

# Intellectual Property Survey

University of Oklahoma College of Law  
Fall 2022

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Course/section 6213-600

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## 1. GOALS AND GENERAL REMARKS

I intend for this class to provide meaningful training for the practice of law relating to intellectual property, including litigation, transactional practice, and advising and counseling clients. By the end of the course, you should have a broad grasp of the principal doctrines, be keenly alert to the law’s many pitfalls for the unwary, be conversant in the theoretical underpinnings and policy aims of IP law, and be aware of how a real-world panoply of expectations and value judgments filters IP law’s effects on people and industries.

Compared to many other areas of law you have studied, IP is a relatively new body of law—much of it extremely new—and it is in a great state of flux. Its current relevance is compounded by the fact that it is at the center of the two great transformations of our age: globalization and cyberization. Therefore, it is particularly important that you be able to think about IP in its constantly evolving historical, societal, cultural, and political context. The work-a-day world of IP is a blizzard of first-impression and not-yet-brought cases. Policy arguments and theoretical perspectives are not mere academic curiosities—they’re standard tools of the trade.

## 2. LEARNING OUTCOMES

The following is a non-exclusive list of specific learning outcomes for this course:

1. Broadly know and be able to apply the principal doctrines of U.S. copyright, patent, trade secret, trademark, and right of publicity law.
2. Be able to avoid pitfalls of U.S. intellectual property law—especially where entitlements can be unwittingly surrendered or foregone.
3. Know and be able to apply U.S. law such that you can counsel a client confidently as to the legal consequences of making use of a particular creative work, design, invention, putative trademark, indication of personal identity, or other potential subject of intellectual property—such as concluding that the use is safe, somewhat risky, very risky, or highly likely to incur liability.
4. Know and be able to apply U.S. law such that you can advise a client on how to use intellectual property law in the context of an incipient business strategy.
5. Be able to fashion persuasive appellate-level or scholarly arguments, grounded in theoretical and policy perspectives, for and against propositions involving intellectual-property doctrine.
6. Recognize how the real-world effect of IP law can fail to correspond with blackletter doctrine because of strategic behavior, tactical maneuvering, ignorance of the law, and unpredictable outcomes in court.
7. Be able to speak intelligently and knowledgably about current trends in the development of IP law.

### **3. CLASS WEBSITE**

The central repository for class materials and information is the class website. It is not password protected. You can go to [ericejohnson.com](http://ericejohnson.com) and find the link on the upper left. The direct URL is: [http://ericejohnson.com/courses/ip\\_22\\_fall/](http://ericejohnson.com/courses/ip_22_fall/)

I have no plans to use Canvas. If that changes, I'll let you know by e-mail or by instruction on the chart of assignments.

### **4. MATERIALS**

#### **4-1. The Book**

There is nothing you have to buy.

The materials for IP Survey Fall 2022 will be downloadable for free (open-source/open-access/OER), distributed as a multi-volume anthology called [Intellectual Property Surveyor \(Museum Edition, Version 1.0\)](#). This anthology will be made available on a rolling basis during the semester.

You have lots of options in terms of how you might access IP Surveyor:

- You could read it on your computer or tablet.
- You could print it yourself.
- You could have someone print it for you.

In addition, I will work on providing a means for optional purchasing of low-cost printed copies, such as a print-on-demand book that can be ordered online.

One thing to keep in mind: Assuming we have a normal exam (i.e., putting aside potential covid pandemic contingencies), then you will probably want to

have a printed copy of the readings by the end of the semester to use for an open-book portion of the exam. So you might choose to start the semester with a printed copy (which you might mark-up and highlight). But you might instead choose to wait until the end of the semester to print out a copy (which perhaps you will have marked-up electronically over the semester). That's up to you.

**4-2. Other Materials:** It is possible that supplemental readings or other materials made part of the required reading could be made available in other ways, such as via links from the course website (such as on the Chart of Assignments).

**4-3. Technology Expectation:** Please bring an internet-connected/web-browsing-capable laptop, tablet, phone, or other portable general computing device to class for use in interactive polling. It is my hope is that all students will be able to do so without incurring any additional expense or buying anything new; if you don't already have such a device you can bring to class, please let me know and we can discuss it. (Note that an iClicker or other similar proprietary clicker device will not work for this course.)

**4-4. Other:** Beyond the required books, some other materials that will be part of the required reading will be made available via links from the course website—such as on the Chart of Assignments—and, at least in one case of a movie, placed on reserve in the library. I don't anticipate using Canvas to distribute materials, but if I end up doing that for some reason, I'll let you know by e-mail and/or by notation on the class website.

**4-5. Study Aids and Unassigned, Additional Reading:**

Beyond the required materials, you are encouraged to use any other materials you find helpful or interesting. There are lots for sale. And the OU Law Library may be able to point you to many resources in the library's collection, or for which the library has subscription access for students. I am aware that some professors discourage the use of commercial outlines or various study aids. I don't. The more you learn about intellectual property law, I figure, the better. But a word of caution is in order.

In my experience, I have found that commercial outlines and other study aids are a great way of gaining a basic understanding of the blackletter law in a subject. But I think the best time to read such an unassigned secondary source is right at the beginning of the semester. That way, you may give yourself a better foundation of knowledge for learning the material presented in the cases and in class. Reading such a book along the way might be helpful as well, as it may explain the material in a different voice.

On the other hand, I recommend extreme caution in reading an unassigned treatise or commercial outline as exam preparation for this class. I suspect it may be a waste of your time and mental energy, because all such study aids will go into much more detail than we will about some things and will gloss over other things we will dig into deeply. But it's up to you, of course, to judge for yourself.

If you do use outside study aids or other resources, I would be interested in hearing about your experience with them—whether good or bad. I'm always keen to know what is contributing to people's learning.

## 5. ASSIGNMENTS

**5-1. Posting:** Readings will be posted to the Chart of Assignments, online. You'll find a link to the Chart of Assignments on the class webpage. Keep in mind that you may need to hit refresh or reload the page to see the most recent updates. **Ordinarily, readings for any given week will be posted by the day after the last class of the preceding week.** Thus, readings for Thursday will generally be posted by the preceding Saturday.

**5-2. Minimum Out-of-Class Workload Expectation:** The vast majority of your law-school education is meant to take place outside of class. For this course, you should at least be doing out-of-class work that averages at least eight hours per week—roughly twice the amount of time you spend in class. This is in line with ABA standards. (The American Bar Association (ABA) is the accrediting body for American law schools. Regarding the out-of-class workload expectation, see Standard 310 at [https://www.americanbar.org/groups/legal\\_education/resources/standards/](https://www.americanbar.org/groups/legal_education/resources/standards/).) I have put together the assignments with this minimum expectation in mind. Note that this out-of-class workload expectation is an average across the semester. Some weeks might require less time than the average, others more.

**5-3. Approach:** My aim is to avoid making the raw amount of reading unduly burdensome. Given this, I ask that you do the reading conscientiously. What does that mean? You could, of course, brief the cases, use a highlighter, make margin notes, or do any of a number of other things. And, of course, you should do what works for you. But the most important thing is to read the material with interest. “With interest” means you should be having thoughts going through your head such as, “Mmmm, interesting!” “Ah ha! That makes sense!” or “What is wrong with this judge!?”

More to the point, don't waste the case merely looking for a rule to put in your outline or to commit to memory. If a rule were the only thing to get out of a case, I would just assign the rule. The point of reading cases and other assigned materials is to help you develop a lawyerly intuition about the law. The ideal is to be able to speak in sentences like, “I'm not aware of a case exactly on point, but my sense is that in a situation like this, a court would ... ”

One way to approach the reading, suggested by Professor Scott Brewer, is to be aware of “the literary drama of the law,” that is, to “be alert to the narratives of the hopes, aims, fears, aspirations and frustrations of the litigants ... ” Behind every case there is a real story. The more you allow yourself to be absorbed into that story, the more you will get out of the case.

Also, you should attempt to put yourself in the position of the judge. Force yourself to confront the challenge of trying to interpret the law in a way that is fair, unbiased, beneficial for society, and true to precedent and statute. Using this kind of viewpoint, you are bound to get something extra out of every case you read.

**Questions to always be prepared to answer:** I urge you to read to reflect on your reading so that afterward you have answers to these questions about primary-source readings (cases, for example):

- What is something interesting/compelling/instructive about this case (or other reading)?
- What is your best argument against or critique of the court's opinion (or author's view)?
- What is a question you are left with?

Those first three are questions I want you to be prepared to answer to the extent I do cold-calling. (See §8-2(c), *infra*.)

Here's two more that I think are useful that you might consider:

- What is a strength in the analysis or presentation?
- What is a potential weak point in the analysis or presentation?

I'd suggest you use these questions as a checklist to make sure you are reading deeply.

