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From the Editor-in-Chief.

This is the 5th volume of the Southern Journal of Business and Ethics, an official publication of the Southern Academy of Legal Studies in Business. The Journal is being published in hardcopy and electronically on the Southern Academy’s web page at http://www.salsb.org.

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

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

This is my fifth year as Editor-in-Chief, and I wish to express my sincere thanks and appreciation to all the Officers of the Southern Academy for their support, encouragement, assistance and advice throughout this year. I would like to further express appreciation to Will Mawer of Southeastern Oklahoma State University, for his efforts in coordinating the entire process. The publishing of this journal is an intense educational experience which I continue to enjoy.

Many of the papers herein were presented at the Southern Academy of Legal Studies in Business meeting in San Antonio, Texas, March, 2013. Congratulations to all our authors. I extend a hearty invitation to the 2014 meeting of the SALS in San Antonio, Texas, April 3-5, 2014.

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

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

M.P. (Marty) Ludlum
Editor-in-Chief
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SOUTHERN JOURNAL OF BUSINESS AND ETHICS

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WORKPLACE BULLYING: UTILIZING A RISK MANAGEMENT FRAMEWORK TO ADDRESS BULLYING IN THE WORKPLACE

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Workplace bullying has been grounded in European cultures for many years and now workplace bullying has taken center stage in the United States. This paper serves to provide employees and organizations with an overview of the workplace bullying phenomenon. The co-authors present a workplace bullying risk management framework to discuss the processes related to reducing the probability and impact of workplace bullying infractions. More specifically, the co-authors identify and define workplace bullying, discuss practices to prevent and mitigate workplace bullying, present processes and procedures to monitor and control bullying and conclude with the benefits of executing workplace bullying programs.

I. INTRODUCTION

The concept of workplace bullying has become very prominent in the United States. In an online self-reported survey conducted by the Workplace Bullying Institute that included 1,604 respondents, 39% of the respondents reported that they had been bullied and 58% of the respondents reported they were currently being bullied (“Workplace Bullying Institute Research Studies: Effectiveness of Bullied Target Resolution Strategies,” 2012). Additionally, 72% of the respondents reported that the primary perpetrator’s rank was higher, 18% of the respondents reported that the perpetrator’s rank was a peer or coworker and 10% of the respondents reported a lower ranking perpetrator (“Workplace Bullying Institute Research Studies: Effectiveness of Bullied Target Resolution Strategies,” 2012).

Bullying is most notably identified as a “mistreatment severe enough to compromise a targeted worker's health, jeopardize her or his job and career, and strain relationships with friends and family. It is a laser-focused, systematic campaign of interpersonal destruction” (“Workplace Bullying Defined by the Workplace Bullying Institute,” 2010.). Workplace bullying is more specifically noted "as a repeated, health-harming mistreatment of one or more persons (the targets) by one or more perpetrators that takes one or more of the following forms: verbal abuse, offensive conduct/behaviors (including nonverbal) which are threatening, humiliating or intimidating, and work interference — sabotage — which prevents work from getting done” (“Workplace Bullying Defined by the Workplace Bullying Institute,” 2010). A workplace
bullying infraction can be classified as a risk. A risk is an uncertain event or condition that, if it occurs, has a positive or negative impact on an initiative (“CDC Unified Process Practices Guide,” 2006). Thus, risks associated with bullying infractions are negative and include physical, mental, social and economic harm (“Workplace Bullying Defined by the Workplace Bullying Institute,” 2010). More specifically, examples of bullying behaviors include: unsolicited criticism, unfair treatment, isolation, humiliation, excessive monitoring and receiver of targeted jokes.

Risk management includes the processes of planning, identifying, analyzing, responding, and monitoring and controlling a risk (Project Management Institute, 2008). Risk management is an ongoing process that is focused on thinking about the infractions that could occur and defining responses to avoid or minimize the impact of the infractions to the employees as well as the organization. Therefore, the overall goal of infusing a risk management framework into a workplace bullying environmental situation is to reduce the probability and impact of the occurrence (Project Management Institute, 2008).

In this paper, the researchers use the risk management framework per the Project Management Institute (PMI) to guide the discussion about workplace bullying. The framework includes identification, response planning, and monitoring and controlling (Project Management Institute, 2008). The researchers review the history of workplace bullying, discuss current perspectives of workplace bullying in the United States, identify bullying incidents and sources, and present practices to respond to bullying including prevention and mitigation strategies. Additionally, the researchers discuss bullying response plans and workplace bullying programs to monitor and control infractions. The researchers conclude with discussing the benefits of implementing workplace bullying programs.

II. HISTORY

The origin of the term workplace bullying can be traced back to Europe. Workplace bullying was formerly termed mobbing. Mobbing was established as a term in the 1980s by the physician Heinz Leymann (1990). Leymann (1990) defined mobbing as hostile and unethical interactions in the work environment by one or multiple individuals to one individual who is defenseless. Thereafter, the term workplace bullying was coined by British journalist Andrea Adams (Namie & Namie, 2009). Andrea Adams wrote the first book in the United Kingdom on the topic. It has been noted that the United Kingdom has remained a leader in the identification and recognition of the behavior due to Andrea Adams.

In examining the development of laws affecting the concept of workplace bullying, the forerunner in bullying legal reform was Sweden. In 1993 (effective in 1994), a Swedish health and safety ordinance provided for safety in the workplace via “Victimization at Work” (Groeblinghoff & Becker, 1996). The ordinance puts the responsibility on the employer to create
policies and procedures within the workplace to prevent bullying and to train the leadership team as well as to provide support to the victims.

The Dignity at Work Bill and the United Kingdom harassment law (can also be cited as the Protection from Harassment Act of 1997) also protected workers. The Protection from Harassment Act of 1997 states that “every employee shall have a right to dignity at work and if the terms of the contract under which a person is employed do not include that right they shall be deemed to include it” (“The Law - Dignity at Work Now,” 2012, p. 1). Additionally, the Scottish Parliament has enacted a dignity at work policy and complaint process that “aims to support a culture of openness and equality in which people are treated fairly and with dignity and respect. It has sought the support and cooperation of staff in creating this culture and ensuring that others are treated fairly by developing and maintaining positive working relationships with colleagues and others with whom they interact daily” (“Dignity at Work Policy and Complaints Process,” 2012).

Other notable legislation that was passed to protect workers include: (a) in Germany (August 1, 2002), “Zweite Geset zur Anderung schadensrechtlicher Vorschriften was passed and states that employers must do everything in their power to prevent bullying incidents; (b) in France, the Industrial Relation Act of 1999 and law for Social Modernization of 2002 was passed ; and (c) in Belgium (July 2002), the “Onkelinx Law” was passed that protects against violence, bullying and harassment (“The Law- Dignity at Work Now,” 2012).

Ironically, Quebec is the first North American jurisdiction that passed legislation to reform workplace bullying (“When The Abuser Goes to Work,” 2012). More specifically, amendments to the Labour Standards Act outlawed psychological harassment of workers. Quebec defines psychological harassment as “any vexation’s behaviour in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gesture, that affects an employee’s dignity or psychological or physical integrity ant that results in a harmful work environment for the employee” (“When The Abuser Goes to Work,” 2012). Accordingly, this legislation includes the determination of psychological harassment, a demonstration that the harassment affects the person’s dignity or health or psychological state, and thereafter, results in a hostile work environment.

III. CURRENT PROSPECTIVE IN THE UNITED STATES

Although certain countries have extensive laws pertaining to workplace bullying, these efforts have not been enacted in the United States (Davidson & Harrington, 2012). In the United States, “there are no laws specifically designed to provide protection to victims of bullying in the workplace” (Davidson & Harrington, 2012, p. 94). One noteworthy case within the U.S. courts included an Indiana Supreme Court upholding a judgment of $325,000 against a surgeon (Raess v. Doescher, 2008). This decision garnered attention because the surgeon was noted in the case
as being a workplace bully. However, it was stated that the concept of workplace bullying was not supported by law in the court’s opinion.

Consequently, there were efforts to address bullying in the workplace through various state legislatures. As of 2003, twenty-one (21) states within the United States have introduced the Healthy Workplace Bill. However, none of these efforts by the states have been enacted (“Healthy Workplace Bill,” 2012).

Of noteworthy interest, the state legislative introduced bills (Healthy Workplace Bill) which include, but are not limited to: (a) defining an abusive work environment, (b) requiring proof of health-related harm, (c) giving employers ammunition to terminate or sanction employees, and (d) mandating plaintiffs to hire private attorneys for representation (Healthy Workplace Bill, 2012). The Healthy Workplace Bill would provide legal ramifications for health-related incidents in the workplace. It will be interesting to note what actions will take place in the future by the legal arena.

To support the hierarchy established in this paper, the authors have included the following framework to provide a platform to discuss the implementation of a workplace bullying program using a risk management approach. The framework is entitled *Workplace Bullying: Risk Management Framework* and is noted herein.
IV. WORKPLACE BULLYING: RISK MANAGEMENT FRAMEWORK

A. Bullying Identification And Sources

Risk identification includes identifying the various types of workplace bullying risks and then documenting the actions and behaviors associated with these risks (“CDC unified process practices guide,” 2006). The workplace bullying framework begins with the identification of the infraction and sources of bullying (“Bully Risk Management Tool,” 2012). Namie (2005) defined workplace bullying “as repeated, health-imparing mistreatment driven by a perpetrator’s
need to control targeted individuals” (p. 14). Workplace bullying can result in threats centered around professional and personal standings and as such may impact worker productivity. Current research indicates that bullying is widespread and gender neutral.

Some of the sources of bullying include disrespectful behaviors, organizational changes, technological changes, staff reductions, limited resources and negative leadership styles (“Bully Risk Management Tool,” 2012). A majority of the bullies hold leadership positions, including supervisors and managers (70-90%) in the United States, Britain and Australia (“Bully Risk Management Tool,” 2012). However, it is important to note that some individuals are bullies no matter what position they hold. For example, the result of one study noted that when management pressures workers to meet revenue and profit goals with fewer staff, managers are ordered to deliver results with little regard to human behaviors. The fiscal bottom line is the driving force for all actions and behaviors (Namie & Namie, 2003).

B. Prevention And Mitigation - Employers

After identifying the types and sources of workplace bullying behaviors, the risk management framework focuses on developing prevention and mitigation strategies that include planning and responding to the risks (Project Management Institute, 2008). More specifically, response planning includes developing strategies to reduce threats to employees in the workplace.

Prior to outlining some strategies to prevent and mitigate bullying, it is important to note some principles that most bullying infected environments embrace. The principles include: (a) environments creating opportunities for employees to bully each other and in cutthroat manners; (b) bullies scoping out environments and victims that provide little resistance to their behaviors; and (c) employers often rewarding mistreatment and reinforcing an abusive culture (Namie, 2008). The aforementioned principles have been considered prior to listing the suggestions for creating a systematic approach to workplace bullying prevention and mitigation strategies.

One of the first strategies that should be enacted to defray bullying is to establish an anti-bullying policy including a clear definition of bullying, examples of bullying behaviors, and anti-retaliation and confidentiality sections (Namie & Namie, 2009). The policy also needs to include an accountability section that addresses the consequences for engaging in bullying behavior including informal warnings, written reprimands and termination. Thus, disciplinary actions need to be tied to the performance appraisal process (Krell, 2010). Additionally, the bullying policy needs to include a formal and informal complaint process (Namie & Namie, 2009). The complaint process may include; but not limited to, hotlines and face-to-face complaints to third parties.

One consideration prior to implementing the policy is to develop metrics to track and monitor the effectiveness of the policy to prevent and mitigate workplace bullying (Fast, 2010). A key to tracking the metrics is to integrate the policy into the performance appraisal process. Some of the suggested metrics that need to be tracked include: (a) how many of your employees have been bullied in your organization over a one year period and a five year period? (b) are employees leaving the company due to workplace bullying? If so, what are the specific reasons for leaving? and (c) what are some of the health issues related to missing work? (Fast, 2010).
As performances are accessed and rewards and benefits are distributed, employers should not promote behaviors that manipulate or harm others (Salin, 2003). Additionally, the performance assessors need to establish realistic performance objectives and goals including manufacturing, customer service, sales targets and quotas. After gathering the metrics from performance reviews and other processes, analyses and plan implementations must occur in order to revise the policy as needed in order to create and sustain improvements (Namie & Namie, 2009).

After the workplace bullying policy has been developed, the policy needs to be communicated to hiring candidates and current employees on an ongoing basis. One method to infuse the knowledge into the workplace is to conduct training sessions that explore the definitions, policy, and disciplinary actions associated with workplace bullying (Namie & Namie, 2009). Supplemental training should also be targeted to groups such as human resources, the senior leadership team, and the board of directors (Namie, 2008). Additionally, human resource personnel need to screen and select individuals prior to employment noting background and reference information about behaviors and setting expectations about behaviors in the work environment prior to employment (Glendinning, 2001; Vega & Comer, 2005).

C. Response Planning – Employees

Not only should employers have strategies in place to mitigate workplace bullying; but, the employees need to be armed with some tools to assist in mitigating bullying. Namie and Namie (2003) and Fast (2010) suggest several steps that employees should implement when a bully situation has been encountered.

The recommended steps include:

1. Identify the behavior as bullying to prevent others telling you your problem is not legal (Namie & Namie, 2003).

2. Take time off, research and study your options. This includes consulting with professionals about your physical and emotional health. Additionally, the bullying victim needs to research whether the behaviors fall under federal or state laws. For example, some behaviors may fall under harassment (Namie & Namie, 2003).

3. Expose the bully including making the case that keeping bullies employed is too expensive. You should gather data including turnover rates, replacement costs, training, and absenteeism (Fast, 2010).

D. Monitoring and Controlling

After developing prevention and mitigation strategies, monitoring and controlling of the responses ensure the strategies are enacted, evaluated and modified, if needed (Project Management Institute, 2008). The monitoring and controlling on a high level includes an organizational approach to controlling bullying and processes and procedures to evaluate the results based on targets, performance indicators and overall strategies (“Bully Risk Management Tool,” 2012).
One of the first steps to ensure a successful monitoring and controlling program is to gain the commitment from the senior leadership team. The senior leadership team can show various levels of support by allocating resources to: (a) establish a bullying policy to monitor and control behaviors; (b) establish a system for easily and confidentially reporting and handling complaints; (c) implement processes to investigate and resolve bullying issues; (d) provide training for awareness, complaint handling, investigation and resolution of bullying; (e) reprimand the bullying individuals; and (f) monitor the work environment for potentially hazardous relationships (“Bully Risk Management Tool,” 2012).

After the resources have executed the strategies, human resource personnel need to execute action plans to monitor the effectiveness of the controls (“CDC Unified Process Practices Guide,” 2006). The monitoring plans include resources to measure and report behaviors. For example, the behaviors may include absenteeism, employee turnover, grievances, complaints, employee satisfaction surveys, and injury reports.

**V. BENEFITS AND CONCLUSIONS**

Grubb, Robers, Grosch, & Brightwell (2004) reported via a research team for the National Institute for Occupational Safety and Health that employers in (approximately) 75.5% of the time reported bullying never occurred in the workplace. This statistic feeds into the strategy that companies are not taking any action to prevent nor mitigate bullying in the workplace. Therefore, the authors are concluding with some of the benefits of implementing the Workplace Bullying: Risk Management Framework presented herein.

Some of the benefits of implementing the aforementioned strategies include reduced health effects including reduced mental health issues such as posttraumatic stress disorder (Tehrani, 2004) and physical health issues (Namie, 2005). The aforementioned health effects result in time off from work and thus reduced productivity.

Other benefits of bullying programs include reduced employee turnover and less issues related to recruiting and retention of employees (Namie, 2005). “Workplace bullying infractions need to be mitigated because of the impacts to the organization, employees, and society” (Carden & Boyd, 2010, pp. 153-154). The social issues that are a result of workplace bullying include health consequences suffered by the bullied victims. “Cardiovascular, gastrointestinal, immunological problem onset can be triggered by the bully’s systematic deconstruction of the target’s work life” (Namie, 2005, p. 4). Additionally, social issues can extend to witnesses of bullying including interjecting fear into performance and thus impairing worker productivity which can extend to others (Namie, 2005). The social issues can be addressed by focusing on a policy that restores the rights and health issues for the victims (Namie & Namie, 2009).

In this paper, the researchers have reviewed the history of workplace bullying, discussed perspectives of workplace bullying, identified bullying incidents and sources, and presented practices to respond to bullying including prevention and mitigation strategies. Additionally, the researchers discussed bullying response plans and workplace bullying programs to monitor and control infractions. The researchers concluded with discussing the benefits of implementing workplace bullying programs.
REFERENCES


Mediation, offering an alternative to the rigors of formal litigation in a courtroom, has become a successful conflict resolution tool because it provides an opportunity to resolve virtually any issue in “a cost effective and timely manner.”\(^1\) Moreover, according to Gene Valentini, director of the Texas Dispute Resolution System, one can speak freely in mediation “about anything you feel will get you to a point of resolution because nobody’s recording or saying it’s out of order, whereas in the courtroom you may not be able to address those things.”\(^2\) Businesses of all sizes should be more aware of the dynamics of mediation in order to understand how this process either can be successful or an exercise in futility. Only when business leaders have some understanding about those dynamics can they both prepare for and manage a successful mediation.

This paper is the fourth article in a series designed to offer insights into how to prepare for and conduct mediation so that the time and energy expended will not be wasted. Building on earlier work applying models from the field of group dynamics to improve mediation, this paper focuses on defensiveness — a common cause of mediation failure. Four models discussed include Common Defense Mechanisms in Mediation, Gordon’s Experience of Defensiveness\(^3\), an integrative Model of Defensive Reactions and Conflict Style, and Gibb’s Characteristics of Defensive and Supportive Climates.\(^4\) The extent to which business leaders apply these models to address defensiveness can determine whether mediation succeeds or fails. Before considering how skills can be developed using the models, it is important to examine the meaning of mediation, its use, and its success in resolving conflict.

\(^{2}\) Ibid.
II. THE MEANING OF MEDIATION

What are the characteristics of mediation? Texas statutory law defines mediation this way:

(a) Mediation is the forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them.

(b) A mediator may not impose his own judgment on the issues or that of the parties.5

This statutory definition, however, offers little insight into what mediation can and should be. When successful, mediation can be characterized as proactive, forward-looking, and problem-solving in nature. Evoking less stress than formal litigation, mediation is enlightening, flexible, and confidential. It also can effectively diffuse emotional time bombs because it basically involves negotiation through a disinterested third party. It is not a drastic action and does not involve the surrender of freedom that arbitration dictates, as the latter requires an impartial third party who breaks a deadlock by issuing a final binding ruling.6 One drawback mars this otherwise rosy picture: neither side is bound by anything in mediation. Arbitration binds; mediation intervenes benevolently. If the parties involved remain stubborn, intervention can sour, and mediation then becomes an exercise in futility.

Proactive use of mediation can help businesses keep conflict out of costly litigation and can even help settle conflicts already in litigation. For this to happen, though, business leaders must know what should happen in mediation and how to prepare for it.

III. THE USE OF MEDIATION

Over the past two decades, the use of mediation has exploded. Business leaders have discovered it to be a valuable, cost-effective alternative to litigation in the traditional adversarial system. In Texas and Oklahoma, the number of mediation cases is staggering. Mediation cases have exploded in Texas in recent years. The cases received by Texas alternative dispute resolution centers in the most recent three-year period for which records were kept total an average of almost 20,000 cases annually, with a total of more than 58,000 cases from 2003 to 2005.7 The same type of growth holds true in Oklahoma. As shown in Table 1, on average, more than 6,000 cases have been referred annually in that state to the alternative dispute resolution system, with 57,539 cases referred through the most recent nine-year period available.8 Equally impressive is Oklahoma’s settlement rate, which averages 65 percent over the most recent nine-year period available.9 Settlement rate data are not available for Texas, but as Table 1 shows, in Oklahoma, almost two-thirds of all mediation cases were settled.

These impressive regional settlement rates are mirrored in mediation cases around the world. The World Intellectual Property Organization, which protects industrial property (inventions, trademarks, and industrial designs) and copyright (literature, art, music, film, and software),

7 Annual Report of the Texas Judiciary, Office of Court Administration, 2005 (last year reported).
9 Ibid.
Table 1: Oklahoma Alternative Dispute Resolution System Cases Referred and Settlement Rate

<table>
<thead>
<tr>
<th>Date</th>
<th>Cases</th>
<th>Settlement Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003</td>
<td>6,800</td>
<td>64%</td>
</tr>
<tr>
<td>2004</td>
<td>6,353</td>
<td>64%</td>
</tr>
<tr>
<td>2005</td>
<td>6,328</td>
<td>68%</td>
</tr>
<tr>
<td>2006</td>
<td>7,968</td>
<td>62%</td>
</tr>
<tr>
<td>2007</td>
<td>5,139</td>
<td>64%</td>
</tr>
<tr>
<td>2008</td>
<td>5,766</td>
<td>64%</td>
</tr>
<tr>
<td>2009</td>
<td>6,275</td>
<td>71%</td>
</tr>
<tr>
<td>2010</td>
<td>6,375</td>
<td>63%</td>
</tr>
<tr>
<td>2011</td>
<td>6,535</td>
<td>64%</td>
</tr>
<tr>
<td>Total</td>
<td>57,539</td>
<td>65%</td>
</tr>
</tbody>
</table>

Source: Annual Report Alternative Dispute Resolution System from the Supreme Court of Oklahoma Administrative Office of the Courts

reports an overall settlement rate in mediation cases across its 185 member nations of 67 percent—virtually identical to the rate reported in Oklahoma. Moreover, these results were obtained in cases across a wide variety of industries, including: Information and Communication Technology (34%), Medical/Life Sciences (16%), Industrial/Mechanical (14%), Entertainment (10%), Luxury Goods (5%), Chemistry (1%), and Other (20%). Thus, the widespread use of mediation and its potential for cost-effective conflict resolution are well-established.

IV. PURPOSE

Mediation can become a waste of time and effort for any business not aware of its dynamics. Mediation is collaborative communication that both cultivates and then depends upon a high degree of mutual trust among participants. Only when business leaders have some insight into these dynamics can they prepare for and manage a successful mediation. Mediation depends as much on the participants understanding one another as it does understanding the issues at hand. Despite differences in perspective, personality, and behavior, mediation participants must understand each other and believe that each has integrity, character, and capability. Without that interpersonal connection, the option of persuasion upon which mediation is founded cannot operate. In mediation dynamics, perceptions are as important as reality. If interpersonal barriers cause people to perceive a situation as being closed, then that becomes their “truth,” and the motivation to communicate with the opposing party will not exist. Frustration then builds from feelings of being misunderstood. The ultimate result is a barrier to any collaborative activity and even a loss of desire to communicate with others who share a common stake in a resolution.

11 Ibid.
This is the fourth paper in a series offering tools for success in mediation. The first offered tools to prepare for mediation, the second addressed communication in mediation, and the third dealt with difficult people in mediation. Now more tools for mediation success are offered, this time focusing on a common cause of mediation failure — defensiveness. This paper explores the physical, psychological, and behavioral consequences of defensiveness in mediation and proposes four tools to identify, address, and prevent defensive behaviors from derailing the mediation process. First, this paper examines eight common defense mechanisms that impact mediation. Then it examines the Experience of Defensiveness in mind, body, and emotions. Next, an integrative model of Defensive Reactions and Conflict Style is presented. Finally, drawing on Gibb’s Characteristics of Supportive and Defensive Climates, this paper describes specific guidelines for dealing with defensiveness. These tools draw from classic works in organizational psychology, communication, and group dynamics to offer unique insight into the causes and consequences of defensiveness and to provide useful strategies to avoid its devastating effects on mediation.

V. Four Tools for Dealing with Defensiveness in Mediation

A. Common Defense Mechanisms in Mediation

Mediation is built on trust, open communication, and a collaborative style of conflict resolution. A supportive communication climate encourages participation, free and open exchange of information, and constructive conflict resolution. The reverse is true in a defensive climate in which participants withhold information, make only guarded statements, suffer from reduced morale, and resort to defensive behavior. Unfortunately, conflict resolution, by its very nature, can be threatening and can exert considerable pressure on mediation parties, giving rise to defensiveness which derails the mediation process. Defensive behavior occurs when an individual perceives threat or anticipates threat in a group. It suggests protecting one’s self from attack (not from physical attack, but from attack on one’s self-concept, which is the sum total of one’s personal identity). A person’s identity of himself includes perceptions of himself in terms of physical characteristics; personality; character strengths and weaknesses; and various other traits and beliefs that vary in significance for each person.

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18 Ibid
When mediation parties become defensive, focus is lost and a considerable amount of energy diverted from the mediation process. Rather than resolving the issue at hand, parties become more focused on how they appear to others; how they can win, dominate, and impress; and how they can escape punishment and avoid the perceived attack.\textsuperscript{21} The resulting drain on mediation energy does not end there, because defensiveness is contagious. It often produces a reciprocal response in others, creating a vicious cycle that becomes increasingly destructive. As mediation parties become more defensive, they are less able to accurately perceive the motives, values, and emotions of their counterparts.\textsuperscript{22} Trust, communication, and collaboration quickly deteriorate, and mediation becomes an exercise in futility.

Any discussion of defensiveness begins with the classic notion of unconscious defense mechanisms. Much of the time, many people are guilty of misrepresenting themselves to others. It takes a lifetime to form a self-image, and people desperately want to protect it. Anytime a person’s self-image is questioned or attacked, an individual automatically become defensive. Just as self-image develops over time from childhood, so do defense mechanisms employed to protect that self-image. Thus, defense mechanisms are unconscious, learned responses to threat or attack. While defense mechanisms may be necessary for self-preservation in some instances (e.g., abusive attacks), these tactics form a significant barrier to effective communication and conflict resolution. Of the twelve classic defense mechanisms\textsuperscript{23}, eight are particularly relevant to mediation. These eight defense mechanisms can be classified into three defensive postures (\textit{Defend}, \textit{Deflect}, and \textit{Disconnect}). A brief description and an illustrative quote for each mechanism are given in Table 2.

The first option in the classification scheme is to \textbf{Defend}, which involves three defense mechanisms (see Table 2) designed to counter or reject threats to self-image. \textbf{Defend} includes, from most intense to most subtle, three mechanisms: verbal aggression (vigorous counterattack against the perpetrator), rationalization (defending or justifying one’s self), and repression (denying the threat exists). In mediation, these are the easiest defense mechanisms to spot, but whether they result in attack, debate, or denial, their destructive impact is profound.

A second option, to \textbf{Deflect}, involves unconscious attempts to divert or project onto other individuals attributes or emotions unrelated to the original threat. These defense mechanisms (see Table 2), which are counterintuitive and difficult to spot in mediation, include reaction formation (acting opposite of the way felt), compensation (covering weaknesses with other strengths), projection (extending one’s faults onto others), and displacement (venting hostility onto bystanders). Great skill and patience are required by mediation parties to look beyond what is being projected on the surface to uncover and respond to the hidden motives and emotions driving these processes.

\textsuperscript{22} Ibid, p. 142
Table 2: Common Defense Mechanisms in Mediation

<table>
<thead>
<tr>
<th>Defense Mechanism</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Defend</strong></td>
<td></td>
</tr>
<tr>
<td>Verbal Aggression</td>
<td>Drowning out criticism with a more vigorous counterattack. The best defense is a good offense! Raising one’s voice, throwing tantrums, or exploding! <em>“I’m not defensive! You are!”</em></td>
</tr>
<tr>
<td>Rationalization</td>
<td>Justifying one’s behavior. Making excuses for actions that allow a person to maintain his self-image. <em>“We exceeded the tolerances because we wanted to deliver on time.”</em></td>
</tr>
<tr>
<td>Repression</td>
<td>Rather than facing an unpleasant situation, protecting one’s self by denying the problem’s existence. <em>“I know we’ve lost a lot of customers, but I think things will pick up next year.”</em></td>
</tr>
<tr>
<td><strong>Deflect</strong></td>
<td></td>
</tr>
<tr>
<td>Reaction Formation</td>
<td>Avoid facing a problem by acting in a way that is an exaggerated opposite of how one really feels — a smokescreen! <em>“If we really stand out in the community, no one will ever discover our dirty laundry.”</em></td>
</tr>
<tr>
<td>Compensation</td>
<td>Camouflaging a personal weakness by focusing on a strength. <em>“I’m not very good with people, so I just pay my people very well to keep them out of my office.”</em></td>
</tr>
<tr>
<td>Projection</td>
<td>Disowning an unpleasant part of one’s self by attributing it to others. <em>“I can’t stand the new guy; he never shuts up! No way, I don’t talk nearly as much as he does!”</em></td>
</tr>
<tr>
<td>Displacement</td>
<td>Venting hostile feelings against people seen as less dangerous than the original perpetrator — safe venting. <em>“No, it didn’t go well with the boss! By the way, I’m sick and tired of your coming back from lunch late!”</em></td>
</tr>
<tr>
<td><strong>Disconnect</strong></td>
<td></td>
</tr>
<tr>
<td>Emotional Insulation</td>
<td>Rather than facing an unpleasant situation, avoid the hurt by not getting involved or by pretending not to care. <em>“Since they promoted Bob over me, I really don’t care anymore. Let someone else do it!”</em></td>
</tr>
</tbody>
</table>

The final option is to **Disconnect**. This category, shown in Table 2, is reserved for those who have checked out emotionally. **Emotional insulation** involves avoiding an unpleasant situation or pretending not to care to ensure one is not hurt again. Such apathy and lack of involvement are difficult to overcome in mediation unless the affected party can be reassured that he will indeed not be hurt again.

