculation. When calculating a range of damages based on loss of future income, the numbers should be expressed as present value (to account for the time value of money) and reflect anticipated future inflation. In other words, inflation must be incorporated into the discount rate used in present value calculations—often called a “real discount rate.”

⁶³ Sabriyya Pate, *Platform Liability for Platform Manipulation*, 124 COLUM. L. REV. 875, 875 (May 2025).

⁶⁴ *Id.* at 877.

⁶⁵ Dreibelbis, *supra* note 59, at 257–69.

⁶⁶ Ji Won Kim, *They Liked and Shared: Effects of Social Media Virality on Perceptions of Message Influence*, 84 COMPUTERS IN HUM. BEHAV. 153, 153–161 (2024).

As for the plaintiff's income, damages suffered are generally measured by the difference between the plaintiff's projected earnings if the defamation did not occur and the plaintiff's actual earnings. This process involves evaluating their historical earnings and using them to calculate possible future earnings, often a complex and painstaking process. (Again, the present value of these future earnings should use a real discount rate.) In addition to W-2s and tax filings, legal teams may also look at the state of the economy, the condition of the plaintiff's industry, the plaintiff's business calendar showing a possible decline in business, and the earnings of others involved in the same occupation. In *Harte-Hanks Communications, Inc. v. Connaughton*, the U.S. Supreme Court affirmed \$200,000 compensatory damages for the plaintiff's failed political campaign and business reputation, emphasizing the case report's detailed evidence concerning loss of opportunities such as withdrawn campaign support.⁶⁷ Conversely, in *Brady v. Ottaway Newspapers*, the court denied damages in part because the plaintiff, a police chief, could not show with definitive evidence that defamation caused any specific losses, such as loss of promotions or early retirement.⁶⁸

Although the burden of evidence in *per quod* cases can prove complicated for plaintiffs and their attorneys, calculating presumed damages in *per se* cases can also be complex, given the intangible nature of reputation as explored by Post and others, prompting some to call for minimum presumed awards in cases of defamation *per se*.⁶⁹ While most scholars recognize the justification for the presumed damages rule for individuals, some question the doctrine's application to corporations, arguing that it "may cause a corporate plaintiff's damages award to be artificially inflated," or perhaps worse, to "obtain supposedly compensatory damages for a reputational injury that never occurred."⁷⁰

2. PHYSICAL HARM DAMAGES

Defamation deals with the spoken and written word, so it's easy to overlook physical damages. Yet, the old saying, "Sticks and stones will break my bones, but words will never hurt me," does not apply to defamation. Even though the main damage in defamation cases involves harm to reputation, compensation may be due if the defamation causes stress or other factors that result in physical health problems. For instance, if someone suffers high blood pressure or an ulcer because of a defamatory statement, that is, of course, physical damage. Likewise, a reduced libido or loss of hair because of a defamatory statement is physical harm.

In *Lerman v. Flynt Distributing Co.*, the plaintiff successfully argued that, in addition to emotional anguish, she had suffered from ulcers and insomnia following a false magazine story. The jury decided to award damages for her injuries. In its opinion, the federal court pointed out that the evidence clearly tied Lerman's ulcers and related health issues to the defamation, and that

⁶⁷ *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657 (1989).

⁶⁸ *Brady v. Ottaway Newspapers, Inc.*, 84 A.D.2d 226, 445 N.Y.S.2d 786 (N.Y. App. Div. 1981).

⁶⁹ Steven A. Krieger, *Defamation Per Se Cases Should Include Guaranteed Minimum Presumed Damage Awards to Private Plaintiffs*, 58 SAN DIEGO L. REV. 641, 641-676 (2021).

⁷⁰ Arlen W. Langvardt, *A Principled Approach to Compensatory Damages in Corporate Defamation Cases*, 27 AM. BUS. L. JOURNAL 492 (1990).

a private person like Lerman did not have to prove malice.⁷¹ In a Maryland case, *Bowden v. Caldor*, the plaintiff proved that he had suffered physical ailments following a false public accusation, causing him to experience a nervous breakdown that required hospitalization.⁷² Medical experts testified that the false allegation led to the plaintiff's worsening physical health, including acute anxiety and stress-related symptoms. The jury decided that the plaintiff was entitled to \$110,000 in compensatory damages, which included harm to his reputation as well as his health, and an appellate court upheld the verdict.⁷³

Courts usually request medical proof to support physical harm claims and, in turn, to calculate a dollar figure. Answering questions such as how much an ulcer has damaged a person is often more art than science, subject to broad interpretation. Legal teams must quantify and provide evidence for these issues, often in the form of expert witness testimony. As with emotional harm, medical experts must distinguish pre-existing conditions from defamation-related ailments.⁷⁴ Plaintiffs may also include corroborating testimony from family or colleagues to help substantiate claims.⁷⁵

3. EMOTIONAL HARM DAMAGES

Defamation victims often suffer from a range of emotional distress issues that can result in real medical and psychological problems. Twenty years ago, most courts focused primarily on economic damages, but today the only question regarding emotional damages is how to quantify them.⁷⁶ There is often a high level of mental anguish from the stigma associated with defamation. This often stems from the awareness that friends, family, neighbors, and colleagues know about defamatory content and the constant need to explain. As some experts have noted, "Some allegations are so heinous that any reasonable person would accept that they are inherently distressful [like] 'child molester,' 'sexual predator,' and 'racist' are hot-button accusations."⁷⁷

The landmark case *Gertz v. Robert Welch, Inc.* helped establish precedent regarding emotional distress claims in many jurisdictions.⁷⁸ The U. S. Supreme Court decided that states could base awards on elements other than injury to reputation, specifically listing "personal humiliation and mental anguish and suffering" as examples of harm which may be compensated consistently with the Constitution upon a showing of fault.⁷⁹ When defamation causes mental anguish—as it often does—evidence can be collected similar to documenting lost wages and business opportunities. Given this evidentiary requirement, victims should begin collecting evidence from the start. Common evidence includes medical reports from therapists and

⁷¹ *Lerman v. Flynt Distributing Co., Inc.*, 789 F.2d 164 (2d Cir. 1986).

⁷² *Bowden v. Caldor, Inc.*, 350 Md. 4, 710 A.2d 267 (1998).

⁷³ *Id.*

⁷⁴ David A. Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747, 763 (1984).

⁷⁵ Lyrissa Lidsky, *Where's the Harm?* 71 WASH. & LEE L. REV. 1101, 1123 (2014).

⁷⁶ RODNEY A. SMOLLA, *LAW OF DEFAMATION* (2d ed. 2023).

⁷⁷ Nicholas Carroll, *Emotional Distress Damages in Defamation Cases*, AM. BAR ASS'N (Apr 30, 2019), <https://www.americanbar.org/groups/litigation/resources/newsletters/trial-evidence/emotional-distress-damages-defamation-cases/>

⁷⁸ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974).

⁷⁹ *Id.*

psychiatrists, prescriptions for medications, and documentation of emergency room and hospital visits.

In a high-profile case, Las Vegas casino billionaire Steve Wynn filed a slander suit against Joe Francis, creator of the Girls Gone Wild adult video empire.⁸⁰ Wynn successfully argued that he experienced mental anguish over worries that his employees could suffer if his casino suffered because of the defamation, leading the jury to award him \$3 million in damages for emotional distress, which was later reduced to \$2 million. In Minnesota, a state senator alleged that a citizen defamed her by accusing her of theft on signs placed throughout her district in the weeks leading up to the election, which the senator lost.⁸¹ In the trial, the senator testified that she “experienced severe stress, manifested by headaches and sleeplessness,” and that the act of libel had placed additional strain on her children and marriage, stating that “she was personally humiliated, and one of her children was taunted at school,” forcing her to move to a different vicinity that was unaware of the case.⁸² The jury awarded her \$150,000 in damages as a result of her testimony. This case demonstrates how courts assess and compensate not only for damage to one’s professional reputation but also for emotional harm resulting from defamation, regardless of one’s social or economic status.

Victims often experience stress and anxiety, panic attacks, and depression. Other common problems include insomnia, eating disorders, alcohol and substance abuse, and in some cases, thoughts of self-harm or suicide. In proving emotional distress, reports from psychologists or psychiatrists help document mental issues. Other essentials include related medical records from doctors’ visits and prescriptions to medications used to combat anxiety. More severe cases might result in ER visits or hospitalization. As a result, victims may suffer panic attacks, strokes, or heart problems, which overlap with physical harm damages. In defamation cases, these issues are both documentable and compelling as evidence.

4. REHABILITATION REPAIR DAMAGES

Victims can begin the process of repairing damages to their reputation by legally forcing the removal of defamatory content. However, defamation travels far and fast online, often causing irreversible harm before the victim can respond.⁸³ This viral nature of defamation in the digital age has necessitated awards for reputation rehabilitation costs, particularly for online defamation. Courts treat these as compensatory damages akin to medical treatment for physical harm.⁸⁴ Just as there are mechanics to fix your car, electricians to fix your lights, and surgeons to fix your hernia, there are reputation professionals and companies that specialize in helping restore a person’s or company’s reputation. One central strategy employed is the suppression of defamatory content online. These experts and companies identify the audience that was exposed to negative content and target it with new, positive content.

⁸⁰ Wynn v. Francis, No. B245401, 2014 WL 2811692, at 3–4 (Cal. Ct. App. June 23, 2014).

⁸¹ Prinzing v. Schwab, No. A05-398, 2006 WL 538926, at 1 (Minn. Ct. App. Mar. 7, 2006).

⁸² *Id.*

⁸³ DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 45 (Harvard Univ. Press 2014).

⁸⁴ Doe v. Ciolli, 611 F. Supp. 2d 216, 221 (D. Conn. 2009).

Complete removal of anything posted on the internet is also impossible in most cases. For example, despite Dominion Voting Systems' case against Fox News forcing retractions and settlements, Fox's original false claims proliferated online, with many users continuing to believe them long after the court's decision was rendered.⁸⁵ Users can take screenshots of posts before their removal, sharing them indefinitely after their deletion. Therefore, beyond forcing the removal of content, victims can create new content narratives to replace the negative content. This strategy looks at search engine results pages (SERPs) and where defamatory statements appear in results. Publishing favorable content on trusted platforms can dilute negative search results. By creating and posting positive content on high-authority domains, burying negative content is possible, pushing it down to the fifth or sixth page of search results on the name of the individual or business in question.

Not surprisingly, this process is costly and time-consuming, and it requires a diverse range of expertise. The job is usually carried out by online reputation management companies that help individuals and organizations build and monitor brands and reputations and manage crises when they do arise. As seen in the aftermath of high-profile cases such as *Carroll v. Trump* and *Giuliani v. Freeman*, reputation professionals employ suppression strategies when removal is impossible. In the first *Carroll v. Trump* case, the plaintiff's expert calculated that a rehabilitation campaign to try to restore the plaintiff's reputation might cost as much as \$15 million.⁸⁶ Although courts in some jurisdictions consider the costs for these services to be speculative, many courts have acknowledged these efforts as legitimate, awarding damages to cover their costs if proven to mitigate measurable harm.⁸⁷ Effective suppression can sometimes require six months to a year of sustained effort by firms with expertise in legal, PR, and SEO skills. A number of state courts have acknowledged this and approved expert testimony from reputation specialists.⁸⁸

5. LOSS OF REPUTATION DAMAGES

Given the intangible nature of reputation, as detailed previously, this last category is the most conceptually complex but often the most important component for plaintiffs in terms of damages. Unlike economic or emotional distress damages—which, though complex to calculate, are at least somewhat quantifiable—damage to one's reputation can be proven through witness testimony or other corroborating evidence to demonstrate that the victim has experienced negative social repercussions as a result of defamation.