## 6. GRADING

**6-1. Overview:** I care a great deal about fairness in grading, and I believe you will see the product of that thinking throughout the course. Here are the basics: Your grade for the course will be based on your exam performance. From that, a few things could work to lower your grade, including class conduct, attendance, and academic misconduct/dishonesty.

**6-2. Assigning of Exam Grades:** There is no pre-determined grade-point average or grade distribution for this class. So you are not in competition with your fellow students for a limited pool of grades! Favor cooperation.

I will assign grades as follows: When I have the raw point totals from the exam, I will use my discretion to draw grade cut-offs based on natural breaks and clumps that occur in the point totals, a developed sense of how a given letter grade corresponds to levels of performance and achievement, and precedent set by grade distributions and grade-point averages in prior semesters in this and other courses. But I treat precedent lightly. If the whole class does well, then the grade-point average should skew toward the higher side. Of course, it's possible that the reverse could be true. Bottom line, I aim for grading that is fair, so the class should neither be harsh nor an "easy A," and so that everyone is incentivized to work cooperatively.

### 6-2. Alternative Minimum Grading

(a) In addition to the method of the initial assignment of grades discussed in §6-2, I will also calculate an alternative minimum grade in terms of a percentage of possible points for the exam, according to this schedule:

- A+ 97% to 100%
- A 93% to 96.99%
- A- 90% to 92.99%

B+	87% to 89.99%
B	83% to 86.99%
B–	80% to 82.99%
C+	77% to 79.99%
C	73% to 76.99%
C–	70% to 72.99%
D+	67% to 69.99%
D	63% to 66.99%
D–	60% to 62.99%

If the alternative minimum grade according to this schedule is higher for any student than the assignment of grade under the method disclosed in §6-2, that student's initial assignment of grade will be the alternative minimum grade.

(b) Note that through the alternative minimum grading approach described here, it is possible that one or more students' grades might end up higher than they would have been otherwise. But nothing in this §6-3 can work to make a student's grade lower than it would be otherwise.

(c) For clarity, note that this alternative minimum grade applies prior to any adjustments made, including for attendance and misconduct.

#### **6-4. Class Participation, Class Conduct, and Grading**

##### ***Class participation will not count for grading:***

Class participation, as such, will not count in grading. That is, things said aloud by students in class (whether volunteering or responding to being called on) will not be evaluated with that evaluation affecting the final course grade. But class conduct (which could include using one's voice in a disruptive way, for example) may have a negative effect on the course grade. Read on.

##### ***Here's my explanation for why class participation won't count for grading purposes:***

For years, I have kept notes on class participation and used that as the basis for potentially stepping up the final grade (which I did often), or potentially lowering the class grade (which I did infrequently). But this year I am not doing that.

The reason for changing my practice is the changing policy or practice—currently unclear and potentially in flux—regarding the issuance of audio recording accommodations to students by the main campus Accessibility and Disability Resource Center (ADRC).

Let me be crystal clear about the following:

I strongly believe that students with disabilities should avail themselves of approved accommodations. Of course they should. And I am certain that audio recording accommodations can be reasonable and appropriate in various circumstances. But because of ADRC's communication or lack thereof with faculty, I cannot be sure at any given time whether a student has been given approval to make an audio recording in class. Also, I have not been able to get

clarity on what, if anything, ADRC tells students that they may and may not do with the resulting recordings.

Given those circumstances, I worry that it raises various problems for me to compel a student to speak in class through dint of grading when that student is being recorded by another student. Thus, I have decided to leave class participation entirely ungraded.

***Class conduct (as opposed to class participation) may negatively affect grading:***

While class participation won't be graded, I may lower the class grade of a student for class conduct, including a pattern of repeated and substantial visible disengagement while in class (including being noticeably distracted by a phone or device), conduct contrary to the In-Class Conduct Rules (listed below, see §8-1, *infra*), conduct contrary to other admonitions communicated in the syllabus or otherwise, conduct that I regard as potentially dangerous (see §8-1B, *infra*; this includes, for example, driving during class if class were to be conducted on Zoom—and yes, students actually did that), or any conduct that detracts from the educational process.

**6-5. Attendance and Grading:** Attendance issues—including tardiness and absences—if substantial, can affect your grade. If attendance issues are severe enough, they can even result in a failing grade or involuntary withdrawal. See §9 on attendance, *infra*.

**6-6. Academic Misconduct/Dishonesty and Grading:** Cheating, dishonesty, and serious academic misconduct of any kind in this class will presumptively result in a failing grade (e.g., a letter grade of F) for the semester. To be clear, failing to follow final exam instructions in a way that might give a student an advantage—even if done without intent to gain such an advantage and even if inadvertent—constitutes, in my judgment, serious academic misconduct, and it will presumptively result in a failing grade and a referral for discipline. It is your responsibility to treat exam instructions with diligence and care.

In any instance of misconduct, I reserve the right in my discretion to request involuntary withdrawal or award a lower grade other than a failing grade if I find there to be extraordinary mitigating circumstances. Despite my reservation of rights in this regard, however, do not expect leniency.

Please note that the awarding of a lower grade or a failing grade for misconduct is not to the exclusion of other sanctions, and I intend, in virtually all instances, to refer cheating and other serious academic misconduct to the College of Law and/or the administration of the University of Oklahoma for being dealt with under applicable policies, including the Code of Academic Responsibility.

## **7. COMMUNICATIONS AND OFFICE HOURS**

**7-1. Invitation to Chat:** At least once during the semester, I hope you will take advantage of office hours, an appointment, or some other opportunity to chat—even if you have no questions or nothing specific to discuss. That's not a requirement, just a request. Ideally, I would like to spend some informal time with everyone.



**7-2. Questions About the Exam:** If you have any questions about the exam, please ask them in open class. In the aims of fairness, I do not discuss the exam on an *ex parte* basis.

**7-3. Office and Office Hours:** My office is on the third floor, room number 3034. My phone is 405-325-2273. I post open office hours on my website, direct URL: [http://ericejohnson.com/office\\_hours.html](http://ericejohnson.com/office_hours.html). If office hours are not convenient, please do not hesitate to e-mail me to make an appointment to talk, and when you do, it helps if you include some suggested times that work for you. Also, I am happy to meet with students after the completion of the course, either by appointment or during open office hours, including for reviewing exam results.

**7-4. E-mail:** My e-mail address is [eric.e.johnson@ou.edu](mailto:eric.e.johnson@ou.edu). Please note that I do not answer or discuss substantive questions through e-mail. Why not? The answer to a substantive question is almost always, “It depends ...”, and thus it becomes very difficult to draft satisfying written responses to substantive questions. Answering those questions live and in-person is much easier, because I can ask clarifying questions and we can go back and forth until there’s an answer you find satisfactory. So please bring substantive questions to class or to office hours.

Please do not ask questions for which the answers are clearly found in this syllabus. And if you miss class, please ask other students what you may have missed.

Any e-mail communications you do have with me should be prepared in a professional manner, including the use of a meaningful subject line. Also please note that, perhaps unlike many students, I do not read e-mail on a constant basis. So please be patient for a reply.

**7-5. Lack of Confidentiality; Faculty Reporting Obligations; No Legal Advice**

(a) **Tell me nothing that is confidential.** It is important for students to understand that faculty are subject to various mandatory reporting obligations stemming from federal law, state law, and university policies. Information a student shares with me that I may be obligated to report may include, but is not necessarily limited to, that which relates to sexual harassment; gender-based discrimination; sexual-orientation discrimination; other forms of discrimination; sexual assault; stalking, dating or domestic violence; child abuse or neglect; and various crimes. This might include third-hand accounts of claims or allegations of these things. Mandatory reporting obligations can cover things that happened in the past, on or off campus, involving university-affiliated persons or not. The requirements can be complex. More information can be found here: <http://www.ou.edu/eoo/reporting-responsibilities>. Moreover, I do not wish to take on any confidences from students, even to the extent I might be able to do so. Bottom line: **Assume that nothing you tell me will be kept in confidence.**

(b) Please do not ask me for legal advice. I am not licensed to practice law in Oklahoma, and I cannot be your attorney. It is my job to prepare you eventually to give legal advice to others, and I am obviously happy to talk through hypotheticals with you, as that is a key way of exploring and learning the law. But giving legal

advice upon which someone should be able to rely generally takes working up an in-depth understanding of the facts and taking a careful appraisal of the client's interests—all of which calls for working in the context of a confidential relationship. It also often requires doing legal research. I'm not in a position to do any of that for you.

#### **7-6. Letters of Recommendation, Serving as a Reference**

It's important to me to do a good job as a reference for my students. If you might wish for me to serve as a reference for you or write a letter of recommendation for you in the future, it would be helpful if you let me know that on the last day of class with an e-mail that attaches your résumé. You might take a moment to put this on your calendar now. Such an e-mail will allow me to file away some notes about my recollections of you, and then I can use those notes in the future as a basis for writing a letter for you or taking a telephone call on your behalf. I also refer you to a memo I've written about references and recommendations: [http://ericejohnson.com/docs/Memo\\_to\\_Students\\_re\\_References.pdf](http://ericejohnson.com/docs/Memo_to_Students_re_References.pdf). If you review that memo, you can help me to do the best possible job in helping you.