These unconscious defense mechanisms operate in all of us from time to time.\(^{24}\) Moreover, they often appear together in various combinations, further complicating detection.\(^{25}\) Being acquainted with these defense mechanisms may help reduce them in one’s self and in mediation partners. This, in turn, would enhance communication and the prospect of mediation success.

### B. The Experience of Defensiveness

Much has been learned concerning defense mechanisms and defensive behavior, as well as about what triggers them. However, little was known about the effects of defensiveness on the mind, body, and emotions until Ronald Gordon mapped the experience of defensiveness in his classic study of 200 college students in 1988.\(^ {26}\) Employing a 382-item checklist of physiological, cognitive, and affect states, Gordon obtained a clear description of the experience of defensiveness and its antithesis, feeling understood. Figure 1 is a compilation of the findings of Gordon’s study. The clear message is that defensiveness, brought on by a perceived or anticipated threat, has a profoundly negative impact on physical, mental, and emotional well-being. A person in a defensive state is likely to be “uptight, somewhat physically sick, hyper, stuck, cut-off from friends and the world, mentally mixed-up, and wanting to strike out.”\(^ {27}\) Any communicator in such a “negative state of body, mind, and emotions is likely to be dysfunctional as both a source and receiver of communication.”\(^ {28}\) Moreover, Gordon reminds us that this state is contagious and may trigger the same reaction in another communicator. Defensiveness clearly destroys the bedrock of the mediation process: effective communication.

Fortunately, Gordon found that those who felt understood (see right panel of Figure 1) could be described as alive, strong, good, and close. They wanted to reach out to others. Obviously, a communicator in this state is “considerably more likely to be effective as both a message source and receiver than is the defensive communicator.”\(^ {29}\) Thus, defensiveness must be addressed if mediation is to succeed.

Learning to recognize common defense mechanisms and to foster understanding over defensiveness in communication are of great practical value in mediation. Nevertheless, these

\(^{25}\) Ibid, p. 259.
\(^{27}\) Ibid, p. 57.
\(^{28}\) Ibid, p. 57.
\(^{29}\) Ibid, p. 61
tools are somewhat general in nature. In the next section, a more specific integrative model of definitive defensive strategies and conflict styles that impact mediation will be presented.

**Figure 1: Experiencing Defensiveness versus Feeling Understood**

<table>
<thead>
<tr>
<th>DEFENSIVENESS</th>
<th>FEELING UNDERSTOOD</th>
</tr>
</thead>
<tbody>
<tr>
<td>Feel like Striking Out</td>
<td>Feel like Reaching Out</td>
</tr>
<tr>
<td>Want to do something TO others</td>
<td>Want to do something FOR others</td>
</tr>
</tbody>
</table>

**DEFENSIVENESS**
- **Tensed**: jumpy, jittery, trapped
- **Discomforted**: heavy, sinking feeling, loss
- **Sped-Up**: agitated, keyed-up, heart pounding, breathing faster
- **Gripped by the Situation**: caught-up, trapped by the situation, bottled-up inside
- **Moving Against**: wants to strike out, get even, explode, but manages to control self
- **Estranged**: alone, cut-off, the world is hostile and unfair, wants to escape to friends
- **Mentally Confused**: keep rehearsing what happened, why, what can be done, what next?

**FEELING UNDERSTOOD**
- **Awakened**: open, calm, warm excitement, stimulated, alert, more interested and involved in things around one's self
- **Comforted**: cheerful, optimistic, whole, smiling, relaxed, peaceful, thankful
- **Empowered**: sense of accomplishment, fulfilled, thinking clearly, strong, confident, feels as though can do anything
- **Moving Toward**: trust and appreciation for others, feels wanted, wants to reach out to others and make others happy


**C. DEFENSIVE REACTIONS AND CONFLICT STYLE**

One of the most useful descriptions of specific defensive behaviors one may encounter in mediation can be found in Sharon Ellison’s book “Taking the War Out of Our Words.” According to Ellison, when a person feels put down, angry, frustrated, or hurt, he may feel as though he has been attacked and so will try to protect himself by using one or more of six defensive reactions. These defensive reactions blend nicely with Thomas’ Model of Conflict Handling Style. Because mediation mainly is concerned with conflict resolution, these six reactions will be examined in the context of the conflict style they embody. Offered in Figure 2

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is an integrated model of Defensive Reactions and Conflict Style that superimposes Ellison’s six defensive reactions on Thomas’ Model of Conflict Handling Style. In the sections that follow, Thomas’ five conflict styles will be examined, as will Ellison’s defensive reactions. All will be placed in the appropriate quadrants of the integrative model. A discussion of the relationship between defensive reactions and conflict styles then will follow.

Thomas’ five distinct conflict styles (avoiding, accommodating, competing, compromising, and collaborating) are represented in four quadrants and the central area of Figure 2. Each style is defined in terms of assertiveness (concern for self) and cooperativeness (concern for other’s needs).32 Few parties to mediation choose Avoiding (neither assertive nor cooperative) because it involves escaping the conflict. At times, one party may choose to yield to the other using the Accommodating (not assertive, but highly cooperative) style. The assertive styles are the most common but are not equally effective. Competing (highly assertive and uncooperative) is the most inflexible, least-effective approach. Here, one party insists on having its way, as in “My way or the highway.” A better alternative is the middle-of-the-road Compromising (somewhat assertive and somewhat cooperative) approach. While it is often used, it has the disadvantage of forcing both sides to give up, or compromise, some objectives in order to reach agreement. The most intense approach leading to the most beneficial solution is Collaborating (highly assertive and highly cooperative), as it blends full focus on both parties’ positions. The mediator’s role is to help the parties resolve the grievance through a collaborative process that is more satisfying than compromise and more inclusive than accommodation. Collaboration and a search for a mutually beneficial outcome occur when the parties to conflict each desire to satisfy fully the concerns of all. The intention of the parties is to clarify differences and to find a win-win solution.

In her call to take the “war out of words,” Ellison classifies six defensive reactions into three distinct categories: Surrender, Withdraw, and Counterattack.33 Because these are defensive reactions to feelings of being attacked, it is appropriate that the options are consistent with those of a soldier defending a position on a battlefield. Both Surrender reactions reflect the Accommodating conflict style (cooperative, but not assertive, thus losing willingly) as shown in Figure 2. Surrender-Betray is a codependent response that occurs when a person takes the blame and defends the perpetrator when mistreated, thus betraying himself.34 Surrender-Sabotage is a passive-aggressive response called “a sneaky surrender,” whereby an individual appears to give in and cooperate on the surface but later seeks to get even in an underhanded, indirect way by gossiping, procrastinating, or ignoring the agreement.35 This response is primarily Accommodating with a subtle hint of the Competing conflict style.

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Both Withdraw responses match the Avoiding conflict style (neither cooperative nor assertive, and thus escape) as shown in Figure 2. Withdraw-Escape is a passive response designed to avoid conflict and contact with someone by ignoring him, changing the subject, or leaving the room.\(^{36}\) It is the classic avoidance style. Withdraw-Entrap is similar but with a vindictive twist. This response also involves withdrawal but with the slight difference of withholding information to set the perpetrator up to make a mistake or to look bad while avoiding responsibility for the behavior.\(^{37}\) This is a tactical retreat whereby the target withdraws but then resorts to guerrilla warfare, setting a well-concealed trap for the perpetrator but making sure to be nowhere around when the trap is sprung.

Finally, Ellison’s Counterattack responses closely match the Competing conflict style (highly assertive, but not cooperative) as shown in Figure 2. Counterattack-Justify is a defensive counterattack by which one explains or justifies his behavior, makes excuses when criticized, and seeks to demonstrate the injustice of the perpetrator’s action.\(^{38}\) The intent is not to make it right, but to be right. Counterattack-Blame is an aggressive counterattack in which the injured party goes on the offensive to shift blame and attack the perpetrator.\(^{39}\) Such a person subscribes to the adage, “The best defense is a good offense!” Then, when accused, an old motto from the Federal Bureau of Investigation -- “Deny everything and make counter allegations” -- will be employed.

A recent study of 160 employees in two large banks in Pakistan\(^{40}\) confirms the classification of Ellison’s defensive reactions in the Conflict Handling Styles model. Consistent with this analysis, study findings indicate that supportive behaviors are strongly associated with Collaborating and Compromising, while defensive behaviors such as Ellison’s are strongly associated with Competing and Avoiding. Accommodating, however, was associated with supportive behaviors, not defensive ones. This is consistent with the Conflict Handling Style Model, because Accommodating is highly cooperative. While Ellison describes Surrender-Betray as a defensive reaction, it could be considered supportive because it involves total surrender and is cooperative, or Accommodating. On the other hand, Surrender-Sabotage, while clearly defensive, is a hybrid reaction, a combination of surrendering (Accommodating) and secretly getting even (Competing). Overall, the classification of Ellison’s defensive reactions in the Conflict Handling Style Model is confirmed with the exception of the Surrender reactions, which are not as easily classified as a single conflict style.

\(^{36}\) Ibid, p. 15.
\(^{37}\) Ibid.
\(^{39}\) Ibid.
To summarize, Ellison provides perhaps the best description of the specific defensive reactions one will encounter in business and in mediation. The integrative model presented in Figure 2 is significant for three reasons. First, it provides a means by which to classify and graphically visualize specific defensive reactions. Second, it reveals a correspondence between defensive reactions and existing theory in conflict resolution. Finally, it highlights that none of the defensive behaviors examined in Figure 2 occupies either the collaborative or compromising quadrants of Thomas’ model, making conflict resolution next to impossible. Overall, the complexity and variety of defensive behaviors facing mediators are daunting and a clear threat to

Sources: An adaptation of Thomas’ Model of Conflict Handling Styles\(^{41}\) classifying Ellison’s Defensive Behaviors\(^{42}\) by conflict style. Placement of defensive behaviors by the authors.

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the collaborative process upon which mediation is built. Ellison’s Powerful Non-Defensive Communication Program, outlined in her book and in seminars, offers hope for dealing with defensiveness. She advocates using non-defensive communication when asking questions, making statements, and predicting consequences (using if-then statements to set boundaries by telling others in advance how one will react to specific choices made). Details of her extensive program are beyond the scope of this paper, but her book should be required reading for anyone planning to engage in mediation.

The final model for dealing with defensiveness, Gibb’s Classic Model of Defensive and Supportive Behavior, was written more than 50 years ago but is still one of the most widely cited articles in the field of organizational communication. It provides invaluable guidance for reducing defensiveness and promoting a supportive climate for mediation.

D. GUIDELINES FOR DEALING WITH DEFENSIVENESS

The review of common defense mechanisms, the experience of defensiveness, and defensive behaviors in the models presented thus far shed light on the nature, operation, and detrimental effects of defensiveness in mediation. What remains is to note some guidelines by which to combat defensiveness so that mediation does not become ineffectual. Gibb’s article on defensive communication provides a complete set of guidelines for reducing defensiveness and promoting a supportive climate.

Working over an eight-year period with recorded discussions from various settings, Gibb developed the six pairs of defensive and supportive categories presented in Figure 3. Behavior possessing any of the characteristics from the left side of the model arouses defensiveness, whereas behavior possessing the supportive qualities on the right side of the model reduces defensiveness.

**Evaluation Versus Description**

Speech or other behavior that appears evaluative increases defensiveness. If the sender, by “expression, manner of speech, tone of voice or verbal content seems to be evaluating or judging the listener, the receiver goes on guard.” The degree to which this occurs depends in part on the presence of characteristics from other categories of Gibb’s model, which tend to interact. It also depends upon the self-esteem of the receiver, whether it is stable or fragile. A recent study confirmed that individuals with stable self-esteem (well-anchored and secure) exhibit low levels of Gibb’s characteristics of defensiveness while those with fragile self-esteem (unstable and contingent on external factors) exhibit considerably higher levels of defensiveness.

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46 Ibid.
On the other hand, descriptive speech tends to arouse little uneasiness. According to Gibb, “Presentation of feelings, events, perceptions, or processes which do not ask or imply that the receiver change behavior or attitude are minimally defense producing.”

**Control Versus Problem Orientation**

Speech that seeks to control the listener evokes resistance. In most of our communication, someone is trying to change an attitude, influence a behavior, or restrict an activity. As Gibb notes, “The degree to which attempts to control produce defensiveness depends upon the openness of the effort, for a suspicion that hidden motives exist heightens resistance.” Implicit in all attempts to alter another person is the change agent’s assumption that the person is inadequate in some way and in need of change. The subconscious perception that the speaker secretly views the listener as inadequate (e.g., ignorant, indecisive, unwise, immature, or irresponsible) is a valid basis for defensive reactions.

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49 Ibid, p. 144.
50 Ibid.
51 Ibid.
On the other hand, problem orientation is a permissive approach that reduces defensiveness. It allows the receiver to set his own goals, make his own decisions, and evaluate his own progress. Gibb describes problem orientation as follows:

“When the sender communicates a desire to collaborate in defining a mutual problem and in seeking its solution, he tends to create the same problem orientation in the listener; and, of greater importance, he implies that he has no predetermined solution, attitude, or method to impose.”52

**Strategy Versus Spontaneity**

No one likes to be a pawn in someone else’s chess game. Receivers become defensive when they feel the sender is engaged in a strategy, playing games, or using some cleverly disguised subterfuge on them.53 Such attempts often backfire, as that which is concealed appears to the receiver to be larger than it really is, thus generating even more defensiveness. In his research, Gibb was surprised by the extent to which members were able to perceive the strategies of their colleagues, who were equally shocked that others could so easily see through their cleverly hidden stratagems.54

Spontaneous behavior that is free of deception reduces defensiveness. If the communicator is viewed by the receiver “as having uncomplicated motives, as being straightforward and honest, as behaving spontaneously in response to the situation, he or she is likely to arouse minimal defensiveness.”55

**Neutrality Versus Empathy**

Most people desire to be perceived as valued persons, as someone with special worth, and as an object of concern and affection. Neutrality in speech, which offers little warmth, concern, or caring, communicates rejection, which results in defensiveness.56 Communication that “conveys empathy for the feelings and respect for the worth of the listener, however, is particularly supportive and defense reductive.”57 Understanding and empathizing with the other person without trying to change him produces a high level of acceptance, as does spontaneous facial and body language demonstrating concern.

**Superiority Versus Equality**

When a person communicates that he feels superior in power, position, wealth, intelligence, physical ability, or in other ways, he arouses defensiveness.58 The listener who feels inadequate no longer perceives the message but focuses on either competing with the sender or being jealous or resentful of him. According to Gibb, “The person who is perceived as feeling superior

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54 Ibid.
55 Ibid.
56 Ibid, p. 146.
57 Ibid.
58 Ibid.
communicates that he or she is not willing to enter into a problem-solving relationship, does not desire feedback or help, and is likely to reduce the power, status, and worth of the receiver.”

Defenses are reduced when differences in talent, ability, worth, appearance, status, and power are de-emphasized in favor of participative planning with mutual trust and respect.

**Certainty Versus Provisionalism**

Dogmatic people know all the answers and see their ideas as truths to be defended. They are more interested in winning arguments than in solving problems and regard themselves as teachers rather than coworkers. They have no tolerance for those who do not agree with them and are notorious for producing defensiveness in others.

The defensiveness of the listener is reduced when one communicates a willingness to experiment with one’s own behavior, attitudes, and ideas. The person who appears to be using a provisional or flexible approach toward investigating issues and solving problems communicates that “the listener may have some control over the shared quest or the investigation of ideas.”

**Summary of Gibb’s Model**

It’s hard to imagine anyone reading Gibb’s article without finding at least one characteristic on the left side of the model that describes his own behavior. Gibb’s article suggests defensiveness was common 50 years ago, and it likely is rampant in today’s organizations. One wonders whether much effort is being expended in business or in mediation to address this destructive problem. More importantly, how much of this defensiveness are we as business leaders and mediators personally responsible for? Has the art of supportive communication been lost? Is anyone even aware of the destructive effects of defensiveness and its evil twin, incivility, in business and society as a whole? Most businesses would do well to examine their communication climate and take action to build a more supportive one. Costigan and Schmeidler at the University of San Francisco have developed a detailed survey instrument that assesses all the characteristics in Gibb’s model to yield individual scores for each dimension as well as overall scores for Defensive and Supportive Climate. These scores could be used to direct communication training in business and to prepare parties for mediation. Gibb’s model provides the specific guidelines business leaders need to deal effectively with the problem of defensiveness in the workplace. A supportive communication climate is essential in business and, because of the need for close collaboration, indispensable in mediation.

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59 Ibid.
60 Ibid, p. 147.
61 Ibid.
62 Ibid.
VI. SUMMARY

Defensiveness could be characterized as the poison pill of effective mediation. It is the antithesis of the collaborative style of conflict resolution upon which successful mediation is built. With the rise of incivility in American culture, defensiveness will continue to plague American business and, thus, mediation. This paper examines defensiveness primarily from a mediation practitioner’s perspective, but the insights presented extend beyond mediation to virtually any form of business or non-business communication. The focus in this article series has been to present practical tools for mediation success.

This article offers four useful tools to aid mediation practitioners in recognizing, understanding, and addressing defensiveness in mediation. The first highlights eight common defense mechanisms particularly relevant to mediation. These defense mechanisms are classified into Defend, Deflect, and Disconnect categories to aid mediators in recognizing them. Next outlined is a tool to help mediators identify and understand the physical, mental, and emotional signs of defensiveness. The third tool explored is Ellison’s Six Defensive Reactions. These reactions are broken down in terms of the specific conflict styles they entail. They are presented as a visual tool, the Model of Defensive Reactions and Conflict Style, to aid mediators in recognizing and understanding each reaction. Finally, a tool for dealing with defensiveness is given by applying Gibb’s characteristics of supportive and defensive climates to mediation. His specific guidelines for dealing with defensiveness are presented, as is a diagram as a visual tool to illustrate them.

One question remains: How can these tools be built into mediation practice to control defensiveness, enhance supportiveness, and improve success? The Four Components of Emotional Intelligence (Self-Awareness, Self-Management, Social Awareness, and Relationship Management)64, which are summarized below, are used as the framework for a four-step plan for dealing with defensiveness.

**Step 1: Self-Awareness**

When it comes to defensiveness, an ounce of prevention is worth a pound of cure. First, a person should educate himself about defensiveness by doing some reading on the subject. Two sources reviewed in this article would be helpful: Ellison’s book “Taking the War Out of Our Words”65 and Gibb’s article “Defensive Communication.”66 Next, some introspection would be helpful. A person should ask himself two important questions. First, “How do I threaten others (make them defensive)?” The more one avoids inadvertently threatening others, the less resulting defensive, difficult behavior will have to be dealt with. In his book “Coping with Difficult People,” Robert Bramson concluded that defensiveness and the defensive strategies we learn as children are root causes of difficult behavior at work.67 He suggests keeping an “inner

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eye” on one’s self over a period of time, recording instances of causing others to react defensively and noting what triggered their responses. The second question is, “When am I defensive and what triggers defensiveness in me? For a period of time, such as a month, a person attempting to answer this question should note when he feels defensive, paying attention to his behavior, feelings, and what he says. A person working on this question will attempt to identify the behavioral triggers for his own defensiveness. Bramson recommends folding a sheet of paper in half length-wise and on one side recording words and phrases that describe actions and feelings when in defensive mode and on the other side, recording situations that cause defensiveness. He notes that a pattern usually will be seen in the list of recurring reactions to the same triggers. A person’s list can be reviewed with others to confirm pattern discoveries.

**Step 2: Self-Management**

When a person’s buttons are pushed, he is likely to lose control and slip into defensive responses. People usually do not plan to be defensive, but they become so. Armed with information from Step 1, a person can recognize behavioral signs or triggers that cause him to slip into defensiveness. The moment it is realized that defensive programming has taken over, the person can stop what he is doing, compose himself, and modify his behavior as he tries to identify the threat. The more that is known about triggers, the more a person can do to anticipate his reaction “and be ready with a more productive response.”

**Step 3: Social Awareness**

Perhaps the most important skill in managing defensiveness is recognizing it. This paper is designed to help mediators recognize defense mechanisms; the physical, mental, and emotional signs of defensiveness; and defensive reactions and behaviors in themselves and others. Armed with this knowledge, mediators should be able to spot defensiveness and what triggers it in others. To help with this in a mediation process, a laminated card with Gibb’s Characteristics of Supportive and Defensive Climates (see Figure 3) can be taken into meetings to help one identify defensive and supportive behavior. In addition, noting how others respond when they become defensive and what triggers their defensiveness can be helpful.

**Step 4: Relationship Management**

Once a person has established awareness about his own defensiveness and can recognize defensiveness in others, management can be addressed. Successful mediation depends upon effective communication, and that is built upon relationships. According to Gibb,

“One way to understand communication is to view it as a people process rather than a language process. If one is to make fundamental improvement in communication, one must make changes in interpersonal relationships.”

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69 Ibid, pp. 205-205
70 Ibid, pp. 203-204.
71 Ibid, p. 205.
Overall, the complexity and variety of defensive behaviors that mediators face is daunting and represents a clear threat to the collaborative process upon which mediation is built. Gibb’s guidelines for transforming a defensive climate into a supportive one, as summarized in this paper, are essential for dealing with defensiveness in mediation. These guidelines, together with those in Ellison’s Powerful Non-Defensive Communication Program, are great tools to help mediators create the supportive climate so vital to mediation success.

VII. SUCCESSFUL MEDIATION IN BUSINESS

While there is room to improve mediation through application of the interpersonal tools presented in this paper, there is no doubt that mediation has become a highly effective mechanism for conflict resolution. The large number and rapid growth in number of cases in Texas and Oklahoma, the impressive settlement rates seen in the region, and the global reach of mediation as exemplified by the World Intellectual Property Organization demonstrate the significance of mediation to individuals and managers of both small and large organizations here and abroad. Beyond the numbers, however, mediation’s success is also evident in the wide variety of cases settled, not to mention the many cases that do not reach full settlement yet narrow the differences to be subsequently resolved through arbitration or litigation. As shown in Table 3, successful mediation has occurred in a broad range of conflict situations varying greatly in both the size and nature of the dispute. Cases range from multimillion-dollar disputes involving thousands of employees, governmental agencies, and large corporations to smaller domestic disputes over a few hundred dollars in building materials. Table 3 also highlights the variety of issues involved in mediation, ranging from malpractice suits, copyright violations, federal wage disputes and interstate commerce to dissensions over discrimination, whistleblowing, house defects, restraining orders, and fence materials. Overall, the increasing volume, variety, and scope of mediation cases highlight its expanding role in business and society.

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VIII. CONCLUSION

The success of mediation and its application across a wide spectrum of conflict situations have been noted, and four tools for addressing defensiveness to ensure success in mediation have been supported. Business leaders can use these tools to address defensiveness among mediation participants, thus leading to greater harmony and more success in the process. Mediation need not be an exercise in futility. It is most likely to succeed in a supportive climate in which interpersonal barriers are removed, individual differences are understood, and the gradual progression to mutual trust and open communication is engaged.

The volume, variety, and impressive settlement rates of mediation cases suggest a bright future for this form of conflict resolution. With the use of mediation on the rise, it is more important than ever for business leaders to master skills necessary to take full advantage of the opportunities this process offers. Mediation is an effective tool when business leaders prepare for and navigate the process with a clear understanding of how to remove interpersonal barriers, thus ensuring more understanding, mutual respect, and open communication.
Table 3: Examples of Successful Mediation in Business

Cases Mediated by Bruce Meyerson74
- A claim of legal malpractice.
- A dispute under the FLSA allowing off-the-clock work.
- A claim under the Arizona securities statute.
- A dispute over alleged defects in construction of residence and a counterclaim for payment.
- An FLSA collective action involving claims of 80,000 employees.
- An ERISA claim involving transportation between states of fixed-wing aircraft.
- A claim of retaliation and discrimination against a Fortune 500 company.
- A claim by a whistleblower.

Cases Mediated by World Intellectual Property Organization (WIPO)75
- A Dutch company granted a copyright license to a French company that later became insolvent and defaulted on royalties. A settlement was concluded after just two meetings with a mediator.
- A research center and a European technology company signed an R&D pact to improve voice recognition software. The technology company violated the payment schedule. The parties reached a settlement after months of intense negation facilitated by a mediator.
- Legal areas in WIPO mediation and arbitration cases include: Patents (41%), IT Law (21%), Trademarks (13%), Copyright (8%) and other (17%). Industry areas include: Information and Communication Technology (34%), Life Sciences (16%), Mechanical (14%), Entertainment (10%), other (25%). Settlement rates for Mediation averaged 67%.

Cases Mediated by SEEDS (Services that Encourage Effective Dialogue & Solutions)76
- Undisclosed house defects case: The dispute was about money owed to property managers. Each side shared their story without anger and emotion getting in the way. As a result both parties compromised and stated, “We wish we’d discovered mediation years ago!”
- Court-recommended mediation cases from daily life: Saying you’re Sorry: Two parties argued over the cost of a fence repair between their houses. With the help of a mediator, they were able to work out a payment plan and keep their relationship as neighbors healthy. Two Brothers Find Each Other Again: Two brothers sued each other after a long disagreement and escalation of hostilities. They met with the mediator at SEEDS, settled the judgment, modified the restraining order, and reached an understanding together.

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CORRUPTION OF ETHICS: DOMESTIC BRIBERY OF PUBLIC OFFICIALS:
HONEST SERVICES FRAUD

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Introduction

There is a broad general consensus that governmental ethics are viewed as a pillar of democracy, and corrupt behavior can threaten democratic institutions.1

This article picks up where an excellent article titled Can You Put a Price on Corruption? The Future of Honest Services Fraud, co-authored by Lara L. Kessler, Ryan J. Hunt, and William Mawer, and published in this publication in 2012,2 left off. The authors addressed the honest services mail fraud statute3 and the United States Supreme Court’s ruling in Skilling v. United States4 in which the United States Supreme Court held that the honest services fraud statute would only apply where there had been actual bribery or a kickback. That ruling effectively put a stop to the efforts of U.S. Attorneys to utilize the honest services fraud statute to criminally prosecute traditional breaches of fiduciary duties in non-governmental, private business situations where the conduct involved undisclosed conflicts of interest.5 Where the statute was the DOJ’s primary weapon used to address both public corruption and private breaches of

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1 Hon. Pamela Mathy, Honest Services Fraud After Skilling, 42 St. Mary’s L.J. 645, 715 (2011).
3 18 U.S.C §§1341, 1346.
4 130 S.Ct. 2869 (2010).
5 See generally Mathy, supra note 1 at 700-01; Lori A. McMillan, Honest Services Update: Directors’ Liability Concerns After Skilling and Black, 18 Tex. Wesleyan L.Rev. 149 (2011); Elizabeth R. Sheyn, Criminalizing the Denial of Honest Services After Skilling, 2011 Wis. L.Rev. 27, 65.
fiduciary duties in business settings, with the Skilling ruling, its use in private fiduciary duty settings, absent traditional schemes to defraud, bribery, or kickbacks, was effectively diminished.

Therefore, absent any corrective legislation by Congress, for now, the focus under the honest services fraud statute must be on the types of questions traditionally raised in fraud cases, but with a specific focus on bribery and kickbacks in the public corruption context, both state and federal. A primary question is how the courts will develop the concept of bribery and kickbacks in the context of the honest services fraud statute.