To illustrate this, let us first consider a hypothetical example. A 70-year-old retired man is defamed. He is falsely accused of committing a heinous crime, and the accusation spreads far and wide in the news and on social media before the truth emerges. Since he is retired, he does not have the same professional losses of income, employment, and future opportunities that working people would face. His social security check still comes, and his other retirement assets remain. Likewise, he did not suffer emotional damage, and at his age, launching a rehabilitation campaign does not make sense, so the first four types of damages do not apply much. However,

⁸⁵ Patrick Marley and Jeremy Barr, *After Fox Settlement, Experts Warn Falsehoods Will Persist*, THE WASHINGTON POST, (April 19, 2023).

⁸⁶ *Carroll v. Trump*, No. 23-CV-1045 (S.D.N.Y. 2023).

⁸⁷ ROBERT D. SACK, SACK ON DEFAMATION § 4:3.2 (5th ed. 2023).

⁸⁸ *Ampex Corp. v. Cargle*, 128 P.3d 996, 1003 (Okla. Civ. App. 2005).

his reputation—the one he worked for decades to develop—is destroyed. It’s the only reputation he has. People in church no longer sit next to him. He is not invited to the neighborhood block parties. His neighbors no longer shovel his driveway in the winter. Obviously, his loss of reputation is harm in and of itself.

This last category is often the only category for defamation *per se* cases. In many jurisdictions, in the absence of concrete evidence, reputational harm can extend into the realm of presumed damages, allowing a plaintiff to recover damages to reputation without tangible proof of harm.⁸⁹ In assessing damages, as some have noted, the presumed damages rule “has had remarkable staying power in American law” in part because reputation acts as a vital social currency.⁹⁰ Presumed damages were recognized by the U.S. Supreme Court in *Gertz*, mentioned earlier for its support for mental anguish damages.⁹¹ In this case, the Court expressed the view that reputation is an important interest worthy of legal protection, one that reflects our basic concept of the essential dignity of people. However, *Gertz* created a two-tier damages approach depending on whether or not the defendant acted with actual malice.⁹² In cases that involve less than actual malice, the plaintiff would be limited to “compensation for actual injury.”⁹³ Although the Court in the *Gertz* opinion declined to define “actual injury” in its ruling, it offered the pathway for a broad interpretation: “Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.”⁹⁴

Given this scope, modern courts have sought valuation methods that are more well-defined, particularly in jurisdictions that limit presumed damages. This was expressed in *New York Times v. Sullivan*, where the court found that to sustain a claim of defamation or libel, the First Amendment requires that the plaintiff show that the defendant knew that a statement was false or that the defendant was reckless in deciding to publish the information without confirming that it was accurate.⁹⁵ In the case of *Wynn v. Francis*, the jury awarded the plaintiff \$17 million for presumed damages to his reputation.⁹⁶ The size of the award demonstrates how seriously many courts take defamation that results in negative consequences on a person’s career or professional reputation.

Reputational damages can also occur in cases involving corporations. In *Brown & Williamson Tobacco Corp. v. Jacobson* (1987), the plaintiff successfully proved that a television broadcast had falsely accused the tobacco company of intentionally advertising to minors.⁹⁷ Despite being unable to prove any economic loss caused by the defamation, the jury awarded \$3

⁸⁹ Restatement (Second) of Torts § 621, 1977.

⁹⁰ Michael K. Steenson, *Presumed Damages in Defamation Law*, 40 WM. MITCHELL L. REV. 1491 (2014).

⁹¹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

⁹² *Id.* at 349-350.

⁹³ *Id.* at 349.

⁹⁴ *Id.* at 350.

⁹⁵ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 267 (1964).

⁹⁶ *Wynn v. Francis*, No. B245401, 2014 WL 2811692, at 3–4 (Cal. Ct. App. June 23, 2014).

⁹⁷ *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 9 Media L. Rep. 1936 (7th Cir. Ill. July 14, 1983).

million in presumed damages to the plaintiffs.⁹⁸ Many jurisdictions impose a presumed damages rule because of “the overriding state interest in protecting reputation and the difficulty—if not the impossibility—of providing evidence of actual injury to reputation.”⁹⁹ This allows juries to assign a value to reputational harm independent of its direct economic or physical impacts. Although most states hold that damage is implied in *per se* cases, eight states have eliminated presumed damages as unconstitutional, often citing *Gertz v. Welch*. This landmark case, cited earlier for its impact on emotional distress damages, also set an important precedent with respect to Constitutional versus state law. The court in *Gertz v. Welch* found that liability in defamation cases against public figures cannot be imposed without fault, but states otherwise can craft their own defamation laws. However, plaintiffs are limited to actual damages if the state does not require actual malice to be shown. Other states have placed special restrictions on damages in *per se* cases.¹⁰⁰ For example, Iowa has excluded libel *per se* and presumed damages in defamation cases involving media defendants.¹⁰¹

Although there remains no easy answer to the ideal way of quantifying a victim’s loss of reputation, as with other aspects of defamation damages, finding a value often involves nuances that expert witnesses help explain. Below are useful constructs that can provide a degree of clarity in breaking down the sub-elements that contribute to an overall loss of reputation.

THE THREE RINGS OF REPUTATIONAL DAMAGE

Because of the elusive conceptual nature of reputation, it becomes useful to consider the various layers of relationships that determine one’s social standing. Legal scholars have rightly noted that reputation is “not a monolith but a network of perceptions held by different communities.”¹⁰² As such, when assessing damages, courts should consider the different levels of personal and professional associations that people maintain and how each group is affected by the defamation in question. Although not strictly legal terminology, these “rings of relationships” help outline the scale of reputational damages, particularly as it is the hardest type of damage to calculate. In my (Somal’s) own work as an expert witness, I have used this theory to estimate damages, and my findings have helped calculate reputational damages and assist legal teams in settlements.

RING 1. THE INNER RING (FAMILY, CLOSE FRIENDS, INTIMATE ASSOCIATES)

The inner ring represents those closest to the defamation victim, including family, closest friends, and trusted colleagues. This is the most damaging ring emotionally, when the people most cherished by the victim hear the false accusations. Defamation that penetrates this circle can splinter deeply personal bonds of trust and create humiliation in front of the people whose opinions matter most to the victim. *Gertz v. Welch* established that defamation can cause “mental anguish,

⁹⁸ *Id.*

⁹⁹ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹⁰⁰ Susan E. Seager, *Jackpot! Presumed Damages Gone Wild—and Unconstitutional*, 3 COMMUN. LAWYER 1 (2015).

¹⁰¹ *Beirman v. Weier*, 826 N.W.2d 436, 447 (Iowa 2013).

¹⁰² DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 51 (Yale Univ. Press 2007).

humiliation, and damage to familial relationships.”¹⁰³ In fact, loss of social connections from being cut off from one’s immediate community is central to the concept of reputational damage, and studies show that isolation from community activities can add to the decline of a person’s overall mental health.¹⁰⁴ In expert witness calculations, the damage to this ring may be evaluated by direct interviews and quotes with relevant individuals to ascertain their perception and observation of any changes in or for the concerned person.

In *Bowden v. Caldor*, for example, the plaintiff suffered a nervous breakdown and required hospitalization when false public accusations disrupted his family and immediate social life.¹⁰⁵ Medical evidence and testimony demonstrated that the defamatory statements had strained his closest relationships, highlighting how reputational damage within this inner ring often manifests as emotional and physical harm. The Johnny Depp and Amber Heard litigation also illustrates the impacts of this ring. While most attention focused on public perception, Depp testified about the personal toll of being labeled a domestic abuser, including how it affected his children, his close circle of friends, and his private life.¹⁰⁶ That harm to intimate relationships falls squarely within Ring 1 and represents an important component in assessing the overall damages to the plaintiff, as certainly harming the relationships between a person and one’s close circle of family and friends must factor into the valuation of the awards for damages.

These relationships may sometimes prove more resilient, since the victim can speak to this group directly, and members of this group may be predisposed to discount defamatory claims about a person they already know because of their preexisting trust. However, when the harm does take root, it has the ability to cause profound personal devastation. This level of harm is significant and, at times, the most damaging, and therefore courts have recognized this dynamic in awarding damages for humiliation, mental anguish, and the collapse of family ties.

RING 2. THE MIDDLE RING (ACQUAINTANCES, COLLEAGUES, AND SOCIAL NETWORKS)

The middle ring consists of acquaintances, coworkers, neighbors, fellow churchgoers, and professional contacts. Unlike close family, these individuals know the victim mostly casually, and as such, they are more likely to believe defamatory statements without seeking clarification directly from the victim. The harm in this middle ring can be acute since these individuals know and recognize the victim, but usually not well enough to ask the victim whether the accusations are true. In fact, often this group will avoid the victim and the awkwardness of direct communication while still gossiping about the allegations themselves, thereby continuing the spread. This dynamic leads to what scholars have described as “social cascades,” in which gossip spreads unchecked within a community or professional network.¹⁰⁷

¹⁰³ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

¹⁰⁴ ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (Touchstone/Simon & Schuster 2000).

¹⁰⁵ *Bowden v. Caldor*, 350 Md. 4, 710 A.2d 267 (1998).

¹⁰⁶ *John C. Depp v. Amber Laura Heard*, No. CL-2019-0002911 (Va. Cir. Ct. 2022).

¹⁰⁷ CASS R. SUNSTEIN, *ON RUMORS: HOW FALSEHOODS SPREAD, WHY WE BELIEVE THEM, AND WHAT CAN BE DONE* (Princeton Univ. Press 2009).

In the Giuliani case, defamation against the two Georgia election workers illustrates the effects of this middle ring.¹⁰⁸ Giuliani's repeated false allegations of ballot-stuffing spread rapidly through the women's professional and community circles, causing not only racist harassment but also estrangement from neighbors and colleagues. The jury's enormous award of \$148 million reflected the profound damage occurring in this middle ring, where professional reputations and daily community standing were destroyed.¹⁰⁹ Similarly, in *Harte-Hanks Communications, Inc. v. Connaughton*, reputational harm in the plaintiff's professional and political network cost him campaign support and career opportunities.¹¹⁰ The damage was not limited to strangers at large, but played out within the network of acquaintances and political colleagues who were positioned to further, or else derail, his career.

This ring is especially consequential for professional or corporate plaintiffs, as it weighs heavily on the victim's social and professional networks. In the case of *Steve Wynn v. Joe Francis*, for example, Wynn argued that defamatory statements created fear among his employees and business associates, destroying trust and stability within his middle ring of business relationships.¹¹¹ The damages for this middle ring may be calculated through direct or indirect experiential interviews, or any other evidence of changing social attitudes towards the plaintiff, such as documentation of lost opportunities or shifting opinions about the plaintiff. For some plaintiffs, defamation's impacts on this ring can impact job mobility, since most job referrals and opportunities derive from one's network of acquaintances, including those in this middle ring. The effects of false accusations within this ring can thus devastate career prospects and damage business partnerships.

RING 3. THE OUTER RING (THE GENERAL PUBLIC AND STRANGERS)

The outer ring comprises the wider public, people whom the victim may never have met in person but whose perception can nonetheless have devastating consequences. In the digital age, this is often the largest and most venomous ring because defamatory allegations spread virally to millions of strangers who only know the victim through the prism of the false allegations. On one hand, the damage from these outer rings may seem negligible, since these are strangers, not people the victim will likely have to face in person. However, this is a nearly infinite group of people disposed to assume accusations are true unless they hear otherwise. The victim will always know this group is out there, and that someone from this group may be the next personnel manager or a potential client the victim hopes to impress.