### **8. IN CLASS**

#### **8-1. In-Class Conduct Rules**

##### **In general:**

(a) Avoid behavior that might disrupt class or distract your fellow students.

##### **Some specifics:**

(b) Do not eat in class. Do not chew gum audibly or with your mouth open.

(c) Refrain from any use of a digital device where such use could reasonably disrupt class or distract fellow students. All digital devices must be operated without audio volume. Screens must not display any distracting content, including, but not limited to, distracting images, indecent content, moving images (video), and animation or flashing graphics (including GIFs and display ads with movement that are common on sites like Facebook, the New York Times, etc.). If you are being distracted by a classmate's digital device usage, please let me know! If you are being distracted, it is almost certain multiple people are being distracted at the same time. Once I know about this, I can then communicate with that student about issue—which I will seek to do tactfully, without causing anyone any embarrassment.

(d) You may use digital devices (including, without limitation, computers, phones, and tablets) in class; however, from the time of class's scheduled beginning until class ends: (1) You may not engage in any digitally enabled network communications with anyone else in class, including, but not limited to, e-mail, text messaging, IM'ing, etc. (2) No posting to social media. You may not engage in any digitally enabled network communications that effect a publication, uploading to, or updating of any public or group-delimited platforms or channels, including, but not limited to, Twitter, Discord (private or public channels), Facebook (including, but not limited to, Facebook groups), Reddit, Instagram, the web, and so forth. The prohibitions of this subparagraph (d) are not

limited by context and apply without regard to whether the activity in question can be characterized as disruptive or distracting. Any violation of the policy in this subparagraph (d) will presumptively result in a lowered course grade and may also be referred for disciplinary action. The prohibitions of this subparagraph (d) do not apply if and when you are absent from class and not on campus, nor do they apply to communications with OU information-technology staff for technical-support purposes. Bottom line: Keep the discussion in class, where it is productive and beneficial for all.

### **8-1A. Zoom/Remote Contingency Rules: General**

*If we end up conducting part of class via Zoom or a similar online arrangement—which I hope we won’t—then please mind the following:*

*Keep your video on.*

*Avoid distractions on video. If you eat, eat discretely. Dress appropriately.*

*Remember to stay muted when you’re not talking.*

*You can use artificial backgrounds, but avoid distracting content.*

*More guidance and rules may be forthcoming if it comes to that.*

### **8-1B. Hazardous Attention-Critical Activity During Class Time**

In recent semesters, when class was being done remotely through Zoom, I found out that some students attempted to drive a car and attend a class on Zoom at the same time. (Can you imagine if I cold called on a student and that caused the student to lose their focus on the road, in turn causing a collision?) Thus, whenever attending, observing, watching, or listening to class—including, for the avoidance of doubt, whether or not you are counted as absent—**you may not drive a motor vehicle, operate a bicycle or scooter, operate heavy machinery, or undertake any other task where distractions could lead to personal injury, loss of life, damage to property, or other loss. This includes harms to the student and to third persons. Sitting in the driver’s seat of a vehicle will be construed as driving.** Such conduct and activity is herein referred to as “Hazardous Attention-Critical Activity.” Engaging in Hazardous Attention-Critical Activity during class is prohibited.

It is also true that while physically present in class you may not undertake any Hazardous Attention-Critical Activity. I’m not sure what that would be (remotely operating a drone?), but you can’t do it.

Engaging in any Hazardous Attention-Critical Activity during class will be construed as serious academic misconduct. Consequences may and presumably will include a failing grade and/or involuntary withdrawal, and a disciplinary referral to the administration. (See Syllabus §§ 6-1, 6-6 in this regard.) In addition, expect that I will report known hazardous behavior to law enforcement.

### **8-2. In-Class Participation**

(a) ***Appropriate levels of voluntary participation:*** Your participation in in-class discussion should be meaningful and appropriate. Please feel free to raise your hand to have a say in discussion when you have a comment that will contribute to the experience of the class as a whole, or when you have a question, the clarification of which will benefit the entire class. On occasion there are students

who raise their hand too often and take up too much of the class's time. Please aim to avoid that.

(b) **Getting called on:** For this semester, I haven't decided to what extent I may call on people who haven't volunteered (frequently referred to as "cold calling"). The wrinkle concerns questions over student audio recordings (see some relevant discussion in §6-4, above). So while I've decided not to grade class participation, depending on how things evolve, I'm leaving the door open to possibly doing some cold calling.

(c) **Questions to always be prepared to answer:** If I do cold calling, at a minimum I expect you to have an answer to the following three questions about readings:

- What is something interesting/compelling/instructive about this case (or other reading)?
- What is your best argument against or critique of the court's opinion (or author's view)?
- What is a question you are left with?

(d) **If you aren't prepared:** If I end up doing some cold calling, and you are not prepared, not feeling well, or simply prefer not to be called on for whatever reason (and there's no need to tell me why), please tell me before class. Preferably tell me in person if there's not a lot of lead time. That way I can avoid calling on you. If I missed a message you sent me or if I forget that you told me in person, and I then call on you anyway, it's always fine to politely remind me that you requested not to be called on.

### **8-3. How to Think About Class Time**

Class time should be about deepening understanding, not trying to create a verbatim transcript of what is said.

I intentionally structure the course so that the written materials are the source of the "information" or "content" of the course. I'm a strong believer in need-to-know information being made available to students in writing. To begin with, there's the assigned reading—I have and am putting effort into those materials being straightforward and clear. There will sometimes be slides—and I will post the slides after class (although I may omit pictures/graphics content from posted versions of slides). Thus, you'll never need to transcribe words off of the screen. I also may provide content in other written forms that I post online.

If you are skeptical of my commitment to putting need-to-know material in writing, check the length of this syllabus!

So if the need-to-know material is already written down for you, what is the use of class? Class is about making the content/information come alive, exploring it, providing context, answering questions, checking your understanding, making connections, etc. That can even involve going down some dead-end paths.

What this all means is that I urge you to avoid transcribing what is said. Instead, relax your mind and try to engage intellectually.

**8-4. Audio Recordings and Video:** No one (other than me) is permitted to make an audio or video recording of class, nor make any transmission (e.g.,

livestream) of class, or any reproduction of any class recordings. Any exception— which I do not anticipate making—would require my express, written permission.

I generally do record all class sessions myself. Understand that these recordings are solely for my own use. I have often found them helpful in improving my teaching. (For example, if I feel I've done something particularly well, I can go back and listen to it the following year to try to replicate it. Indeed, I've done this many times.) Also, recording class also serves the purpose of perfecting copyright in the lecture content.

But please don't ask me for a copy of a recording. I don't give them to students. My distribution of recordings—even to students in this class—that contain students voices would, I believe, significantly hamper students' sense of classroom discussion as being a safe space; plus, there are legal issues with distributing such recordings. And, at any rate—and this is the most salient point—focusing on the verbatim of what was said in class is the wrong study strategy. See §8-3, *supra*. So providing a way for students to watch or listen to class after it happens isn't part of what I do. (I guess it is possible that something really bad could happen—natural disaster, new pandemic, really bad turn of old pandemic, etc.—that would be cause for me to change the way I do things and start putting audio/video recordings on Canvas or something like that. But it would have to be unique circumstances, and there would have to be safeguards.)

The OU College of Law has provided the following language for inclusion in syllabi, all of which is applicable to this course:

“Sessions of this course may be recorded or live streamed by the professor. These recordings are the intellectual property of the individual faculty member and may not be shared or reproduced without the explicit, written consent of the faculty member. Students may not share any course recordings with individuals not enrolled in the class or upload them to any other online environment.”

The OU Center for Faculty Excellence has provided similar language for inclusion in syllabi (obtained from August 2022 from <https://www.ou.edu/cfe/teaching/syllabus-support>), all of which is also applicable to this course, and which usefully additionally emphasizes privacy rights of students:

“Sessions of this course may be recorded or live-streamed. These recordings are the intellectual property of the individual faculty member and may not be shared or reproduced without the explicit, written consent of the faculty member. In addition, privacy rights of others such as students, guest lecturers, and providers of copyrighted material displayed in the recording may be of concern. Students may not share any course recordings with individuals not enrolled in the class or upload them to any other online environment.”

Let me provide some rationale for not distributing recordings to students: A key part of class is letting students feel free to stumble and attempt to push past their competency. Often that can be with difficult, emotional subject matter. Student recordings of class time would—I think it is reasonable to infer—impede that.