The focus of the authors’ article was on the effect of the Skilling ruling and how, and in what circumstances, the statute would be applied after that ruling. What the authors did not have an opportunity to address was the subsequent focus by the courts on the definition of bribery in public corruption settings, what that concept would mean in the new post-Skilling world, and how that concept would be adapted to the honest services fraud concept. This article, therefore, builds on their excellent work and addresses those issues.

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7 See Mathy, supra note 1 at 700. But cf. Joan K. Krause, Skilling and the Pursuit of Health Care Fraud, 66 U. MIAMI L.REV. 363, 364 (2012) (“[W]hile Skilling is widely considered to have narrowed the scope of honest services fraud overall, it may turn out to have the paradoxical effect of inviting additional prosecutions of physicians and others in the health care industry” because of activities of bribery and kickbacks that “have particular salience in health care.”).
8 See Susan Kavanagh, DOJ Urges Congress to Repair the Honest Services Fraud Statute, 17 FED. ETHICS RPT. 9 (Oct. 2010) (addressing comments by then Assistant Attorney General Lanny Breuer).
9 See Alex Stein, Corrupt Intentions: Bribery, Unlawful Gratuity, and Honest Services Fraud, 75 LAW & CONTEMP. PROBS. 61 (2012) (bribery and related offenses addressed from an economics perspective). Honest services fraud is sometimes referred to as “‘fiduciary fraud.’ “); Krause, supra note 7. Therefore, fiduciary relationships between the public and public officials are still an underpinning concept. See Skilling, 130 S.Ct. at 2930-31 (public and public officials example); United States v. Milovanovic, 678 F.3d 713, 721-22, 728-29 (9th Cir. 2012); United States v. Tanabe, 2012 WL 5868968 * 4 (N.D. Cal. Nov. 19, 2012) (“The fiduciary duty required is not limited to the classic definition of the term but also extends to defendants who assume a comparable duty of loyalty, trust, or confidence with the victim.”); United States v. Langford, 647 F.3d 1309, 1320 (11th Cir. 2011) (references to the “fiduciary duty of the intangible right of honest services.”); United States v. deVegter, 198 F.3d 1324, 1328 (11th Cir. 1999) (“Public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public’s best interest. . . . When official action is corrupted by secret bribes or kickbacks, the essence of the political contract is violated.”). See also Geraldine Szott Moohr, Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us, 31 HARV. J. ON LEGIS. 153, 163 (1994) (pointing out that, as contrasted with traditional fraud, fiduciary fraud may not involve any misleading of a third party from whom the fiduciary receives a benefit.).
10 Mathy, supra note 1 at 691 (“[W]e do not know how the courts will define ‘bribes’ and ‘kickbacks’ . . . . “).
11 Mathy, supra note 1 at 707-08 (“With respect to post-Skilling honest services prosecutions alleging a scheme involving bribes or kickbacks, the definition of “bribery” and “kickbacks” may not be as straightforward as one might initially conclude.”); Note, Jared B. Cohen, The Commonwealth’s Right to “Honest Services”: Prosecuting Public Corruption in Massachusetts, 93 B.U.L.REV 201, 213 (2013) (“‘bribes’ and ‘kickbacks’ are not fully self-defining terms which eliminate the problem of interpretation. After Skilling, it still remains for the federal courts to conduct the fact intensive, context-specific inquiries necessary to determine just what kinds of schemes qualify.”).
Post-Skilling Development of the Concept of Bribery

At the end of their analyses, the authors in the above article asked: “What Does the Ruling in Skilling Mean for the Future?”12 Two recent decisions that have provided a partial answer by addressing bribery under the honest services fraud statute13 in public corruption situations when First Amendment values are at stake, are the recent Sixth Circuit’s decision in United States v. Terry,14 and the District of Columbia Circuit’s decision in United States v. Ring.15 Terry Involved bribery in connection with campaña contributions. Ring involved bribery in connection with lobbying activities.16 An earlier opinion involving the convictions of former Alabama Governor Don Siegelman and Richard Scrushy,17 and a 2012 opinion from the United States District Court for the Middle District of Alabama, United States v. McGregor,18 also provide the present context to help answer the authors’ question. The Siegelman case involved bribery in a political issue campaign. The McGregor case involved bribery of public officials to get certain legislation passed. In the McGregor case, the thoughtful writing of Judge Myron Thompson on the issue of the meaning of bribery and the concept of a quid-pro-quo in the campaign contribution setting is extremely instructive.

While there were multiple issues in all of these cases, the issue with which this article deals is the courts’ definition of bribery under the honest services fraud statute in a public corruption setting where First Amendment issues are at stake, the question of the whether there must be a quid-pro-quo proven under that statute and, if so, whether it must be stated or whether it is sufficient under if the quid-pro-quo is implicit. The Sixth and D.C. Circuits have now provided their answers to those questions by finding that an implicit quid-pro-quo is sufficient for culpability. Their

12 Kessler, supra note 2 at 119.
13 For characteristics of bribery, see Carl Pacini, The Foreign Corrupt Practices Act: Taking a Bite Out of Bribery in International Business Transactions, 17 FORDHAM J. CORP. & FIN. L. 545, 548-551 (2012). One characteristic described is that bribery is “a crime of calculation [in which] public officials weigh expected benefits from corrupt behavior against the punishment imposed by society if they get caught. The transaction costs of illegal exchanges are important for maintaining secrecy.”. For an interesting article that discusses the adverse costs of bribery on a business, see Philip M. Nichols, The Business Case for Complying With Bribery Laws, 49 AM. BUS. L.J. 325 (2012).
14 707 F.3d 607 (6th Cir. 2013), reh’g and reh’g en banc denied (April 29, 2013).
15 706 F.3d 460 (D.C. Cir. 2013), reh’g en banc denied (March 21, 2013), petition for Cert. filed, 82 USLW 3004 (June 17, 2013).
16 It is suggested that, as part of a company’s compliance and ethics program, and in keeping with a board’s fiduciary duty of oversight, monitoring of lobbying activities should be considered as part of risk assessment and management. Having a corporation’s name associated with a lobbyist who is caught up in a scandal like the Abramoff scandal, would severely damage a company’s good will and, in addition, the company might initially be a target of any criminal investigation arising out of the lobbying issues. An “effective” compliance and ethics program will help in the event that prosecutors turn their sights on the organization.
answers continue the perspectives of the Eleventh Circuit in Siegelman and Judge Thompson’s perspectives in McGregor.

Both the Ring and Terry courts addressed and drew on the 1991 United States Supreme Court decision in McCormick v. United States,19 which was a decision dealing with the Hobbs Act,20 for their perspectives on the contours of bribery.21 The Hobbs Act addresses extortion in various forms, but, specifically extortion that does not necessarily involve physical coercion but involves extortion under color of one’s official position.

McCormick, involved an allegation that Robert McCormick, who was then a member of the West Virginia House of Delegates, had wrongfully induced and received campaign contributions through the wrongful use of his official position. The facts showed that he had sponsored legislation that allowed foreign doctors to practice in West Virginia without passing the licensing exam. He mentioned to the foreign doctors’ lobbyist that he had spent a lot of out of pocket money on his campaign and that he had heard nothing from the doctors. The lobbyist told him that he would talk with the doctors. Subsequently, cash payments from the doctors came in. He did not declare them as campaign contributions nor did he pay taxes on the payments.

The Supreme Court held that, under the Hobbs Act, “making campaign contributions can constitute criminal extortion only when made pursuant to an explicit quid pro quo agreement.”22 Therefore, two important concepts came out of McCormick: for a campaign contribution to be considered to have been induced by the power of a politician’s office, there must be a quid-pro-quo i.e. an induced exchange of value; and, the quid-pro-quo had to be explicit. The issue that the McCormick decision left unanswered, however, was the meaning of the term explicit. There was no guidance on whether explicit meant expressed or explicit in the sense of an actual animating factor.

Terry was a campaign contribution case. It involved the bribery conviction of a Cuyahoga County (Ohio) Court of Common Pleas judge, Steven Terry, for agreeing to make, and making, certain rulings on summary judgment motions that were pending before him and that were favorable to an attorney, Joe O’Malley, who had sought the help of Frank Russo, the County Auditor. Russo, who was very powerful in Cleveland, Ohio politics, was also assisting Terry in Terry’s re-election campaign and, therefore, campaign contributions were at issue.

20 18 U.S.C §7206(1).
21 For a recognition that the courts will look to other cases and statutes, see, United States v. Scruggs, 714 F.3d 258, 266 (5th Cir. 2013) (“In Skilling, the Court did not crystalize what constitutes a ‘paradigmatic bribe,’ but it did observe that the ‘prohibition on bribes and kickbacks draws content’ from case law and federal statutes.”)[citation omitted].
22 Ring, 706 F.3d at 465 citing McCormick, 500 U.S. at 271-274.
As related by the Sixth Circuit in *Terry*, “[i]n ancient Persia, a judge who accepted a bribe was flayed alive and his successor was forced to sit on a chair made from the predecessor’s skin.”23 At his trial, former Judge Terry did not face such an ultimate deterrent. Instead, after a five day trial, the jury convicted him on three out of five counts and the trial judge sentenced him to 63 months in prison. He can be thankful that he was not in ancient Persia!

He appealed and the issues that are relevant to this article were the contours of a bribe in a campaign contribution setting, as criminalized in the honest services fraud statute, what was necessary to avoid First Amendment issues and to make the linkage between an offer or an act of some type and an acceptance i.e. whether there had to be a *quid-pro-quo* and, if so, whether it had to be *expressed* in some way or whether it could be inferred by a jury from all of the circumstances. The Sixth Circuit held in this campaign contribution case that a *quid-pro-quo* was necessary, that it had to be *explicit*, but that it did not have to be *expressed*.

The lawyer had approached Russo and asked him to get Terry to deny certain summary judgment motions that were pending before him. Russo assured the lawyer that Terry would do what was necessary. The court observed that “Russo promised to call Terry and make sure Terry did what he was ‘supposed to do’ with the cases.”24 The court observed that “Russo. . . expected that his political and financial patronage meant Terry ‘would do what [he] asked him to do.’”25

The F.B.I. was already investigating Russo and in subsequent telephone conversations between Russo and Terry that were intercepted by the FBI, it was clearly established that Russo made the request and Terry said that he would dismiss the motions. The court observed that in one of the conversations, “Russo told Terry to deny the motions. . . and Terry said he would.”26 Terry tried to get a magistrate judge to dismiss them, but that judge at least had the honor not to do it. He referred them back to Terry to handle and Terry did exactly what Russo had asked him to do.

Terry was indicted on conspiracy to commit mail fraud and honest services fraud; commission of mail fraud by granting the motions; and violations of honest services fraud by “‘accepting gifts, payments, and other things of value from Russo and others in exchange for favorable official action.’”27 He was convicted on the conspiracy count and two of the three counts alleging commission of honest services fraud.

On appeal, Terry contended that, because the case involved a campaign contribution and that it was not a typical under-the-table type of payment, there should be two burdens of proof: one for politicians who are not getting campaign contributions; and one for those who are.28

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24 *Terry*, 707 F.3d at 610.
25 *Id.*
26 *Id.*
27 *Id.*
28 *Id.* at 613-14.
position was based on the fact that, for honest services fraud, there must be a bribe and a *quid-pro-quo*, i.e. the acceptance of something of value in exchange for official action.\(^{29}\) His reasoning was that the receipt of a campaign contribution was not a *quid-pro-quo*, but an acceptance of a contribution and that to attribute a favorable official act to the concept of a *quid-pro-quo* when there had simply been a contribution would be an insufficient nexus to find a corrupt *quid-pro-quo*. Because bribery requires that a favorable act be causally linked with the receipt of something of value, Terry contended that the causal connection simply should not be made because, without more there would be a resulting infringement on the legitimate process of campaign contributions.\(^{30}\)

The Sixth Circuit declined to make that burden of proof distinction and stated that the essence of what makes a *quid-pro-quo* criminal is *mens rea*. The court referred to it as “intent,” but what the court held was that “the question is one of inferences taken from what the participants say, mean and do, all matters that juries are fully equipped to assess. ‘[M]otives and consequences, not formalities,’ are the keys for determining whether a public official entered an agreement to accept a bribe, and the trier of fact is ‘quite capable of deciding the intent with which words were spoken or actions taken as well as the reasonable construction given to them by the official and the payor.’”\(^{31}\) In this context, the court quoted favorably from *Ring v. United States*,\(^ {32}\) that, intent “‘distinguishes criminal corruption from commonplace political and business activities.’”\(^ {33}\)

In contrast to the pure campaign contribution context of *Terry*, the D.C. Circuit’s decision in *Ring*, which was decided before *Terry*, concerned lobbying and a massive investigation involving Jack Abramoff in which Ring was caught up.\(^ {34}\) The court described that investigation as “[e]xposing the dark underbelly of a profession that has long played an important role in American politics” and the case as probing “the boundary between legal lobbying and criminal conduct.”\(^ {35}\) In that context the court observed that while the “distinction between legal lobbying and criminal conduct may be subtle. . .it spells the difference between honest politics and criminal corruption.”\(^ {36}\)

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\(^{29}\) *Id.* at 612.

\(^{30}\) *See Scruggs*, 714 F.3d at 268 (overbreadth argument made and the court responded: “We see no real likelihood that §1346 will chill a significant amount of protected political speech, if any. . . .”); United States v. Nelson, 712 F.3d 498 (11th Cir. 2013) (vagueness argument rejected).

\(^{31}\) *Terry*, 707 F.3d at 613 (citations omitted).

\(^{32}\) 706 F.3d 460 (D.C. Cir. 2013).

\(^{33}\) *Terry*, 707 F.3d at 613 citing *Ring*, 706 F.3d at 468.


\(^{35}\) *Ring*, 706 F.3d at 463.

\(^{36}\) *Id.* at 464.
The facts showed that Ring’s lobbying activities “included treating congressional and executive branch officials to dinners, drinks, travel, concerts, and sporting events.” Ring referred to these public officials as his “‘champions’” and the evidence showed that they “often took actions that were favorable to Ring’s clients.” The investigation revealed “meals, tickets, and travel [that] Ring provided to public officials were impermissibly linked to official acts that benefitted Ring and his clients.” As a result, the government indicted him on charges of violating the honest services fraud statute, payments of illegal gratuities, and conspiracy. The jury convicted Ring of some of the honest services fraud counts, the illegal gratuity count, and the conspiracy count.

Ring challenged the district court’s instruction on the honest services fraud counts. He contended that an explicit quid-pro-quo was required and that the court’s instruction had not made that clear. The D.C. Circuit stated that “[a]s relevant to the issue here, the government had to show that Ring gave gifts with an ‘intent to influence’ an official act ‘by way of a corrupt quid pro quo’.” As in Ring, the concept of an explicit quid-pro-quo was acknowledged and, therefore, the question in Terry was whether the quid-pro-quo had to be stated or expressed in some way, or whether it could be implied by the actions and words of the participants and, therefore, inferred by a jury.

In the context of lobbying, gifts are given, but rarely with the stated and articulated understanding that a favorable act from the recipient is expected. Instead, the gifts are given and later the public official magically takes actions that benefit the lobbyist’s client. This was the case in Ring and in much the same way as in Terry where the campaign contributions were being made and then Terry responded favorably when called upon by the briber without the briber ever referring to the contributions, Ring’s lobbying targets did things favorable to Ring’s clients.

The D.C. Circuit in Ring recognized that the Court in McCormick “expressly declined to decide whether the requirement [of an express and agreed to quid-pro-quo] ‘exists in other contexts, such as when an elected official receives gifts, meals, travel expenses, or other items of value’” and that the Court in McCormick did not clarify what it meant by “explicit.” U.S. District Judge Myron Thompson, in the McGregor case observed, as late as July, 2012, that “[t]he definition of ‘explicit’ remains hotly contested.”

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37 *Id.* at 464.
38 *Id.*
39 *Id.*
40 *Id.*
41 *Id.* at 465.
42 *Ring*, 706 F.3d at 465 citing *McCormick*, 500 U.S. at 274 n. 10.
43 *Ring*, 706 F.3d at 466.
With this issue left hanging, Ring made a rather appealing argument predicated on the First Amendment and, specifically, the right to petition government. He argued that lobbying was like contributing to political campaigns and that such activity implicated constitutionally protected conduct and, therefore, without elevating the standard of proof in such cases to the level of an "explicit quid pro quo agreement" there would be an impingement on protected First Amendment activities. Ring’s position, therefore, was that explicit meant explicit and that, in order to protect First Amendment values, such an element of a corrupt bribe should not be able to be inferred, but that the evidence had to show some outward expression of the agreement to avoid the chilling of First Amendment conduct.

While recognizing that the Supreme Court had not clarified that issue, the D.C. Circuit disagreed with Ring and made a statement that was not later picked up on by the Terry court. The D.C. Circuit said that an explicit quid-pro-quo instruction is not “required outside the campaign contribution text.” The D.C. Circuit, therefore, may have implicitly indicated that campaign financing cases might indeed be different and that it might be agreeing that, in addition to a Hobbs Act situation, in an honest services fraud case where campaign contributions are at issue, the requirement of an explicit quid-pro-quo might be appropriate. While that statement is certainly dictum, it is a statement that was never addressed by the Terry court which was a campaign contribution case. Instead the Terry court cited Ring and the case of former Alabama Governor Don Siegelman as cases that are representative of the struggle to determine the definition of quid-pro-quo in various contexts.

The trial of former Governor Siegelman also involved Richard Scrushy who is the founder and former CEO of HealthSouth Corporation a major hospital corporation and home health care company that was started in Birmingham, Alabama, that grew state-wide, and that was a tremendous success until a major accounting fraud and corruption scandal brought the company down. As a result of that corruption and eventual bankruptcy, Scrushy and a number of other corporate officers were prosecuted by the federal government in a case which was the first case under Sarbanes-Oxley and the new certification requirements that not only did the CFOs of companies have to certify the companies’ reports to the S.E.C., but so did the CEOs. The others who were prosecuted entered guilty pleas and struck deals with the DOJ. Only Scrushy went to trial in Birmingham, the home of HealthSouth, in what was to become a highly controversial trial on a number of levels. In the end, he was acquitted, but his troubles did not end there.

45 Ring, 706 F.3d at 465-66.
46 Id. at 466.
47 “But even assuming as much, we believe that campaign contributions can be distinguished from other things of value.” Id.
49 Terry, 707 F.3d at 612-13.
Scrushy eventually faced new charges when he was indicted by the federal authorities, along with former Alabama Governor Don Siegelman, for the appointment of Scrushy to the Alabama Certificate of Need Review Board (CON Board) that determined the number of healthcare facilities in the State. Decisions of that board affected HealthSouth’s ability to grow and, therefore, it was important to Scrushy to be on the board again. He had already served on the Board under three previous governors of the State.

The charges on which Scrushy and Siegelman were convicted and that are relevant to this article are those involving honest services fraud. While there has been a tremendous amount of criticism of the Eleventh Circuit’s upholding of the convictions on the honest service fraud counts, a review of the testimony and evidence supporting the convictions postures perfectly the issue of what is an explicit agreement under the act, whether it has to be expressed in some way, and the role of a jury in making such a determination. Ultimately, the role of the inferential process by juries was sanctioned in Scrushy and later in Ring and Terry to find an explicit agreement.

The facts showed that it was important to Scrushy to be on the CON Board because decisions made by that board affected whether HealthSouth would be able to grow. What transpired was essentially the same type of “agreement” that was never put in writing, that was never explicitly stated, but that produced reciprocal acts and results from which a jury was able to infer, under the honest services fraud statute, an explicit quid-pro-quo that was never expressed, but was nevertheless effective for both Siegelman and Scrushy to get the results that they wanted. As is true in many of these situations, intermediaries were used by both Siegelman and Scrushy to convey the making of reciprocal decisions and the taking of reciprocal acts that produced the results. It was the testimony of these intermediaries that resulted in the convictions.

Siegelman had recently been reelected and the primary campaign theme on which he had run was the establishment of a lottery in the State of Alabama. After the election he created the Alabama Education Lottery Foundation (the Foundation) to raise money to campaign for voter approval of a ballot initiative to establish a state-wide lottery. The Foundation eventually borrowed $730,789.29 from an Alabama bank to pay down the debt incurred by the Alabama Democrat Party for a voter campaign advocating the lottery. This debt was personally guaranteed by Siegelman. Scrushy had contributed to Siegelman’s opponent. In that setting, Siegelman commented to Nick Bailey, one of Siegelman’s closest associates, that Scrushy needed to contribute “at least $500,000 in order to ‘make it right’ with the Siegelman

50 See Anthony J. Gaugham, The Case for Limiting Federal Criminal Jurisdiction Over State and Local Campaign Contributions, 65 Ark. L.Rev. 587, 605-610 (2012) and sources cited therein describing the disagreements as “withering criticisms” and reviewing the criticisms of the trial court’s ruling and the ruling of the Eleventh Circuit.
52 The establishment of a state lottery was eventually rejected by the voters of Alabama.
53 Siegelman, 640 F.3d at 1165.
Bailey also testified that Eric Hanson, an outside lobbyist for HealthSouth, had told him that “Scrushy wanted control of the CON Board.”

Mike Martin, the former CFO of HealthSouth testified that “having influence over the CON Board was important to Scrushy and HealthSouth because it determined the number of healthcare facilities in the state, thereby affecting HealthSouth’s ability to grow.” He testified that “Scrushy told him that to ‘have some influence or a spot on the CON Board,’ they had to help Siegelman raise money for the lottery campaign. Scrushy said that if they do, ‘[they] would be assured a seat on the CON Board.’” Martin then testified that they “were making a contribution . . . in exchange for a spot on the CON Board.”

Bailey testified that Hanson, the lobbyist, “made it clear to him that if Mr. Scrushy gave the $500,000 to the lottery campaign that [they] would not let him down” with respect to the CON Board seat. The evidence then showed that Scrushy gave instructions on how to make the payment in a secretive way, to include enlisting the assistance of their banker, who eventually refused to play any part in the transaction. Eventually, a way was found to make the payment in a way that masked it as a payment to the Siegelman campaign for the lottery.

Bailey testified to a meeting between Siegelman and Scrushy in Siegelman’s office; Siegelman showed him the check; and Bailey asked, “[W]hat in the world is he [Scrushy] going to want for that?” He testified that Siegelman replied, “the CON Board.” Bailey commented, “I wouldn’t think that would be a problem, would it?” At which point Siegelman replied, “I wouldn’t think so.”

That meeting took place on July 14, 1999. Scrushy was appointed to the CON Board twelve days later. Bailey testified that Siegelman then went so far as to instruct him to contact the Board chair-designee and to tell her that he “wanted Scrushy to be the vice-chair of the CON Board.” Scrushy was then put in that position. Siegelman had told Bailey that he put Scrushy in that position “[because [Scrushy] asked for it.”

The testimony showed that a second payment was made when Bailey and Siegelman went to the HealthSouth headquarters in Birmingham and Scrushy and Siegelman met privately in Scrushy’s

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54 Id. at 1166.
55 Id.
56 Id.
57 Id.
58 Id.
59 Id.
60 Id. at 1167.
61 Id.
62 Id.
63 Id.
64 Id.
65 Id.
office. That check was applied directly to the balance of money owed on the loan by the
Foundation.

With these facts posturing the issue of an *explicit quid-pro-quo* in the context of Scrushy and
Siegelman never having had a direct conversation (at least that the evidence was able to show)
before the first payment was made, the Eleventh Circuit turned to *McCormick*, just as the courts
in *Ring* and *Terry* did later to resolve the question of what was an *explicit quid-pro-quo* when
there was no direct evidence of any conversational agreement, written agreement, or memoranda
of any type confirming reciprocal understandings? It should also be noted that these payments
by Scrushy were not for Siegelman’s campaign for election or re-election; they were for an issue
campaign i.e. the lottery that Siegelman supported.

As a result of the Supreme Court’s decision in *McCormick*, the Eleventh Circuit accepted the
requirement that, in order to be liable under the honest services fraud statute, there had to be an
*explicit quid-pro-quo*. The question for the Eleventh Circuit, as it was later in *Terry* and *Ring*,
was whether for something to be *explicit* it had to be manifested in some traditional way, such as
in writing, an oral conversation that is overheard, or something that would provide more than
circumstantial evidence of a common understanding and an agreement.

The Eleventh Circuit accepted the trial court’s instruction that Scrushy and Siegelman had to
“agree”⁶⁶ as part of the *quid-pro-quo* requirement, but Scrushy and Siegelman contended that
such an instruction was still inadequate because the trial court should have instructed the jury
that “not only must they find that Siegelman and Scrushy agreed to a *quid-pro-quo*, the CON
Board seat for the donation, but that [the] agreement had to be *express*.”⁶⁷ It was with this
proposition that the Eleventh Circuit disagreed. The court said that *McCormick* had used the
word *explicit*, but that that term “does not mean *express*.”⁶⁸ That differentiation formed the *ratio
decidendi* of the Eleventh Circuit’s position and was, effectively, the basis of the courts’
decisions later in *Terry* and *Ring*. With that differentiation, the court rejected Scrushy’s and
Siegelman’s contention that “only ‘proof of actual conversations by [them]’ [would] do.”⁶⁹

The court rejected the positions taken by Scrushy and Siegelman in their briefs that “only
*express* words of promise overheard by third parties or by some means of electronic surveillance
[would] do.”⁷⁰ The Eleventh Circuit described the standard being advocated by them as
“stringent”⁷¹ and said that *McCormick* did not require that. The court said that, in order to meet
the *explicit* test, there was “no requirement that [the] agreement be memorialized in writing, or
even, as defendants suggest, be overheard by a third party.”⁷² The court said that “the agreement

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⁶⁶ Id. at 1170.
⁶⁷ Id. at 1171.
⁶⁸ Id.
⁶⁹ Id.
⁷⁰ Id.
⁷¹ Id.
⁷² Id.
must be *explicit,* but there is no requirement that it be *express.*”73 Giving recognition to the role of circumstantial evidence and jury decision-making, the court held that an explicit agreement may be “‘implied from [the official’s] words and actions’”74 and evidence of bribery “may be supported by ‘inferences drawn from relevant and competent circumstantial evidence.’”75

Before *Terry* and *Ring,* United States District Judge Myron Thompson in the Middle District of Alabama presided over one of the most recent, highly publicized cases in Alabama. The allegations were against gambling facility operators, lobbyists, lawmakers, and legislative staff. The allegations were that the defendants conspired to buy and sell votes of Alabama lawmakers to ensure the passage of a bill that would authorize a constitutional referendum on whether to legalize electronic bingo in Alabama. The allegations included charges of federal-programs bribery, extortion, honest services mail and wire fraud, obstruction of justice, and conspiracy to commit federal programs bribery. In the end, the defendants were acquitted, but Judge Thompson considered the bribery issues to be so important that he wrote a special opinion76 after the conclusion of the trial in which he set out his jury instructions and traced the *quid-pro-quo* issues through the *McCormick,* *Evans,*77 and *Siegelman* cases. Judge Thompson’s thoughtful and thorough analysis mirrored what were the subsequent perspectives in *Terry* and *Ring.*

Judge Thompson concluded that a *quid-pro-quo* was necessary, but he also observed that, in campaign contribution cases, because of the First Amendment, there had developed an elevated burden of persuasion. While this concept, *per se,* was not articulated in *Terry* or *Ring,* it was effectively used by the courts in those cases because of their perspectives on the need for explicit *quid-pro-quo* instructions. It is the requirement, in these types of public corruption cases, that there be an *explicit* understanding and agreement for the exchange of something of value and that Judge Thompson described as an elevated burden persuasion. On the issue of what *explicit* meant, he cited Justice Kennedy’s admonition in *Evans* that *quid-pro-quo* did not have to be stated in *expressed* terms because that would not be a realistic perspective given how such bribery activities actually take place.78 Judge Thompson, using Justice Kennedy’s perspectives, stated that “a quid pro quo need not be expressly stated orally or put in writing. Rather an explicit quid pro quo could be inferred from vague words and conduct.”79

Describing what he viewed to be the current state of the law, as of July 24, 2012, the date of his writing, he said that many of the cases had tried to conflate the concept of a *quid-pro-quo* with an agreement, but admonished that “[f]ederal corruption laws are not limited to completed agreements to exchange a vote for a campaign contribution. . .[and that his instructions]

73 Id.
74 Id. at 1172.
75 Id. (citation omitted).
78 Evans, 504 U.S. at 274 (“The official and the payor need not state the quid pro quo in express terms, for otherwise the law’s effect could be frustrated by knowing winks and nods.”).
79 McGregor, 879 F.Supp.2d at 1316.
distinguished between a quid pro quo agreement and a quid pro quo promise or solicitation. 80
He thus incorporated the quid-pro-quo concept into consummated agreements, solicitations, and promises. He further observed that with a consummated agreement, both parties can be liable; with a promise, only the person offering to make the payment may be liable; and for a solicitation, only the public official might be liable.81 He did not address the law of attempts in formulating this perspective.