The Alex Jones litigation regarding his false claims about the Sandy Hook mass shooting incident illustrates the outer ring's power.¹¹² Millions of strangers who had never met the victims nonetheless consumed Jones's false claims that the massacre was a hoax. As a result, bereaved parents were harassed by strangers, threatened in public, and forced to move multiple times.¹¹³ The

¹⁰⁸ *Freeman v. Giuliani*, No. 1:23-cv-03754 (D.D.C. 2023).

¹⁰⁹ *Id.*

¹¹⁰ *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657 (1989).

¹¹¹ *Wynn v. Francis*, No. B245401, 2014 WL 2811692, at 3–4 (Cal. Ct. App. June 23, 2014).

¹¹² *Lafferty v. Jones*, X06-UWY-CV18-604637-S (Conn. Super. Ct. Nov 10, 2022).

¹¹³ *Id.*

billion-dollar judgment reflected not only private anguish but also the sheer scale of reputational harm inflicted in the outermost ring.¹¹⁴ Similarly, Dominion Voting Systems' defamation case against Fox News demonstrates the stakes of reputational harm in the outer ring.¹¹⁵ While Dominion's employees and clients were part of the middle ring, the real harm was inflicted on the millions of television viewers and social media users across the globe who believe the false narrative that Dominion rigged the 2020 election.¹¹⁶ The \$787.5 million settlement recognized the extent to which reputational damage in the outer ring can destroy public trust in a company, regardless of industry and jurisdiction.¹¹⁷

Even in celebrity cases such as *Depp v. Heard*, much of the litigation was based on the worldwide loss of roles, endorsements, and fan support as a result of defamatory allegations being repeated in headlines and social media. For the actors and politicians, however, the outer ring—the mass public—could be the most financially consequential. Politicians, celebrities, and authors rely on public perception, meaning that defamation can destroy careers. For politicians, this ring includes voters; for authors like E. Jean Carroll, readers; and for actors like Johnny Depp, the moviegoers' admiration that can make or break box office results and future roles.

The layer of complexity elevates celebrity defamation cases, both in the intricacy of the cases and the size of the monetary damages. Mass media defamation, represented by the outer ring, in fact, can lead to multimillion-dollar verdicts. In my (Somal's) own expert witness work, I have calculated damages from harm to the third ring by determining the precise number of a celebrity's fans who saw the damaging accusations online or in stores and assigned dollar values to these numbers to calculate a range of damages based on reputational harm.

Taken together, these examples illustrate the way reputational damage spreads outwards through concentric circles. The inner ring speaks to personal dignity; the middle ring to one's community standing and professional opportunities; the outer ring to mass perception in the age of viral communication. Courts that do not draw distinctions between these rings risk either undervaluing—or overvaluing—the harm of a reputation. By placing damages in this multiple-level context, judges and juries may more accurately calibrate awards to the lived realities of plaintiffs, whether those are private citizens ostracized in their neighborhoods or global corporations maligned before millions.

UNSETTLING VERDICTS

The increasingly high dollar figures in damages awarded in recent cases have led to calls for reform, or at least a more balanced and quantified approach in calculating damages. Especially in high-profile cases, even detailed documentation of various damages and the most skilled expert witness testimony does not ameliorate the inherent ambiguity in assessing reputational harm. One may argue that the relatively high social status of celebrities involved in defamation implicitly contributes to their higher awards, or perhaps their cases reach across all three reputational rings and therefore deserve higher compensation. Regardless, court rulings are often appealed, and

¹¹⁴ *Id.*

¹¹⁵ *US Dominion, Inc. v. Fox News Network, LLC*, N21C-03-257; N21C-11-082 (Del. Super. Ct., Mar 31, 2023).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

settlement negotiations lead in numerous directions, often leaving questions about the degree to which the perceived social status of both the defendant and the plaintiff plays a role in valuations.

Of course, collecting damages is another complicating factor. In the Rudy Giuliani case, two Georgia election workers sued, saying Giuliani's false claims of election fraud had upended their lives by inciting racist threats and harassment—misinformation they claimed that Giuliani refused to stop repeating. As the Associated Press reported, following emotional testimony, there was “an audible gasp” in the courtroom when the jury's foreperson read aloud the award of \$75 million in punitive damages added to \$36 million each in other damages.¹¹⁸ Still, eight months later, they were back in court asking a federal court to help enforce the judgment, listing the assets of the former New York mayor, including properties in New York and Florida, a Mercedes-Benz, some two-dozen luxury watches, sports memorabilia, including three New York Yankees World Series rings, and other personal items.¹¹⁹ To some extent, higher valuations provide an incentive for the defendant to challenge the awards in appellate courts, and bankruptcy proceedings can shield guilty defendants from their impacts.

In the case of Alex Jones, who claimed the 2012 Sandy Hook school shooting that killed twenty children and six adults was a hoax staged by actors, he was found guilty of libel by a Connecticut jury for nearly \$1 billion, and an additional \$473 million in punitive damages. In a separate case in Texas, Jones was ordered to pay \$49 million in damages to Sandy Hook parents, \$4.1 million of that in compensatory damages. But how much of those damages the plaintiffs will ever receive remains uncertain. Jones's Infowars media business was set to be auctioned off in October 2024 as part of bankruptcy proceedings.¹²⁰

The eye-popping \$787.5 million settlement in Dominion's case against Fox News came with an added layer of complexity. The trial was scheduled to begin in April 2023, with Dominion planning to subpoena Fox Corp. Chairman Rupert Murdoch and his son, Fox Corp. CEO Lachlan Murdoch. Fox News hosts, including Sean Hannity and Tucker Carlson, were also likely to be called for testimony. Fox News had already been subjected to months of negative publicity, and the prospect of a trial apparently induced the company to accept the gigantic settlement. In fact, the Fox Corp. suit is one of several cases related to false claims of voter fraud. The voting tech company Smartmatic reached a “confidential settlement” on Sept. 26 with Newsmax, and a similar settlement in April with One America News, and the company is still involved in a lawsuit against Fox News.¹²¹ The political sensitivity of these cases, involving false claims of voter fraud, cannot be overstated, given their impact on public trust in the democratic process.

¹¹⁸ Lindsay Whitehurst & Alann Durkin Richer, *Jury Awards \$148 Million in Damages to Georgia Election Workers*, AP NEWS (Dec. 15, 2023) <https://apnews.com/article/giuliani-2020-election-georgia-defamation-moss-freeman-6f6446c4f5224f521db8ff7763fb12d1>.

¹¹⁹ *Id.*

¹²⁰ Akiko Matsuda, *Infowars for Sale: Alex Jones's Assets Again Debated in Bankruptcy Court*, WALL ST. J. (Sept. 19, 2024), <https://www.wsj.com/articles/infowars-for-sale-alex-joness-assets-again-debated-in-bankruptcy-court-b194c804>.

¹²¹ Sara Fischer, *Newsmax, Smartmatic Settle Defamation Lawsuit*, AXIOS (Sept. 27, 2024), <https://www.axios.com/2024/09/27/newsmax-smartmatic-settle-defamation-lawsuit>.

Finally, the Johnny Depp–Amber Heard case shows examples of how calculating defamation damages is often far from an exact science. Originally, Depp sued Heard for defamation, claiming \$50 million in damages, and Heard filed a countersuit claiming \$100 million in damages. In its finding, the jury awarded Depp with \$10 million in compensatory damages and another \$5 million in punitive damages. The punitive damages, however, were reduced to \$350,000 because of limits imposed by Virginia state law, as the trial was held in Fairfax County, Virginia. Less reported is the award in Heard’s countersuit. The jury found that a contested statement made by Depp’s lawyer to be false and defamatory and awarded Heard \$2 million in compensatory damages. Both sides appealed the judgments against them in late 2022 and, in December, settled the case and dropped their appeals. Many commentators noted Depp had won the closely followed case in the court of public opinion, and as for the damages, Depp’s attorney stated that the “jury’s unanimous decision and the resulting judgment in Mr. Depp’s favor against Ms. Heard remain fully in place,” and the settlement would result in a \$1 million payment to Depp—paid by Heard’s homeowner’s insurance—which “Depp is pledging and will donate to charities.”¹²²

Thus, the complexities of defamation damages extend far beyond their initial calculation. From documentation and expert testimony to appellate review, settlement negotiations, and the practical challenge of enforcing judgments, reputational harm remains one of the most elusive injuries in tort law. Cases from Trump to Giuliani, from Dominion to Depp, demonstrate society’s broader struggle to value reputation in an era when misinformation can spread instantly and globally. As both state and federal courts have recognized, the path forward lies in evidence-based frameworks that acknowledge not only the falsehood of the defamatory statements or the malicious intent behind them, but also the speed, scope, and relational impact of reputational harm in the digital age.

CONCLUSION

Defamation law has always found itself at the intersection of personal dignity, social status, and economic consequence. Today, those stakes are multiplied by digital communication and global media, which magnify reputational harm at exponential rates. The law, however, still struggles with a central paradox: reputation is one of the most valuable assets an individual or a business can possess, yet it remains one of the hardest things to quantify when it experiences injury.

The long history of defamation damages, from Roman edicts to modern billion-dollar verdicts, has resulted in general principles of valuation that courts currently recognize. Yet, at the center of nearly every case is a problem of reputation itself: how to define it, how to value it, and how to restore it once it has been damaged. The proposed three rings of reputational damage offer one way forward. By separating the damage experienced within one’s inner circle, one’s social and professional networks, and the public as a whole, courts are afforded a clearer sense of scale and impact.

Adopting such a layered perspective does not solve all of the ambiguities, nor does it remove a discretionary role for juries, but it does help to create a conceptual anchor more

¹²² Elyse Dupre, *Johnny Depp to Donate \$1 Million Settlement from Amber Heard to 5 Charities*, NBC LOS ANGELES (2023), <https://www.nbclosangeles.com/entertainment/entertainment-news/johnny-depp-to-donate-1-million-settlement-from-amber-heard-to-5-charities/3170160/>.

applicable to the lived experience of defamation victims in the digital age. Just as economic damages are calculated with the help of accounting principles and expert testimony, so should reputational damages be assessed using tools that reflect the relational nature of reputation. The three rings framework offers a useful way for courts to move beyond intuition and to more evidence-based awards.

Ultimately, the three-ring framework offers a way to make sense of defamation damages. By distinguishing among injuries to identity, emotional harm, and economic losses, it provides categories that juries can understand and courts can use to guide remedies. In that sense, the framework is not only descriptive but prescriptive: it gives judges, litigants, and expert witnesses a roadmap for presenting and assessing damages in a way that is accessible and coherent. As defamation law continues to grapple with the challenges of online speech, a clear taxonomy like this can help ensure remedies are not only consistent but also proportionate and just.