All that having been said, I cannot guarantee that class sessions won't be recorded by a student under an accommodation from ADRC. Indeed, I won't necessarily know ahead of time if such an accommodation is issued and a student has begun recording. (See §§ 6-4 & 8-2, *supra*, for some relevant discussion.)

If ADRC has issued an accommodation to you that conflicts with the admonitions against recording set out above, then you should of course avail yourself of that accommodation. But you must abide by the above admonitions to the extent that the accommodation does not provide otherwise. Additionally and particularly, you may not do any of the following: play a recording for others, distribute a recording or post any recorded material online, use a recording for non-class purposes, fail to delete a recording following the conclusion of the semester. The only exception would be if—and only to the extent that—your accommodation contains specific language approving such conduct, and then only to the extent that such conduct does not violate the legal rights of others, including intellectual property rights and privacy rights.

## 9. ATTENDANCE

### 9-0 Overall

I have to require attendance. That derives ultimately from law-school accreditation standards and college policy. Also, I happen to be of the view is that punctual, regular attendance in class is an essential component of the educational experience.

Given that I need to require students' attendance, I need an attendance policy. If there's going to be a policy, I believe it should be enforced. (I believe in enforcement because of the obvious sort of justice rationale: It's unjust for most people suffer a detriment because of anticipated repercussions while a few do what they want and face no consequences.) The only meaningful way to enforce it is with grading/course-withdrawal/credit-denial consequences. And if an attendance policy is going to be enforced with these things, then I believe the policy should be clear and laid out in advance—not made up on the fly.

So, here comes my attendance policy. It's long. It's detailed.

But here's the thing. My attendance policy is very generous. Grading penalties don't kick in until there are nine absences. Now, there are some nuances—for instance, a tardy is half an absence. But still, that's very generous. Consider that there are 28 scheduled meetings for this course. Missing nine classes means missing more than 32%—roughly a third of the semester!

**9-1 Communications About Attendance:** There is generally no need for you to e-mail me if you are or anticipate being absent. Moreover, there is generally no need for you to explain to me why you have been absent. The only reason I imagine that I would need to know why you are absent is if attendance is approaching a severely deficient level (discussed below) and it becomes necessary to discuss extenuating circumstances, or if your absence is excusable under university or college policy and you wish to have it excused (in which case see §§ 9-3(f)-(h), 9-6).

**9-2. Keep Track of Your Attendance:** You must keep track of your own attendance. Do not ask me how many absences/tardies you have accumulated. I do not add up attendance on a day-by-day, week-by-week, or even month-by-month basis. I only add up attendance once: after the semester is over, right before I submit grades. I'm only trying to enforce the outer bounds of a policy that already has generous attendance allowances baked into it. Thus: **It is your responsibility to keep track of your own absences**, including with regard to the presumptive involuntary withdrawal or failing grade. And do not expect to get independent notice that you are approaching the threshold for grade reduction, failing, or being involuntarily withdrawn. **This syllabus provision is your notice.**

A caveat: If your question is limited to asking me to what extent I've used my discretion under §9-3(a) & (b), *infra*, then I admit there's no way you could know that just on your own. If you really want to know that, come up to me after class and ask about the specific day or days about which you are concerned.

**9-3. Specifics Concerning Effects of Absences and Tardiness, Including Excused Absences, Extenuating Circumstances, Grade Reductions, Other Consequences, Etc.**

(a) **Late Arrivals and Early Departures:** For purposes of determining the appropriateness of penalties discussed below, a late arrival or early departure will presumptively count as half of a whole absence. In my discretion, however, a very late arrival or a very early departure may be counted as a whole absence. (For recordation of late arrivals and early departures, see §9-4, *infra*.)

(b) **Comings and Goings; Intraclass Absences:** I understand that you may have an urgent need to leave class for a short time. Bear in mind that leaving and re-entering may be counted as a whole or half absence. It also tends to be disruptive, so please leave class only when necessary.

(c) [reserved]

(d) **Automatic Reduction in Grade for Severely Deficient Attendance:** Independent of and cumulative with any effects of attendance on the class-participation grading component, a student's grade will be automatically reduced as follows: **nine (9)** or more absences will result in the dropping of a student's final grade by one step (e.g., from a B to a B-); **ten (10)** or more absences will result in the dropping of a student's final grade by one additional step (e.g., from a B- at 12 absences down to a C+); **eleven (11)** or more absences will result in the dropping of a student's final grade by yet another additional step (e.g., from a C+ at 13 absences down to a C). So for a student that started with a B but has 14 absences, the automatic grade reduction is three steps (e.g., from B, to B-, to C+, to C) Note that if a student's grade is reduced from a D-, that results in an F.

**Special pandemic/context note:** Previously (e.g., in Fall 2019), my absence policy provided for automatic reductions at six, seven, and eight absences instead of, as provided above, nine, 10, and 11. Thus, I have already added in a large amount of forgiveness for absences on account of the coronavirus pandemic.

(e) **Involuntary Withdrawal or Failing Grade for Profoundly Deficient Attendance:** For a student with a profoundly deficient attendance record, I will presumptively have the student involuntarily withdrawn from the course without

credit and with a grade of F, have the student involuntarily withdrawn from the course without credit and with some other grade that may be appropriate under university or college policy, or award a failing grade at the end of the semester. For these purposes, I will presumptively regard as profoundly deficient attendance twelve (12) or more absences. Recall that partial absences (i.e., late arrivals, early departures) presumptively will count as half an absence and may, in my discretion, be construed to constitute a whole absence. **It is your responsibility to keep track of your own absences, including with regard to the presumptive involuntary withdrawal or failing grade.** Thus, do not ask me to calculate your attendance record so that you can weigh whether to miss an additional class. And do not expect to get independent notice that you are approaching the threshold for failing or being involuntarily withdrawn. **This syllabus provision is your notice.**

***Special pandemic/context note:*** Before the pandemic (e.g., in Fall 2019), my absence policy provided for involuntary withdrawal or failing grade at nine absences instead of, as provided above, 12. Thus, again, I have already added in a large amount of forgiveness for absences on account of the coronavirus pandemic.

(f) **Special Extenuating Circumstances:** I may take account of special extenuating circumstances in deciding whether to drop a grade, award a failing grade, and/or request involuntary withdrawal. Special extenuating circumstances can include weather emergencies, personal illness, illness of a close family member, bereavement, etc. Extracurricular activities, job interviews, court appearances, or the like can be considered in this vein as well. (For absences caused by religious observances, which are excusable, see §9.3(g), *infra*, and for absences caused by covid, which are excusable, see §9.3(h), *infra*.)

Notwithstanding the foregoing, it is expected that under almost all circumstances students will be able to keep absences within the numerical thresholds identified above—including absences caused by illness, storms, job interviews, etc., and even the coronavirus pandemic. Giving students special dispensation on the issue of attendance will only be done if appropriate under the totality of the circumstances. As an example, suppose a student was absent from class a number of times because the student wanted to sleep in; then, at the end of the semester, the student was absent one additional time because of an out-of-town job interview. In such a case, if the job-interview absence takes the student over the threshold for an automatic reduction in grade, then the grade reduction is appropriate. If the student had been generally conscientious about attendance from the beginning, the student would not have created any issue with missing class for the job interview.

**If you wish for me to consider any special extenuating circumstances with regard to your attendance, then you must file an End-of-Semester Attendance Mitigation Statement,** as discussed in §9-6. (I suggest you calendar the filing of that statement now, so you'll remember to do it if you need to. See §9-6.)

Note that you should not feel compelled to discuss with me reasons for absences or extenuating circumstances if your attendance is not approaching a severely deficient level.



(g) **Absences Resulting from Religious Observances:** In accordance with University of Oklahoma policy, I will excuse absences that result from religious observances. That the absence is excused means it doesn't count as an absence for purposes of hitting the "severely" or "profoundly" thresholds for grade reductions, involuntary withdrawal or failing grade under Syllabus §9-3(d) and §9-3(e)). To have an absence excused on the basis of a religious observance, **you must file an End-of-Semester Attendance Mitigation Statement**, as discussed in §9-6. (Calendar the filing of that statement now if you think you might have an excusable absence this semester because of a religious observance or holiday. See §9-6.) You should also separately contact me as appropriate or useful during the course of the semester in regard to such absences.

(h) **Absences Excused for Covid:** Absences that result from covid will be excused—including being sick with covid, staying away from class to avoid exposing others after you have been exposed, acting in compliance with university, state, or federal policy/guidelines/rules, or following the advice of a physician, nurse, or other health care provider. As with religious observances, that the absence is excused means it doesn't count as an absence for purposes of hitting the "severely" or "profoundly" thresholds for grade reductions, involuntary withdrawal or failing grade under Syllabus §9-3(d) and §9-3(e)). But to have an absence excused, **you must file an End-of-Semester Attendance Mitigation Statement**, as discussed in §9-6.