While Judge Thompson’s perspectives predated Terry and Ring, they form a consistent and developing perspective on the concept of quid-pro-quo in bribery jurisprudence and the struggles that the courts had post-Skilling with how to fashion a body of bribery law that conformed to the underlying values present in the honest services fraud statute and the conduct that that statute is designed to reach. What is common to all of these perspectives is that the quid-pro-quo is the inducing and animating factor underlying bribery. Added into that basic concept, in public corruption cases where First Amendment issues may be implicated is what Judge Thompson referred to as an elevated burden of persuasion as a requirement that the agreement be an explicit underlying reality understood and agreed to by both parties.82 The requirement that the agreement and the understanding be explicit balances the First Amendment concerns in campaign contribution, issue contribution, and lobbying settings. The fact that such agreements need not be expressed in writing or orally does not diminish the First Amendment protections, it only affects the way that such explicit agreements can be proven by the inferential process from the parties’ actions, words, and conduct. Such explicit understandings are still the animating realities of culpable bribery in these political settings.

The recognition that explicit does not mean express and that bribery-type evidence can be shown by circumstantial evidence from which juries are perfectly capable of drawing rational inferences, formed the heart of the Eleventh Circuit’s position in Siegelman and, later, the positions of the courts in Terry and Ring. This is a realistic position that satisfies Justice Kennedy’s concern that, “otherwise, the law’s effect could be frustrated by knowing winks and nods.”83 This reconciliation of the concepts of explicit and express seems to offer the best compromise to effectively reach bribery in the public corruption setting, which is inherently secretive but which is an issue that juries, with proper instructions, are capable of handling, using their common sense and the inferential process, and protecting First Amendment values at the same time.

80 Id. at 1317. See also Stuart P. Green, Matthew B. Kugler, Public Perceptions of White Collar Crime Culpability: Bribery, Perjury, and Fraud, 75 LAW & CONTEMP. PROBS. 33, 39-40 (2012) (addressing the distinctions).
82 See generally Green, supra note 80 at 40 (“[A]s traditionally understood, bribery consists of a bilateral agreement or quid pro quo in which the bribee solicits or accepts something of value from the briber in exchange for the bribee’s acting, or agreeing to act, on the briber’s behalf. This exchange requires a meeting of the minds, with the bribee agreeing to ‘be influenced’ in the performance of an official act.”).
83 Evans, 504 U.S. at 274.
Conclusion

The Supreme Court’s decision in Skilling confining the honest services fraud statute to bribery and graft gutted the statute’s continuing use by federal prosecutors to reach breaches of fiduciary duties in the private setting where there was a conflict of interest. It, therefore, removed an arrow in the quiver of prosecutors’ ability to address breaches of fiduciary duties in private businesses and, thereby, removed one means to enforce ethical conduct in the private business sector. Whether Congress responds and amends the statute to return its capacity to be used in that area remains to be seen.

In the meantime, even with the resolution of the definition of bribery in public corruption settings such as occurred in Siegelman, McGregor, Terry, and Ring, because of the language of the statute, there will be an inevitable continuing common law-type of refinement of honest services law, to include bribery and kickbacks, by the federal circuits. This process will take place out of necessity in spite of strong objections to such a process in the area of criminal law.

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84 See Anita Cava, Brian M. Stewart, Quid Pro Quo Corruption is “So Yesterday”: Restoring Honest Services Fraud After Skilling and Black, 12 U.C. DAVIS BUS. L.J. 1 (2011).

85 See Cohen, supra note 11 at 203; Griffin supra note 6 at 1846-47 (“[P]ublic corruption prosecutions have engaged courts in teasing out case by case the principles and standards that define harmful influences. . .The statute uses only twenty-eight words and leaves it to the courts to supply limiting principles and monitor extensions, and at the same time, it vests substantial discretion in prosecutors to test the boundaries of the law. . .Carving out cases that merit prosecution is thus a classic common law undertaking. Common law interpretation is incremental and potentially inconsistent, but it is also patient and flexible enough to operationalize subtle limiting principles like harm.”).

86 See Sorich v. United States, 555 U.S. 1204, 129 S.Ct. 1308, 1310 (2009) (J. Scalia dissenting from a denial of certiorari) (“[I]t is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail.”).
ETHICS IN THE BUSINESS CURRICULUM:
DOES DELIVERY NEED TO BE REVISITED?

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Abstract

Business Schools have been teaching business ethics for over a generation. Despite the best efforts of the educators, ethical lapses and scandals are a recurrent headline in the news. This raises the question of why is ethics education not working. This study analyzes the current practice of a sample of AACSB accredited Business Schools and compares that with the recommended practice from the business ethics literature. The results indicate that ethics content is introduced to students too early in the curriculum and spread too thinly in many courses instead of in one dedicated course.

KEYWORDS: Business Ethics; Ethics Curriculum; Recommended Practice; Higher-order Learning

Introduction

The U.S. business world seems to have a problem with ethical decision making. Surveys have shown that the American public perceives a decline in business ethics. Clymber (1985) found that 55% of Americans believed that corporate executives were dishonest. More recently, a 2009 study by the Harvard Business Review Council found that the respondents exhibited less trust in senior executives in U.S. companies than they did in the previous year (Podolny, 2009). Cordiero (2003) interviewed senior managers regarding their impressions of the ethical climate in business. All of the managers stated that the ethical climate has been getting worse.

In terms of business education, Lampe and Engelmann-Lampe (2012) note that business students top the cheater's list at both undergraduate and graduate levels (McCabe & Trevino, 1996; McCabe, Butterfield & Trevino 2006). On personality tests, finance students in particular, scored significantly higher on narcissism and lower on empathy, compared to other students (Sautter et
Most business students place high value on money and image, and pursue these extrinsic values rather than the intrinsic ideals that would lead to greater ethical conduct (Kasser & Ahuvia, 2002). Pfeffer (2009) indicts business schools for their failure in this area given the tremendous effort they have exerted. He states that “evidence is almost completely inconsistent with the idea that business schools are having positive effects on the development of student values and attitudes…”. These arguments indicate that despite business schools exerting considerable effort in delivering ethics in business education, the results are not what is needed or desired.

According to Sims and Brinkmann (2002), a discussion of teaching ethics in business schools needs to focus on a mixture of three elements; a) mode of the delivery of ethical content, b) the goals of the ethical instruction, c) current workplace ethical practices. While all three factors are important, an in-depth discussion of all three is impractical in one journal paper. Consequently, this paper focuses on the first of the three elements; *the delivery of ethical content within business schools*.

Since 1974, the Association to Advance Collegiate Schools of Business (AACSB) has recommended that ethical content be included by all member institutions. However, that same body does not mandate the manner in which this curriculum is distributed. Revisions of the AACSB standards in 1991 and 2003 have moved the standards away from an explicit ethics course requirement to allowing “infusion” or “integrating” ethical content in other courses (Brinkmann, Sims, and Nelson 2011), which leaves the choice up to the individual academic institution as to how the ethical content is delivered.

The current study is directed at evaluating the extent to which allowing flexibility in the delivery of ethics in the business curriculum results in diluting its effectiveness and results in poor outcomes. To evaluate the issue, the study gathers data on current practice in terms of teaching ethics in the business curriculum. Using the results of that empirical research, the authors compare *current* business school practice with what prior research has suggested as *recommended* practice.

The contribution of this study is two-fold. First, it provides a snapshot of current practice in teaching business ethics in the United States. Second, it evaluates the extent to which current practice matches best practice recommendations. The paper has three sections. The first reviews some of the literature covering the subject. The second reports the results of an empirical evaluation of current practice. The final section of the paper suggests changes that should be made if business schools are going to meet better their mandate for producing business leaders capable of making ethical decision in the future.

**Literature Review**

There have been recurring scandals and misdeeds reported in the popular and business press, including the problems at Enron, WorldCom, Parmalat, and Madoff. The number of incidents has resulted in calls for inquiry to establish why so many business leaders engage in unethical conduct (McCurry 2009). Much of the criticism is directed at business schools (B-Schools) because the culprits are very often graduates of these institutions. For instance Andrew Fastow (CFO of Enron) is a graduate of the MBA Program at Northwestern University in the Chicago area.
The criticism directed at B-Schools is that graduates engage in unethical behavior. As noted above, studies have found that business students indicate higher levels of narcissism and lower empathy, which are linked with cheating and unethical practices (McCabe and Trevino 1995, McCabe, Butterfield and Trevino 2006). Furthermore, a survey by the Aspen Institute, Center for Business Education (2008) found that the longer students were in an MBA program, the less importance they placed on having an important impact on society and that the business school student’s confidence that they were prepared to handle value conflicts at work fell as they progressed through the MBA program. This supports Davis’ (1997) earlier finding that MBAs score lower on moral reasoning when they graduate than when they are admitted. Pfeffer (2009) suggests that this is due to the emphasis in business education on the “ends” rather than the “means.”

Gottesman and Morey (2006) found that firms led by non-MBAs or CEOs without law degrees had slightly better risk-adjusted market performance. David Serchuk of the Forbes Intelligent Investing Panel (2009) attributes this to the possibility that graduate-level business schools inculcate values incompatible with long-term firm performance. However, this is not only an issue involving MBAs. Brown et al (2010) studied personality traits in all business students that led to unethical behavior. Not only did the authors find that students with narcissistic and non-empathetic personalities were more likely to behave in unethical manners, but that finance majors were the most likely to exhibit these personality traits. Brown et. al. (2010) attribute this to the pecuniary values emphasized in their discipline, such as profit maximization and the need to commoditize all aspects of a business.

There appears to be little doubt that some graduates of business schools act in an ethical manner. In their defense, business schools point to the inclusion of ethics in the business curriculum. The following section traces the roots of the inclusion of ethics in B-Schools.

Ethics in the Business Curriculum
The issue of including ethics in the B-School curriculum is not a new one and has not been ignored by business researchers. Prior to the early 1980’s, few B-School programs included ethics as a required part of the curriculum. Drucker (1981) was an early opponent of including ethics, mostly because it smacked of being the ‘flavor of the month’. Levin (1989) opposed including ethics in the business curriculum on the basis that it was a spurious defense of Business Schools without achieving anything meaningful. Henderson (1988) opposed the inclusion of ethics because normative standards do not exist and cannot be tested. Halfond (1990) asserted that ethical and unethical decisions are made by individuals not by B-Schools and little can be taught in that regard.

Despite the power of these arguments, counter arguments were made that effectively rebutted opposition to including ethics in the business curriculum (McDonald and Donleavy 1995). Perhaps the most cogent argument was that to do nothing was just not acceptable. When Harvard Business School and other larger institutions formally included business ethics into their curriculum the die was cast and ethics entered the mainstream of business school education. By the end of the 1980’s most programs had included some sort of ethics education.

The leading education institutions in business belong to, or are closely aligned with, the
Association to Advance Collegiate Schools of Business (AACSB). As early as 1974, this association called for the inclusion of ethical content within the Business School curriculum. As a result, many B-Schools incorporated a course in Business Ethics. However, since that time, there have been a number of revisions to AACSB standards.

As part of its review and evaluation process, AACSB established the Ethics in Education Task Force (EETF) to review the standards and best practices for incorporating ethical content into the business curriculum. The EETF recommended, and AACSB adopted, standards for the distribution of ethics content consistent with the distribution of all other business curriculum content (AACSB 2004). That is, AACSB accredited institutions can choose to include a course in business ethics or spread the instruction of business ethics across a number of courses in the overall curriculum. The choice is left to each institution because AACSB does not mandate any institution to organize itself in a specific manner. This approach provides the member organizations with the opportunity to adapt to the environment in which they operate.

What has been the impact of including Ethics Instruction within the Business School Curriculum?

There have been many studies measuring the impact of including ethics in the business curriculum. The results appear to be mixed.

In the field of Accounting, studies have shown that students who cheat at the university level are more likely to demonstrate professional misconduct in their future (Harding et al 2004). Furthermore, a study by Buchko and Buchko (2009) found that business courses do not influence ethical behavior. In contrast, the integration of ethics into accounting courses seemed to improve reliance on ethical standards among accounting students (Hiltebeitel and Jones 1992). Enyon, Hill, and Stevens (1997) found that an ethics course in the Accounting curriculum seemed to have a significant impact on attitudes toward ethical issues. In another study of Accounting majors, the authors found that requiring an ethics course does make an immediate, but short-term, difference in ethical decision making and in assessing potential ethical/unethical behavior (Rogers and Smith 2008). It is hard to discern a distinctive pattern of success from these studies.

In areas of business other than Accounting, there have been studies evaluating the extent to which students are learning business ethics both in the United States (Bloodgood, Turnley, and Mudrack 2010, Lawson 2004) and in other countries (Arzova and Kidwell, 2004; Karambia-Karpades and Zopiatis 2008). Some of these studies indicate that students are learning better ethical decision making skills, and others find the opposite. Yet more studies try to link unethical behavior to latent variables such as narcissism (Menon and Sharland 2010, Sautter et al 2008) or cheating on tests (Twenge and Campbell 2009). These studies seem to find no distinctive pattern of behavior or indications that students are learning good ethics skills consistently.

There is other evidence that challenges the extent to which ethics in the business curriculum really works at all (Warren and Rosenthal 2006, Buchko and Buchko 2009). For instance, in their study, Buchko and Buchko (2009) found that exposure to ethics education had almost no discernible impact on moral reasoning. As the authors conclude, the good news is that ethics education is not creating immoral practitioners. The bad news is that ethics education is having no apparent effect. This may explain why, in later life, business leaders are not guided by moral reasoning; because they have learned little to guide their behavior.
The available research indicates that the current structure of ethics education in the business curriculum is not achieving the desired goals; that is, there is mixed evidence (at best) that students are learning how to better manage business situations so that ethical lapses do not occur, and there continue to be reports of ethical misdeeds and a deteriorating ethical environment. An obvious question to ask at this point is “if teachers are teaching ethical behavior, how can it be that students are not learning and acting in an ethical manner?” The following discussion focuses on this question by examining the ‘timing’ and the ‘form’ of delivering ethical content in the business curriculum.

**Delivering Ethical Content - Timing**

Business ethics by its very nature is complex with overlapping issues and priorities. As such, students can only grasp the nature of this complexity after they have studied or experienced some level of business practice (Pamental 1989). This is consistent with Kohlberg’s work in moral reasoning (Kohlberg 1969). This approach asserts that people are more inclined to good ethical practice later in their lives rather than earlier (Kaplan 2007, Desplaces et al 2007, Monga 2006).

Therefore, any business ethics course should, at the very earliest, follow the introductory marketing, management, and finance courses taken in the curriculum. This means ‘ethical content’ should be introduced into the curriculum no earlier than at the end of junior year or the beginning of senior year in a traditional four year undergraduate program (Pamental 1989).

Consistent with that reasoning, Reeves (1990) aligned business ethics content with Bloom’s Taxonomy of Higher Order Learning (Bloom 1956). The reasoning is as follows. Due to its complexity, properly learning ethical decisions requires Analysis, Synthesis and Evaluation, all of which are higher-order learning skills. The use of essays, project, cases, simulations, and scenarios use such higher-order skills and are essential to grasping the complex nature of ethical decision making. These skills can only be effectively utilized once they have been learned, which is usually later, rather than earlier, in a student’s academic career. Therefore, ethical curriculum content should only be introduced in the latter stages of a student’s course of study (Reeves 1990).

Based on the above suggestions, there emerge some elements of recommended practice in teaching ethics in the business curriculum; that is, such content should be delivered in the latter stages of a student’s education, preferably as late as possible to allow for greater use of higher-order learning skills.

**Delivering Ethical Content - Form**

As noted above, recent AACSB guidelines make it clear that member institutions can choose whether to include the ethics curriculum in one course or spread it across several courses. This is consistent with AACSB guidelines for other curriculum content. However, many researchers argue that ethics is different by virtue of its complexity and the need for higher-order skills (Hartman and Hartman 2004). These researchers maintain that spreading the ethics curriculum across several courses dilutes its effectiveness.
Few, if any, B-School faculty are pedagogically trained in the subject, and many faculty feel uncomfortable in this area (Podolny 2009). Joel Podolny, the Dean and Vice President of Apple University in Cupertino, California, the former Dean of the Yale School of Management and a former Professor at Harvard Business School and the Stanford Graduate School of Business (2009) see this problem as a result of the belief by many business professors and business students that ethics topics are “soft” because they do not require detailed data analysis. He states that professors often stay away from teaching the normative aspects of business because it is outside of their functional expertise. This causes the study of such management challenges to become fragmented. As an example, Podolny mentions a survey of Harvard business students which found a third of those surveyed regarded right and wrong as defined by the norm.

If faculty have ‘qualifications’ in the field, these are likely to be based on research and articles published rather than on courses taken in a Doctoral or even Masters level program. However, recent AACSB guidelines require faculty to teach and publish in similar areas. If a faculty member teaches an ethics course, there is now considerable institutional pressure to publish in that area too. Consequently, it is more expedient for a faculty member to focus on his/her main research themes rather than trying to develop expertise in what can be a relatively minor sector of their teaching portfolio.

For the above reasons, we surmise that distributing ethics education content across several courses is likely to result in the subject matter being taught by faculty who are not well prepared in the subject or to teach the subject. This means that the depth of coverage and learning potential are much reduced using the multiple course method rather than focusing all content in a dedicated stand-alone course.

The above criticisms of teaching ethics content in multiple courses are rooted in faculty qualification concerns or pedagogy and learning outcomes. There is also an institutional perspective that has to be considered. Most faculty members are trained in specific functional areas of business; Marketing, Finance, Accounting, Management. Within almost all B-Schools there is a constant battle to get more functional area content into the curriculum. Distributing ethics across several courses rather than dedicating a specific course to the subject means that three credit hours can be released for other “more specialized” content. So there is a considerable incentive for B-Schools to abandon the stand-alone business ethics course in favor of another functional area course.

‘Best Practice’ Guidelines
The graduates of the leading schools of business continue to make poor ethical decisions. Researchers continue to study what may be the reasons for this trend. The empirical research appears to show contradictory results with some studies indicating students do learn some ethical decision skills and others showing little or nothing is learned, remembered or retained.

Researchers identified some best practices for including ethics in the business curriculum in the late 1970’s and early 1980’s; namely teaching the content at the end of the business curriculum. However, the AACSB standards do not enforce this call for best practice and allow colleges and schools business to spread ethics content over several courses rather than in one course.

This situation gives rise to the research question “how is business ethics taught in the leading
business schools and is the way it is taught instrumental in explaining why so little appears to be learned”? In pursuit of answering that question, the current study a) seeks to establish a snapshot of current business ethics practice in AACSB accredited business education programs, and b) to evaluate where in curriculum ethics is taught and whether it is taught in a stand alone format or distributed across several different courses.

**Data and Results**

The study draws data from AACSB institutions in eleven states scattered across the Eastern United States of America. A total of 129 institutions are included in the study. In some of the states there were AACSB accredited institutions that only teach graduate courses in ethics. These were excluded from the study.

Much of the data are gathered from a review of course descriptions published by the colleges and universities on website or via catalogs. Once the ‘ethics courses’ were identified the researchers reviewed the published information in detail and then, wherever possible, made contact with a faculty member involved in teaching the course. All colleges with a dedicated ‘business ethics’ course were contacted; however, the researchers were not able to communicate with all relevant faculty.

The first step determined which was the ‘primary’ ethics course in the business curriculum. This part of the study also determined which programs have stand-alone ethics courses and which have spread ethics education across several courses (the form of ethics instruction). The second step identified where in the curriculum the ethics instruction occurred (the timing of ethics instruction). The last step analyzed the course content and evaluated the methodologies used in the course (back to the form of ethics instruction).

**Business Ethics Courses (Form of Delivery)**

The first step involved analyzing course descriptions and determining if the description included ‘business ethics’ or ‘ethics in business’ or a term related to this subject. The words business ethics do not appear in many course descriptions which makes it easier to distill the courses of interest for this study from others. AACSB guidelines mandate that course descriptions identify the key business concepts covered by the course. So, if ethics is covered in the course in any depth it should be in the course description.

Having identified the courses that included ethics content, the researchers identified whether the course was an elective, a functional area requirement (e.g. Marketing or Finance), or a core business major requirement (all business students must take this course).
Table 1: Programs That Require All Business Majors to Take a Dedicated Business Ethics Course

<table>
<thead>
<tr>
<th>State</th>
<th>Total Number of Institutions</th>
<th>Lower Division Course</th>
<th>Junior Year Course</th>
<th>Senior Year Course</th>
<th>Required Ethics Course for All Majors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>11</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Connecticut</td>
<td>7</td>
<td>1</td>
<td>1</td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>Florida</td>
<td>17</td>
<td>1</td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Georgia</td>
<td>20</td>
<td>3</td>
<td></td>
<td></td>
<td>3</td>
</tr>
<tr>
<td>Louisiana</td>
<td>14</td>
<td>1</td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Maryland</td>
<td>8</td>
<td>4</td>
<td>2</td>
<td></td>
<td>6</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>15</td>
<td>1</td>
<td>1</td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>Mississippi</td>
<td>5</td>
<td>2</td>
<td></td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>Tennessee</td>
<td>9</td>
<td>1</td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>South Carolina</td>
<td>11</td>
<td>2</td>
<td></td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>Virginia</td>
<td>16</td>
<td>2</td>
<td></td>
<td></td>
<td>2</td>
</tr>
</tbody>
</table>

Table 1 reports the number of institutions that require a specific course in business ethics for all majors. Approximately, nineteen percent (19%) of AACSB accredited institutions have this requirement. Furthermore, of these institutions, only four require students to have senior status before they can enroll in the course. The data reported in Table 1 indicate that a high proportion of B-Schools do not have a specific and dedicated ethics course required for all majors. It can be assumed that ethics instruction is increasingly spread across several courses, as discussed in the earlier sections.

**Timing of Delivery**

Table 2 reports the data for the next step; that is, identifying which course or courses include business ethics content within the B-School undergraduate curriculum whether these are dedicated courses or not. Obviously, for programs including a dedicated ethics course this was relatively simple. For programs with ethics content distributed across several courses, the research evaluated course descriptions and included those that used the key words “business ethics” or “ethics in business”. This approach was guided to the logic explained above. The totals reported in Table 2 do not match the total number of institutions because some institutions have gaps or duplication in the course descriptions. The gaps occur where no course description mentions ethics. The duplications occur where multiple courses descriptions mention the key words.

The research process revealed that most B-Schools mention business ethics in the course description of a ‘Business Law’ or ‘Legal Environment course’. This would indicate that the person discussing business ethics in these courses is not trained in the subject. However, there was no in-depth analysis of this aspect of the curriculum.
Table 2: “Business Ethics” In Course Descriptions

<table>
<thead>
<tr>
<th>State</th>
<th>Lower Division</th>
<th>Junior</th>
<th>Senior</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>9</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Connecticut</td>
<td>4</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Florida</td>
<td>3</td>
<td>11</td>
<td>2</td>
</tr>
<tr>
<td>Georgia</td>
<td>9</td>
<td>6</td>
<td>1</td>
</tr>
<tr>
<td>Louisiana</td>
<td>3</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>Maryland</td>
<td>1</td>
<td>6</td>
<td>1</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>10</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Mississippi</td>
<td>2</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Tennessee</td>
<td>1</td>
<td>8</td>
<td></td>
</tr>
<tr>
<td>South Carolina</td>
<td>3</td>
<td>6</td>
<td></td>
</tr>
<tr>
<td>Virginia</td>
<td>4</td>
<td>10</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>49 (42%)</strong></td>
<td><strong>59 (51%)</strong></td>
<td><strong>8 (7%)</strong></td>
</tr>
</tbody>
</table>

The course number was used as a proxy for the ‘level’ at which the course(s) is offered. That is, if the course numbering system is 100, 200, 300, 400, then 100 and 200 level courses are included in the Lower Division column of Table 1. Just because a course has a 200 number does not mean that all course students are Sophomores. However, given the nature of modern course scheduling, most students take as many lower level courses as soon as they can to meet the prerequisite requirements of their program of study. Therefore, the current research assumes most students taking a ‘sophomore level’ course are probably sophomores.

The results are somewhat interesting. Forty two percent (42%) of AACSB institutions offer business ethics to students at the Freshman or Sophomore level. Just over half of the reviewed institutions teach the subject at the Junior level (51%), and only seven percent (7%) of AACSB institutions require students to learn about business ethics at the Senior level.

Taking the points of Reeves (1990) and Pamental (1989) into consideration, one can surmise that many, if not most, students are taking the course in business ethics before they have taken their marketing, management, and/or finance courses, and well before they have mastered many of the
higher order learning skills in Bloom’s Taxonomy. It appears that in general the timing of delivering ethical content is not following recommended practice.

**Form of Delivery**
The vast majority of programs (over 80%) do not have a dedicated ethics course, preferring instead to distribute the ethics content over several courses. Where a dedicated business ethics course is offered, the researchers made contact with the primary course contact. The purpose of the contact was to discuss course details such as the number of sections, who teaches the course (full time or part time faculty) and the teaching and assessment methodologies (cases, lectures, multiple choice or other formats).

It was not possible to make verbal or email contact in all cases. Furthermore, even when contact was made, some faculty were unwilling to discuss the status of colleagues teaching the course. The anecdotal data gathered using this method provided additional insight into the course and how it is taught and assessed. This data is reported in Table 3.

<table>
<thead>
<tr>
<th>State</th>
<th>Req’d Ethics Course</th>
<th>Public or Private</th>
<th>Use Decisions*</th>
<th>Use Cases</th>
<th>Projects</th>
<th>M/C** or Essays</th>
</tr>
</thead>
<tbody>
<tr>
<td>AL</td>
<td>3</td>
<td>2 private 1 Public</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>Essays(2)</td>
</tr>
<tr>
<td>CT</td>
<td>2</td>
<td>2 Private</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>Essays</td>
</tr>
<tr>
<td>FL</td>
<td>1</td>
<td>Public</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>Essays</td>
</tr>
<tr>
<td>GA</td>
<td>3</td>
<td>1 Private 2 Public</td>
<td>1</td>
<td>2</td>
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<td>Essays(2)</td>
</tr>
<tr>
<td>LA</td>
<td>1</td>
<td>Private</td>
<td></td>
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</tr>
<tr>
<td>MD†</td>
<td>6</td>
<td>6 Public</td>
<td>0</td>
<td>2</td>
<td>2</td>
<td>M/C &amp; Essays</td>
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<tr>
<td>MA</td>
<td>2</td>
<td>2 Public</td>
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<tr>
<td>MS</td>
<td>2</td>
<td>2 Public</td>
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<td>Essays(2)</td>
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<td>2</td>
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<td>TN</td>
<td>1</td>
<td>Private</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>Essays</td>
</tr>
<tr>
<td>VA</td>
<td>2</td>
<td>2 Public</td>
<td>0</td>
<td>2</td>
<td>1</td>
<td>M/C</td>
</tr>
</tbody>
</table>

*Decision techniques include scenarios and simulations
** Multiple Choice
† Only 2 Colleges responded

The data reported in Table 3 is incomplete and represents an impression rather than a clear picture because the researchers were not able to get responses from every institution. Despite the partial data, there are certain points that can be gleaned. First, there appears to be no bias between public and private institutions; that is, private business education is no more inclined to require a business ethics course than is public education. Second, most institutions tend to use essays when testing students in business ethics courses. Furthermore, cases are used widely but not universally so. Finally, although it is not reported in the table, almost all institutions use full-time business faculty, as opposed to adjunct faculty or faculty from other parts of the institution,
Conclusions, Limitations and Future Directions

Business Schools have included ethics within the business curriculum since the 1980’s. However, empirical studies indicate that although the B-Schools teach ethics, the students do not appear to be learning it very well, as evidenced by the recurring scandals and problems experienced in the commercial world. A review of that literature and the data collected in this study suggests that one reason why this problem keeps recurring could be due to the way in which business ethics is included within the B-School curriculum. The aim of this study was to evaluate the extent to which Business Schools follow the guidelines for best practices as offered by researchers such as Pamental (1989), Reeves (1990), and Hartman and Hartman (2004). The results found in the study can be boiled down to the following:

a. a) Few institutions require all business majors to take a single course dedicated to business ethics;

a. b) Students rarely take an ethics course in senior year, and many students (approximately 41%) take such a course as sophomores; probably well before they have been properly prepared to use higher order learning methodologies even if they are used in the course;

a. c) Many institutions are abandoning a required ethics course in favor of distributing ethics content across several courses throughout the curriculum.

a. d) In institutions where a specific and required (of all business majors) course in business ethics is taught, the faculty are usually full time, the course uses cases, and assesses achievement using essay examinations. So when it is done, it is done right.