**HOMELESSNESS AND THE AMERICAN LEGAL ORDER:
HISTORICAL FOUNDATIONS, COMPARATIVE PERSPECTIVES
AND
PATHWAYS TO REFORM**

John Paul¹

INTRODUCTION

Homelessness in the United States presents not merely a problem of economic scarcity but a complex and evolving challenge at the intersection of constitutional doctrine, statutory law, public policy, and human dignity; the phenomenon requires sustained scholarly attention precisely because it illuminates the extent to which American legal institutions both respond to and perpetuate structural inequality.²

The task of situating homelessness within a legal framework is particularly urgent given the shifting jurisprudence of the Supreme Court, the episodic nature of congressional intervention, and the uneven commitment of states and municipalities, each of which alternately employ criminal, civil, and administrative strategies to govern the lives of unhoused persons.³

This Article proceeds by: (1) offering a historical account of legal regimes surrounding poverty and displacement; (2) examining the rise of federal statutory frameworks such as the McKinney-Vento Homeless Assistance Act; (3) surveying the constitutional law of homelessness from vagrancy decisions to contemporary Eighth Amendment cases; and (4) assessing the empirical relationship between housing markets, social services, and homelessness; before (5) proposing a set of legal and policy reforms designed to meet both doctrinal constraints and normative imperatives of social justice.⁴

HISTORICAL BACKGROUND

The history of homelessness law in the United States traces back to colonial poor laws that imported English traditions of parish-based relief, which placed responsibility on localities to provide subsistence

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² Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295 (1991). Waldron argues that homeless individuals possess less freedom than housed persons, contending that homelessness itself constitutes a state of unfreedom. He posits that because all actions must occur in a specific location, the combination of private property laws and regulations targeting public spaces legally prevents homeless people from performing necessary daily activities anywhere.

³ See generally U.S. Interagency Council on Homelessness, *Federal Strategic Plan to Prevent and End Homelessness* (latest ed.).

⁴ 42 U.S.C. § 11431 et seq. (McKinney-Vento Homeless Assistance Act).

support to indigent residents, yet simultaneously subjected mobile and itinerant persons to exclusion, removal, and criminal sanction.⁵

By the nineteenth century, municipalities had embraced vagrancy statutes that functioned less as measures of social welfare than as instruments of public order, designed to suppress visible poverty in burgeoning urban centers. The courts largely upheld such ordinances until the Supreme Court's landmark invalidation of a broad vagrancy law in *Papachristou v. City of Jacksonville*, which condemned vague statutes that conferred unfettered discretion upon police to target marginalized populations.⁶

The Great Depression of the 1930s marked a turning point, as mass unemployment and widespread destitution overwhelmed local systems and prompted the creation of federal welfare and housing programs, including the establishment of public housing authorities and the introduction of Social Security. While these policies together marked the beginning of a federal role in alleviating poverty, they did not directly resolve the issue of homelessness, which persisted in the form of transient camps and so-called Hoovervilles.⁷

New Deal housing investments and civil rights legislation recalibrated the legal environment; however, the closure of psychiatric hospitals without commensurate community care, combined with deindustrialization and restrictive land-use regimes, produced rising shelter need by the 1980s.⁸

The post-war era witnessed the simultaneous expansion of suburban development through federally subsidized mortgages and the contraction of affordable inner-city housing through urban renewal and clearance projects, which displaced low-income residents without guaranteeing replacement housing. These policies sowed the conditions for later surges in visible homelessness as urban centers lost both population and affordable housing stock.⁹

⁵ William P. Quigley, *Five Hundred Years of English Poor Laws, 1349-1834: Regulating the Working and Nonworking Poor*, 30 AKRON L. REV. 73 (1996).

⁶ *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). The U.S. Supreme Court declared the City of Jacksonville's vagrancy ordinance unconstitutionally vague and overbroad. The Court found the ordinance violated due process because it failed to provide fair notice of what conduct was prohibited, allowing for arbitrary and discriminatory arrests and convictions. The ordinance's broad language criminalized normally innocent activities, such as wandering aimlessly or frequenting places where alcohol was sold, giving police nearly unlimited discretion to arrest individuals.

⁷ Kenneth L. Kusmer, *DOWN AND OUT, ON THE ROAD: THE HOMELESS IN AMERICAN HISTORY* (1987).

⁸ Chris Lester, *Homeless in America: 40 Years of Crisis and the Role of Corporate Interests in Contemporary Homelessness*, THE FLAW February 23, 2024. Argues that contemporary homelessness is largely a result of systemic factors, particularly the influence of corporate interests within the neoliberal framework over the past 40 years. Lester contends that corporate influence has shaped policies, individualized the problem, deflected blame from corporations, and contributed to the criminalization of homelessness, allowing systemic factors like lack of affordable housing to be ignored in favor of individual intervention.

⁹ Alexander von Hoffman, *Housing and Urban Development Since 1945: A Review Essay*, 29 PLANNING PERSPECTIVES 1 (2014). examines the evolution of US housing policies and the inherent conflicts between federal goals and local interests after World War II. The article critiques programs like urban renewal and highlights how

DEINSTITUTIONALIZATION AND THE RISE OF MODERN HOMELESSNESS

The deinstitutionalization movement that began in the 1960s and accelerated into the 1970s reshaped the landscape of poverty and public health in the United States, as large state psychiatric hospitals were closed or downsized in response to constitutional litigation, changing professional norms, and fiscal pressures; yet, the promised alternative of well-funded community mental health centers never materialized at the necessary scale, leaving thousands of individuals with serious mental illness without consistent housing or treatment options.¹⁰

Cases such as *O'Connor v. Donaldson*, in which the Supreme Court held that a non-dangerous individual could not be confined without treatment, reflected a growing judicial unease with custodial warehousing; yet, the doctrinal victories in liberty interests did not translate into the positive provision of housing or treatment, thereby shifting the burden of care to families, local jails, and the streets.¹¹

The convergence of deinstitutionalization with the broader economic upheavals of the 1970s, including stagflation, the decline of manufacturing employment, and the retrenchment of federal housing subsidies, generated the modern crisis of chronic homelessness, particularly in urban centers like New York, Los Angeles, and San Francisco, where restrictive zoning and gentrification limited the supply of low-rent housing.¹²

By the 1980s, the growth of visible homelessness was undeniable, with tent encampments and emergency shelters becoming durable features of the urban landscape. The federal government responded by enacting the McKinney Act, the first comprehensive attempt to establish a national framework for addressing the issue, though it remained

private sector influence often undermined efforts for progressive housing reform, though the ideal of decent housing for all persists despite these challenges.

¹⁰ *O'Connor v. Donaldson*, 422 U.S. 563 (1975). The U.S. Supreme Court held that a state cannot constitutionally confine a non-dangerous person who is capable of surviving safely in freedom, even if they are mentally ill. The ruling established a constitutional minimum for involuntary civil commitment, stating that mere diagnosis of mental illness is insufficient grounds for deprivation of liberty without due process. The Court also found that the state lacked the usual justifications for confinement—safety or treatment—in Donaldson's case and upheld the jury's finding of a constitutional violation, though it remanded the case for further consideration of monetary damages.

¹¹ Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 OHIO ST. J. CRIM. L. 53 (2011). compares the emptying of state mental hospitals to the challenge of reducing mass incarceration, arguing that the failures of deinstitutionalization offer insights for addressing today's prison crisis. Harcourt suggests strategies such as using voluntary medication and monitoring as alternatives to incarceration, implementing federal funding incentives for community-based programs, and using media and litigation to influence public opinion, while stressing the need to avoid pitfalls like racialization and simple transfers to other problematic institutions.

¹² Peter H. Rossi, *DOWN AND OUT IN AMERICA: THE ORIGINS OF HOMELESSNESS* (1989). Argues that homelessness stems fundamentally from extreme poverty rather than individual failings, characterizing the homeless as an extremely poor subset who have lost social support systems. He notes a shift in the homeless population from older white men to a younger, more diverse group in the 1980s and proposes poverty alleviation programs as solutions.

modest relative to the scale of the crisis.¹³

FEDERAL STATUTORY FRAMEWORK

The McKinney-Vento Homeless Assistance Act of 1987 represented a watershed in federal policy, marking the first time Congress enacted a comprehensive statutory scheme directed specifically at homelessness, and its various titles authorized programs for emergency shelter, transitional housing, supportive services, and education, while also signaling a recognition that homelessness implicated not only welfare policy but also civil rights and educational equity.¹⁴

The subsequent HEARTH Act of 2009 restructured McKinney-Vento, placing greater emphasis on prevention, rapid rehousing, and performance measurement, thereby institutionalizing the policy shift toward evidence-based funding allocation, which required local Continuums of Care to collect data, coordinate entry systems, and demonstrate measurable reductions in homelessness as a condition of continued federal support.¹⁵

HUD's implementation of these statutes through detailed rulemaking and program guidance has produced a highly bureaucratic but indispensable infrastructure for local homeless service systems, and the interplay between statutory mandates and administrative discretion illustrates the dynamic character of American social welfare law, in which agencies must balance congressional directives, judicial review, and local implementation capacity.¹⁶

Interagency collaboration remains crucial, as the Department of Health and Human Services funds behavioral health treatment, the Department of Veterans Affairs administers extensive homeless programs for veterans, and the U.S. Interagency Council on Homelessness provides coordination; however, gaps persist due to fragmented funding streams and differing eligibility criteria across programs.¹⁷

¹³ Dennis P. Culhane & Stephen Metraux, *Reinstitutionalization: The Revolving Door of Mental Illness*, 60 PSYCHIATRIC SERV. 127 (2009). Examined "reinstitutionalization," describing how individuals with serious mental illness cycle repeatedly through institutions like shelters, hospitals, and correctional facilities, rather than state mental hospitals. They argue this system incurs high social and economic costs, proposing that supportive housing is a more humane and cost-effective alternative demonstrated by studies like the New York-New York initiative.

¹⁴ 42 U.S.C. § 11301 et seq. (McKinney-Vento Homeless Assistance Act).

¹⁵ Homeless Emergency Assistance and Rapid Transition to Housing (HEARTH) Act of 2009, Pub. L. No. 111-22, 123 Stat. 1663.

¹⁶ HUD, Continuum of Care Program Interim Rule, 24 C.F.R. Part 578 (2012). The 2012 Continuum of Care (CoC) Program Interim Rule, under 24 C.F.R. Part 578, established the framework for communities to end homelessness by requiring them to form a collaborative group (a CoC) that coordinates services, applies for HUD funding, and manages a Homeless Management Information System (HMIS). Key requirements include establishing local coordinated assessment systems, implementing processes for evaluating and prioritizing homeless individuals, and developing plans to address the needs of those fleeing domestic violence. The rule aimed to promote access to mainstream services and optimize self-sufficiency for homeless populations.

¹⁷ U.S. Interagency Council on Homelessness, Federal Strategic Plan to Prevent and End Homelessness.

CONSTITUTIONAL JURISPRUDENCE

Constitutional jurisprudence on homelessness has developed unevenly, reflecting broader tensions in American constitutional law over the limits of state power and the recognition of positive social rights, and the Supreme Court's precedents illustrate a halting progression from the criminalization of status offenses toward a more nuanced consideration of involuntary conduct, particularly in the Eighth Amendment context.¹⁸

The Court's decision in *Robinson v. California* established the principle that the state may not criminalize the status of addiction, and in *Powell v. Texas* the Court fractured over whether public intoxication could be punished when it was inseparable from chronic alcoholism. These cases set the stage for subsequent lower court litigation over homelessness, culminating decades later in the Ninth Circuit's influential holding in *Martin v. Boise* that punishing sleeping in public when no shelter was available violated the Eighth Amendment's prohibition on cruel and unusual punishment.¹⁹

In 2024, the Supreme Court's decision in *City of Grants Pass v. Johnson* narrowed the scope of *Martin* by distinguishing between status and conduct while reaffirming municipal discretion to regulate public spaces, a ruling that has sparked intense debate over whether the Court retreated from protecting the most vulnerable or clarified an unduly expansive reading of the Eighth Amendment.²⁰

Beyond the Eighth Amendment, homelessness litigation has raised Fourth Amendment concerns over the seizure of personal property

¹⁸ Kameron Bechler and Gregory B. Leong, *Eighth Amendment Rights of Homeless Individuals*, JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW March 2025, 53 (1) 99-101; DOI:

<https://doi.org/10.29158/JAAPL.240124L1-24>. analyzes the U.S. Supreme Court's *City of Grants Pass v. Johnson* decision, finding that the Court's 6-3 ruling permits cities to fine and jail homeless individuals for sleeping outside even without available shelter. The authors conclude that while the ruling addresses one aspect, it leaves many questions unanswered regarding homelessness and legal challenges for unhoused individuals.