**Please note: I strongly wish to encourage students to err on the side of caution and stay away from class whenever they perceive a potential risk to members of the law school community by coming to class.**

**9-4. Attendance Record:** To avoid being distracted in class by constantly noting things like late arrivals and early departures, I generally require students to log their own attendance, including filling out late slips. Thus, **it is of paramount importance that you deal with all attendance issues with utmost honesty, integrity, and care.** Inaccuracies in marking an attendance log or late slip will presumptively be treated as academic misconduct and will presumptively result in a lowered grade or a failing grade. If an inaccuracy is inadvertent, prompt self-disclosure is encouraged and will be considered ameliorative.

(a) **Means of Taking Attendance:** Attendance may be taken by means of a paper log (paper sheet or card) for students to fill out during class, by roll call, by reference to the seating chart, or by some other method.

(b) **Indicating Attendance:** If attendance is taken by means of a paper log, then when the attendance log comes around to you, fill it out as instructed, indicating your attendance for the instant date. ("Instant date" means the current date as you are looking at the log.) Indicating your attendance this way is your responsibility: If the attendance log does not come around to you, simply come up to me immediately after class and ask to fill it in. If you omit to fill in the log during class or immediately afterward and before I leave the room, you will be counted as absent.

This is very important: **You may only fill out the attendance log on behalf of yourself and for the instant date.** You may not mark the log on behalf of another person, even if that person is in attendance, and you may not permit another

person to mark the log on your behalf. You may not make any mark indicating your attendance for any other date other than the instant date, even if you were or will be in attendance on that other date.

(c) **Self-Reporting Partial Attendance:** If an attendance log is used, and if you will need to depart class early and not return, then you must make an appropriate notation of that on the attendance log. Alternatively, if you have a change of plans requiring you to leave early despite not having indicated that in advance on the attendance log, then you must inform me by e-mail as soon as reasonably possible afterward to correct the record.

(d) **Filling Out of Late Arrival Slips:** If you arrive late to class, you must legibly and completely fill out a late arrival slip before you sit down. If a blank late arrival slip is not available for you, then before you take your seat you must leave on the podium (or with me if I am seated at a table, as in a seminar class) a letter-size sheet of paper providing your name, the name of the class, the full date, the day of the week, and the time of your arrival.

(e) **Unrecorded Absences:** At my discretion, I may announce that for a particular class meeting I will not record attendance and that absences from such a class meeting will not count for purposes of the attendance policy. Situations in which I might deem this appropriate are: (1) if it is necessary to hold a make-up class at an irregular time or (2) if there is the occurrence of a disaster that implicates issues of safety or public necessity. It is also possible that I may omit to record attendance for a class. That being said, recordation of an absence is a distinct issue from the existence of an absence. And for the purposes of self-disclosures of profoundly deficient attendance under §9-5, *infra*, a student's self-disclosure obligation is not relieved by the fact that one or more absences (including partial absences) may be unrecorded. Toward the end of encouraging candor, I will exercise discretion with unrecorded-but-disclosed absences and may choose not to count them for purposes of grade penalties and administrative withdrawal. So err on the side of disclosure.

**9-5. Mandatory Immediate Self-Disclosure Statement of Accumulated Absences in Cases of Profoundly Deficient Attendance:** I do not add up and calculate accumulated absences on an ongoing basis during the semester. As mentioned previously, it is each student's responsibility to keep track of her or his own absences. In keeping with that: Upon a student's accumulation of a record of profoundly deficient attendance (see §9-3(e), *supra*), that student is required to disclose such accumulation immediately in writing to me. The disclosure must be made to me by e-mail (eric.e.johnson@ou.edu) with a paper copy handed to me in person, or, if in-person delivery is not practicable, to a faculty administrative assistant with an explicit explanation of the nature and urgency of the communication. The subject line of the disclosure e-mail must be "Self-Disclosure Statement of Accumulated Absences."

If the student hopes to avoid involuntary withdrawal or the awarding of a failing grade for the course, then the statement must explain the reasons for the student's absences, or at least a portion of the absences sufficient to avoid the profoundly deficient attendance, and must provide a rationale for why the student should be allowed to continue in the course notwithstanding the

accumulated absences. Any supporting backup documentation that is to be considered must be provided with the statement, or, if this is not immediately possible, then the student must provide what she or he can with the statement and explain in the statement the nature of the delay and when the remaining documentation will be forthcoming. To this end, the student is referred to §9-3(f), *supra*, regarding special extenuating circumstances.

If a student has already submitted a disclosure under this section and then subsequently accumulates another absence (including a partial absence in the form of a late arrival or early departure), the student must submit a supplemental disclosure, like the original disclosure in form and substance.

For counting absences to determine the necessity of submitting a disclosure under this section, where there are any interpretive questions, a student is instructed to err on the side of inclusiveness. That is, a student who is unsure of whether a given instance will count as an absence or partial absence should err on the side inclusion of that absence or partial absence in the quantification of deficient attendance. A student is advised to note such interpretive questions and the fact of the student's erring on the side of inclusiveness in the statement. Further to this regard, refer to §9-4(e), *supra*.

**9-6. End-of-Semester Attendance Mitigation Statement:** In order for me to consider absence excuses and extenuating circumstances, I must be aware of them. It is crucial that this information is readily accessible to me at the moment I am putting together grades at the end of the semester! To make sure that I don't miss anything, I require that students provide this information to me in a particular way: **To the extent a student wishes to make a claim of extenuating circumstances for any reason or claim any excuse (e.g., based on religious observance), then the student must file an End-of-Semester Attendance Mitigation Statement not earlier than the last day of class, nor later than the day after the last scheduled day of final exams** for the College of Law for the semester. **Take a moment now to calendar this**—so you will remember when the time comes at the end of the semester.

**The statement must be sent to me by e-mail (eric.e.johnson@ou.edu) with the subject line, "End-of-Semester Attendance Mitigation Statement."** I also suggest providing a paper copy to a faculty administrative assistant with the request that it be given to me. File just one statement—that is, just one e-mail with attachments, and if you are handing in a physical copy, just one stapled packet of papers. By your putting everything together, we can avoid any possibility of my overlooking anything relevant. If you want me to consider any previously sent e-mails in a claim for special extenuating circumstances, then please include copies of those e-mails within the one communication.

There is no prescribed format for the statement; substance is what matters. Regarding what might qualify as extenuating circumstances or excuse, see §9-3(f) & (g), *supra*.

If you have already filed a mandatory disclosure for profoundly deficient attendance under §9-5, *supra*, then you should additionally file an End-of-Semester Attendance Mitigation statement, which can include copies of any previously filed disclosures made pursuant to §9-5.

Please note! The End-of-Semester Attendance Mitigation Statement and the requirements above are not intended to be retributive or to deter students from making use of valid excuses or calling my attention to extenuating circumstances. Rather, **the point is to make sure I have the relevant information at the time I count up attendance for grading purposes and so no one is needlessly given a reduced grade!** ☺

**9-7. No Waiver:** No provision of this attendance policy can be waived by me orally. (See §12, *infra*). If you think I said something that relieved you of an obligation under this attendance policy, you then misunderstood me. Also, I can't imagine a circumstance under which I would grant a written waiver: The policy is already built to be fair and to take into account varied circumstances. It must apply to everyone equally.

## 10. EXAMINATION

### 10-0. Transparency and Fairness

(a) **Overall aims:** The most important thing to me in creating exams and grading them is fairness. I think you will see throughout my description of the exam that I have made design choices and adopted practices with fairness utmost in my mind.

(b) **Ex Parte Communications:** I will not discuss the exam on an *ex parte* basis. (See §7-2, *supra*.) Giving some information to some students that I don't give to all students would undermine fairness.

(c) **Anonymity:** Each exam will be "blind graded," so that I will not know the identity of the student as I am grading her or his exam. This, too, is a key part of fairness. This is not just a matter of protecting students that, theoretically, might have impressed me unfavorably in class. It is really mostly a matter of avoiding giving any advantage to students who have impressed me *favorably* in class. Thus: **You may not waive anonymity. Do not include your name in your exam response, and do not write your name on any exam materials.** Self-identification on the exam or otherwise compromising anonymity will presumptively result in a deduction from your exam grade and a referral for disciplinary action.

### 10-1. Commitments in How I Will Design the Exam and Key Advice to You in Studying

#### (a) A "Normal Exam"

Things have been so unpredictable and non-normal over the past few years that I feel I have to start by addressing that.

The normal sort of exam I use is one that has a Part 1 portion, which comprises multiple-choice questions and is administered on a closed-book basis, and a separate Part 2 portion, which comprises essay questions requiring legal analysis of a fact pattern and is administered on an open-book/open-note basis wherein any printed materials are allowed but referencing electronically stored files or information is not allowed. Yet it seems like these days we can't take normal for granted. So pandemic contingencies, a natural disaster, or something else out of left field may require something other than a normal exam. Thus, in this syllabus, I'm mostly going to discuss and make various commitments to what

I'll do for a normal exam. But I have to reserve the right to make adjustments if circumstances require it.