The long run implication is that teaching business ethics has become a supply-side proposition. Institutions offer, and in some instances require the course, but make little effort to make sure that graduates are well prepared to make good (ethical) decisions in their business careers. Further, study needs to be done on the various methods of delivery of ethical content within a business curriculum and the resulting ethical behavior.

The study has several limitations; most notably in terms of sample and the data recording methodology. First, the study uses data from a sample of AACSB accredited institutions. Obviously, a complete census would provide a more complete picture. However, the geographic dispersion of the institutions is such that the researchers are confident that the results found in this study will be replicated in other parts of the USA.

Second, the data was gathered using a content analysis technique; that is, reading course abstracts and descriptions and determining whether it is a course with business ethics content. It is possible that some courses with such content were missed using this technique. However, the researchers believe that the term “business ethics” is so widely used now that a course with ethics content is almost certainly going to use that term in its course description.
In terms of future directions for research, the study should be replicated in other areas to assess the extent to which regional variations, or even international variations, exist. As mentioned at the beginning of the paper, the delivery of the ethical content is just one of three elements. Future studies should also review the goals of the ethical content as well as the current workplace ethical practices to ensure that what is taught is synchronized with workplace requirements including professional development requirements.

References


Kasser T., and Ahavia A.C. (2002) Materialistic values and well-being in business students,


Abstract

Warren Bennis’ recent article in Bloomberg BusinessWeek asks whether or not the study of world religions belongs in our business schools. While he sees that the provocative nature of his inquiry lies in the word “religion,” his argument is largely instrumental in the sense that such a study would facilitate our instructional efforts to create within our students a global (cosmopolitan) mindset. An area into which he does not tread is whether or not there might be teachings which could be used for inspirational purposes when it comes to encouraging better, more ethical behavior on the part of our students now and in the future, and, if so, a basis for identifying which of such teachings would not offend current norms (legal or otherwise) of religious separation. The authors argue that such use can be made but only in cases of teachings having universal recognition. In support of their argument, the authors seek to explain how it is that so many divergent civilizations have come to a centrally held belief that we should treat others as we would want to be treated, a belief commonly referenced as the Golden Rule within the Judaic Christian tradition. It is the authors’ position that the universality of such a rule justifies its use for instructional (inspirational) purposes and that the Story of the Good Samaritan is just one historic example of its teaching. When it comes to an explanation of the universality of such a belief, the authors rely on findings from the disciplines of neuroscience and bioethics which now have made clear the organic, innate nature of such belief, a reality which makes its exact cause (by design or evolution) irrelevant. Thus, such an explanation makes less likely a successful challenge to the use of such a parable based on the First Amendment.

Introduction

Addressing any topic associated with religion in a business school context has to be viewed justifiably as provocative (needlessly or otherwise) especially when one teaches at a state funded and supported school. Warren Bennis’ article readily recognizes this fact but then justifies his discussion of the diversity of faiths on the bases of its instrumental importance to increasing students’ global awareness. This sense of provocation is rooted in the age-old conflict between religious belief and science when it comes to the origin of

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life on our planet, a conflict which began with the publication of Darwin’s “On the Origin of Species,”¹ and its theoretical construct “natural selection.”² In a very real sense, this conflict has now gone nearly full circle as research findings in neuroscience, biochemistry and bio-ethics have established certain commonalities across certain mammalian species that cannot be explained totally from exogenous factors. In fact, at least in one instance, a biochemist, Michael J. Behe, PhD, argues from his scientific findings that the origins of life simply cannot be explained without resort to some form of intelligent design.³ In any event, it is now clear that mankind does share certain characteristics (albeit by evolution or design) that help explain some universalities of belief shared across generations of mankind regardless of the presence or absence of any faith in God.⁴ It is the authors' contention that the existence of these universalities and their manifestation in religious writings can be used as appropriate pedagogical illustrations to inspire students to realize their connection to their fellow man and the necessity for them to act ethically in that regard. The authors use the Parable of the Good Samaritan to illustrate their point.⁵

The paper will be divided into the following parts. First, the paper briefly reviews the law as it relates to the Establishment Clause of the First Amendment. Second, mention is made of the insightful contributions coming from the scientific community including, but not limited to, cognitive psychology, bioethics and neuroscience. Third, a case is made that generally religious and nonreligious (faiths and non-faiths) alike, for that matter, adhere to the belief that one should always look to do unto others as they would wish

¹ 1859.
³ Behe, M.J. Darwin’s Blackbox: The Biochemical Challenge to Evolution (Simon & Shuster, 1996), revised and updated 2007; The Edge of Evolution: The Search for the Limits of Darwinism (Free Press, 2007). Behe is credited with helping to launch the Intelligent Design movement. See, however, Kitzmiller v. DoverAreaSchool District, USDC, Penn Middle District (Case No. 04cv2688), Memorandum Opinion dec’d December 20, 2005, in which the court held that a board resolution that stated that “Students will be made aware of gaps/problems in Darwin’s theory and other theories of evolution, including, but not limited, to intelligent design,” violated the Establishment Clause of the First Amendment.
⁴ WaroftheWorldviews:Sciencevs.Spirituality [Center Point 2012] contains a debate between views on science and spirituality written by Deepak Chopra, an MD and spiritualist and Leonard Mlodinow, a physic professor at Cal Tech. Interesting Mlodinow, a Jew, concedes that science is incapable of addressing the question of the origins of life.
⁵ Luke 10: 25-37
others would do unto them, a belief underlying the Parable of the Good Samaritan.
Finally, the paper will discuss the unique contribution that the Parable of the Good
Samaritan can make to illustrate our connection to our fellow persons and the use that can
be made of it to inspire business students to act ethically in their professional careers.

Establishment Clause of the First Amendment

A wonderful history of the Establishment Clause is provided by Noah Feldman in his
book, “Divided by God: America’s Church-State Problem—What We Should Do About
It.”6 From his work, it is clear that the application of the Establishment Clause has
evolved as the demographic profile of the United States has changed over the last 200
years. At one time Bible readings were felt to provide the moral and ethical training that
public education required since “the notion of teaching children morality by some means
that did not involve religion would have hardly entered the American mind.”7 “No
religion would have meant no morality, and no morality would have meant that the
schools could not achieve their society-shaping function.”8 The only real controversy
came with the Biblical instruction that would follow Bible verse readings due to the many
different sects within the Protestant faith at that time in our history. This controversy was
resolved through the adoption of what became known as the “nonsectarian solution;” that
is, the Bible verses would be read but no accompanying commentary made. This solution
worked until the immigration of a large number of Catholics into the United States when
controversy again emerged. This was for two reasons. One was the theological
difference between Protestant faiths that saw no intermediation between man and God as
with the concept of the papacy and, second, the fact that Catholicism used a different
Bible reflecting their different faith. (Up until then, schools were using the King James
Version of the Bible.) Other developments in the underdoing of the “nonsectarian
solution” were the rise in secularism born of Darwin’s theory of evolution and its
challenge to the belief in intelligent design and the rise of poorer Jewish immigrants from
Eastern Europe.

Godless Communism gets credit for the high water mark in the political manifestation of
our Nation’s belief in God. This came in the form of the addition of the words “under
God” in our Pledge of Allegiance in 1954 and official adoption of “In God We Trust” as
our national motto in 1956. People will recall this was the period of McCarthyism in
American politics. As for the Judiciary, the relationship between government and
religion had long been the province of state legislatures and their political majorities with
the exception of the Supreme Court ruling in 1878 that religious duty was not a defense
to a crime charged under the federal statute outlawing polygamy in the Utah territory.10

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7 Id., at 59.
8 Id., at 60.
10 Reynolds v. United States, 98 U.S. (8 Otto.) 145 (1878), which held that religious
duty was not a defense to a criminal indictment for polygamy.
and the Court’s decision in Cantwell v. Connecticut\textsuperscript{11} that applied to the states the First Amendment’s protection of religious free exercise by incorporation through the Due Process Clause of the Fourteenth Amendment. The floodgates, however, opened to secular attacks on the separation question with the Supreme Court ruling in 1947 that gave standing to taxpayers whose tax dollars may have been spent in violation of the Establishment Clause.\textsuperscript{12} While the Court held that the expenditure of public funds to transport children to parochial schools was a form of a public good and therefore did not violate the First Amendment, it stated what was to become known as the credo of legal secularism:

Neither a state nor the Federal Government can set up a church. Neither can pass laws, which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbelief in any religion, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whichever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against the establishment of religion by law was intended to erect ‘a wall of separation between Church and State.’\textsuperscript{13}

The United States Supreme Court has drawn certain bright lines when it comes to the Establishment Clause. First, states are prohibited from adopting laws outlawing the teaching of Darwin’s theory of evolution.\textsuperscript{14} Second, the dual requirement that public schools teach “creation science” along with Darwin’s theory of evolution has been deemed a violation of the Establishment Clause.\textsuperscript{15} These cases employed a framework found in earlier cases that have been commonly referred to as the endorsement\textsuperscript{16} and the lemon tests.\textsuperscript{17} What is certain is that a state mandated

\begin{itemize}
\item \textsuperscript{11} 310 U.S. 296 (1940).
\item \textsuperscript{12} Everson v. Board of Education, 330 U.S. 1 (1947).
\item \textsuperscript{13} Ibid, at 15-16.
\item \textsuperscript{14} Epperson v. Arkansas, 393 U.S. 97 (1968).
\item \textsuperscript{15} Edwards v. Arkansas, 482 U.S. 578 (1987).
\item \textsuperscript{16} The endorsement test was proposed by Justice Sandra Day O’Connor in Lynch v. Donnelly, 465 U.S. 668 (1984). It asks whether a particular government action amounts to an endorsement of religion. According to the test, a government action is invalid if it creates a perception in the mind of a reasonable observer that the government is either endorsing or disapproving of religion. She states: “Endorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.” The
teaching of alternate theories of life other than Darwin’s theory are highly suspect and likely subject to judicial condemnation.\textsuperscript{18}

The landmark case when it came to the reading of verses from the Bible is \textit{In The School District of Abington Township, Pennsylvania v. Schempp},\textsuperscript{19} a decision Feldman calls the “logical apotheosis” of legal secularism as a result of its enunciation of the principle that a secular purpose now is a requirement of constitutionality under the Establishment Clause. Quoting Feldman:

\begin{quote}
The argument for protecting religious minorities had, as never before, a chance for success. In response to it, the Supreme Court formulated the first two parts of a constitutional test that would make legal secularism the law of the land. To withstand a challenge under the Establishment Clause, the Court said, the law must have a “secular legislative purpose and a primary effect that neither advances nor inhibits religion.” The Court then concluded that
\end{quote}

\begin{footnotesize}
\begin{enumerate}
\item[17] The Lemon test, found in \textit{Lemon v. Kurtzman}, 403 U.S 602 (1971), addressed specifically state legislation touching on religion. Its three prongs required that (1) the legislation have a secular legislative purpose, that (2) it must not have as its primary effect the advancement or inhibition of religion and that (3) it must not result in “excessive government entanglement” with religion.
\item[18] The most recently found case involving the application of the endorsement and Lemon tests was the earlier mentioned case of \textit{Kitzmiller v. Dover Area School Dist.} (supra, ftn 2). The decision unfortunately was not appealed and therefore its precedential value is suspect. What is not clear from the decision is the extent to which the Board’s resolution basically calling into question the theory of evolution to the extent that current science exists exposing gaps in the evolutionary chain could or should be taught in the absence of the resolution’s specific reference to intelligent design. In other words, was the Board’s resolution fatally flaw when it suggested explicitly intelligent design as a single alternate theory for students to consider? In this regard, it seems that it would have been somewhat short sighted on the part of the trial judge to require students to learn specifically the theory of evolution as a state mandated learning outcome by the state’s department of education but then to sanction the withholding of scientific evidence that might undermine its validity. It is clear from the decision that the Judge saw the term “intelligent design” as synonymous with “creationism” and that this greatly impacted his decision.
\end{enumerate}
\end{footnotesize}
the Bible must surely be “an instrument of religion,” not used “either as an instrument for nonreligious moral inspiration or as a reference for the teaching of secular subjects.” It followed that the reading of the Bible in school, long considered a bulwark of American education, violated the federal Constitution and must be prohibited.20

Feldman goes on to state that the Supreme Court in Abington, while exalting the place of religion in our society, held “with precious little historical precedent, that the Constitution required government to act with a ‘secular’ purpose, and that civic practices deeply ingrained in American life would have to be eliminated.”21 With that decision, the Supreme Court finally pivoted from a century and a half belief that the “necessity of moral education and the centrality of the Bible in teaching morality” was essential for the proper functioning of a democracy to a concern for the discomfort felt by religious minorities in the presence of such activities notwithstanding the fact that there was no requirement for their participation.22

**Informing The Discussion Through Scientific Study**

It is not unusual for scientific breakthroughs to occur serendipitously. For instance, mirror neurons were discovered in a laboratory in Italy when a monkey whose brain was being studied with the aid of a functional MRI machine showed the same cranial activity when viewing a lab technician attempting to open a nut as when he himself had engaged in the same activity.23 This has led to an explosion in research enabled by technology in the areas of neuro-cognitive science, evolutionary biology child development research and many other fields including economics that are beginning to challenge many of the beliefs we have about human nature and our beliefs as to what it means to be human.24 For instance, It was generally believed by social scientist that—
   - people are generally rational; and,
   - emotions explain most of the occasions when people depart from rationality.

However, Nobel Laureate Daniel Kahneman (a cognitive psychologist) traced systematic errors in thinking to the machinery of cognition itself rather than the corruption of thought by our emotions.25 In fact, functional MRI machines have revealed much about our decision process. For instance, neuroscience, aided by Functional MRI imaging, has taught us—

20 Supra, fn 6, 180-181.
21 Id., 181-182.
22 Id., 181.
• Thought and decision-making are not the same thing necessarily.
• Decisions can originate both consciously and subconsciously.  
• The actual process of human decision-making (our CPU) lies in our lymbic system.
• Our lymbic system lacks any ability to articulate “reasons.”

This research calls into question both the extent to which our decisions merely reflect articulated rationalizations for our chosen actions and our need for deep learning in order to engage our subconscious (feelings) in the decisions that we make. It further calls into question the extent to which our decisions may merely reflect articulated rationalizations for our chosen actions and our need for deep learning in order to engage our subconscious (feelings) in the decisions that we make.

The most amazing discovery is that we, as humans, are wired (albeit hard or soft) for empathy, a characteristic we share with other mammals. Fransiscus Bernardus Maria de Waal, PhD, is a Dutch primatologist and ethologist and holds the Charles Howard Candler Professor of Primate Behavior Chair in the Emory University psychology department in Atlanta, Georgia. His research has revealed some extremely interesting facts about primate behavior relating to what he refers to as the “pillars of morality.”

The two pillars consist of the innate sense of reciprocity or fairness and a sense of empathy or compassion. His work included lab experiments where primates were treated the same (given slices of cucumber in exchange for tokens) and then treated differently (one was given a grape and the other a cucumber) for no apparent reason. The primate who was denied the grape became so upset that he hurled the cucumber slice back at the lab researcher and banged on the cage. Another experiment involved one primate who would select either a green or a red token. If he selected a red token, he was given a treat, whereas if he selected a green token, both primates received the treat. When the pattern became clear, the primate overwhelmingly chose the green token. What is most interesting is de Waal’s finding that even though there is a common belief that primates are wired for aggression and competition, they actually show a clear predilection to live cooperatively and harmoniously even to the point that male

26 Gladwell, M., Blink [Little Brown 2005]. A video in which Gladwell discusses his research can be found at http://www.youtube.com/watch?feature=player_embedded&v=3TRioBkpUwY.  
27 Sinek, S. StartWithWhy: How Great Leaders Inspire Everyone to Take Action. (Penguin Books 2009). It demonstrates the prescience of Socrates who said that humans were social animals possessing the capacity for reasoning.  
28 It is true for chimpanzees and elephants. Studies continue when it comes to other mammals. See: ftn 19.  
primates, if they do fight, hug and kiss once their spat is over. In other words, whatever the provocation, their anger does not linger indefinitely.\textsuperscript{30}

Another area of research that serves to inform our discussion is provided by the Institute for Positive Psychology at the University of Pennsylvania.\textsuperscript{31} Their findings reveal three origins of human happiness: pleasure, flow or engagement (what Plato called “eudaemonia”), and selfless service to others (exemplified by Mother Teresa). Of the three, research shows that the greatest among them when it comes to feeling a sense of sustained positive emotion is service to others (“living the meaningful life”).\textsuperscript{32}

A final area of research informing our discussion comes from behavioral economics and the work of Dan Ariely, formerly of MIT and presently on the faculty of Duke University as the James B. Duke Professor of Psychology and Behavioral Economics, with appointment at the Fuqua School of Business, the Center for Cognitive Neuroscience, the Department of Economics, and the School of Medicine. He has earned doctorates in both cognitive psychology and in business administration. His most recent book is entitled, “The (Honest) Truth About Dishonesty: How We Lie To Everyone—Especially Ourselves.”\textsuperscript{33} Among his many findings is the importance of our memory and awareness of moral codes. He stated:

…I ran an experiment at the University of California, Los Angeles (UCLA). We took a group of 450 participants and split them into two groups. We asked half of them to contemplate the Ten Commandments and then tempted them to cheat on a [task]. We asked the other half to try to recall ten books they had read in high school before setting them loose on the [task] with the opportunity to cheat. Among the group who recalled the ten books, we saw the typical widespread but moderate cheating. On the other hand, in the group that was asked to recall the Ten Commandments, we observed no cheating whatsoever. And that was despite the fact that no one in the group was able to recall all ten.\textsuperscript{34}

In a separate experiment, Ariely studied the effects of university honor codes on cheating. Princeton University has an honor code that is rigorously drilled into incoming freshmen before the beginning of classes. Ariely wished to know if such training stuck or not. Waiting two weeks from their immersion in the honor code, he asked them to do a task with the opportunity for cheating. Were the freshmen honest? His findings follow:

\begin{itemize}
  \item \textsuperscript{30} A video by de Waal discussing his findings can be seen at <http://www.youtube.com/watch?v=GcJxRqTs5nk>. Also see: de Waal, F. The Bonobo and the Atheist: In Search of Humanism Among the Primates. (Norton 2013).
  \item \textsuperscript{31} Their website can be located at http://authenticity.org.
  \item \textsuperscript{32} Dr. Martin Seligman directs the Institute. A video discussing his work and findings can be seen at <http://www.ted.com/talks/martin_seligman_on_the_state_of_psychology.html>.
  \item \textsuperscript{33} Harper, 2012.
  \item \textsuperscript{34} Id., 39-40. Ariely goes on to say that even self-declared atheists adhered to the straight and narrow when asked to recall the Ten Commandments before beginning the tasks.
\end{itemize}
Sadly, they were not. When the Princeton students were asked to sign the honor code, they did not cheat at all (but neither did the MIT or Yale students). However, when they were not asked to sign the honor code, they cheated just as much as their counterparts at MIT and Yale. It seems that the crash course, the propaganda on morality, and the existence of the honor code did not have a lasting influence on the moral fiber of the Princetonians.\textsuperscript{35}

It is clear that technology has had a tremendous impact on what we now know about human behavior and human decision-making. It is also clear that our capacities for thinking and deciding involve the entire brain and not just what we commonly think of as neo-cortex or that part of the brain enabling logical thought. Finally, it is furthermore true that we, as mammals, share certain behavioral commonalities when it comes to our empathic nature and our soft-wired (evolution) or hardwired (design) need to be or feel responsive to others.

**TheUniversalNatureof OurBelief In “DoingUntoOthers”**

It would be possible to argue the universality of what Christians call the “Golden Rule” to the essential effect that you should treat others as you would like to be treated by scouring history of all religions and philosophies both ancient and modern. However, since legal secularism in the context of the Establishment Clause has to do with religion or its absence from state mandated activities, a compelling case could be made for its universal nature simply by exploring what atheism in the guise of humanism\textsuperscript{36} believes when it comes to a person’s treatment of his or her fellow man. For instance, Walter’s work claims the Golden Rule as a humanist principle and identifies it as empathy for other people, including those who may be very different from us. It sees empathy as the root cause of our ability to exhibit kindness, compassion, understanding and respect. It further has to do with our ability to try to avoid suffering in others given our own ability to recognize what would cause suffering in us. It should be acknowledged, however, that Greg M. Epstein, a humanist chaplain at Harvard University, while acknowledging the universal acceptance of the Golden Rule principle, feels that no single statement of it necessarily assumes the existence of a God.\textsuperscript{37}

\textsuperscript{35} Id., 43.

\textsuperscript{36} Humanism is a group of philosophies and ethical perspectives, which emphasize the value and agency of human beings, individually and collectively, and generally prefers individual thought and evidence [rationalism, empiricism] over established doctrine or faith. See: Nicolas Walter’s Humanism—What in the Word [London: Rationalist Press Association, 1997 ISBN 0-301-97001-7].

The Pedagogical Value in the Parable of the Good Samaritan

The Parable of the Good Samaritan begins when an expert in the law approaches Jesus and asks, “Teacher…what must I do to inherit eternal life?” Jesus replies, “What is written in the law?” to which the expert replies in pertinent part, “Love your neighbor as yourself.” Upon acknowledging the correctness of his response, Jesus then tells him, “Do this and you shall live.” But the expert was yet not done. He asked Jesus, “And who is my neighbor?” It is at this point that Jesus begins the Parable.

The following points give the Parable tremendous value from a pedagogical standpoint. First, we know nothing of the character or social class of the person assailed. Secondly, the first two persons coming upon the person attacked, a Priest and a Levite, were both persons of a higher class in society. Upon seeing the injured person, each chose to pass by him. Thirdly, they did not just pass by him but “passed by on the other side,” and thereby removed themselves from close proximity to him. When the Good Samaritan came upon him, “he took pity on him…he went to him and bandaged his wounds, pouring oil and wine,” all of which would have required him to be in physical contact with the victim. He then took him to an innkeeper and said he would return to pay for his lodging. When asked who among the three “was a neighbor to the man who fell into the hands of the robber,” the expert replied (sheepishly one would assume), “The one who had mercy on him.”

The pedagogical value of the Parable lies in the reticence of people to get involved in the plight of others. It also lies in the statement that the Priest and the Levite both chose to physically distance themselves from the assailed person, basically so as not to dirty or inconvenience themselves by coming to his aid. Finally, when confronted with the reality of the situation and then confronted with the need to address the answer to his own question to Jesus, (namely, who is my neighbor?) the expert was compelled to move outside of his own selfish concern and deal with the misery around him. For him, it may have been an epiphany of sorts and perhaps redefined for him his connection to humanity.

Conclusion

Peter Senge, in his book, “The Necessary Revolution: How Individuals and Organizations Are Working Together to Create a Sustainable World,” includes a chapter entitled, “Life Beyond the Bubble.” What a wonderful metaphor when it comes to helping students realize their connection to society and the needs of others! Business

38 All quoted verse is taken from the New International Version (NIV), Luke 10: 25- 37.
39 Leviticus 19:18.
Schools notoriously focus students along the lines of narrow self-interest and their own personal and professional development. Little attention is given, however, to their future happiness and the predicates that will enable it. What the Parable of the Good Samaritan does to help open the minds of young business students is present a possible avenue to happiness through what Seligman describes as a "life of meaning", a life of service to others and the positive emotion that comes with it. The genius of the Parable is the recognition, two millennia ago, of the power of empathy to help people move beyond the bubble of their own self-interest and, in so doing, provide a source of genuine happiness as a concomitant feature of their service and concern for others (albeit their customers, suppliers, or the larger community).
EMPLOYEE ACCESS “WITHOUT AUTHORIZATION” UNDER THE COMPUTER FRAUD AND ABUSE ACT: A CASE STUDY

Michelle Evans*

Introduction

Portable equipment, such as laptop computers, flash drives, portable hard drives and smart phones, can improve employee productivity in the modern workplace.1 Coupled with internet access, this equipment also allows the employee to work off site while still permitting access to the employer’s computer network.2 Unfortunately, this technology also makes it incredibly easy for an employee to take information from the company’s computer system.3 If this occurs, the company may have a claim against the employee under the Computer Fraud and Abuse Act (CFAA).4

Under the CFAA, a civil remedy may be available to the employer if the employee accessed the computer “without authorization.”5 However, there is currently a split among federal courts on the definition of “without authorization,” specifically whether an employee, who was given permission to access the employer’s computer system as part of the employment arrangement, falls within this definition when the employee accesses the information for an improper purpose, such as to misappropriate the information.6

Stating a claim under the CFAA for access “without authorization” can be tricky for the employer though. And while a number of articles address the statute and existing case law, there do not appear to be any case studies discussing the CFAA that can be used in the classroom to instruct future business owners.7 This article provides such a case study along with a discussion

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1 See Judith Gebauer & Michael J. Shaw, Success Factors and Impacts of Mobile Business Applications: Results from a Mobile e-Procurement Study, 8 INT’L J. ELEC. COM. 19 (2004).
4 This is not the only cause of action that would be available to the employer. For instance, the employer may also pursue a cause of action for misappropriation of trade secrets, if the information rises to the level of trade secret protection. For articles discussing misappropriation of trade secrets, see generally Janell M. Kurtz & Drue K. Schuler, Competitive Intelligence at Proctor & Gamble: A Case Study in Trade Secrets, 21 J. LEGAL STUD. EDUC. 109 (2003); Kurt M. Saunders, The Law and Ethics of Trade Secrets: A Case Study, 42 CAL. W. L. REV. 209 (2006).
7 For further discussion of the Computer Fraud and Abuse Act, see generally Molly Eichten, Survey of Computer Fraud and Abuse Cases, 67 BUS. LAW. 321 (2011); Michael R. Levinson &
about the nuances of the statute and how it is treated in different jurisdictions. To explain these nuances, this article will begin with the case study in Part I. This case study will be used to introduce the current state of the law concerning employee access to information “without authorization” under the CFAA. It will attempt to clarify the underlying circumstances that may permit an employer to properly state a claim for recovery in each jurisdiction. Teaching objectives for the case study are found in Part II. Part III is a teaching note on the CFAA with emphasis on the specific sections typically asserted against former employees for accessing information from the computer system “without authorization” along with a comparison of case law interpreting the phrase “without authorization” under the statute. This part provides suggested answers to the discussion questions to illustrate the application of the law to the facts in the case study.

I. A Case Study on the CFAA with Discussion Questions

Harper, Miller, & Associates, Inc., a graphic design firm, has been in business for twenty years. The company currently employs forty-two people. In the course of the company’s twenty years of business, Harper, Miller, & Associates, Inc., spent a considerable amount of money perfecting the originality of its graphic designs. As a result, the company developed a reputation as a good company that offers unique designs at fair prices. It was this reputation that led Candice Jones to apply for a position at the company. She was hired by the company as a Designer I right out of college five years ago.

When Ms. Jones was hired she signed an employment agreement that stated, in part: Candice Jones shall not divulge or communicate to any person (other than those whose province it is to know the same or with proper authority) any of the trade secrets or other confidential information of Harper, Miller, & Associates, Inc., its subsidiaries and/or affiliated companies which she may (whether heretofore or hereafter) have received or obtained during the course of this Agreement with Harper, Miller, & Associates, Inc. This restriction shall continue to apply after the termination of this Agreement without limit in point of time but shall cease to apply to information or knowledge which may come into the public domain. Further, Ms. Jones recognizes and agrees that certain messages and materials simply must not be sent or accessed on company equipment or through company systems, these include materials accessed for personal gain.