¹⁹ *Robinson v. California*, 370 U.S. 660 (1962); *Powell v. Texas*, 392 U.S. 514 (1968) ; *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019). *Robinson v. California* established the status crimes doctrine, holding that punishing a person's status as a drug addict is cruel and unusual punishment under the Eighth Amendment. *Powell v. Texas* distinguished *Robinson* by allowing states to punish public conduct related to a status (like public intoxication by an alcoholic) rather than the status itself, creating a fractured and contested interpretation of the limits of the Cruel and Unusual Punishments Clause. *Martin v. City of Boise* extended this logic, arguing that criminalizing the status of homelessness by punishing related conduct (like sleeping in public) is also unconstitutional, although this application of the status crimes doctrine remains controversial and was later challenged in the Supreme Court case of *City of Grants Pass v. Johnson*.

²⁰ *City of Grants Pass v. Johnson*, 603 U.S. 520 (2024). In *City of Grants Pass v. Johnson* (2024), the Supreme Court ruled that local governments can enforce ordinances banning sleeping or camping on public property, finding these laws do not violate the Eighth Amendment's prohibition against "cruel and unusual punishment". This decision allows cities to penalize people for living in public spaces, even if there is no alternative shelter available, and effectively reverses a previous lower court ruling that had applied the precedent of *Martin v. Boise*. The ruling gives cities and states more authority to address homelessness through local ordinances, shifting the responsibility of solving the crisis back to state and local policymakers.

during encampment clearances, as illustrated in *Lavan v. City of Los Angeles*, as well as Fourteenth Amendment procedural due process claims, which require notice and an opportunity to reclaim belongings, demonstrating that homelessness law is intertwined with the broader architecture of constitutional protections against arbitrary state action.²¹

STATE-LEVEL APPROACHES

States have approached homelessness with remarkable heterogeneity, reflecting differences in political culture, fiscal capacity, and legal tradition, and the resulting patchwork demonstrates both the promise and the peril of American federalism in addressing a social crisis.²²

Massachusetts stands out for codifying a statutory right to shelter for families, which obligates the state to provide emergency housing regardless of budgetary strain, while New York City enforces a judicially recognized right to shelter through the consent decree in *Callahan v. Carey*, a unique mechanism by which judicial oversight has entrenched a positive obligation on municipal government.²³

California, by contrast, has experimented with statutory frameworks such as the Homeless Coordinating and Financing Council and large-scale appropriations for supportive housing, but implementation remains hampered by local zoning restrictions and neighborhood opposition, illustrating the difficulty of translating fiscal investment into durable housing access.²⁴

Southern states such as Texas and Florida have tended to rely more heavily on punitive ordinances restricting public camping and panhandling, strategies that have drawn litigation and civil liberties challenges, yet continue to shape the lived experience of homelessness in regions where political support for entitlement-style programs remains limited.²⁵

²¹ *Lavan v. City of Los Angeles*, 693 F.3d 1022 (9th Cir. 2012). In *Lavan v. City of Los Angeles* (2012), the Ninth Circuit held that the Fourth and Fourteenth Amendments protect homeless individuals from the summary seizure and destruction of their unabandoned, personal property, even if left momentarily unattended on public sidewalks. The court ruled the City's practice of destroying items like personal identification, blankets, and shelters violated the constitutional rights of homeless individuals who stepped away to perform necessary tasks like showering or attending court. The case affirmed an injunction against the City's regular clean-up practices and established that the Fourth Amendment's protection against unreasonable seizures applies to the summary destruction of a person's unabandoned possessions.

²² Don Mitchell, *Homelessness, American Style*, URBAN GEOGRAPHY May 2013, 933-956; DOI: <https://doi.org/10.2747/0272-3638.32.7.933>

²³ Mass. Gen. Laws ch. 23B, § 30 and 760 CMR 67.00 (right-to-shelter regulations); *Callahan v. Carey*, No. 79-42582 (Sup. Ct. N.Y. County, Cot. 18, 1979).

²⁴ Allison Hanley, *Rethinking Zoning to Increase Affordable Housing*, JOURNAL OF HOUSING AND COMMUNITY DEVELOPMENT, Vol. 80(2) Fall/Winter 2023.

²⁵ Texas Penal Code § 48.05 prohibits camping in public places without the consent of the managing authority, which can lead to a fine of up to \$500 for a Class C misdemeanor. A person commits an offense by intentionally or knowingly camping in a public place without proper authorization. Intent can be shown through evidence like

LOCAL GOVERNANCE AND ENFORCEMENT

Local governments occupy the front lines of homelessness policy, and their ordinances, policing strategies, and service-delivery models shape the daily lives of unhoused residents more directly than distant federal statutes, yet this proximity to the crisis also produces a tension between immediate demands for public order and the long-term goal of stabilizing housing markets and social services.²⁶

Cities have enacted ordinances regulating public camping, vehicle habitation, panhandling, and the use of sidewalks, often justifying these measures as essential to health and safety, yet critics argue that such ordinances amount to the criminalization of poverty, especially when they are enforced in contexts where shelter beds are unavailable or inaccessible due to eligibility rules.²⁷

Some jurisdictions have experimented with sanctioned encampments, tiny-home villages, and designated safe-parking programs for individuals living in vehicles, initiatives that occupy a legally ambiguous space because they acknowledge the persistence of unsheltered homelessness while raising questions about whether they normalize or entrench substandard living conditions.²⁸

Regional collaborations, such as multi-county Continuums of Care or metropolitan housing authorities, demonstrate that interlocal

making a fire, cooking, storing belongings, digging, or sleeping in a public area. The law, effective September 1, 2021, specifies that consent is not effective if intended for recreational camping or for sheltering the homeless; Fla. Stat. § 316.2045 is a Florida law that prohibits obstructing public streets, highways, and roads by impeding traffic or endangering pedestrians and vehicles. The law doesn't explicitly name "panhandling" but prohibits actions like standing in the roadway, which can include panhandling if it interferes with traffic or creates danger. Violations are considered a pedestrian violation.

²⁶ National Law Center on Homelessness & Poverty, *Housing Not Handcuffs* (2019),

<https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf>. The National Law Center on Homelessness & Poverty's 2019 *Housing Not Handcuffs* report details a national trend of increasing city laws that criminalize homelessness by restricting life-sustaining behaviors like sleeping, sitting, and begging in public spaces. The report found that prohibitions on these activities, as well as camping and living in vehicles, had grown in every measured category since 2006, demonstrating a rising criminalization of homelessness despite the fact that it is a symptom of deeper social and economic issues. The report highlights that these laws, which punish unavoidable behaviors of people experiencing homelessness, only worsen the problem by creating more barriers to housing and employment. The report serves as a call to action for cities and states to shift resources from punishment and enforcement to compassionate, evidence-based solutions that prioritize housing and aim to end homelessness.

²⁷ Sara K. Rankin, *Criminalizing Homelessness*, 23 HARV. C.R.-C.L. L. REV. 161 (2015). In the article, Rankin argues that laws punishing essential life-sustaining activities in public spaces are an ineffective, costly, and harmful approach to homelessness, worsening the problem by creating barriers to exiting homelessness. Rankin advocates for a shift from punitive measures towards humane, evidence-based solutions like Housing First, defining criminalization as punishing basic survival acts rather than true crimes.

²⁸ Deborah K. Padgett, *Homelessness, Housing Instability and Mental Health: Making the Connections*, BJPSYCH BULLETIN, Volume 44, Issue 5, October 2020, pp. 197 - 201 DOI: <https://doi.org/10.1192/bjb.2020.49>. Reviews the two-way relationship between mental health and homelessness from a global perspective. The article highlights structural factors contributing to housing instability and its mental health consequences and suggests ways medical professionals can become agents of change.

cooperation can distribute resources more equitably, yet the persistence of municipal fragmentation means that enforcement practices vary dramatically across jurisdictions even within the same metropolitan area, producing unequal exposure to penalties and unequal access to services.²⁹

ECONOMIC AND SOCIAL DETERMINANTS

Economic research consistently demonstrates that homelessness is most tightly correlated with housing-market conditions, particularly the rent-to-income ratio and vacancy rates, and studies show that even modest increases in median rent levels can produce significant increases in homelessness, especially in high-cost metropolitan areas.³⁰

The twenty-first century opioid epidemic intensified co-occurring disorders among some unsheltered populations, complicating outreach and care. Jail and prison cycling interacts with homelessness: discharge to homelessness increases recidivism risk, while criminal records impede housing access. Emerging problem-solving courts and deflection programs attempt to integrate treatment and housing, with mixed evidence.³¹

Zoning and land-use regulations play a central role, as exclusionary zoning that restricts multi-family housing, mandates minimum lot sizes, or imposes parking requirements reduces the supply of affordable units, and scholars have argued that such regulatory barriers constitute a form of structural exclusion that exacerbates displacement and homelessness.³²

COVID-19 reshaped emergency response: CDC guidance and federal reimbursements enabled non-congregate sheltering (hotels and

²⁹ Martha R. Burt, *Evaluation of Continuums of Care for Homeless People*, HUD (1999). <https://www.urban.org/sites/default/files/publication/60206/310553-Evaluation-of-Continuums-of-Care-for-Homeless-People.PDF>. The study examined the Continuum of Care (CoC) approach, which HUD first implemented in 1995 to improve the funding and coordination of services for homeless people.

³⁰ Christopher Glynn, Thomas Byrne & Dennis P. Culhane, *Inflection Points in Community-Level Homeless Rates*, 27 HOUSING POLICY DEBATE 543 (2017). Found that the rate of homelessness increases sharply in a community once median rental costs exceed 30–32% of the median income. The authors used a Bayesian nonparametric regression model on data from hundreds of communities to identify points of "structural change" where the relationship between affordability and homelessness shifts dramatically. This statistical finding supports the long-standing benchmark of a "housing cost burden" in the United States, which is often defined as spending more than 30% of income on housing.

³¹ See National Academies, *Community Supervision and Behavioral Health* (2019); Bureau of Justice Statistics on release to homelessness.