**(b) My goal and your goal:** Your goal in taking the exam is to show your mastery of the material presented in the course and your skills in analyzing legal problems involving the course's subject matter. My goal in designing the exam is to provide you with a full and fair opportunity to do so and to avoid arbitrariness in the results.

**(c) The Correspondence Principle**

When I write an exam, I work hard to ensure that the emphasis on the exam will track the emphasis in class and in the materials, and the topics covered on the exam will be at least roughly proportional to the time spent on those topics in the course. I call this the Correspondence Principle, and I will do my best to obey this when putting the exam together. (And to be clear, this applies whether it's a "normal exam" or not.)

So, for example, if something received very little attention in the course, you can expect that it will receive very little attention on the exam—if any. Thus, when studying, I advise you to be balanced in your topic approach and to concentrate on understanding the bigger issues rather than memorizing minutiae.

**(d) Comprehensiveness:** In keeping with the Correspondence Principle, I will strive to be very comprehensive in terms of the coverage of topics on the exam. I will use the syllabus and chart of assignments as a checklist. I expect to include, in some way, every topic that was substantially explored in class.

**(e) Breadth and depth of coverage:** Any material presented in class or in the readings is potentially fair game for the exam. But, in keeping with the Correspondence Principle, the emphasis given to topics will correspond to how much attention they received in class and in the readings. So, if some doctrinal point came up only in one smallish note appended to a case, then you can be sure that such a doctrinal point will not loom large on the exam. In fact, it won't even loom medium.

**(f) Multiple-choice questions:** For multiple-choice questions, a general design principle I follow is try to make all of them straightforwardly answerable through application of key concepts and major points of doctrine—not memorization of obscure points. (Often I try to provide multiple ways for a student to get to the right answer on the basis of what we studied.)

Now, that being said, note that "**straightforward**" **does not mean "easy."** The regular type of multiple-choice question I use, where you are expected to apply law to facts, is a kind of puzzle. You solve the puzzle by applying the law you've learned. You have to work through the question to eliminate wrong answers and figure out the right one based on the doctrine taught in the course. I wouldn't represent that task as being easy. And, indeed, if you could tell the answer right away just by glancing over the question, it wouldn't be accurate to describe it as a kind of puzzle.

Here's another way to think about it: I've got a lot I keep in mind when I design multiple-choice questions: fairness, accuracy, straightforwardness, correspondence to coverage in the course. Easiness is just not something I worry

about. Statistically speaking, what I care about with an individual question is getting a high point biserial (which can be thought of as an indicator of fairness). I do not concern myself with whether a question garners a high percentage of correct responses (which would be a measure of easiness).

Looking over past statistical results, it is clear that some of my questions end up being easy, and some end up being hard. Frankly, before running the test, I can't tell what will be easy and what will be difficult. Many questions that I thought before would be easy end up being answered correctly by only a small percentage of test takers. And I've had questions I thought would be decently difficult be answered correctly by 100% of the class.

All in all, what I find in looking over past statistical results is that **my multiple-choice exams often skew toward being fairly hard**. In one recent class for which I looked up statistical information, a student with a median score on the multiple-choice section answered fewer than two-thirds of the multiple choice questions correctly. So that was a hard test. And if I used a grading system, as in high school, where a student had to get 83% correct to get a B, then that would be pretty frightening. But my grading system is much, much more forgiving.

To the extent that a test is hard, that can be a very good thing for grading fairness. In truth, **you don't want a test that's super easy**. Instead, **you want a test where what you score is correlated to how much you know**—in other words, a fair test. And if you think about it, an exam that is super easy becomes dangerous: Happen to miss a question or two—perhaps because your mind is randomly drawing a blank on something—and then all of a sudden you are at the bottom of the class. **A test that is decently difficult ends up being forgiving of random little mental blocks and minor slip-ups**.

So when you are taking the exam, if you feel like you are missing lots of questions, don't freak out. It doesn't necessarily mean you're doing poorly. You might be doing very well. Just keep moving forward, staying on pace, working through the questions to straightforwardly apply what you have learned in the course.

**(g) Essay questions:** For the essay exam, it will be built to avoid testing you on obscure points. Now, that being said, I cannot guarantee that no obscure point will find its way onto the essay exam. Why not? There is always the possibility that some clever student will make a brilliant point regarding some tiny point of law, even if I never intentionally meant to include it. Such a possibility is a natural consequence of having an open-ended essay response. Obviously, I can't hold it against the clever student who sees something I didn't, and in such a situation I will happily award an extra point or two, although not a windfall.

That brings up a related point: As a matter of strategy on the essay exam, I strongly counsel you to stick to the straightforward aspects and do a good job on those rather than looking for obscure opportunities to make quirky, eccentric points. There should be more than enough straightforward material to engage you. Put differently, when approaching the essay booklet's hypothetical facts, I would advise you to read carefully but not suspiciously. My experience in reading exams is that when students try to look for hidden opportunities for points they usually end up going off in unproductive directions.

So, the bottom line is, the more you know, the better, but do not obsess about trying to commit to memory all the finer points. Instead, I suggest you prioritize your studying based on what I explain next.

When I sit down to write the exam, in order to obey the Correspondence Principle, I will look for areas that were emphasized during our semester. To accomplish that, I will make particular reference to the following: (1) doctrine emphasized in the casebook's explanatory text (i.e, the part of the casebook that explains the law, as opposed to the cases and other "readings" within the casebook); (2) doctrine that was important to the resolution of a case we read or otherwise loomed large in a reading; (3) problems from the casebook that we went over in class; (4) hypotheticals, examples, problems, etc. from slideshows posted to the class website; (5) the mindmap, particularly where it overlaps with the casebook.

Indeed, when I draft exam hypos and questions, I frequently look back at the above sources to convince myself that what I'm testing is something that's fair to expect a good student to have learned. In fact, I often gain inspiration for an exam's hypothetical facts by looking at the problems from the book that we went over in class, the examples and problems from posted slides, and the facts of cases we read.

But note that I don't re-use those problems or facts. This means that some fictional events appearing in the exam may be loosely similar to, but not the same as, the facts from problems and examples. To put it another way, the problems and examples will give you a good idea of kinds of things you might find on the exam, but they would not represent an opportunity to draft portions of your essay exam answer ahead of time.

The main message is not to worry about small details. Instead, work on having a thorough understanding of the major concepts.

I try to make my exams interesting and engaging. In comparison to other law-school exams, you may find that my exams have more narrative, plot, character, and backstory—things that aren't necessarily relevant to the legal analysis.

On the other hand, my essay exams also tend to have a lot of facts that are, indeed, footholds for productive legal analysis. And at first glance—as in real life—these may appear innocuous. Law school essay exams are often called "issue spotters," and let's just say that mine tend to have lots and lots and lots of issues to spot. Indeed, even the top-performing student in any given class misses at least one or two issues that were successfully picked up and dealt with by other students. So I guess you can fairly describe my essay exams as being "difficult." But again, as with multiple-choice questions, that's a good thing! It makes for an exam that tends to be forgiving of little slip-ups. I mean, if the top student in a class is routinely missing one or two issues, then everyone can do that and more and still walk away happy.

**(h) Jurisdictional coverage:** Unless I make an exception in writing in the "exam prospectus" that I issue toward the end of the semester, you will not be tested on the law of any particular state, municipality, or circuit. It's all just general United States law. Thus, you will not need jurisdiction-specific answers.

Sometimes, to emphasize this, I place exam facts in a fictional state. In the past, I've used Arkassippi, Floribama, Nevizona, and Minnesconsin, to name a few.

## **10-2. Obeying Exam Requirements and Instructions**

**(a) Be wary:** As you read above, it is happily the case that my multiple-choice questions and essay questions, while difficult, end up being forgiving of minor mistakes (see §10-1(f)-(g), *supra*). But be aware the reverse is true when it comes to things like complying with exam instructions, correctly using your exam ID number, and turning back in all exam materials. These things are easy to do. But making a mistake with these things can have severe negative consequences.

**(b) Failure to follow exam requirements and instructions:** A huge part of fairness is that students receive like treatment. The foundation of that is the exam requirements and instructions, which are meant to ensure that everyone labors under the same parameters. Thus: Failure to follow exam requirements or instructions is an academic misconduct issue, and violations will be treated as such, even if inadvertent and/or without intent to gain advantage. Make sure you treat exam instructions with diligence and care. (Syllabus §6-6, *supra*, says a bit more about this.)