Ms. Jones recognizes and agrees that she has received or will receive special knowledge through this relationship with Harper, Miller, & Associates, Inc. Ms. Jones further recognizes and agrees that this industry in which Harper, Miller, & Associates, Inc. is engaged is extremely competitive and Harper, Miller, & Associates, Inc. would suffer irreparable harm if Ms. Jones were to engage in activities directly in competition with Harper, Miller, & Associates, Inc. In consideration of this Agreement and the valuable knowledge provided or to be provided to Ms. Jones by Harper, Miller, & Associates, Inc., Ms. Jones agrees that for a reasonable period, deemed by the parties to be five (5) years, after the termination of the Agreement for any reason, Ms. Jones will not engage in any business in direct competition with Harper, Miller, & Associates, Inc. in the United States of America. It is further understood that Harper, Miller, & Associates, Inc.’s designs are

marketed and distributed nationwide, and it is specifically understood and agreed that the geographic restrictions above are reasonable and necessary to protect the business and interests of Harper, Miller, & Associates, Inc.

At the time that Ms. Jones was hired, Harper, Miller, & Associates, Inc. and others in the design industry were seeking to devise a new graphic design software program with novel features not available in existing programs. At the time of her employment Ms. Jones had no special expertise in computer programming, but she played an important role in using her skills as a graphic designer to assist the computer programmer in developing the new software. Ms. Jones also acted as the primary beta tester for the program during its development, the data from which was used to further improve the program. The program was completed late last year. The company opted to only use the software in house rather than release it to the marketplace. This gave the company a significant competitive advantage and resulted in the development of several new clients. Because of her contribution to this project, Ms. Jones was promoted to Lead Graphic Designer and received a higher security clearance to the company computer system.

At the beginning of this year, however, Ms. Jones gave two weeks’ notice that she was leaving the company. Ms. Jones attended an exit interview on her final day of employment. During this meeting, she was asked to return all of her computer disks, flash drives, portable hard drives, papers, supplies, laptop computer, and keys that belonged to the company; however, she did not return her laptop until three weeks later. She was presented with her employment agreement and asked to read it again and confirm that she understood her continuing obligations. A forwarding address was obtained for the file.

Later the company learned that Ms. Jones had left Harper, Miller, & Associates, Inc.’s employ to become Lead Graphic Designer with Jessup and Sons, LLC, a software development company. Jessup and Sons, LLC released a graphic design software program strikingly similar to that of Harper, Miller, & Associates, Inc. only a few months after Ms. Jones started employment. A forensic investigation of the computer system revealed that Ms. Jones had downloaded a significant amount of information from the system on her last day on the job, including sketches, blueprint drawings, estimates of hours necessary to do certain work, a price sheet for design estimates, customer lists, and the new graphic design software program. A more detailed review revealed that numerous customer entries had been deleted by Ms. Jones, as had several templates within the software program. These deletions occurred on Ms. Jones’ last day of employment.

Because the design software program incorporated so many novel features, Harper, Miller, & Associates, Inc. is convinced that Ms. Jones disclosed the information she downloaded from the company to Jessup and Sons, LLC in exchange for her new job position. Harper, Miller, & Associates, Inc. filed a lawsuit against Candice Jones seeking damages under the Computer Fraud and Abuse Act for accessing the computer system without authorization and damaging some of the data therein. In order to succeed on this claim, Harper, Miller, & Associates, Inc. must show that Ms. Jones did not have authorization.

Discussion Questions
A. What is the CFAA and how does it apply to this case study?
B. Discuss the factors that a court considers to determine whether liability under the statute exists in a broad view jurisdiction and decide who should prevail.
C. Discuss the factors that a court considers to determine whether liability under the statute exists in a narrow view jurisdiction and decide who should prevail.
D. Discuss whether your answer to Question C changes if the employee accessed the computer system after employment.

E. Discuss whether the language of the employment agreement has any impact on the court’s determination of liability in a narrow view jurisdiction.

F. What should the employer do to better protect itself in a narrow view jurisdiction when an employee is given access to the computer system during employment?

II. Teaching Objective and Use of the Case Study

The present case study and discussion questions are used to help students (1) understand the nuances of the Computer Fraud and Abuse Act; (2) think like business owners trying to protect information in their computer systems; (3) develop critical thinking and problem-solving skills as they discuss whether Harper, Miller, & Associates, Inc. has a cause of action under the Computer Fraud and Abuse Act; (4) enhance decision-making skills as they decide whether the employee accessed the information “without authorization” and (5) develop clear and effective communication skills as they discuss the various issues.

It can be used in both undergraduate and graduate business law courses designed to introduce students to “real world” issues, such as Business Law, Business Ethics, and Business in its Legal Environment. The case study is used by this author in a graduate Business Organizations course designed to introduce students to different business entities and their legal concerns. In this course, the case study is used to introduce the Computer Fraud and Abuse Act, procedures necessary to protect information within computer systems, employment contracts, and business ethics. The entire discussion concerning this case study was designed to cover one 3-hour session.

Students are provided with the statute and exemplary cases as reading material before the first class. During the class session the entire class is dedicated to discussing whether Harper, Miller, & Associates, Inc. has a viable claim under the Computer Fraud and Abuse Act and the procedures the company could have used to better protect the information from employee theft. The material presented in this article only covers one 3-hour session dedicated to the Computer Fraud and Abuse Act. However, the case study lends itself to several “side” discussions as well. Therefore a second 3-hour session is generally reserved to allow sufficient time to develop discussions about employment contracts as well as in-house procedures to address potential problems with employees in the future. Employment contract analysis is helpful for this part of the discussion, particularly as it relates to interpretation of the phrase “direct competition” in Ms. Jones’ employment contract. In addition, business ethics is discussed during this second session with a particular focus on how the students would apply Blanchard and Peale’s three “ethics check” questions to the employee’s actions. Introducing students to various theories of ethical

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8 For materials that can be used in the classroom to introduce contract issues, see generally Susan M. Denbo, Contracts in the Classroom—Providing Undergraduate Business Students with Important “Real Life” Skills, 22 J. LEGAL STUD. EDUC. 149 (2005); Larry A. Dimatteo & T. Leigh Anenson, Teaching Law and Theory Through Context: Contract Clauses in Legal Studies Education, 24 J. LEGAL STUD. EDUC. 19 (2007).

9 KENNETH BLANCHARD & NORMAN VINCENT PEALE, THE POWER OF ETHICAL MANAGEMENT (1988) (providing three questions to use in analyzing ethical problems: (1) Is it legal? (2) Is it balanced? (3) And how will it make me feel about myself?)
behavior is useful during this portion of the discussion.\textsuperscript{10} They must then apply the theories to the case study.

III. Teaching Note: Assigned Discussion Questions

Students are expected to review the statute and representative cases from each jurisdiction and answer the discussion questions related to the case study before class to prepare for the class discussion. This part presents answers to Discussion Questions A-F.

A. What is the CFAA and how does it apply to this case study?

Harper, Miller, & Associates, Inc. is seeking recovery under the CFAA against Ms. Jones so an introduction to the CFAA is necessary. The Computer Fraud and Abuse Act (CFAA), enacted in 1986, is essentially a criminal statute that punishes unauthorized access to computer systems traditionally considered hacking activities. However, the legislature added a civil cause of action to the statute in 1994.\textsuperscript{11} Since that time the statute has provided an avenue for an employer to bring a claim against a former employee if the former employee accessed information from or caused damage to the company’s “protected computer.”\textsuperscript{12} In many cases, the claims for access only and access to cause damage are combined because employees who take information may also want to cover their tracks by removing all signs that they took the information. This may cause them to directly delete the information or install software programs, such as drive scrubbers, to erase their tracks.

There are several possible claims available for a civil action under the CFAA and more than one claim can be brought in a case. Wrongful acts are addressed in Section 1030(a) of the statute.\textsuperscript{13} These wrongful acts are divided into acts committed intentionally and those committed knowingly.\textsuperscript{14} There are five sections that address intentional acts, but there are only three that have been used in cases of access “without authorization” brought against former employees.\textsuperscript{15} These sections focus on access simply to obtain information (Section 1030(a)(2)) as well as access to cause damage (Sections 1030(5)(B) and 1030(5)(C)).

\textsuperscript{10} For further discussion of business ethics in the curriculum, see generally Andrew Crane & Dirk Matten, Questioning the Domain of the Business Ethics Curriculum, 54 J. BUS. ETHICS 357 (2004); Edward L. Felton & Ronald R. Sims, Teaching Business Ethics: Targeted Outputs, 60 J. BUS. ETHICS 377 (2005); Murray S. Levin, Reflections on Enhancing the Understanding of Law Through Ethical Analysis, 27 J. LEGAL STUD. EDUC. 247 (2010); Daniel T. Ostash & Stephen E. Loeb, Teaching Corporate Social Responsibility in Business Law and Business Ethics Classrooms, 20 J. LEGAL STUD. EDUC. 61 (2002); Ronald R. Sims & Edward L. Felton, Jr., Designing and Delivering Business Ethics Teaching and Learning, 63 J. BUS. ETHICS 297 (2006).

\textsuperscript{11} See 18 U.S.C. § 1030(g) (2011).

\textsuperscript{12} The broadest definition of “protected computer,” found in Section 1030(e)(2)(B) of the statute, is “a computer which is used in or affecting interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States.”


\textsuperscript{14} A person acts “intentionally” if he desires to cause the consequences of his act or he believes consequences are substantially certain to result. In contrast, a person acts “knowingly” when he acts with awareness of the nature of his conduct.” BLACK’S LAW DICTIONARY 810, 872 (6th ed. 1990).

\textsuperscript{15} Sections 1030(a)(2), (a)(3), (a)(5)(B), (a)(5)(C), and (a)(7) address intentional acts.
In addition to the sections discussed above which deal with intentional acts, the statute also addresses acts committed knowingly in four sections. The sections commonly alleged against former employees in cases involving access “without authorization” under the CFAA focus on knowing access to obtain information (Section 1030(a)(4)) and knowing access to cause damage (Section 1030(a)(5)(A)).

In the case study, Ms. Jones accessed the computer system to download information and caused damage to the computer system by deleting customer entries and several templates within the custom graphic design software program. Therefore, each of the CFAA sections discussed above could apply to our case study. However, a question still remains as to whether her access and the damage she caused were authorized. Unfortunately, the statute provides no definition for “without authorization.” As a result, there is a split in the circuits concerning what constitutes “without authorization.” There is both a broad view, which applies agency-based interpretation, and a narrow view, which applies a code based interpretation so further analysis beyond the statute is necessary.

B. Discuss the factors that a court considers to determine whether liability under the statute exists in a broad view jurisdiction and decide who should prevail.

Harper, Miller, & Associates, Inc. will likely prevail in a broad view jurisdiction. The broad view approach, adopted by a minority of courts, assumes that the employee acts “without authorization” if the employee does something against the employer’s interest. This view specifically argues that whenever the employee acquires an interest adverse to the employer, without the employer’s knowledge, or is guilty of a serious breach of loyalty then the employee acts “without authorization.” This view is said to rely on an agency-based interpretation because of its reliance on agency law concepts.

In 2006, when the reasoning behind the broad agency-based view was adopted by the Seventh Circuit in *Int’l Airport Ctrs., LLC v. Citrin*, the broad view began to be regularly discussed in cases interpreting the definition of “without authorization.” In *Citrin*, a former employer brought action against a former employee alleging violation of former Section 1030(a)(5)(A)(i) of the CFAA, concerning access to cause damage. The employer alleged that the employee decided to quit employment and go into business for himself in breach of his employment contract. Furthermore, he deleted all the data contained in the company laptop he had in his possession by installing a secure erasure program designed to overwrite deleted files to prevent recovery. Even though the employee had been given authorization by the employer to access the computer during employment, the court reasoned that deciding to quit in violation of his employment agreement and destroying company files to prevent incrimination was a breach of the duty of loyalty imposed on employees. This breach terminated the agency relationship

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16 Sections 1030(a)(1), (a)(4), (a)(5)(A), and (a)(6) of the CFAA cover these actions.
19 *Id.* at 419.
20 *Id.*
21 *Id.*
22 *Id.*
23 *Id.* at 421.
with the employer and therefore terminated his authority to access the laptop. The court determined Section 112 of the Restatement (Second) of Agency applied. Specifically, “unless otherwise agreed, the authority of an agent terminates if, without knowledge of the principal, he acquires adverse interests or if he is otherwise guilty of a serious breach of loyalty to the principal.” As a result, the court reversed the trial court’s decision in favor of the employee and remanded. Since the Citrin case is binding appellate authority in the Seventh Circuit, district courts within that Circuit have also followed the broad view approach with each case finding in favor of the employer because of the employee’s breach of loyalty even with distinctly different facts from those of Citrin. The Citrin case is currently the leading case used by employers to argue in favor of the broad view in other jurisdictions that have yet to adopt a standard.

Along with the Seventh Circuit, district courts in the First Circuit have applied the broad view; however not all results are in favor of the employer. For example, the district court for the district of New Hampshire in the case of Nucor Steel Marion, Inc. v. Mauer, made it clear that the employee must do something while he or she is employed that would constitute a breach of loyalty before authorization will be considered terminated. In this case, the employee did access the computer system and take information while still employed. However, the employee did not do anything that would have terminated his authorization to access the employer’s data, such as contact the competitor, transmit data to a competitor, or actively make plans to compete with the employer while still employed. Therefore the court granted the employee’s motion to dismiss for the employer’s failure to state a claim for the CFAA action.

Using the reasoning put forth in the broad view cases, it seems clear that there is very little Harper, Miller, & Associates, Inc. will need to do to properly state a claim under the CFAA.

24 Id.
25 Id.
26 Id.
27 Id.
28 See, e.g., LKQ Corp. v. Thrasher, 785 F. Supp. 2d 737 (N.D. Ill. 2011) (denying an employee’s motion to dismiss for failure to state a claim under Section 1030(a)(2) of the CFAA stating that the employer’s allegation of breach of fiduciary duty is sufficient); Dental Health Prods., Inc. v. Ringo, No. 08-C-1039, 2011 U.S. Dist LEXIS 95802 (E.D. Wis. Aug. 24, 2011) (granting the former employer’s motion for summary judgment under the CFAA reasoning that once the employee had determined to leave the company and decided to get a copy of the employer’s hard drive, the employee’s authorization to access ended because he had violated his duty of loyalty).
31 Id. at *2.
32 Id. at *4.
33 Id. at *5.
against Ms. Jones for access “without authorization” as long as Harper, Miller, & Associates, Inc. can show that Ms. Jones’ actions were adverse to that of Harper, Miller, & Associates, Inc.’s interests, taking care to show that Ms. Jones did more than the employee in the Nucor Steel case.34

C. Discuss the factors that a court considers to determine whether liability under the statute exists in a narrow view jurisdiction and decide who should prevail.

The narrow view, adopted by the majority of courts, argues that “without authorization” only applies to conduct of those outside the company who have no permission to access the company’s computer. Under this view if the employee was ever given authorization to access the computer system at all then the employee did not act “without authorization” even if he or she accessed the information for an improper purpose. Access “without authorization” only occurs when the employee bypasses the security protocols designed to restrict access.35 Therefore, Harper, Miller, & Associates, Inc. will only be successful in this jurisdiction if it can be shown that Ms. Jones gained access in this manner. Given that she had special security clearance, this is probably unlikely. This view applies a code-based interpretation because of its strict application of the statutory language to the actual access of a computer system.36

In 2009 the Ninth Circuit specifically adopted the narrow view in LVRC Holdings LLC v. Brekka, which became the leading case used by employees in response to actions filed by their employers under the CFAA.37 In Brekka, LVRC Holdings LLC brought action against its former employee Brekka alleging intentional and knowing access “without authorization” to obtain information under the CFAA.38 The employee filed a motion for summary judgment on the issue of authorization which was granted by the trial court.39 The employer appealed arguing that the trial court erred in assuming that if the employee’s access occurred during the term of his employment that he was “authorized” for purposes of the CFAA.40 The Ninth Circuit affirmed the trial court’s decision.41 The court reasoned that there was no language in the CFAA that supported the employer’s argument that the employee’s authorization ceased when the employee used the computer contrary to the employer’s interest.42 Furthermore, the court noted, “it is the employer’s decision to allow or to terminate an employee’s authorization to access a computer that determines whether the employee is with or ‘without authorization’.43 Since there was no dispute that the employee had permission to access the computer, the employee did not act “without authorization.”44

37 LVRC Holdings LLC v. Brekka, 581 F.3d 1127 (9th Cir. 2009).
38 Id. at 1129.
39 Id.
40 Id. at 1132.
41 Id. at 1129.
42 Id. at 1133.
43 Id.
44 Id.
Because Brekka is binding appellate authority in the Ninth Circuit, district courts within that Circuit have also followed the narrow view approach. The Brekka case is also the leading case used by employees to argue in favor of the narrow view in other jurisdictions that have yet to adopt a standard. Although most cases that adopt the narrow view find for the employee, one of these cases is particularly noteworthy because it presents an extreme set of facts that may lead to liability for the employee even in a narrow view jurisdiction. This is specifically the situation where the employee acts as a corporate spy. Currently, district courts in the Third, Fourth, Sixth, Eleventh, and D. C. Circuits have clearly adopted the narrow view with the majority of the cases in favor of the employee. D. Discuss whether your answer to Question C changes if the employee accessed the computer system after employment.

It is clear that the Brekka reasoning and the code-based interpretation does not apply when an employee accesses the former employer’s computer after terminating employment. Therefore, if Harper, Miller, & Associates, Inc. is able to establish that Ms. Jones accessed the computer system after termination of employment, then the company will be successful in a narrow, code-based jurisdiction. This would include accessing her laptop computer after her last day of employment since she held onto it for three weeks. In Vurv Tech. LLC v. Kenexa Corp, the court found that the employer did state a claim for relief under the CFAA for actions after employment.

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46 Starwood Hotels v. Resorts Worldwide, Inc. v. Hilton Hotels Corp, No. 09 Civ. 3862(SCR), 2010 U.S. Dist. LEXIS 71436 (S.D.N.Y. June 16, 2010) (denying the former employees’ motion to dismiss for failure to state a claim under Sections 1030(a)(2)(C) and (a)(4) of the CFAA on the issue of “without authorization” even though the employees were fully authorized to access their employer’s computers and electronic information where the former employees accessed the information after they were co-employed by their new employer, their current employer’s direct competitor, and therefore accessed the information with the intent of transferring it to their new employer).
47 See, e.g., Grant Mfg. & Alloying, Inc. v. McIlvain, No. 10-1029, 2011 WL 4467767 (E.D. Pa. Sept. 23, 2011) (finding the employees were given permission to access the employer’s computer system and were permitted to mark records for deletion); Oce N. Am., Inc. v. MCS Servs., Inc., 748 F. Supp. 2d 481 (D. Md. 2010) (finding the employer permitted the employee to use its software); Lewis-Burke Associa. LLC v. Widder, 725 F. Supp. 2d 187 (D. D.C. 2010) (finding the employee was authorized to access the information while he was employed even though some of the access occurred on the employee’s last day of employment); Clarity Servs., Inc. v. Barney, 698 F. Supp. 2d 1309 (M.D. Fla. 2010) (finding for the employee where the employee resigned on September 30, 2008, the employer did not suspend the email account until October 3, 2008, and the employer presented no evidence that the employee accessed the email after October 3); ReMedPar, Inc. v AllParts Med., LLC, 683 F. Supp. 2d 605 (M.D. Tenn. 2010) (finding the employee was authorized to access all aspects of the alleged application while he worked for the employer).
committed by the employee after termination of employment.\footnote{Vurv Tech. LLC v. Kenexa Corp., No. 1:08-cv-3442-WSD, 2009 WL 2171042 (N.D. Ga. July 20, 2009).} In this case, the Northern District of Georgia was confronted with a claim by the employer, Vurv Technology LLC against its employees Clements and Swearingen under the CFAA.\footnote{Id. at *2.} The employees filed a motion to dismiss for failure to state a claim which was denied by the court.\footnote{Id. at *6.} The court did not deny the motion based on the employees access of the employer’s information during their employment because that was not restricted.\footnote{Id. at *7.} However, because the employees accessed the employer’s computers that had been issued to them and copied confidential information after terminating employment, the court found the employer had stated a claim.\footnote{Id. at *8.} In addition to Vurv Tech. LLC, at least one case has suggested that an inference of access can be made when the employee maintains possession of a company computer after termination.\footnote{SBM Site Servs., LLC v. Garrett, No. 10-cv-00385-WJM-BNB, 2012 WL 628619, *5 (D. Colo. Feb. 27, 2012).} Under this reasoning, Harper, Miller, & Associates, Inc. need only show that Ms. Jones maintained possession of the company’s laptop computer after termination of employment in order to state a claim.

E. Discuss whether the language of the employment agreement has any impact on the court’s determination of liability in a narrow view jurisdiction.

It is also clear that a properly worded agreement may be sufficient for Harper, Miller, & Associates, Inc. to overcome a narrow view argument. A case from the Eastern District of Texas, while not adopting either the broad or narrow view, suggests a way for Harper, Miller, & Associates, Inc. to be successful in a narrow view jurisdiction even where Ms. Jones accessed the system during employment. This argument introduces a third potential interpretation, that of contract-based interpretation.\footnote{See Katherine Mesenbring Field, Note, Agency, Code, or Contract: Determining Employee’s Authorization under the Computer Fraud and Abuse Act, 107 MICH. L. REV.819 (2009).} Under this analysis, the employee must violate a contract before his or her access is “without authorization.” In order for the contract-based interpretation to be used successfully in a narrow code-based jurisdiction, the language of the contract must specifically restrict access, rather than simply use, of the information. The cases are clear that limiting use alone will not suffice in a narrow view jurisdiction.\footnote{See, e.g., Farmers Bank & Trust, N.A. v. Witthuhn, No. 11-2011-JAR, 2011 WL 4857926 (D. Kan. Oct. 13, 2011) (limiting employee access to information for business reasons was insufficient); WEC Carolina Energy Solutions, LLC v. Miller, No. 0:10-cv-2775-CMC, 2011 WL 379458 (D. S.C. Feb. 3, 2011) (prohibiting employees from “downloading confidential and proprietary information to a personal computer or using any confidential information or trade secrets unless authorized by WEC” did not restrict access); Sloan Fin. Grp., LLC v. Coe, No. 0:09-cv-02659-CMC, 2010 WL 4668341 (D. S.C. Nov. 18, 2010) (prohibiting employees from removing client information from the office or using client information for their personal gain was not effective); Black & Decker (US), Inc. v. Smith, 568 F. Supp. 2d 929, 933 (W.D. Tenn. 2008) (agreeing to “maintain the confidentiality of all information of a confidential, proprietary
In *Hewlett-Packard Co. v. Byd:Sign, Inc.*, the heart of the decision rested with the confidentiality agreements signed by the employees.57 Two of the provisions of the agreement were similar to those seen in typical confidentiality agreements. First, the employees agreed not to disclose any of the employer’s “intellectual property, trade secrets, or confidential information to unauthorized persons.”58 In addition, the employees agreed not to “work for a competitor of any HP division or operation.”59 However, it was a third provision that distinguished this case. In this third provision, the employees agreed that “certain messages and materials simply must not be sent or accessed on HP equipment or through HP systems: these include messages for personal gain.”60 The court stated that the employees had agreed to refrain from disclosing information as well as to refrain from sending or accessing messages on the computer system for personal gain.61 This was considered sufficient to state a claim for relief under the CFAA and the employees’ motion to dismiss was denied.62 This same language was also seen in the employment agreement Ms. Jones executed with Harper, Miller, & Associates, Inc.; therefore, it offers some hope that Harper, Miller, & Associates, Inc. will be successful in a narrow view jurisdiction.

F. What should the employer do to better protect itself in a narrow view jurisdiction when an employee is given access to the computer system during employment?

From a review of the case law it appears that the modern trend is toward adoption of the narrow view definition of “without authorization” under the CFAA. Therefore, employers who hope to maintain a CFAA cause of action for access “without authorization” in the future should take steps to satisfy the restrictions of this view, both with in house security measures and contracts. Since it is clear that termination of employment terminates authorization in narrow view jurisdictions, the employer should focus on ways to limit access while the individual is still employed since this appears to be the greatest obstacle.63

One possible way to limit access is with a confidentiality agreement. However the employer should be careful with the language used in the agreement to limit access such as that used in the *Hewlett-Packard* case rather than limiting the use to which the information is to be

58 *Id.* at *12.
59 *Id.*
60 *Id.*
61 *Id.* at *13.
62 *Id.*
However, prohibiting the employee from accessing ABC information from the server or from accessing the XYZ database may be sufficient language to support a claim under the CFAA if the employee does these prohibited acts.

In addition, limiting the number of employees who are permitted to access the information from the computer may also prove useful. This can be accomplished at the administrative level by limiting network access. The employer can install monitoring software to determine whether anyone outside of this select group of employees has accessed the information. If so, this should support a claim under the CFAA.

Furthermore, the monitoring software can also be used to determine whether anyone within the select group of employees accessed the system for a reason that appears to be adverse to the employer. Electronic mail monitoring may also be used to determine whether any access was adverse to the interests of the employer. If the employer does become aware of any actions by the employee or any other actions that are potentially adverse to the employer, written notice should be provided to the employee terminating authorization to access the computer. Any access beyond the date of the letter should support a claim under the narrow view.

Last, maintaining sensitive company information on a limited number of computers and restricting physical access to those computers to a select group of people could also be helpful. This can be accomplished through the use of controlled access security doors that can be monitored by keypad and/or camera for unauthorized access.

Conclusion

The presented case study gives business law faculty an opportunity to introduce the Computer Fraud and Abuse Act into their courses. The discussion and analysis questions can be

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66 For further discussion of whether an employer should fully disclose monitoring to an employee or maintain secrecy, see generally Mitchell A. Farlee, Disclosure and Secrecy in Employee Monitoring, 22 J. MGMT. ACCT. RES. 187 (2010); Adam Moore, Employee Monitoring and Computer Technology: Evaluative Surveillance v. Privacy, 10 BUS. ETHICS Q. 697 (2000).

used in a class discussion to present the law, but give the law practical application. Students will be encouraged to think like business owners trying to protect information within their own computer systems while considering whether the presented company has a viable claim against its former employee. In addition, forcing students to choose a side and support their position helps them develop the decision making skills which are essential for business owners. Overall the exercise gives students a better opportunity to understand the nuances of the Computer Fraud and Abuse Act should the issue arise in the future.
INTRODUCTION:

Throughout history, both science and technology have been credited with increasing our life span and curing harmful and often times, terminal, diseases. For countless years, pharmaceutical companies have used this science and technology to manufacture and produce drugs that benefit the human population. It has long been the expectation that drug companies will continue to explore new means and discover new science to create new cures to horrible diseases.

Recently, however, these companies have been challenged in a new way, and the future of drug making is now more in question than ever before. In the last 10 to 15 years, pharmaceutical patents have been under fire, and many of these patents have even been disregarded or ignored.\(^1\) Obviously, this upsets the drug makers as their patents are the source of their profits, which as a result have been decreased. With decreased profits comes less money for research, which in turn hinders the ability of pharmaceutical companies to create more lifesaving drugs. Pharmaceutical companies put a lot of money into research and development, and their profits are often times put back into the drug they are releasing. Therefore, their profits are far more important than a retail company or other business.

The ethical issue lies in the fact that several of the countries whose inhabitants need these drugs are too poor to afford them. In the past, drug companies have worked with developing countries to aid in the pricing dilemma.\(^2\) Several drug companies have offered the drugs for a much cheaper price to impoverished countries than fully developed countries. However, countries such as South Africa still claim that these prices have not been reduced enough, and that its citizens are unable to afford drugs that are needed to help control and prevent serious diseases such as HIV and Aids.\(^3\) In addition to this, several middle-income level countries such as China and India have


\(^3\) Id.
started to use compulsory licensing to create generic drugs selling at a much cheaper price to sell to their citizens. While this, in theory, sounds like a great idea, they are violating the patents of the original manufactures of these drugs.\footnote{Pharmaceuticals: A Gathering Storm, THE ECONOMIST, (Jun. 7, 2011), http://www.economist.com/node/9302864?story_id=9302864} This has caused immense tension between the governments of these countries and the pharmaceutical companies that own the drug patents.