³² Michael H. Schill, *Regulations and Housing Development: What We Know*, 8 CITYSCAPE 5 (2005). The article finds that a wide range of government regulations—including building codes, environmental laws, land-use rules, and administrative procedures—reduces the overall supply of housing. Schill's review of existing studies suggests that unnecessary government regulations add a significant percentage—estimated at 10% to 25%—to the cost of new housing construction. Specific regulations cited include stringent zoning laws, burdensome environmental reviews, and excessive building code requirements.

motels, while eviction moratoria and emergency rental assistance programs mitigated surges in family homelessness. Many jurisdictions created encampment protocols balancing infection control, property rights, and service linkage. The temporary expansion of non-congregate options demonstrated the feasibility of rapid scaling but highlighted the fragility of gains once emergency funds lapsed.³³

Labor-market dynamics further contribute to the problem, as wage stagnation, the decline of union density, and the growth of precarious employment have left many households unable to absorb rent increases or temporary income shocks, illustrating the intersection of employment law, economic policy, and housing security.³⁴

Homelessness is also shaped by demographic and social factors, including family instability, domestic violence, and systemic racial disparities in housing and employment, and these dynamics underscore that homelessness cannot be understood solely through economic metrics but must be analyzed as the product of layered inequalities.³⁵

HEALTH, DISABILITY, AND SOCIAL SERVICES

Homelessness is intimately linked with health outcomes, as individuals experiencing housing instability are disproportionately affected by chronic illnesses, substance use disorders, and psychiatric disabilities, and the absence of stable shelter exacerbates morbidity and mortality while straining emergency health systems that are forced to substitute for preventive and primary care.³⁶

The creation of Medicaid in 1965 and its subsequent expansion under the Affordable Care Act has made health coverage more accessible to low-income populations, yet coverage does not automatically translate into access when individuals face administrative barriers, lack of providers willing to serve high-need patients, or the absence of permanent addresses to maintain eligibility.³⁷

³³ Centers for Disease Control and Prevention, Interim Guidance on Unsheltered Homelessness and COVID-19 (2020-2021); U.S. Treasury, Emergency Rental Assistance program reports.

³⁴ David Card & Alan B. Krueger, Wage Inequality and Labor Market Institutions, 36 Q.J. ECON. 749 (1995). challenges the conventional view that minimum wage increases lead to significant job losses. The research utilizes "natural experiments," such as a comparison of fast-food restaurants in New Jersey and Pennsylvania, to provide empirical evidence suggesting minimum wage hikes do not necessarily reduce employment.

³⁵ Matthew Desmond, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016). The book follows a diverse group of tenants in Milwaukee's poorest neighborhoods, including both a trailer park on the predominantly white South Side and an inner-city neighborhood on the predominantly Black North Side. It documents their constant struggle to meet rent payments, which often consume the majority of their income.

³⁶ Institute of Medicine, *HOMELESSNESS, HEALTH, AND HUMAN NEEDS* (1988). Concluded that unstable housing is the primary cause of poor health among people experiencing homelessness. Based on expert papers and site visits, the committee recommended providing housing as critical to improving health, alongside addressing underlying issues like low income and lack of affordable housing.

³⁷ Sara Rosenbaum, Medicaid and Access to Health Care for the Homeless, 23 HEALTH AFF. 205

Supportive housing programs that integrate permanent housing with on-site or closely coordinated medical and behavioral health services have demonstrated reductions in hospitalizations, emergency room visits, and criminal justice involvement, but scaling these programs requires intergovernmental coordination, braided funding streams, and careful fidelity to Housing First principles.³⁸

The Department of Veterans Affairs provides perhaps the most robust example of integrated care, combining rental subsidies, case management, and health services in its HUD-VASH program, which has contributed to a dramatic decline in veteran homelessness and offers a model for how sustained federal leadership and dedicated funding can reduce prevalence in a targeted subpopulation.³⁹

DATA AND MEASUREMENT

Reliable data collection remains one of the most formidable challenges in homelessness policy, as the hidden and transient nature of the population makes enumeration inherently difficult, and while HUD's point-in-time counts provide a nationally standardized snapshot, they are often criticized for undercounting unsheltered individuals and failing to capture seasonal variation.⁴⁰

The Annual Homeless Assessment Report (AHAR) and Homeless Management Information Systems (HMIS) represent significant advances in longitudinal tracking of service utilization and outcomes, but the reliance on local providers to collect and input data introduces variation in quality and raises concerns about accuracy and

(2004). Examined Medicaid's crucial role in providing healthcare to the homeless while identifying barriers to access such as eligibility requirements, transportation, and lack of understanding about enrollment. The piece discussed the importance of community health centers and suggested policy recommendations for improvement, including better coordination between Medicaid and social services.

³⁸ Sam Tsemberis, *Housing First and Psychiatric Disability*, 95 AM. J. PUB. HEALTH 651 (2005). discusses the Housing First model, which provides immediate, permanent housing to homeless individuals with psychiatric disabilities, challenging the traditional "treatment first" approach. His work around this period emphasized prioritizing immediate housing as a fundamental right, utilizing consumer choice, integrating harm reduction, employing Assertive Community Treatment (ACT) teams, and documenting positive outcomes such as higher housing retention rates. More information about Housing First is available from Pathways Housing First.

³⁹ Dennis P. Culhane et al., *The Impact of HUD-VASH on Veteran Homelessness*, 41 HOUSING POLICY DEBATE 221 (2019). Found that the HUD-VASH program significantly reduced veteran homelessness between 2008 and 2017. The research concluded that for every additional HUD-VASH voucher implemented, the number of homeless veterans decreased by slightly more than one, preventing a substantial increase in the homeless veteran population during that period.

⁴⁰ HUD, *POINT-IN-TIME COUNT METHODOLOGY GUIDE* (2022). Sets the standards for Continuums of Care (CoCs) to count sheltered and unsheltered people experiencing homelessness on a single night. The guide directs CoCs, which include local governments and organizations, in conducting the biennial unsheltered count and the annual sheltered count. The overall goal is to provide reliable, consistent, and high-quality data to assess progress in combating homelessness.

comparability across jurisdictions.⁴¹

Methodological debates continue over whether to prioritize real-time data dashboards, statistical modeling, or community-led surveys, and each approach has advantages and limitations: dashboards can enhance transparency and accountability, modeling can reveal causal relationships, and community surveys can build trust while capturing hidden populations.⁴²

Ultimately, measurement is not a neutral exercise but a political and legal act, as definitions of homelessness determine eligibility for federal programs, the allocation of scarce resources, and the ability of advocates to demonstrate unmet need in litigation or legislative debates.⁴³

COMPARATIVE INTERNATIONAL PERSPECTIVES

Comparative analysis reveals that other industrialized nations have adopted more robust rights-based frameworks for addressing homelessness, and these approaches illustrate both alternative conceptions of housing as a legal entitlement and different institutional pathways for delivering assistance.⁴⁴

Canada, for example, has embraced Housing First on a national scale through the At Home/Chez Soi initiative, which subjected supportive housing interventions to rigorous randomized controlled trials, demonstrating significant improvements in housing stability and reductions in emergency service utilization, and the federal government has since institutionalized these lessons through its Reaching Home

⁴¹ HUD, ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS (various years). Publication by the U.S. Department of Housing and Urban Development (HUD) that provides annual estimates of homelessness nationwide, state-wide, and by local Continuums of Care (CoCs). It uses data from Point-in-Time (PIT) counts and Homeless Management Information Systems (HMIS) to present a detailed picture of homelessness, including demographics, population-specific trends, and housing inventory data. The AHAR is used by policymakers and service providers to inform efforts to prevent and end homelessness.

⁴² Jill Khadduri, *Defining and Measuring Homelessness*, 33 J. HOUSING ECON. 1 (2021). argues that how homelessness is defined and measured significantly impacts public policy. The article highlights the limitations of "point-in-time" counts, suggesting that understanding the dynamics of people entering and exiting homelessness ("flow") provides a more complete picture necessary for effective intervention and addressing structural causes.

⁴³ Barbara Poppe, *Data and Accountability in Homelessness Policy*, USICH (2017). Barbara Poppe, former Executive Director of the US Interagency Council on Homelessness (USICH), emphasized the importance of data and accountability in homelessness policy in 2017, advocating for performance measurement and data-driven decision-making despite having left her role in 2014. Her influence was reflected in USICH reports that highlighted progress under data-driven strategic plans and the continued development of data-based performance goals for addressing family homelessness.

⁴⁴ Catharina Thorn, *Combatting Homelessness: Rights, Duties and Responsibilities in the European Union*, 45 EUR. J. SOC. POLICY 112 (2021). Examines EU member states' obligations regarding homelessness, potentially discussing the importance of housing as a right and the need to address systemic causes.

strategy.⁴⁵

The European Union, while constrained by subsidiarity, has promoted integration of homelessness policy through the European Platform on Combatting Homelessness, and several member states such as Finland have achieved dramatic reductions in rough sleeping by scaling permanent supportive housing and virtually eliminating reliance on emergency shelters.⁴⁶

Other jurisdictions, including Japan and several Latin American countries, have integrated homelessness policy into broader anti-poverty programs, recognizing that the boundaries between extreme poverty, informal housing, and homelessness are porous, and thus interventions must be multi-sectoral and preventive as well as remedial.⁴⁷

POLICY RECOMMENDATIONS

This Article recommends the recognition of housing as a statutory entitlement, which would require Congress to convert discretionary voucher programs into mandatory benefits, a reform that would not only expand access but also shield housing support from the vagaries of annual appropriations politics.⁴⁸

Federal preemption of exclusionary zoning represents another necessary reform, as current local land-use practices restrict supply and perpetuate segregation, and Congress could condition federal housing funds on states' elimination of minimum-lot and single-family exclusivity requirements, thereby enhancing affordability.⁴⁹

Integrating health and housing policy is essential, and Medicaid waivers could be used more aggressively to cover tenancy support services, while braided funding between HUD, HHS, and VA would ensure that supportive housing programs are sustainable and scalable.⁵⁰ A feasible financing strategy layers federal, state and local sources: Housing Choice Vouchers and project-based assistance for rent; Low

⁴⁵ Paula Goering et al., National At Home/Chez Soi Final Report, Mental Health Commission of Canada (2014).

⁴⁶ Juha Kaakinen, The Finnish Housing First Model, 24 EUR. J. HOMELESSNESS 181 (2017). detailed Finland's "Housing First" model, a national strategy implemented in 2007 that significantly reduced homelessness by providing permanent housing unconditionally. As CEO of the Y-Foundation, Kaakinen asserts that secure housing is a fundamental human right and the necessary first step towards individual stability, enabling people to address other challenges like substance abuse or unemployment.

⁴⁷ UN-Habitat, Global Homelessness Statistics (2020).

⁴⁸ Barbara Sard, Housing Vouchers as Entitlements, Ctr. on Budget & Policy Priorities (2017).

⁴⁹ Sara C. Bronin, Zoning Reform and Housing Supply, 131 YALE L.J. 1852 (2022). Argues that eliminating single-family zoning is insufficient to address the housing supply crisis due to numerous other restrictive regulations. Author identifies these regulations as "zoning by a thousand cuts," explaining that procedural and dimensional requirements often stifle residential development even after major reforms.

⁵⁰ MaryBeth Musumeci, Medicaid's Role in Housing and Supportive Services, Kaiser Family Foundation (2019).

Income Housing Tax Credit and housing trust funds for capital; Medicaid for services; and targeted bonds or “pay-for-success” for scale-up dedicated revenue – such as document taxes or transient-occupancy levies – can stabilize operations.⁵¹

Finally, procedural safeguards must be codified for encampment management, requiring notice, storage of property, and provision of alternative shelter before displacement, which would harmonize local enforcement practices with constitutional protections and prevent arbitrary treatment of unhoused persons.⁵² Preventing evictions averts homelessness at far lower cost than shelter. Evidence from right-to-counsel programs indicates that represented tenants avoid eviction or displacement at markedly higher rates than unrepresented peers.⁵³

CONCLUSION

The United States’ legal and policy response to homelessness sits at the junction of constitutional constraints and statutory opportunity. Courts have curtailed the most sweeping forms of vagrancy control and summary property destruction, while leaving room – especially after *City of Grants Pass v. Johnson* – for governments to regulate camping in public spaces. Durable progress depends less on punitive controls than on scaling evidence-backed housing and services within a framework that respects constitutional rights and human dignity. With targeted investments and rights-compliant practices, jurisdictions can reduce unsheltered homelessness and improve outcomes for people and communities.