**(c) Your responsibility with regard to handling and returning exam materials and using your exam identification number:** You bear the burden of properly, legibly, and correctly marking exam materials with your exam identification number. (Your examination identification number, of course, means your examination number for this semester—not one from a prior semester.) You must also obey instructions on the handling and non-mutilation of examination materials. Given the system we have, these things are crucial to exam security and to the accurate assigning of grades, which means they are crucial for basic fairness in grading. If some exam item (question booklet, scantron answer sheet, etc.) is not turned in with your number on it, that, unfortunately, creates a serious problem that may be impossible to fix. So please do not omit to do what you are asked with regard to exam materials. And expect that any omissions, even if inadvertent, will be treated harshly, including resulting in a failing grade and a referral for discipline.

**10-3. Decorum:** *Assuming we have a live, in-person exam administration*, then during the administration of the exam you must refrain from conduct which could reasonably be distracting to the students sharing the room with you, including by generating noise and smells. (Yes, there have been problems in the past.) Here's the thing: exams are stressful. Yet some of the things some students hope will be useful in lowering their stress can actually intensify the stress of others. One recurrent problem in this regard has been food and beverage use during exams. Thus, you will be allowed to have food and drink with you during the exam only under the following conditions:

- Drinks must be open and drinkable before the exam starts. No popping cans or opening soda bottles during the examination period.
- Food and beverages cannot smell. Nothing creating an odor stronger than a cup of unflavored coffee is permitted. So, to be crystal clear, no sandwiches, condiments, salads, etc.



- Food cannot be noisy. No chips, carrots, or granola. In addition, food in wrappers must be unwrapped before the exam begins. For example, if you bring a package of M&Ms into the examination, the candy should be removed from the wrapper and poured onto a paper towel before the exam starts.
- Chew with your mouth closed.
- Do not allow examination materials to be contaminated with food. (Yes—this has happened. ☹)

In addition:

- Don't wear perfume or cologne.
- No essential oils. No candles, potpourri sachets, or anything that is infused with scents.

Be aware that I may issue further specific instructions in this regard at some point later on.

#### 10-4. Format

The format of the exam is in part dependent on how it is administered. At the time of writing this syllabus, I can't know for sure how the exam will be administered. Exam administration has been in flux over the past couple of years because of the ongoing coronavirus pandemic.

Here's what I can say about the exam for now:

Assuming we can have a normal exam, then I anticipate that there will be a closed-book multiple-choice portion.

And so long as we have any kind of exam at all (and I know that sounds wild, but in Spring 2020 we didn't!), then it will certainly include an essay-based portion, which will consist of one or more open-ended questions calling for a written essay response delivering legal analysis concerning a hypothetical fact pattern that is provided as part of the exam. And at least part of the essay portion—or all of it if we are having a normal exam—will be administered on an open-book basis. **Expect that allowed materials for the open-book portion will be limited to paper-based notes and books.** And expect that the device you use to type your response will be required to be locked down with software that prevents access to the internet and to locally stored electronic files. You might consider how this factors into your choices over the semester about how you read, how you outline, etc.

It is likely that I will divide up the time during the essay portion so that the first 30 minutes is a Reading-Outlining Period ("RO Period") during which you can read the exam booklet (that is, the facts and the question or questions), take notes, reference your printed materials (outlines, books, etc.), and outline your response on scratch paper. But during this time you cannot begin typing or handwriting the actual response upon which you will be graded. I've found that imposing this constraint on students has led to better exams—more organized, more balanced in coverage, more focused on the more important issues, and overall less scattered and stream-of-consciousness-like.

I will provide more detail about the exam at a later time, likely in the form of a document called an “Exam Prospectus,” mentioned below.

### **10-5. Things You Can Have With You During the Exam**

I’ve gotten lots of questions over the years about what students are allowed to have with them during the exam. So I’ve created pretty specific instructions on that. So, assuming we have a normal in-person exam, I anticipate providing the following instructions:

Applicable to multiple-choice and essay:

- You must refrain from conduct which could reasonably be distracting to the students sharing the room with you, including by generating noise and smells.
- For food and drinks: Drinks must be open and drinkable before the exam starts. No popping cans or opening soda bottles during the examination period. Food and beverages cannot smell. Nothing creating an odor stronger than a cup of unflavored coffee is permitted. Food cannot be noisy—whether because they are crunchy or they are in a wrapper or package that makes noise. Chew with your mouth closed.
- No essential oils, perfumes, or colognes.
- No smart watches, no phones, no music, nothing with Bluetooth. All items and materials are subject to inspection.
- You may use earplugs. You may use noise-cancelling or white-noise-producing headphones (the word “headphones” includes earbuds) provided that they have no other electronic capabilities, functions, or features (including but not limited to Bluetooth, signal transmission, signal reception, playing music, etc.). What matters is the item’s capacity to do other things—not whether that capacity is being used. Expect inspection.
- You may wear a regular watch with no functions other than timekeeping. A digital watch that has an alarm and stop watch function in addition to providing the time of day and date is permitted—but it may not beep or emit noise.
- You cannot share items with other students.

Applicable to a normal “closed book” multiple-choice portion:

- You can have no materials to reference.

Applicable to a normal “open book” essay portion:

- You can have your computing device (including a laptop or keyboard-equipped tablet) to write your exam, provided it is running the required exam-taking software and is used pursuant to applicable policies. But you may not reference files stored thereon during the examination session.
- You may use any paper-based notes and books you like, including inert binders and tabs. You can also use pens, pencils, and highlighters.

- Any touching, using, accessing, viewing, or listening to electronic devices or other materials, except as provided, is prohibited.
- You cannot share materials with other students.

**10-6. Exam Prospectus:** Toward the end of the semester, I anticipate releasing a document called the “Exam Prospectus,” posted to the class website, providing more detailed information about the exam and how I recommend preparing.

**10-7. Exam Archive:** You should note that I have a very large archive of old exam questions. It is publicly accessible online. Go to [http://ericejohnson.com/exam\\_archive/](http://ericejohnson.com/exam_archive/). The point of the archive is to provide lots of practice opportunity, and to provide it to everyone on the same footing. Old exams won’t perfectly correspond to this semester—different semesters had at least somewhat different topic coverage—but with this large repository of released exam materials, you will have a great opportunity to practice with the sorts of questions you can expect on your exam for this class.

## 11A. ACCOMMODATIONS

**Disability Accommodation:** At the OU College of Law, disability accommodations are handled through the main campus Accessibility and Disability Resource Center. Address: 730 College Avenue. Phone: 405-325-3852. TDD (Telecommunications Device for the Deaf): 405-325-4173. E-mail address is [adrc@ou.edu](mailto:adrc@ou.edu). Website <https://www.ou.edu/adrc>.

The OU Faculty Handbook §5.4 states that the Disability Resource Center “is the central point of contact to receive all requests for reasonable accommodation and all documentation required to determine disability status under law. This center will then make a recommendation concerning accommodation to the appropriate administrative unit.”

The following text, which is useful in explain the scope of disability issues, accommodations, and arena for university support, has been provided by OU for inclusion in syllabi:

“The Accessibility and Disability Resource Center is committed to supporting students with disabilities to ensure that they are able to enjoy equal access to all components of their education. This includes your academics, housing, and community events. If you are experiencing a disability, a mental/medical health condition that has a significant impact on one or more life functions, you can receive accommodations to provide equal access. Possible disabilities include, but are not limited to, learning disabilities, AD(H)D, mental health, and chronic health. Additionally, we support students with temporary medical conditions (broken wrist, shoulder surgery, etc.) and pregnancy. To discuss potential accommodations, please contact the ADRC at 730 College Avenue, (ph.) 405.325.3852, or [adrc@ou.edu](mailto:adrc@ou.edu).”

In general, students are not required or encouraged to disclose disabilities to instructors—which is as it should be. But if you are not getting the help you feel you need from the Accessibility and Disability Resource Center, and if you would

like to talk to me about it, then I invite you to do so. As part of my pursuit of effective teaching and the best educational outcomes for my students, I consider it to be in my interest to advocate for students with disabilities to get the accommodations they need to succeed. I also am interested in making changes—whether required or not—to make my materials and my classroom more accessible for people with a variety of impairments. And I am grateful to students with disabilities in the past who have helped me make improvements in that regard.

**Language Accommodation:** An example of a language accommodation would be if you are not a native English speaker and you feel you might need an English-to-foreign-language dictionary on a closed-book portion of the exam.

What I've been told is that if students desire language accommodations for the exam or otherwise and there is not a disability issue involved, then the accommodation request goes directly to me, not through ADRC. But I can't find anything definitive about that in writing. So you could ask ADRC first. At any rate, insofar as it falls to me to authorize a language accommodation, the following is my policy: **Any language accommodation must be authorized by me in writing. Please get this taken care of as soon as possible—at least by the seventh week of classes.** I may decline requests that are otherwise reasonable on the basis of being dilatory.

## **11B. VARIOUS INFORMATION CONCERNING UNIVERSITY POLICIES**

**Religious Holidays/Observances:** The OU Faculty Handbook §3.15.2 states: “It is the policy of the University to excuse the absences of students that result from religious observances and to provide without penalty for the rescheduling of examinations and additional required class work that may fall on religious holidays.”