This issue has thus become an ongoing battle between the low-income to middle-income level countries and the drug companies that manufacture and patent their drugs, such as Merck and Pfizer, on what obligations the countries have of obeying the patents that have been set in place. Much of the issue lies in the international enforcement of pharmaceutical patents. While several policies and laws have been created to deal with this issue, there often seems to be a loophole, such as compulsory licensing, that the governments of several countries find when justifying their disregard for the pharmaceutical patent. It remains to be seen which party will budge first, and there is a definite possibility that the result could affect millions of people’s lives worldwide.

HISTORY:

The Patent Act of 1952 explains what inventions or creations can actually be patented.\footnote{Schacht, Wendy M., and John R. Thomas. Patent Law and Its Application to the Pharmaceutical Industry: An Examination of the Drug Price Competition and Patent Term Restoration Act of 1984, MD. L. REV 1-44. (2005)} The statute states that anyone who “invents or discovers any new and useful process, machine, manufacture, or any composition of matter, or any new and useful improvement thereof, may obtain a patent therefore, subject to the conditions and requirements of this title.”\footnote{Id.} Most pharmaceutical patents, hereby, fall under the category “composition of matter” as they are combining several elements and chemicals to create a drug. In regards to patent infringement, the Act states “a patentee shall have remedy by civil action for infringement of his patent.”\footnote{35 U.S.C. § 271 (2010)}

While the Patent Act of 1952 did an adequate job of covering patent procedure and enforcement, it soon became clear that the drug industry would need their own set of rules, as the requirements were quite different than most other patents. Throughout the 1900s, drug creation was relatively consistent. However, an amendment made in 1962 known as the Kefauver-Harris Amendment began what was known as the “drug lag.”\footnote{Worthen, Dennis B., American Pharmaceutical Patents From a Historical Perspective, 8.1 IJPC. 36-41 (2004)} It was termed this, due to the fact that it required drug manufacturers to conduct extensive research and provide the large amounts of evidence that the New Drug Application (NDA) required.\footnote{Id.} With the additional time needed to rework the process and conduct new evidence-based research on drugs already on the market, pharmaceutical companies were forced to cover the cost of capital previously spent on research and development. In addition to the time lost due to these increased requirements, the industry also lost time

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further along in the process, as the Federal Drug Administration (FDA) now required additional time to review each new lengthy application. This increased the total time for patent approval and delayed the release of several prominent drugs.

Perhaps the chief reason, however, that this period was known as the “drug lag” is because during the time period of 1950 to 1967, the United States was credited with discovering nearly 50% of the drugs worldwide. However, during the period from 1971 to 1973 (a time of increased regulations), this number fell nearly 50% to 25% of total international drug creation.\textsuperscript{10} It became clear that major reform was needed to restore the United States to the leader in drug innovation.

This change came in the form of The Drug Price Competition and Patent Term Restoration Act of 1984, commonly known as the Waxman-Hatch Act. This act was twofold and was created not only to improve and speed up the drug patent application process, but also to encourage the creation of generic drugs after the patent’s expiration. What this act also allowed was for generic drug firms to challenge patents in the middle of their term.\textsuperscript{11} In essence, the Waxman-Hatch Act attempted to please everyone. It increased the term for patents and made it easier for large drug companies to obtain patents for their products, but it also pleased smaller drug manufacturers by allowing them to compete against the bigger companies by challenging their existing patents or recreating their already patented drug at the end of the parent period. The Act allowed generic drug manufacturers to file an Abbreviated New Drug Agreement (ANDA), which freed them from the responsibility of retesting the drug as long as they proved it, was very similar to the drug already created with an NDA.\textsuperscript{12} In order to attain a successful ANDA, several other requirements were needed to match such as the dosage, active ingredient, labels, and others.\textsuperscript{13}

Perhaps the biggest change brought on by the Waxman-Hatch Act, however, was the offering of market exclusivity. There was a possible 180-day exclusivity period, which was granted to the first generic company to file the ANDA.\textsuperscript{14} During this time, no other ANDAs could be approved, which obviously led to generic companies rushing to gain exclusivity rights. Many felt that this caused companies to rush their products and not be as careful as they should.\textsuperscript{15}

While all of the above laws allow for an efficient and practiced process in the United States, globalization has magnified the issues related pharmaceutical patents in the last 10-15 years. In order to reduce the negative global impact, several countries signed into the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Effective as of January 1, 1995, the TRIPS agreement is the most comprehensive

\textsuperscript{10} Id.
\textsuperscript{12} Worthen, Dennis B., American Pharmaceutical Patents From a Historical Perspective, 8.1 IJPC. 36-41 (2004)
\textsuperscript{13} Id.
\textsuperscript{14} Id.
\textsuperscript{15} Id.
international agreement on intellectual property created and signed to date.\textsuperscript{16} Created by the World Trade Organization, “the TRIPS Agreement introduced global minimum standards for protecting and enforcing nearly all forms of intellectual property rights (IPR), including those for patents. International conventions prior to TRIPS did not specify minimum standards for patents. At the time that negotiations began, over 40 countries in the world did not grant patent protection for pharmaceutical products. The TRIPS Agreement now requires all WTO members, with few exceptions, to adapt their laws to the minimum standards of IPR protection.”\textsuperscript{17}

The Agreement consists of 3 main features: Standards, Enforcement, and Dispute Settlement.\textsuperscript{18} In essence, the agreement seeks to protect patents worldwide and allow innovators to be protected even if their creation or invention is used overseas. As far as pharmaceutical patents are concerned, they aim to do relatively the same as mentioned above, but also include a clause known as compulsory licensing. According to the TRIPS Agreement, “compulsory licensing is when a government allows someone else to produce the patented product or process without the consent of the patent owner. It is one of the flexibilities on patent protection included in the WTO’s agreement on intellectual property.”\textsuperscript{19} This clause has been one of the main causes of dispute as it is too vague to be enforced. Many countries have claimed that they have followed the agreement and that their situation is a “special condition”, whereas patent owners have typically disagreed.

Article 31 of the TRIPS Agreement states “normally the person or company applying for a license has to have tried to negotiate a \textit{voluntary license} with the patent holder on reasonable commercial terms. Only if that fails can a compulsory license be issued, and even when a compulsory license has been issued, the patent owner has to receive payment;” the TRIPS Agreement says “the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization”, but it does not define “adequate remuneration” or “economic value.”\textsuperscript{20} Much is left up to interpretation that should be more clearly defined in the TRIPS Agreement, specifically in regards to compulsory licensing.

\textbf{ISSUE:}

\begin{itemize}
\item \textsuperscript{16} \textit{WTO | Intellectual Property - Overview of TRIPS Agreement, WORLD TRADE ORGANIZATION,} http://www.wto.org/english/tratop_e/trips_e/intel2_e.html (last viewed November 21, 2011)
\item \textsuperscript{17} \textit{WTO and the TRIPS Agreement, WORLD HEALTH ORGANIZATION,} http://www.who.int/medicines/areas/policy/wto_trips/en/index.html (last viewed February 23, 2012)
\item \textsuperscript{18} \textit{WTO | Intellectual Property - Overview of TRIPS Agreement, WORLD TRADE ORGANIZATION,} http://www.wto.org/english/tratop_e/trips_e/intel2_e.html (last viewed November 21, 2011)
\item \textsuperscript{19} \textit{Pharmaceuticals: A Gathering Storm, THE ECONOMIST,} (June 7, 2011), http://www.economist.com/node/9302864?story_id=9302864
\item \textsuperscript{20} \textit{WTO | Intellectual Property - Overview of TRIPS Agreement, WORLD TRADE ORGANIZATION,} http://www.wto.org/english/tratop_e/trips_e/intel2_e.html (last viewed November 21, 2011)
\end{itemize}
The ethical issue at hand is the enforcement of pharmaceutical patents in a global setting. There has been a strong dispute between the drug companies that manufacture and file patents on their drug creations, and the countries that buy or use them. Several countries have argued for the compulsory licensing clause, which would allow them to break the TRIPS Agreement under certain conditions. The TRIPS Agreement clearly states that these special conditions were not designed to harm the patent owner, but help a country in case of a true disaster. Due to the fact that the special conditions clause is not clearly defined, much has been left up to interpretation and speculation. The governments of countries who need medication and the drug companies that create and patent the drugs are in major disagreement over this issue.

A perfect example of this disagreement occurred in Thailand in 2007. As Thailand has grown in population and wealth, their pharmaceutical industry has increased proportionally and there are now several nationally known pharmaceutical companies that are able to make drugs, thus decreasing their dependence on other drug manufacturers worldwide. At the Bio Conference of 2007, the Thai government announced that they planned to overrule, and essentially ignore, the international patent on Efavirenz, an anti-retroviral drug. The patent is owned by Merck, and the Thai government said that they will adopt a Thai pharmaceutical company’s version of the drug that retails for nearly half the price. Thailand is a signed participant of the TRIPS agreement and claims they are not violating any rules due to the compulsory licensing “special” clause. Merck, however, does not consider this to be true, and feels they are being cheated. Not to be scared out of production, Thai pharmaceutical companies have announced that they will be doing the same thing for at least two more drugs, and have lead a small revolution in this matter. Brazil, India, Malaysia, and Kenya have all threatened to follow Thailand’s course of action with Efavirenz.

The concerns from poor countries stem from the fact that countries feel they are being over charged for drugs, and their citizens cannot afford to pay the prices asked by companies such as Merck and feel they have the right to do something about it. Pharmaceutical companies, conversely, argue that they are the rightful owners of the drugs and their prices are fair given the amount of money they have put into research and development of the drug. Because the basic disagreement regarding these issues has not been resolved, several countries are taking matters in their own hands (like Thailand) and are taking on a battle they may not be able to win. While these countries have pharmaceutical companies that can replicate patented drugs, the majority of them are not capable of researching and designing the initial drug as large pharmaceutical companies do. The fear, then, is that companies like Merck will stop developing drugs for countries that do not respect their patents, which could lead to a loss of millions of lives. To ensure that that detrimental end is not realized, organizations across the world are putting together corrective legislation.

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21 Id.
23 Id.
24 Id.
The initial goal of the TRIPS Agreement was for countries to work with the drug companies to negotiate the price before they took actions regarding compulsory licensing.\(^{25}\) Because of the ability to reproduce patented products, this trend of arguing for special consideration and misusing the compulsory licensing clause exists with more middle-income level countries than low-income level countries. This is due to the fact that pharmaceutical companies are more willing to work with low-income level countries to reach a price that is fair and agreeable to all, because they do not have the means and infrastructure to recreate generic drugs. More and more middle-income level countries have created their own pharmaceutical companies and feel that they do not need to pay such exorbitant prices for drugs they can create themselves.\(^{26}\) Although this trend of simple drug duplication could prove to be disastrous to new product development many feel the cycle will end its loop eventually. The reason is that as international generic firms become wealthier, they will be able to afford their own research and development and will create their own patented drugs, and change their views entirely on compulsory licensing with their new and vested interest.

To illustrate, one can look at Ranbaxy, an Indian generic pharmaceutical firm who has come to be known for replicating existing drugs and creating knockoffs. While a previous participant in generic replication, Ranbaxy has recently started a research and development sector of their firm and thus has had a change in corporate policy. To prove their new position in drug creation, a member of their board, Ramesh Adige, was quoted saying, “We do not encourage compulsory licensing. We have 1,100 researchers and invest 7% of our turnover in research and development.”\(^{27}\) He further claims that the company has created several patents and should have drugs on the market in the next two years to help combat malaria. “We are very supportive of intellectual property rights, as innovations must be given their reward,” Adige said.\(^{28}\) As Ranbaxy has moved from an imitator to innovator, they have placed a newfound importance on patents and protecting their inventions.

There has yet to be a solution to the growing problem of international enforcement of pharmaceutical patents. A key aspect of the problem is the compulsory licensing clause, which has been a major point of disagreement. Each side of this argument has just as many proponents as opponents and it will be interesting to see which side prevails and at what cost.

**POSITIONS:**

The stakeholders in this issue are fourfold. They include the large pharmaceutical companies, the governments of the countries breaking patents, the people of the world who need the drugs, and the generic drug firms. Any outcome achieved must consider each perspective, as each party will be greatly impacted.

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\(^{27}\) Id.

\(^{28}\) Id.
The first set of stakeholders are the pharmaceutical companies. These large and highly organized companies feel violated and cheated in regards to their patents. Their argument in this matter is that they pour hundreds of millions of dollars into drug creation to benefit people, and at minimum feel they should be paid the asking price for that effort. The companies argue that if they continue to be “taken advantage of,” the outcome could be a lack of funds for a particular country to cure, prevent or manage disease. The companies argue that charging the asking price is not a privilege, but a right and they need those revenues to continue their “good deeds”. Daniel Vasella, the chairman of Novartis, a large Swiss Pharmaceutical company, says “It is easy to see Big Pharma as a source of evil.” He further states that innovation is key to future life-saving drugs, and that these countries are on the brink of decreasing innovation in this industry.29 The bottom line for these firms is that they need profits to invest in drugs to be innovative and create new life-saving measures. “Without intellectual property there is no innovation,” said Fred Hassan, CEO of Schering-Plough and head of the international pharmaceutical lobby.30

The second set of stakeholders are the governments of countries such as India, Thailand, and China who continue to practice compulsory licensing, thus potentially violating patents of several drugs the people of their countries use. These countries argue that they fall within the “special conditions” clause category as not all people can afford the drugs made by large pharmaceutical companies. If they can make the drug for a fraction of the price, they will take action and recreate the drug, dismissing the patent under the compulsory licensing clause in the TRIPS Agreement. Brazil, for example, broke Merck’s AIDS drug with a compulsory licensing claim based on “abusive pricing.”31 Like Brazil, several other countries claim that the prices are just far too high and cite it as the reason they are justified in breaking the patents of pharmaceutical companies. These countries believe that high costs are a valid special condition and warrant the actions taken by them. Fundamentally, the countries view their obligations to their citizens rather than the pharmaceutical companies. In times of need, they provide for their citizens. The large pharmaceutical companies of the West are a much smaller concern for the governments of these countries.

The third set of stakeholders are the citizens of the world who need these drugs to survive and improve the quality of their life and cure diseases. While they have little to do in the negotiations between their governments and the pharmaceutical companies, the decision and outcome of this issue ultimately affects them most. Certainly this group does not reflect all people that need the drugs, but rather the ones who have trouble affording them. For them, this could be a matter of life and death. Of course neither party involved would like these people to die or suffer over profits or ethics, but it seems to be the unspoken result. Although relevant stakeholders in this issue, the general population has little control over what happens or how the two parties reach an agreement in this important matter.

29 Id.
30 Id.
The final group of stakeholders in this issue are the generic drug companies. It’s hard to argue against the fact that regardless of right or wrong, this group of companies have made exorbitant profits in all of this and have watched their companies grow immensely. One such company is Israel’s Teva, which is one of the world’s largest generic drug companies. In 2009, Teva made more than 8 billion pills, and they account for over 22% of the generic drug pills in the United States. The company has grown so rapidly that in 1990, if one were to have made a $20,000 investment in the company, it would have been worth $1,600,000 in 2009. Furthermore, Teva’s CEO, Shlomo Yanai estimates that the company would attain 20 billion dollars in revenue by 2012. The interesting aspect of this stakeholder group is that when several of these companies face tremendous growth, they begin manufacturing drugs of their own, and applying for patents, and thus become agents against compulsory licensing and for patent protection, as Indian giant Ranbaxy has done. These companies do not feel that they are doing anything wrong, as their governments have authorized them to take these actions.

PROPOSAL:

Diseases do not differentiate between countries of origin and their citizens. The true definition of an equal opportunity agent, they impact and influence every part of the world in the same fashion. Because of this, there is a need for the pharmaceutical industry to address the needs of sick people and evolving diseases on a global basis. However, the need for universality of drugs does not match the international policies and procedures that exist at the present time. While the money invested in finding cures to serious diseases is spent disproportionately in one part of the world, the exploitation of that investment is prevalent in other parts of the world. Developed countries often pay the price of innovation to serve the needs of the people in underdeveloped and developing countries. This aspect, while justifiable, on a humanitarian basis does not make sense on a financial basis. To maintain the financial sanctity of the investments made by the developed countries, it is recommended to address this issue in the form of restructuring the TRIPS Agreement, creating a law to incentivize generic firms to create drugs, and the creation of an international board to enforce the rules.

Every country has unique problems, unique populations, and unique diseases that impact the health of their citizens. A change in the TRIPS agreement should be facilitated to define what the “special conditions” clause and special justifications under which the compulsory licensing clause can be used or exercised. As mentioned above,

33 Id.
34 Id.
several countries have used this clause to break an existing patent, with the understanding that they do indeed qualify. If the clause were defined more clearly, and there were a transparent set of rules on how it can be used, much of the conflict would be eliminated. We believe if a country applies for a compulsory license, they should not be involved in the decision process. In addition, “just compensation” should be defined in the TRIPS agreement and should not be left up to litigation between countries and pharmaceutical companies. Countries should have in writing what can be considered a special condition under which the patent can be violated. These conditions should be set in stone, and not left up to interpretation.

As part of the TRIPS Agreement, there should also be an international board that oversees conflicts between countries and companies. If there is a disagreement, an appeal can be filed to this non-biased, third-party board. This board should have participants from both the countries developing the original drugs, pharmaceutical companies, and the developing and underdeveloped countries as they need the drugs as well. Based upon the details provided for a special condition, an international panel of experts should be permanently established to review the details and make a decision as to what constitutes as a special condition. This decision should not only involve providing permission to break the patent rights, but also to provide a portion of the profits (specific number to be determined by the profitability of the generic) to the company who owns the patent. This would then offset some of the financial burdens a company may experience if their patent is violated.

The panel should also take into consideration the previous history of the country in violating patent laws. Countries with a history of violating patents should be discouraged or disbarred from using this privilege. Companies that are repeat offenders of patent violation should be black listed by this board and monitored very closely. While the absence of an international governing board is obvious, the situation is further complicated by differences in legal policies across the world. The adherents to the intellectual property laws in the United States are very strict and are based on the work done by scientists, whereas the intellectual property laws in other countries are governed by the date of filing. The enforcement of this aspect of our proposal is contingent upon the diversity of the panel. It must contain members from several parties to reach an unbiased, fair conclusion to patent related problems.

Further, it is proposed that any waiver of the patent privilege should be accompanied by a mandatory investment of 20% of revenue in research and development by the companies manufacturing the generic drug. It is expected that this investment would generate more patents by the generic companies themselves, along with cures for additional diseases, thus creating a pathway of benefit for the citizens of the world. The hope in this clause is to create a global community of innovators. Rather than continually imitating existing drugs, the generic firms would be encouraged to become innovators and discover new life saving measures. This would be a big step in solving the problem, as patents would be better respected, because now everyone has patents to protect. All companies that create new drugs are very interested in protecting their inventions. When the generic companies have their own products to protect, they will be less interested in becoming a generic firm and more interested in becoming a large, pharmaceutical company responsible for helping cure the diseases of the world.
The above proposal is beneficial for all of the parties involved. It benefits the large pharmaceutical companies as it more clearly defines the compulsory licensing clause and when it can be used. Also, it creates additional requirements for countries and makes them further justify their need to work around patents, and provides them income, through the mandatory research and development investment if the waiver is approved. Mostly, however, it benefits these large companies in that it ends the legal battles between them and several countries of the world. The proposal lays out a clear process on exercising the compulsory licensing clause and allows for countries requests to be denied.

This proposed solution also benefits the countries of the world. First, it allows them a clear process to request a waiver in the case of a patent. If their claim is legitimate, they are allowed to recreate a drug. This frees the countries from several legal obligations that they may face if they decide to violate a patent in the current system. Perhaps most important, though, is that this proposal provides transparency in the negotiations and dealings with large, pharmaceutical companies. It does not leave anything up to interpretation and allows for a smooth and mutually beneficial exchange.

The people of the world who require these drugs are also greatly benefited. These arrangements would strengthen relationships between governments and pharmaceutical companies, which in turn provides security and stability in a healthy, necessary relationship. In addition, innovation is increased with this proposal, which allows for the creation of new, improved life saving measures worldwide. It decreases the dependency on a select handful of companies that create most of the drugs.

Lastly, this proposal would also benefit the generic drug firms as it enables them to move from imitators to innovators. While they may see a temporary decrease in profits, they can see a long-term growth and profit margin with this proposal. It also vests them in the community of patent developers and gives them a reason to want to follow the patent laws as well. They have the unique opportunity of expanding their businesses into a growing and increasingly important industry.

CONCLUSION:

The issue of pharmaceutical patent enforcement has been a growing concern over the past decade. There has been a constant struggle regarding understanding of the TRIPS Agreement between the governments of the world and the pharmaceutical giants. The fear has always been that innovation will suffer and the ailing citizens of the world will be the victims of this disagreement. With this fear growing in recent years, it is imperative that something is done to clearly define the rules and allow for a mutually beneficial relationship between these two parties.

Our proposal, which calls for a restructuring of the TRIPS Agreement to include a global board, as well as required investment in research and development, is the best solution to the current problem. With more clearly defined rules, and an international board to analyze patent situations, this overly complicated process becomes far more transparent.

It remains to be seen whether the countries of the world will get together and conduct the necessary meetings to restructure their current agreement. In that time, we can be sure to expect further litigation, disagreement, and decreased innovation of a critical industry.
THE TAX MAN COMETH—WILL HE BE FAIR?
A COMPARATIVE ETHICAL ANALYSIS OF PROPOSED TAX REFORMS

Katherine Lopez
Linda Specht

Abstract
Notions of the “fairness” of tax laws are usually based upon wherewithal to pay, with a tax judged as “fair” if the taxpayer is able to pay it. This paper takes an alternate approach, examining the ethical implications of a “True Flat Tax”, a “Modified Flat Tax”, and a proposed “Fair Tax” from the perspectives of two ethical frameworks: utilitarianism (i.e., the fairness of the outcome of the tax) and deontology (i.e., the fairness of the intent of the tax). While the results of the deontology analysis indicate that all three models have ethical worth based on their intention to simplify compliance and create a fair system; and the results of the utilitarian analysis indicate all three models have desirable consequences that include reduction of complexity, compliance costs, and collection costs, the analysis must also consider the utilitarian philosophy that seeks the greatest amount of good for the greatest number of people. Only the Modified Flat Tax proposal has the potential to affect all taxpayers equally after consideration of proportionate sacrifice and marginal utility.

INTRODUCTION
Benjamin Franklin once stated “[i]n this world nothing is certain but death and taxes.” For most of recorded history, people have grumbled about taxes and called for reform, regardless of the model of taxation to which they were subject. Current U.S. taxpayers are no exception.¹ In recent years the topic of tax reform has been debated by politicians and citizens, alike.

Any proposal to reform and simplify the Internal Revenue Code or any other aspect of the taxation process in the United States encounters a political minefield. The degree of polarization in public opinion (and among elected officials) results in one group accusing the other of being

¹ See Harris Interactive Inc., 2009 Survey of U.S. Attitudes on Taxes, Government Spending and Wealth Distribution, http://www.taxfoundation.org/taxdata/show/24585.html (Retrieval Date: May 27, 2012). Harris Interactive® conducted an online survey from February 18-27, 2009 of tax attitudes among U.S. adults (2,002 participated). Federal income taxes were viewed as unfair to some degree by 47% of respondents. Results also indicated that 85% of those responding thought that the current federal income tax is complex, and 82% expressed the opinion that the federal tax system should be changed (42% calling for complete overhaul, 40% calling for major changes). In short, “[p]eople want their taxes simpler, fairer, and lower.” See The World is Not Flat—Making Swiss Accounts Less. . .Swiss, Bloomberg Businessweek, November 6, 2011.
either socialists attacking entrepreneurship or one percenters\(^2\) who are unsympathetic to the plight of the poor and unemployed (and thus, are unpatriotic). Despite this toxic environment, proponents at both ends of the spectrum appear to be seeking a way to move forward in reforming the income tax system to achieve some degree of fundamental fairness. Shapiro describes traditional fears about the nature of a democracy—“that it courts the possibility of majority tyranny and contains an ever-present potential to ride roughshod over whatever justice might be thought to require.”\(^3\) He continues his observation:

> Democratic intuitions play a role in most everyday conceptions of social justice, and theories of justice frequently involve reliance on those intuitions. . . [however] [m]ost people would balk at the suggestion that there is a right answer to the question *what is just?* in the same way that there is an answer to the question *what is the sum of the interior angles of a triangle?*\(^4\)

Ultimately, it would be preferable for a functional system of income taxation that it not only be enforceable by law, but that it would ideally command the same sense of respectful obligation that is accorded the playing of the National Anthem—whereby citizens participate in the protocol regardless of any personal objections to the actions or priorities of the nation’s government. It is unlikely that public perceptions would place income tax obligations on the same footing unless those obligations arise from a system that is perceived as ethical (and just), thus worthy of good faith compliance. The opposite has certainly been found to be the case, as the United Kingdom learned in 1990 with its failed attempt to implement a poll tax that was deemed unfair.\(^5\)

As evidenced by charges made during the most recent presidential elections, a large number of U.S. taxpayers seem to believe that the income taxation system is not a fair one.

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\(^2\) See CNBC, 2012 States With the Most 'One Percenters', [http://www.cnbc.com/id/49524151/States_With_the_Most_039One_Percenters039](http://www.cnbc.com/id/49524151/States_With_the_Most_039One_Percenters039) (Retrieval Date: December 18, 2012) One percenters refers to a person who earns $343,000 or more per year.

\(^3\) See Ian Shapiro, Democratic Justice (Yale University Press, 1999, 4)

\(^4\) See id.

\(^5\) See BBC., 2012 History: Margaret Thatcher, [http://www.bbc.co.uk/history/people/margaret_thatcher#p00y3yd6](http://www.bbc.co.uk/history/people/margaret_thatcher#p00y3yd6) (Retrieval Date: November 23, 2012), see The Guardian., April 13, 1999 Poll Tax is History, [http://www.guardian.co.uk/society/1999/apr/14/guardiansociety supplement4](http://www.guardian.co.uk/society/1999/apr/14/guardiansociety supplement4) (Retrieval Date: November 23, 2012),and see Deadline., April 1, 2009, Remembering the Poll Tax 20 Years On [http://www.deadlinenews.co.uk/2009/04/01/remembering-the-poll-tax-twenty-years-on/](http://www.deadlinenews.co.uk/2009/04/01/remembering-the-poll-tax-twenty-years-on/) (Retrieval Date: November 23, 2012). In early 1990 Margaret Thatcher, then Prime Minister of the United Kingdom, introduced a tax—the Community Charge, more commonly known as the Poll Tax. The local council rates, that were based on property value, were replaced with a flat tax charged on every adult in a household. The tax was seen as unfair to the poor who paid the same amount per person as individuals living in mansions. After the tax was passed, riots and marches ensued across the United Kingdom and a few months after signing the tax into law Margaret Thatcher’s resignation as Prime Minister. In addition, billions of dollars in lost tax revenue resulted from the estimated four million United Kingdom citizens who refused to pay the tax.
Presidential candidate Mitt Romney was not so much criticized for his wealth, but for the fact that he paid a relatively low effective tax rate.\textsuperscript{6}

While this paper would not presume to offer its analysis as the “\textit{right answer to the question what is just?” with respect to income taxation in the United States, it does describe and examine the ethical implications of three alternative proposed reforms to our current tax system, a "True Flat Tax”, a “Modified Flat Tax” and a national sales tax, referred to by its proponents as a “Fair Tax.” In doing so, the paper takes an alternate approach to the “wherewithal” assessment of fairness, instead investigating the three reform proposals from the perspectives of two ethical frameworks: utilitarianism and deontology. The discussion is divided into four sections. The first describes the three types of taxes and presents general guidelines for an ethical analysis. Consideration of the three tax models from a non-consequentialist, deontological perspective will be the subject of the second section. The subsequent section examines the proposed models from a consequentialist, utilitarian approach. The final section summarizes the key issues and presents conclusions with respect to the ethical analyses of the True Flat Tax, the Modified Flat Tax, and the Fair Tax.