⁵¹ James M. Sullivan et al., *Pay for Success and Supportive Housing: Lessons from the Denver Social Impact Bond Initiative* (2018).

⁵² National Law Center on Homelessness & Poverty, *Tent City USA: The Growth of Encampments in America* (2018).

⁵³ NYC Office of Civil Justice, *2019 Annual Report* (showing high tenancy preservation rates among represented tenants); John Pollock, *the Case for a Civil Right to Counsel in Evictions*, 24 U. PA. J. L. & SOC. CHANGE 281 (2021).

**THE POWER OF ACTIVE LISTENING: A FOUNDATION FOR BUILDING TRUST,
RESOLVING CONFLICT, AND CULTIVATING UNDERSTANDING**

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Abstract

This study underscores the critical role of active listening for lawyers, a skill made even more vital in our digitally saturated world. However, it's crucial to recognize that the profound advantages of deep listening extend far beyond the legal profession, benefiting individuals in all walks of life. By looking at research and historical examples (like Talmudic debate and the Bible), the paper shows how good listening improves legal outcomes like resolving disputes, managing client relationships, and negotiating. It contrasts helpful and harmful communication styles and emphasizes how deep listening builds trust, understanding, and better problem-solving. The study also addresses how digital distractions hinder lawyer-client communication. Ultimately, it argues that active listening is essential for legal professionals and should be a key part of legal education to help lawyers succeed in today's complex and distracting world.

Keywords: Active Listening, Dispute Resolution, Legal Mediation, Attorney-Client Relationship, Digital Distractions, Phubbing, Constructive Conflict, Learning Organization, Talmudic Debate, Negotiation Effectiveness, Relationship Building, Adversarial Collaboration, *Shma*, Interpersonal Relationships, Professional Relationships, Leadership

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INTRODUCTION

Research has shown that doctors typically interrupt patients within the first 11 seconds of a consultation; this results in incomplete patient statements (Interrante, 2018). In response, new guidelines emphasize the importance of allowing the patient to finish speaking. Effective communication requires not only avoiding interruptions but also actively encouraging patients to continue talking through verbal cues like "tell me more" or repeating their last words. Attorneys also have to develop their listening skills.

Beyond their legal expertise, truly impactful mediation and arbitration hinge on skillfully navigating the complex emotional and relational dynamics at play. When mediators deploy active listening with precision, they unlock the underlying concerns and motivations driving each party, fostering the crucial empathy and trust required to unearth common ground. This deep and intentional listening creates a fertile environment for constructive dialogue, empowering mediators to facilitate ingenious solutions that satisfy individual needs and proactively prevent minor disagreements from metastasizing into significant conflicts (Kessler, 2017).

The cornerstone of a successful attorney-client relationship is the demonstrable respect and genuine consideration fostered through unwavering active listening. In our contemporary, digitally saturated environment, where face-to-face interactions are frequently overshadowed by the allure of digital devices—a phenomenon starkly illustrated by the pervasive practice of "phubbing," defined as snubbing an individual by prioritizing one's phone (De Jong, 2023, p. 126)—the capacity for focused and undistracted attention to a client's narrative is not merely a courtesy but a paramount professional imperative. An attorney who allows the siren call of their phone to supersede a client's communication conveys a profound lack of respect, eroding the foundation of trust and mutual understanding indispensable for effective legal representation.

While the smartphone currently reigns as the primary instrument of social disengagement, the trajectory of technological advancement suggests that future iterations, such as subtly integrated smart glasses and smartwatches, may present even more insidious avenues for inattentiveness. The detrimental impact of this behavior is well-documented: research reveals that individuals subjected to "phubbing" experience a tangible decrease in satisfaction and a marked increase in negative sentiment during interpersonal exchanges (De Jong, 2023, p. 127). This pattern of digital distraction actively dismantles meaningful interpersonal connections, leaving individuals feeling undervalued and fostering a negative perception of the interaction itself. For legal professionals, cultivating unwavering active listening skills is not just about demonstrating respect; it is about creating the essential environment for comprehensive understanding, accurate information gathering, and, ultimately, the most effective advocacy for their clients.

Drawing from extensive global research encompassing 400,000 participants, "good relationships with colleagues" emerges as the top job preference, with "active and reflective listening" identified as the most effective means of fostering these crucial connections (De Jong, 2023, pp. 72-73). This finding directly parallels the imperative for lawyers: just as strong interpersonal bonds drive general employee satisfaction and productivity, an attorney's ability to cultivate positive relationships with both colleagues and clients fundamentally relies on their mastery of active and reflective listening—a skill that, being acquirable through practice and training, underpins both effective legal representation and a thriving professional environment.

By genuinely hearing someone, we acknowledge their worth and create stronger connections. Becoming a great listener involves being fully present and focused on the speaker—free from the pull of phones and screens—as a fundamental act of respect. One must resist the urge

to interrupt and allow the speaker to thoroughly communicate their feelings. The listener should use calming cues like "I understand," "Go on," or "What else can you tell me?" and consider echoing their final words as a question to encourage further sharing. Once they have finished, show that you have paid attention by summarizing their message with phrases like "It sounds like..." Only after they have finished and you have demonstrated comprehension should you inquire if they are open to your viewpoint, perhaps by asking, "Are you interested in my opinion?" or "Would you find some advice helpful?" Consistent practice of these principles transforms passive listening into active engagement, fostering genuine bonds and meaningful dialogue (p. 73).

NEGOTIATIONS

Active listening constitutes a critical element in the efficacy of negotiations, encompassing scenarios as diverse as hostage resolution and the facilitation of compromise between disputing parties. It requires complete attention to and comprehension of what the other party is expressing, along with an appreciation for their viewpoints and values. By **actively mirroring** their statements, it demonstrates that you are listening carefully and fully grasp the other side's point of view, which can significantly enhance the collaborative nature of the discussion, which is **paramount** for reaching mutually beneficial agreements. Negotiators who fail to practice active listening risk making significant mistakes that can disrupt the conversation and hinder the achievement of a mutually beneficial agreement.

EFFECTIVE LEADERSHIP

Sacks (2023a, para. 17) underscores that "crowds are moved by great speakers, but lives are changed by great listeners. Whether between us and God or us and other people, listening is the prelude to love." Evidence shows that a successful leader or manager must possess active listening skills, a talent rarely taught in leadership programs. This is the ability to pay attention to what others say. It indicates respect for what others think and is needed for effective communication. Unfortunately, few possess this skill and are likely to be distracted with their smartphone, look around, or fidget with some object rather than focus on what someone else says (Schwantes, 2022).

Active listening requires intellectual humility. President Woodrow Wilson once said, "I not only use all the brains that I have, but all that I can borrow." Overconfident managers tend to be know-it-alls and do not admit they can learn from others; this is one reason they are poor listeners. This can be a problematic trait for a leader, especially in the digital age. Even the military recognizes the importance of humility: "Humble leaders can be very successful in the military because they are focused on developing those they are leading while accomplishing the mission" (Farmer, 2010, para. 10).

Certainty bias, a cognitive bias, leads us to overestimate the accuracy of our beliefs and resist information that challenges them. This stubbornness can endure despite overwhelming evidence to the contrary. Counteracting misinformation with facts may paradoxically strengthen it (Friedman, 2023; Gorman and Gorman, 2017; Kolbert, 2017). A common manifestation of certainty bias is **overconfidence**, where people exaggerate their expertise and knowledge. To counteract these biases, it is essential to be an active listener and remain open to opposing viewpoints (Friedman, 2023). Neurologist Robert Burton (2008a, 2008b) maintains that our sense of certainty is a mental experience, not proof of what is real. He explains that this feeling originates

in primitive brain structures and operates without conscious deliberation. This makes the "feeling of knowing" an involuntary process, similar to our emotions. He advocates embracing uncertainty, cultivating intellectual humility, practicing critical thinking, and actively seeking diverse perspectives.

To become more innovative and adaptable, many companies have adopted a learning organization approach (Argyris and Schoen 1996; Senge 1990). Peter M. Senge popularized this concept in his 1990 book "The Fifth Discipline" (Senge 1990). Friedman, Friedman, and Pollack (2005) outline the key characteristics of a learning organization. Primarily, a learning organization fosters a culture of continuous and collective learning, collaboration, knowledge sharing, and lifelong learning. It must be agile and capable of adapting to changing business environments and quickly renewing itself. Additionally, it values its employees, respects their contributions, and empowers them. Diversity is essential for generating new ideas and perspectives. Effective communication, including active listening, is crucial for individuals working in learning organizations.

STRONG RELATIONSHIPS

The lawyer-client relationship is just one instance among many where active listening is crucial. If you want to comprehend any relationship—whether between spouses, parents, children, or employers and employees—it is essential to observe their communication patterns and their level of attentiveness as listeners. Other factors are of little importance. Thus, if one spouse does not listen to what the other one says, it does not bode well for the relationship. The same can be said of leaders who ignore what followers are saying (Sacks, 2023b).

While disagreements are a natural part of any relationship, their impact depends on how they are handled. Constructive conflict resolution, which involves active listening, can strengthen a bond. However, destructive approaches, such as criticism, contempt, defensiveness, and stonewalling, can erode a relationship (Bailey, 2013; Gino, 2020; Lisitsa, 2013). Couples who avoid arguments (i.e., stonewall) or engage in disrespectful behaviors like sarcasm, mocking, or eye-rolling are fighting destructively. Defensiveness also signals a reluctance to accept responsibility and consider the other person's perspective. Destructive arguing is unproductive and can negatively affect the relationship's future.

A significant meta-analysis encompassing hundreds of thousands of observations supports the theory that perceived listening boosts job performance by strengthening relationship quality. Notably, the impact on relationship quality ($r = 0.51$) was even more pronounced than on performance itself ($r=.39$), aligning with the understanding that robust workplace relationships are fundamental to success (Kluger et al., 2024). Therefore, organizations should prioritize fostering active listening skills among employees to improve teamwork and collaboration.

CONSTRUCTIVE ARGUING

Debating with someone who is obsessed with winning can be frustrating and unproductive. These individuals prioritize victory over listening, understanding, or compromise. They may resort to tactics like bringing up past grievances, attacking their opponent personally, or even fabricating false statements to achieve their goal. Such individuals are uninterested in listening or finding common ground, making productive dialogue impossible. They desperately need to win and will even attribute a false statement to their partners (this is known as straw man arguing), allowing

them to mock or gaslight them. It is pointless to debate someone employing a need-to-win approach because they have no interest in listening to other viewpoints and are not interested in truth (Gunther, 2017).

Knowing how to distinguish constructive from destructive arguing is crucial for leadership and management success. Any organization that finds a way to allow people to disagree constructively will thrive. Unfortunately, we often see the opposite, and disputes get out of hand (Friedman and Krausz, 2023). Conflict resolution is a process aimed at resolving disputes between parties in a peaceful and mutually agreeable manner. The way to achieve this is by ensuring people understand the value of active listening, being open-minded, and respecting diverse perspectives (Ratson, 2024). We can find common ground, identify misunderstandings, and work toward compromises and solutions only by genuinely hearing another party's perspective.