Note that religion-based absence excuses, like other excuses, need to get in front of me for me to treat them appropriately. So note the relevant portions of the attendance policy above, including §9-3 through §9-7. In particular, see §9-3(g).

**Title IX Resources and Reporting Requirement:** For any concerns regarding gender-based discrimination, sexual harassment, sexual assault, dating/domestic violence, or stalking, the University offers a variety of resources. To learn more, including how to report an incident, please visit <http://www.ou.edu/eoo.html>.

Also, please be advised that professors are mandatorily required to report, among other things, instances of sexual harassment, sexual assault, and discrimination to appropriate campus authorities. (See §7-5, *supra*, in this regard.)

The following is language provided by OU for inclusion in syllabi:

“Anyone who has been impacted by gender-based violence, including dating violence, domestic violence, stalking, harassment, and sexual assault, deserves access to resources so that they are supported personally and academically. The University of Oklahoma is committed

to offering resources to those impacted, including: speaking with someone confidentially about your options, medical attention, counseling, reporting, academic support, and safety plans. If you would like to speak with someone confidentially, please contact [OU Advocates](#) (available 24/7 at 405-615-0013) or another confidential resource (see [“Can I make an anonymous report?”](#)). You may also choose to report gender-based violence and discrimination through other means, including by contacting the [Institutional Equity Office](#) (ieo@ou.edu, 405-325-3546) or police (911). Because the University of Oklahoma is committed to the safety of you and other students, I, as well as other faculty, Graduate Assistants, and Teaching Assistants, are mandatory reporters. This means that we are obligated to report gender-based violence that has been disclosed to us to the Institutional Equity Office. This includes disclosures that occur in: class discussion, writing assignments, discussion boards, emails and during Student/Office Hours. For more information, please visit the [Institutional Equity Office](#).”

**Adjustments for Pregnancy/Childbirth Related Issues:** Should you need modifications or adjustments to your course requirements because of pregnancy-related or childbirth-related issues, you should contact the Accessibility and Disability Resource Center as soon as possible. A useful document to look at is an FAQ with answers to common questions here: <https://www.ou.edu/eoo/faqs/pregnancy-faqs>.

**Mental Health Support Services:** If you are experiencing any mental health issues that are impacting your academic performance, counseling is available through the University Counseling Center (UCC). You can call 405-325-2911 to make a counseling appointment. The Center is located on the second floor of the Goddard Health Center on the corner of Brooks Street and Elm Avenue, at 620 Elm Avenue, room 201, Norman, Oklahoma 73019. For more information please visit the University Counseling Center website: <http://www.ou.edu/ucc>.

**Fire Alarms and General Emergencies:** The following language was provided by OU under the heading **“Fire Alarm/General Emergency”** for inclusion in syllabi.

“If you receive an OU Alert that there is danger inside or near the building, or the fire alarm inside the building activates: 1. *LEAVE* the building. Do not use the elevators. 2. *KNOW* at least two building exits 3. *ASSIST* those that may need help 4. *PROCEED* to the emergency assembly area 5 *ONCE safely outside, NOTIFY first responders of anyone that may still be inside building due to mobility issues.* 6. *WAIT* for official notice before attempting to re-enter the building.

[OU Fire Safety on Campus”](#)

**Severe Weather and University Emergency Procedures:** The following language was provided by OU under the heading **“Emergency Protocol”** for inclusion in syllabi.

“During an emergency, there are official university [procedures](#) that will maximize your safety.

Severe Weather: If you receive an OU Alert to seek refuge or hear a tornado siren that signals severe weather.

1. Look for severe weather refuge location maps located inside most OU buildings near the entrances
2. Seek refuge inside a building. Do not leave one building to seek shelter in another building that you deem safer. If outside, get into the nearest building.
3. Go to the building’s severe weather refuge location. If you do not know where that is, go to the lowest level possible and seek refuge in an innermost room. Avoid outside doors and windows.
4. Get in, Get Down, Cover Up
5. Wait for official notice to resume normal activities.

Additional [Weather Safety Information](#) is available through the Department of Campus Safety.”

**Mass Shooting Situations, Etc.:** The following is language provided by OU for inclusion in syllabi:

“If you receive an OU Alert to shelter-in-place due to an active shooter or armed intruder situation or you hear what you perceive to be gunshots:

1. *Avoid:* If you believe you can get out of the area WITHOUT encountering the armed individual, move quickly towards the nearest building exit, move away from the building, and call 911.
2. *Deny:* If you cannot flee, move to an area that can be locked or barricaded, turn off lights, silence devices, spread out, and formulate a plan of attack if the shooter enters the room.
3. *Defend:* As a last resort fight to defend yourself.

For more information, visit [OU’s Emergency Preparedness site](#).  
[Shots Fired on Campus Procedure – Video](#)”

**University Polices and Recommendations Regarding Covid:** Please be apprised of university policies and recommendations regarding the ongoing coronavirus pandemic. Adhere to the policies and take recommendations strongly into account. **I recommend that all of my students follow the university’s and law school’s recommendations to reduce the spread of covid, including wearing a mask as applicable.**

## **12. REVISIONS TO THIS SYLLABUS, WAIVERS OF STUDENT OBLIGATIONS, MISTAKES**

This syllabus may be amended or revised, and if it is, the most recent syllabus and any amendments or addenda thereto will be posted to the class website.

**No student obligation under this syllabus can be waived by me orally.** If you think I said something that allows you different treatment under this syllabus,

you must have misunderstood me. The syllabus needs to apply to everyone equally. (See also §9-7, *supra*, regarding attendance.)

It is possible (and probable) that this syllabus contains technical mistakes, such as typos, misnumbered cross-references, etc. In construing this syllabus, mistakes that are purely technical in nature and that do not create genuine ambiguities or hamper substantive understanding by a reasonably diligent student are to be disregarded.

**13. COURSE ORGANIZATION:** The planned organization of the course is below. Note that the list below is just the topics. The reading assignments are on the [Chart of Assignments](#), which is updated on an ongoing basis with the exact assignments for the immediate future. There will also be a long-range (but subject-to-change) projection of reading further out.

Topics marked with an asterisk (\*) have a substantial likelihood of being covered out of order and inserted into a class period where time permits.

Topics marked with a diamond-enclosed dot (◊) are topics that you should expect may not be covered at all. Whether we get to them depends on how much time we have toward the end of the semester.

This list is subject to some adjustment and change. It won't be radically revised, but small things could be tweaked. Check the Chart of Assignments for the latest and most authoritative treatment.

#### **PART I: Preliminaries**

1. About the Course
2. Blackletter Overview, Basic Framework and Initial Questions
3. Theoretical justifications

#### **PART II: Expression**

4. Copyrightable Subject Matter: Fixation, Authorship, Originality, Creativity, and the Fact/Expression Dichotomy
5. Copyrightable Subject Matter: Distinguishing Expression from Ideas, Methods, Systems, Etc.
6. Copyright Registration, Notice, Duration, and the Public Domain
7. Copyright Ownership (Works Made for Hire, Joint Authorship, Assignment)
8. Copyright Infringement Analysis
9. Limits on Copyright Infringement (First Sale, Fair Use)
10. Copyright and Music

#### **PART III: Invention and Industry**

##### ***Utility Patents***

11. Patent Anatomy and Patent Claims
12. Patent-Eligible Subject Matter and Utility
13. Patent Novelty

14. Patent Nonobviousness
15. Patent Disclosure and Patent Infringement
16. Patents, Regulatory Exclusivities, and Pharmaceuticals\*

***Additional Rights Regimes***

17. Sui Generis Rights\*

***Trade Secrets***

18. Trade Secret Subject Matter, Gaining and Losing Protection
19. Trade Secret Misappropriation
20. Trade Secret and [a special topic]◊

**PART IV: Identity and Origin**

***Trademark***

21. Trademark Fundamentals and Distinctiveness; Lanham Act Registration
22. Trademark Ownership, Use, Priority
23. Trademark Distinctiveness for Word Marks (Geographical, Misdescriptive, Generic, and More)
24. Trademark Distinctiveness for Trade Dress (Color, Product Packaging, Product Design)
25. Trademark Functionality
26. Trademark Infringement and Defenses
27. Trademark and Toys, Replicas, and Logo Merchandizing◊

***Right of Publicity***

28. Right of Publicity

**PART V: Miscellany & Marginalia**

29. Licensing\*
30. International IP◊\*
31. Claims Regarding Pitches and Idea Submissions◊\*
32. Federal Preemption◊\*
33. Hot News Misappropriation◊\*

**14. FEEDBACK:** If you have feedback for me—suggestions, ideas, commendations, or criticisms—please do not hesitate to tell me in person or by e-mail. If sending something to me anonymously would make you feel more comfortable, then I invite you to do just that. I hope you enjoy the course!

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