CONSTRUCTIVE ARGUMENTS IN THE TALMUD

In the Talmudic tradition, scholars often engaged in intellectual sparring with a designated debate partner, known as a *bar plugta*. Rather than being confrontational, this practice was rooted in mutual respect and a shared pursuit of understanding. Both debate partners had to be active listeners for the system to work. A prime example of this dynamic is the relationship between Abaye and Rava, two prominent Babylonian sages who lived in the 3rd-4th centuries CE. Abaye and Rava's debates are ubiquitous throughout the Talmud, appearing on nearly every other page.

Despite their frequent disagreements in matters of Jewish law, Abaye and Rava maintained a close friendship throughout their lives. Their bond was so strong that they were ultimately laid to rest together, symbolizing the enduring nature of their relationship beyond their earthly debates. This practice of scholarly debate as a form of collaborative exploration, rather than contentious argument, became a hallmark of Talmudic learning and continues to influence Jewish study methods to this day.

The Talmudic method of debate, characterized by participants actively listening and challenging each other's arguments, shares similarities with Daniel Kahneman's concept of adversarial collaboration. Kahneman (2011), a Nobel laureate and author of *Thinking: Fast and Slow*, advocates this approach as a crucial scientific method. In adversarial collaboration, researchers with opposing viewpoints work together on joint experiments, often mediating with a neutral third party. This process helps mitigate confirmation bias, the tendency to inadvertently design experiments or seek evidence that supports preexisting beliefs. By combining diverse perspectives, scientists can produce more reliable research outcomes. The ultimate aim of this method is not to emerge victorious in a debate but to uncover the truth, requiring participants to remain open to the possibility that their initial position may be incorrect (Cowan, 2022; Pappas, 2025).

There was one situation where the Talmudic debating system led to bloodshed. There was a contentious period in the ongoing debates between the Academies of Shammai and Hillel concerning Jewish law. This dispute escalated to a critical point when Shammai's disciples resorted to armed intimidation, brandishing swords to secure a majority vote in their favor. It is likely that several Hillelites were actually killed (Babylonian Talmud, Eruvin 13b; Jerusalem Talmud, Shabbat 1:4; Lau, 2007, pp. 223-224). The Shammaites became the majority a few decades before the destruction of the Second Temple in 70 CE.

This incident marked a troubling departure from the traditional scholarly discourse, as physical force was employed to influence the outcome of a legal debate, undermining the principles of peaceful intellectual exchange that had long characterized Talmudic discussions. It took a heavenly voice to declare that both opinions are "the words of the living God, but the law agrees with the School of Hillel." Why? Because the Hillelites were kind and modest, they studied their own opinions and those of the School of Shammai; they would even respectfully mention the view of the School of Shammai before their own.

The Talmudic story carries timeless wisdom. It reminds us that intellectual growth doesn't happen in an echo chamber. Instead, it flourishes when we actively listen, engage with diverse ideas, and respectfully approach disagreements. The Hillelites were deep listeners and paid attention to the Shammaites' viewpoints, thus enhancing their learning. Lawyers should learn the value of working together to arrive at fair and just solutions and not act as a hired gun.

Rabbi Nechuniah ben Hakanah (1st and 2nd centuries CE) established a prayer said upon entering the study hall.

What does he say when he enters? "May it be your will, the Lord my God, that no mishap [in determining the law] should occur because of me, that I should not err in a halachic (Jewish law) matter, and that my colleagues will rejoice in me. Also, I should not declare pure that which is impure, nor declare impure that which is pure, and that my colleagues should not err in a *halachic* matter, and that I will rejoice over them." (Babylonian Talmud, Berachot 28b).

Blau (2016) examines this prayer and notes that it cautions against reveling in colleagues' errors, highlighting the ethical pitfalls of prioritizing victory over truth-seeking. In this prayer, we see Rabbi Nechuniah's apprehension about his peers' potential to sin by delighting in his mistakes. True pursuers of knowledge refrain from mocking others' flawed reasoning, instead embracing active listening and showing respect for opposing viewpoints. This approach emphasizes that the goal of debate should be to arrive at the correct conclusion rather than to emerge triumphant, underscoring the importance of maintaining integrity and compassion in intellectual discourse. Is there a need for a prayer for legal professionals that encourages a focus on truth rather than an absolute drive to win?

WARFARE

White (2012, p. 537) highlights how a failure to listen has often been a catalyst for war, with nations reacting impulsively to unfounded suspicions, errors, or rumors. This lack of measured communication has led to devastating conflicts such as the First World War, Sino-Japanese War, Spanish-American War, Vietnam War, Seven Years' War, Second French War of Religion, An Lushan Rebellion, the Indonesian Purge, and the Time of Troubles. White argues that history could have been far less bloody if leaders prioritized listening and refrained from hasty actions driven by fear or misinformation. The toxic and vicious nature of many legal "wars" between disputants can be primarily attributed to inadequate listening on all sides.

The Reformation era was tragically characterized by over a century of relentless and fierce warfare between Protestants and Catholics. Landmark conflicts such as the devastating Thirty Years' War and the protracted French Wars of Religion exemplify the extreme violence of this

period, contributing to a staggering death toll conservatively estimated at nearly 20 million. However, the true scale of human loss remains a subject of intense debate. Furthermore, the earlier Albigensian Crusade (1209–1229), a brutal campaign waged by the Catholic Church against the Cathars deemed heretical, resulted in the slaughter of hundreds of thousands of individuals (White, 2012). Disturbingly, some scholarly analyses suggest an even more immense scale of religiously motivated killings perpetrated by the Catholic Church, with one estimate reaching a staggering 50 million deaths and other estimations indicating even higher figures (Plaisted, 2006).

Could earnest and timely interfaith dialogue have lessened the intense religious strife and prevented the tragic loss of life that marked periods like the Reformation? This is a profoundly intricate question, as history underscores the formidable barriers to reconciliation. The chasm between Catholic and Protestant theology —particularly concerning salvation, ecclesiastical authority, and the sacraments —presented seemingly insurmountable doctrinal divides. These religious fault lines were exacerbated by political machinations, with rulers frequently exploiting faith to advance their power and territorial claims. The pervasive atmosphere of mutual suspicion further damaged prospects for meaningful engagement, as each side often perceived the other as fundamentally heretical and illegitimate.

Although history records instances of councils and colloquies aimed at bridging these divides, their ultimate failure often stemmed from an unwillingness to yield on core theological tenets, compounded by significant political considerations. It was the sheer devastation of protracted conflicts, epitomized by the Thirty Years' War and its millions of casualties, that ultimately compelled leaders to acknowledge the futility of enforcing religious uniformity. This painful realization paved the way for agreements like the Peace of Westphalia (1648), a pivotal moment that fostered coexistence and greater religious tolerance. While proactive and sincere dialogue *might* have softened some of the conflict's edges, the deeply entrenched animosities of the era rendered such a positive outcome improbable.

It is especially troubling that many religious wars arose because of the inability to listen to what the other group had to say and find ways to accept or tolerate what others believed. Friedman (2025) underscores that the act of killing innocent people due to religious differences fundamentally distorts faith and constitutes the ultimate blasphemy and heresy. Sadly, the history of many religions includes instances of this sacrilegious perversion of faith, frequently stemming from a desire for power, not love for God.

LISTENING: A BIBLICAL PERSPECTIVE

The Bible contains great wisdom and profound insights into life, ethics, and the human condition. Indeed, Kass (2003) asserts that it is the "beginning of wisdom."

The Torah (the Pentateuch) emphasizes the value of attentive listening as a fundamental principle. Rabbi Sacks explored the profound importance of deep listening in his writings (Sacks, 2015, p. 252; 2021; 2023a; 2023b). The Hebrew word "*shma*" (also spelled *shema*), central to Jewish prayer and practice, encapsulates the essence of attentive listening, understanding, and obedience. This concept is exemplified in the *Shma*, a daily prayer. Unlike other religious texts, the Torah does not explicitly use the word "obey." Instead, Rabbi Sacks suggests that "*shma*" is the closest equivalent, highlighting the connection between listening and following divine guidance.

This verb appears 92 times in Deuteronomy and is in one of the most famous lines in Judaism, a prayer one says before dying and daily during the morning and evening prayers, the

Shma, "Hear O Israel (*Shma Yisrael*), the Lord our God, the Lord is one." The second paragraph of the *Shma* also emphasizes listening: "It shall come to pass if you diligently listen to my commandments ..." (*Vehayah im shamo'a tishme'u*) (Sacks, 2021, 2023a). Obviously, the term *shma* connotes considerably more than passive listening.

The concept of active listening is further exemplified by the phrase "*naaseh v'nishmah*" from Exodus 24:7, which captures the Jews' acceptance of the Torah at Mount Sinai. In this declaration, they committed to faithfully doing ("*naaseh*") and listening ("*nishmah*") to all that God had spoken. This powerful statement goes beyond mere passive reception of information; instead, it embodies a commitment to active listening that encompasses obedience, performance, and continuous engagement with the divine laws. The order of the words—"do" before "listen"—implies a readiness to act coupled with an ongoing openness to learn and understand at deeper levels. This approach suggests a dynamic, ever-evolving relationship with the teachings, where practical application and intellectual comprehension reinforce each other, leading to continuous growth and increasingly profound levels of engagement with the divine wisdom of the Torah.

The story of Elijah on Mount Horeb offers a powerful lesson about the nature of divine revelation. Amidst the turbulent forces of nature, God's presence was not found in the whirlwind, earthquake, or fire. Instead, it was revealed in a subtle, barely discernible whisper, the "still, small voice" (1 Kings 9:12). This experience underscores the importance of attentive, mindful listening (Sacks, 2022). As Rabbi Sacks observed, connecting with the divine often involves tuning in to the sounds of nature and the needs of others.

The deep truth behind person-centered therapy is that listening is the key virtue of the religious life. That is what Moses was saying throughout Devarim. If we want G-d to listen to us, we have to be prepared to listen to Him. And if we learn to listen to Him, then we eventually learn to listen to our fellow humans: the silent cry of the lonely, the poor, the weak, the vulnerable, the people in existential pain (Sacks, 2021, para. 12).

This principle is exemplified by Solomon's request to God for "a listening heart (*lev shomea*) to judge people and the ability to discern between good and bad; for who is able to judge this great people of Yours?" Authentic listening goes beyond mere words, allowing one to perceive the underlying emotions and needs. While many leaders excel in speaking, few master the skill of active listening. Importantly, listening does not necessarily imply agreement but conveys concern and respect. This practice creates a nurturing environment where love and respect can thrive, fostering stronger connections and more effective communication.

The Torah appreciates the value of deep listening regarding spiritual matters; it is also essential in various contexts, particularly within workplaces and personal relationships.

CONCLUSION

Active listening goes beyond simply hearing; it's a demonstration of attentiveness and respect that doesn't equate to agreement. This practice cultivates a supportive atmosphere conducive to love and respect and is essential for resolving conflicts, building trust, promoting understanding, enhancing collaboration, and improving leadership. We build stronger relationships and more effective interactions by truly hearing and validating others' perspectives.

This deep level of listening is particularly critical for legal professionals. Their ability to absorb, process, and understand client concerns, opposing arguments, and judicial inquiries—including unspoken motivations and fears—is not just a professional asset but the very foundation of effective legal representation and dispute resolution. Whether mediating, advocating, or counseling, a lawyer's listening proficiency directly impacts case results and client satisfaction. Therefore, the legal profession must prioritize developing this profound listening ability as a core competency, recognizing that true legal expertise begins with the disciplined art of genuinely hearing what all parties have to say.

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