\textbf{TAXES AND ETHICAL FRAMEWORKS}

The pure form of flat tax may be defined as a proportional tax on earnings whereby all taxpayers are subject to taxation at the same rate (e.g., 10\% of earnings, with all tax deductions eliminated).\textsuperscript{7} In the United States the term “flat tax” has most commonly been associated with a modified flat tax model proposed in 1985 by Rabushka and Hall.\textsuperscript{8} For the remainder of this

\begin{itemize}
\item \textsuperscript{8} Rabushka and Hall have argued in favor of a proposed model whereby all taxpayers would be taxed at a rate of 19 percent on income earned, after subtracting an allowed exemption designed to reduce the tax burden on lower income households. See Alvin Rabushka & Robert Hall, The Flat Tax (Hoover Institute Press, 1985, rev. vol. 2007). Under a flat tax system, only payments of wages, salaries, and pension benefits would be considered personal income. Income derived from dividends, capital gains, interest, or fringe benefits would not be part of personal income because they would already be taxed at the business level. Furthermore, businesses and individuals would be taxed at the same rate. See generally Michael Keen, et al., The “Flat Tax(es)”: Principles and Evidence (IMF Working Paper, 2006); David Lazarus, The flat tax: It’s simple, alluring But one-size-fits-all idea faces skepticism, too, S. F. Chron., April 11, 2007, at C-1 (available at http://www.sfgate.com).\end{itemize}
paper, “Modified Flat Tax” will refer to that model of the flat tax, which has formed the basis for several recent proposals in Congress. For the “Fair Tax”, we will use the model proposed in H.R.25, introduced in the 112th United States Congress (i.e., 2011).

The ethical frameworks used for analyses of the proposed taxes defined above will be basic forms of deontology and utilitarianism, as they represent opposing ends of the philosophical spectrum and are incorporated to some degree in many other ethical philosophies. Deontology focuses on the intent behind a decision, whereas utilitarianism focuses on the outcome of a decision. Because the two philosophies focus on different parts of the decision process, the analysis is very different under the respective approaches. The deontological focus on the intent of a decision tends to result in a more subjective and broad analysis. By contrast, the utilitarian emphasis on the effects of a decision tends to focus the analysis on relatively tangible and concrete factors. The following section will examine the intents and goals of the Flat Tax, the Modified Flat Tax, and the Fair Tax under the deontological perspective; with the subsequent section examining the potential outcomes of the Flat Tax, the Modified Flat Tax, and the Fair Tax under the utilitarian perspective.

ANALYSIS FROM A DEONTOLOGICAL PERSPECTIVE

Deontology has been described as the science of duty or ethical obligation. It is a non-consequentialist philosophy announced by Immanuel Kant, whereby actions are judged based upon their intent and not upon their results. Thus, the ethical force of an action or proposal is not in its consequences, but in the reason for the action. Furthermore, the deontologist considers only actions performed “from” duty as having ethical worth, with actions performed “according” to duty lacking worth. Kant summarizes the implications of acting from duty by developing a

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10 See Fair Tax Act of 2011, H.R. 25, 112th Cong. (2011). Under this bill, the current federal tax system would be replaced by a national sales tax that would be charged only on new goods and services. There would be no exemptions granted to consumers for purchases of new goods and services. Business to business transactions would not be taxed. To negate the impact of the sales tax on low income families, a rebate, also referred to as a prebate, equal to the national sales tax rate multiplied by the poverty level (according to family size) would be given to all individuals at the beginning of each month. See also Americans for Fair Taxation (May 29, 2012), available at www.fairtax.org and H.R. 25, 112th Cong. (2011).

11 An example may clarify the difference between “from” duty and “according” to duty and illustrate the importance of intent to this philosophy. Consider two shopkeepers who never overcharge their customers. Fearing a reputation for dishonesty, the first shopkeeper always charges customers fairly. She acts honestly because she does not want to
universal maxim, the categorical imperative. Technically, Kant developed three renderings of the categorical imperative. However, the analysis will utilize the following criterion as being the most important consideration for this discussion:

\[\text{Act only in accordance with that maxim through which you can at the same time will that it becomes a universal law.}^{12}\]

Hence, this discussion will consider the appropriateness of each of the tax proposals through the following question: Is the adoption of the proposed model universally desirable? Universal desirability is a broad and subjective criterion, but an analysis of the motives and intent of a proposal may provide the basis for judgment of its merits under the utilitarian philosophy. Because criticisms of the current tax system tend to emphasize its perceived inequities and its complexity, this analysis will center on two intentions that might be universally desirable in a tax structure—fairness and simplicity. This section will first consider the intended fairness of the system. Second, it will consider the intention that the proposed tax’s simplicity ease the burden of compliance.

**Fairness**

The current system of federal income taxation is not viewed as a fair system by many taxpayers. Consequently, a True Flat Tax might be proposed with the intent of creating a more fair system of taxation. A True Flat Tax would be a proportional tax, with a uniform tax rate. Although it is sometimes difficult to distinguish intent from outcome, a deontological analysis must consider the intent only. A review of the historical use of the flat tax is helpful in this regard. The various forms of flat tax described below have been historically viewed as fair and might serve as precedent:

- **The Jewish tithe,**\(^{13}\)

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\(^{13}\) The ancient Jewish tithe was, in effect, a flat-rate production and income tax. Unlike a consumption tax, the original tithe would closely resemble the effects of a flat-rate income tax. Every person in the ancient nation of Israel had to contribute ten percent of all goods produced. Even minuscule herbs such as mint and cumin were expected to be donated for national support. Thus, even people at the lowest levels of production or income contributed to and supported their government.
• The Zakat of Islam, and
• Hong Kong’s system under British rule.

A tax system must be considered fair to win support. Fairness is highly subjective, but the flat tax has a universal appeal of fairness. Such divergent cultures as the ancient Jews, medieval and modern Muslims, and the British subjects of Hong Kong all supported a flat tax system. In fact, Hong Kong’s system was praised for its high compliance rates.

The proponents of the Modified Flat Tax also intend to replace a complex (and often viewed as unfair) U. S. tax system with a more equitable system. The Modified Flat Tax follows many of the same principles as the True Flat Tax, except that it allows individual exemptions that are adjusted for family size. Because the exemption is available to all individuals, regardless of income, the Modified Flat Tax might be deemed to retain an element of intended fairness. Even though allowing an exemption based on family size would seem to introduce an element of unfairness, it would still be considered fair from a deontological perspective because it intends to allow individuals a base amount of tax-free earnings necessary to cover living costs, an amount that would increase proportionally with the number of individuals supported.

Implementing a fair system of taxation has a universal appeal. If a tax system seems fair, more people will legitimize it through participation. Current experience with state sales taxes might provide some insight into the perceived fairness of the third proposed model, the Fair Tax. A sales tax, generally between 4 and 7%, has been successfully implemented in forty-five U.S.

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14 The obligatory zakat of Islam is a flat tax of two and a half percent. The zakat is one of the five pillars of Islam and is left up to the individual, except where Islamic law is enforced as national law. It functions as an accumulated wealth tax levied on money, gold and silver, commercial items. See BBC Religion, http://www.bbc.co.uk/religion/religions/islam/practices/zakat.shtml and http://www.bbc.co.uk/religion/religions/islam/practices/fivepillars.shtml (Retrieval Date: May 29, 2012). The tax has complex exemptions for certain types of property, along with rules on payment and due dates. If the individual does not exceed a minimum amount of wealth, known as a Nisab, no zakat must be paid. However, if the individual meets the required Nisab, then a flat 2.5% on all qualifying income. See Islamicity, http://www.islamicity.com/mosque/zakat/ (Retrieval Date: June 13, 2012).

15 Another example of a widely-supported flat tax was Hong Kong’s system under British rule. It had a successful, simple tax system, with its highest marginal rate at 15 percent. Hong Kong's rapid economic growth was attributed to the low standard tax rates. Although not a True Flat Tax, it was very close, and in the 1950's it had a true 10 percent flat income tax with large personal exemptions. See Alvin Rabushka, The New China (San Francisco, Pacific Research Institute for Public Policy, 1987). It was admired for its simplicity, low rates, and compliance ratio. See Tom Herman, Fewer people, Wall St. J., March 13, 1996, at A-1.

16 This would be true if one considers equality of proportional sacrifice beneficial. See Henry C. Simons, Personal Income Taxation. (Chicago, The University of Chicago, 1938). The intention that taxpayers make a proportional sacrifice would thus be regarded as promoting fairness.
states, without public outcries disputing its fairness. Most of the states provide exemptions from the tax on goods deemed to be necessities of life. These exemptions are universal and are not dependant on level of income. Using the state sales tax as a model to judge fairness, the Fair Tax would be considered fair because it intends to tax all individuals at the same rate on new goods and services purchased and to allow an exemption based on family size for all individuals, regardless of income, in order to eliminate taxation on the amount spent to purchase goods that are necessary for life.

Hence, the intent to promote fairness through use of the True Flat Tax, the Modified Flat Tax, or the Fair Tax systems gives them ethical worth from a deontological perspective. The other universally desirable criterion that has been identified is that of simplicity.

**Simplicity**

In order to be effective, a system of income taxation should be one that encourages compliance. Taxpayers are more likely to comply with a system that is understandable to them. Simplicity helps taxpayers understand the system. The intended benefits of simplification from a True Flat Tax, a Modified Flat Tax, and/or a Fair Tax may include:

- elimination of the complexities of compliance with the current system, (where even seemingly beneficial provisions can cause harm to the unadvised taxpayer), by providing a transparent taxing system;
- enhancement of the average taxpayer’s ability to estimate his/her tax liability without assistance;
- increased control over the amount and timing of tax payments;
- reduction of compliance costs; and

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19 Daniel J. Mitchell, A Brief Guide to the Flat Tax, 1866 Backgrounder (The Heritage Foundation, July 7, 2005). Mitchell’s argument regarding the elimination of complexities through adoption of a flat tax might be extended to include the other two models because of the simplified reporting requirements that are inherent in those models.

20 Less professional assistance would be required under the True Flat Tax, the Modified Flat Tax, and the Fair Tax.

21 Under the Fair Tax, the greater the amount of purchases, the more taxes are paid; the amount is apparent at the time purchases are made. See Americans for Fair Taxation, The FairTax (real reform) vs. the flat tax (more of the same): A comparison, http://www.fairtax.org/PDF/FairTaxvsflattax.pdf (Retrieval Date: May 29, 2012).
Applying Kant’s categorical imperative, one could will the application of the True Flat Tax, the Modified Flat Tax, and the Fair Tax universally because the intent of these taxes is to eliminate misunderstanding and make compliance easier. The intent is to bring simplicity to a complex world. All three taxes have ethical worth because they intend to ease the burden of compliance universally.

Conclusion Based on Deontology

The non-consequentialist philosophy dictates that ethical worth be based on the motives of an action. In direct application to the True Flat Tax, the Modified Flat Tax, and the Fair Tax, the analysis must consider the intent behind the proposed system. All three tax models are judged to have ethical worth based on their intentions of simplifying compliance and making the system fair. Based on those intentions, one could offer either of the three tax plans as a universal law and hope that its consequences follow its good intentions.

ANALYSIS FROM A UTILITARIAN PERSPECTIVE

An application of the utilitarian philosophy to the various tax models must begin by reviewing the general concepts of the philosophy, thus establishing a framework for discussion. The analysis must then proceed from a comparison of the consequences of the current system to the consequences of a True Flat Tax, a Modified Flat Tax, and a Fair Tax.

Utilitarianism is a consequentialist philosophy; one that is very applicable to real-world problems. Jeremy Bentham, one of the first to formulate a comprehensive version of this philosophy, tried to reform English law and institutions along utilitarian lines. Further, Adam Smith applied utility theory to economics, and the theory can be applied to any reform or proposal.

Any ethical evaluation using utilitarianism must examine the consequences of the proposal. Ethical behavior, from this perspective, is not judged on the basis of intention or principle; according to the utilitarian philosophy, an ethical act is one that brings about the greatest amount of good for the greatest number of people.

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22 See id. The argument may be made that reduced complexity will also result in reduced compliance costs for all three proposed tax models.


25 A rather extreme example may help clarify the importance of consequences associated with a utilitarian analysis. For the purposes of illustration, assume that a vicious murder has been committed in the city. Many people are injured or killed in rioting that follows the murder. The police know that the rioting will stop when the perpetrator is arrested. Unable to find the perpetrator, the police decide to tamper with the evidence and to jail an innocent person.
How does this apply to an analysis of a proposed True Flat Tax, Modified Flat Tax, and Fair Tax? First, one must consider the consequences of the taxes from the perspective of their utility. Secondly, the consequences must be reviewed to determine whether the proposed system would bring about the greatest amount of good to the greatest number of taxpayers. Criticisms of the current tax system suggest several potential consequences to consider in evaluating the three proposed models:

- the complexity of the tax structure;
- costs of compliance,
- collection costs, and
- whether or not the tax will affect all potential taxpayers equally.

Because pro-forma economic analysis and modeling are highly subjective, they will not be considered in this analysis.

**Complexity**

The complexity of the current tax code elicits a great deal of criticism. Past attempts to simplify the federal tax code have led to greater complexity. One of the least complex in order to stop the rioting. Although the innocent person’s rights are violated, a strictly utilitarian analysis would conclude that the police action is acceptable because it brings about the greatest good for all the stakeholders (citizens of the community) by stopping the violence.

26 Commentators have cited humorist Dave Barry for the proposition that the IRS is making progress in "its mission to develop a tax form so scary that merely reading it will cause the average taxpayer's brain to explode." Barry’s example is Schedule J, Form 1118: "Separate Limitation Loss Allocations and Other Adjustments Necessary to Determine Numerators of Limitation Fractions, Year-End Recharacterization Balances, and Overall Foreign Loss Account Balances". See Tom Herman, Fewer people, Wall St. J., March 13, 1996, at A-1. Barry’s humor is not far off the mark, for even the not-so-average taxpayer is having difficulty with form 1040. The Internal Revenue Service estimates that sixty percent of tax filers receive professional help to fill out the forms, including the former IRS Commissioner, Mark Everson. See David Lazarus, The flat tax: It’s simple, alluring But one-size-fits-all idea faces skepticism, too, S. F. Chron., April 11, 2007, at C-1 (available at http://www.sfgate.com). See also, Scott A. Hodge, et al., The Rising Cost of Complying with the Federal Income Tax, Tax Foundation Special Report No. 138 (January 10, 2006), available at http://www.taxfoundation.org/files/sr138.pdf (last viewed May 27, 2012). The authors calculated that the number of words in the income tax code and regulations increased from 718 words in 1955 to 7,064 words in 2005. From 2000-2010 Congress passed 4,428 tax code changes, of which, 579 were passed in 2010. See Sandra Block, Need help from the IRS? Prepare to wait, USA Today, 4/20/2012 (available at http://www.usatoday.com).

27 See Bradley D. Belt and Alexander T. Hunt, Replacing the Income Tax. (Washington, D.C., The Center for Strategic and International Studies, 1996). A prime indicator of complexity is the sheer number of words in the Internal Revenue code, which grew from 500,000 words to 4.75 million words over a forty year period. Belt describes the effects of this complexity as less than benign, resulting in “frustration with and distrust of the government”. A further consequence of the tax system’s complexity is its deleterious effect on compliance; including failure to remit taxes, failure to benefit from refunds and credits, and incentive to evade taxes. Belt cites a 1994 American Tax Policy Institute study estimating that 1.4 to 2.5 million eligible taxpayers did not receive the
individual income tax returns, the 1040EZ, currently has thirty-six pages of instructions and the form itself is two pages long. A consequence of a True Flat Tax and a Modified Flat Tax would be a dramatic reduction in complexity. Both the True Flat Tax and Modified Flat Tax returns could be postcard sized with less than one page of instructions. The Fair Tax would not require individual taxpayers to fill out any tax forms, except a registration form that would be required to receive a prebate.28 The optional form would require only six items of information, and the only consequence of not filling out the form would be that the individual would not receive the prebate.29 The potential simplicity of any of the three tax proposals would be a very appealing consequence and would benefit every taxpayer by eliminating preparation and research time. In addition to the reduction in the level of taxpayer frustration, a reduction in complexity would also result in reduced costs of compliance.

Compliance Costs

Compliance costs, the costs incurred by taxpayers in preparing and filing tax returns, may be viewed as a hidden tax that diverts resources from more productive uses. It is estimated that Americans spend around 228.4 billion dollars and 6.38 billion hours a year filling out federal tax forms.30 The costs of compliance have been proportionally greater for small businesses than for large corporations.31 Individual taxpayers have also faced increasing compliance costs under the earned income tax credit because they did not understand it. See George K. Yin, et al., Improving the Delivery of Benefits to the Working Poor: Proposals to Reform the Earned Income Tax Credit Program (Washington, D.C.: American Tax Policy Institute, 1994, i-ii).

28 A prebate is a monthly check that is mailed to qualifying families at the beginning of the month. It would be calculated by multiplying the Fair Tax rate by annual poverty level spending, as determined by the Department of Health and Human Services, and dividing by twelve. See Americans for Fair Taxation, A FairTaxSM White Paper, The FairTax prebate explained, http://www.fairtax.org/PDF/PrebateExplained2012.pdf (Retrieval Date: June 5, 2012).

29 See id.


31 The Small Business Administration reported that 80 percent of all regulatory compliance costs for firms with fewer than ten employees stemmed from complying with tax rules. See Kelly D. Smith, Which small firms would be hurt by a flat tax? Your Company 6-8, (April/May 1996). Companies employing fewer than fifty individuals have spent almost 5 percent of their revenue on tax compliance, with small corporations; i.e., those having less than $1 million in assets, paying an amount equivalent to approximately 380 percent of their taxes in compliance costs. By contrast, Fortune 500 firms have paid an amount equivalent to only 3 percent of their taxes in compliance costs. See Daniel J. Murphey, Your 1040 form on a postcard? Tax compliance costs companies, people billions, Investor's Bus. Daily, March 7, 1996. The current tax system has historically placed a greater burden upon small and medium-sized businesses. Estimated costs to businesses reported by the type of form filed for calendar year 2005 may be found at
existing tax code. By reducing compliance costs, all three proposed tax models would benefit the vast majority of Americans, especially small business owners who would be able to focus their resources on business operations, rather than on regulatory compliance. The costs of tax return preparation would be eliminated for most taxpayers, whether they are currently using paid preparers or investing personal time and $40-50 for tax preparation software. Based on the total reduction of compliance costs, a utilitarian perspective would judge all three tax proposals favorably.

Collection Costs
Collection costs incurred by the IRS may be deemed to include the cost of assistance necessarily provided to taxpayers, as well as costs incurred in assuring taxpayer compliance; i.e., enforcement costs. A potential consequence of the adoption of a True Flat Tax, Modified Flat Tax, or Fair Tax would be a reduction in collection costs. In 2011, the IRS assisted almost 83 million taxpayers by telephone or in person and processed over 234 million tax returns. The IRS employs 91,380 people and has an annual budget approaching $14 billion. The enormous costs of collecting taxes and processing returns are attributed to the ever rising complexity of the


33 See I.R.S., Table 19. Selected Taxpayer Assistance and Education Programs, by Type of Assistance or Program, available at http://www.irs.gov/taxstats/article/0,,id=211712,00.html (Retrieval Date: May 27, 2012); I.R.S., SOI Tax Stats - Numbers of Returns Filed by Type of Return - IRS Data Book Table 2, available at http://www.irs.gov/taxstats/article/0,,id=171961,00.html (Retrieval Date: May 27, 2012).

tax code. In fiscal year 2011, the cost of collection was 51 cents per $100 of tax revenue.\(^{35}\) The consequences of tax avoidance/evasion, which was estimated at almost $127 billion every year,\(^{36}\) only serves to increase the cost of collection through required enforcement efforts.

It is quite possible that the perceived risks of tax avoidance/evasion might outweigh the perceived benefits to taxpayers under any of the three proposed models, because the simplicity and transparency of the systems would increase the likelihood of detecting questionable practices. All three proposed tax models would also likely reduce the number of inquiries handled by the IRS, thereby reducing the cost of regulatory infrastructure. The reduction of total costs for collecting taxes would allow all taxpayers to benefit. If collection costs and taxes lost through tax avoidance and tax evasion are reduced, the burden of taxation would be more evenly distributed among taxpayers. Therefore, the reduced cost of collection resulting from any of these three models would make them desirable from a utilitarian perspective.

**Effect on Taxpayers**

Perhaps the most important consequence to consider under a utilitarian analysis is whether or not the various taxes—the True Flat Tax, the Modified Flat Tax, and the Fair Tax—will affect all taxpayers equally. An analysis of the possible outcomes under the three models will consider their proportional effect on taxpayers.\(^{37}\)

It would appear that the True Flat Tax would affect all taxpayers equally because of its proportionate nature.\(^{38}\) Under the True Flat Tax model, all taxpayers would be taxed at the same rate, regardless of whether they are currently taxed at the highest marginal rates or at the lowest marginal rates. As a result, it would seem to impose an equality of proportional sacrifice. Based on the proportionality of the tax, its consequences could be assessed as positive from a utilitarian perspective.\(^{39}\) The Modified Flat Tax and the Fair Tax, however, do not affect all taxpayers

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36 See Bradley D. Belt and Alexander T. Hunt, Replacing the Income Tax. (Washington, D.C., The Center for Strategic and International Studies, 1996). Tax avoidance methods, whereby taxpayers avail themselves of certain provisions of the tax code to reduce their tax liabilities, also reduce the Treasury Department’s collections. A decade ago, economist Milton Friedman noted that there would be less incentive to adopt legal (but costly) schemes to reduce reported income under a flat income tax. See Milton Friedman, A 1962 flat-tax proposal revisited, Wall St. J., Feb. 9, 1996, at A-12.

37 The focus of this analysis is on the individual taxpayer; an alternate perspective might consider the effects on society with focus on income distribution and the labor market. See Bas Jacobs et al, Flat income taxation, redistribution and labour market performance, 42 Applied Econ. 3209-3220 (2010).

38 A flat tax would tax the same percentage of income from all taxpayers regardless of level of income. It would avoid the hidden regressive characteristic of sales and use taxes (including the Fair Tax) because a flat tax would be uniformly applied to all income generated.

39 This would be true if one considers equality of proportional sacrifice beneficial. See Henry C. Simons, Personal Income Taxation. (Chicago, The University of Chicago, 1938).
equally. The Modified Flat Tax is a progressive tax because of fixed exemptions allowed. In reality, the Fair Tax is a regressive tax because the poorer the household, the more of its overall income is consumed simply to meet its needs. Therefore, the household members end up paying a higher percentage of taxes relative to their income. Even with a prebate, the overall effect of a sales tax is regressive in nature. If one considers equality of proportional sacrifice beneficial, both the Modified Flat Tax and the Fair Tax would appear to be undesirable, while the True Flat Tax would appear desirable under this preliminary analysis.

The above analysis is not complete, however, without a consideration of the economic law of diminishing marginal utility. The theory of marginal utility refers to the amount of satisfaction gained from the last unit of an item and is based on the premise that each successive unit yields less additional utility. By applying the theory of marginal utility, one finds that a lower income taxpayer under a True Flat Tax makes a greater proportional sacrifice than one who has a greater level of income, because of the relatively greater importance of that last dollar to the lower income taxpayer. Continuing with this logic, a progressive tax, as is created by the Modified Flat Tax, would be more desirable than a True Flat Tax under a utilitarian perspective. The Fair Tax, with its regressive nature, would not be desirable under this perspective because it would require lower income taxpayers to pay out more dollars in taxes relative to their wages, thus sacrificing a greater marginal utility than higher earning taxpayers. If the most important consequence of a tax is whether it affects all taxpayers equally, the concept of marginal utility seems to illustrate that all taxpayers will not be affected equally by a True Flat Tax or by the Fair Tax. The consequences of a True Flat Tax and the Fair Tax, based on their effects, would not bring about the greatest amount of good for the greatest number of people. However, a case can

40 The more you make, the higher percentage of overall taxes you pay. See Michael Keen, et al., The “Flat Tax(es)”: Principles and Evidence (IMF Working Paper, 2006).


43 In order to apply this economic law to any of the three proposed models, it might be helpful to first illustrate its operation in the context of a regressive tax. If, for example, taxpayer A, who earns $1,000 pays $1 in taxes, and taxpayer B, who earns $10,000 also pays $1 in taxes, the theory would state that the proportional sacrifice of one dollar out of an income of one-thousand is greater than the sacrifice of one dollar out of an income of ten-thousand. See Irving Fisher and Herbert Fisher, Constructive Income Taxation, (New York: Harper Brothers, 1942). Both individuals are taxed one dollar, but this dollar has a greater marginal utility to taxpayer A than to taxpayer B. Because this is a classic example of a regressive tax, the person who earns only $1,000 pays a higher percentage of his income in taxes.

44 Applying this theory to a 10% True Flat Tax, consider two cases: Person A, who earns $1,000 is taxed $100; person B, who earns $10,000 is taxed $1,000. Although the proportion is equal, the relative sacrifice is unequal because the marginal utility differs between A and B. Because A has fewer dollars, her last dollar is more important to her than B’s last dollar is to B.
be made that the Modified Flat Tax might meet the criteria for being deemed ethical under utilitarian theory.45

**Conclusion based on Utilitarian Theory**

To reach a preliminary conclusion on the ethical appropriateness of an income tax model from a utilitarian perspective, three potential consequences of the three tax models have been examined: elimination of complexity, reduction of compliance costs, and reduction of collection costs. Based on these three factors, the adoption of any of the three proposed tax systems would appear to be beneficial. However, a utilitarian philosophy seeks the greatest amount of good for the greatest number of people. If the most important consequence is its effect on taxpayers (i.e., does the tax affect all taxpayers equally), then one must place a greater significance on proportional sacrifice, with the application of the principle of marginal utility. Application of this principle would result in a conclusion that the relative sacrifice among taxpayers would not be equal under the True Flat Tax or the Fair Tax proposals. Due to the relative burden placed on lower-income taxpayers, the True Flat Tax and Fair Tax’s trade-off between complexity and simplicity would lead to inequity. The True Flat Tax and the Fair Tax cannot be considered ethical on utilitarian grounds because they do not bring about the greatest amount of good to the greatest number of taxpayers. On the other hand, the Modified Flat Tax proposal has the potential to affect all taxpayers equally after consideration of the law of marginal utility, and thus, may be viewed as the most ethical model based on utilitarian theory.

**CONCLUSION**

Evaluating a proposed tax change on the basis of its ethical implications provides insights to an area that is often tainted by politics and rhetoric. The desirably of a True Flat Tax, a Modified Flat Tax, or a Fair Tax may be evaluated from the perspective of two traditional philosophical theories: deontology and utilitarianism. A deontological analysis finds the three tax models ethically desirable because of their intention—to benefit all taxpayers. By contrast, only one of the three models is deemed ethically desirable under the utilitarian analysis. Although the potential consequences of all three models include reductions in complexity, compliance costs, and collection costs, not all three models would result in the greatest good to the greatest number of taxpayers. A utilitarian analysis finds the True Flat Tax and the Fair Tax undesirable due to another of their consequences—inequality in their effects on taxpayers because of the law of diminishing marginal utility. Only the Modified Flat Tax would be desirable because of its potential to reduce complexity, compliance costs, and collection costs.

45 But see Deena Waddell Skipper & Hughlene A. Burton, Ramifications of a Flat Tax—Shifting the Burden to the Middle Class, 14 Int Adv Econ Res 460-471 (2008). Skipper and Burton argue that the two proposed models they examined would place a heavier burden on the middle class, despite the availability of specific exemptions.
and to achieve an equitable outcome in terms of taxpayer sacrifice after consideration of the law of diminishing marginal utility.

It is clear that this application of the different philosophies has led to very different conclusions, as demonstrated by the deontological finding that the True Flat Tax and Fair Tax are ethical systems of taxation, while utilitarian analysis found both to be unsuitable from an ethical perspective. Both analyses, however, found the Modified Flat Tax suitable as an ethical system of taxation.

Ultimately, the purpose of this paper has not been to recommend any one of the tax models as ethical or to condemn any of them as unethical, but to offer an alternate means of analysis—a fresh look that is not colored by politics. In the end, rhetoric and politics will probably rule the day, however, political and economic perspectives often have deep roots in philosophy. Is it too much to hope that the tax code of the new millennium might be fashioned on the foundations of an ethical perspective, regardless of whether its focus is on ethical intent or ethical consequences?
GOOD AND EVIL IN CONTEMPORARY BUSINESS PRACTICE

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ABSTRACT

Drawing upon both sacred and secular texts, we suggest that attention to the philosophical foundations of good and evil facilitate our understanding of contemporary business practices and ethical behavior. We examine first the idea of goodness and its relation to rule-following as expressed in the Book of Genesis and in Milton’s *Paradise Lost*. We examine a second set of ideas, the opposition of pragmatism and idealism, as found in the writing of Leibniz and Voltaire. Finally, we consider the work of Nietzsche regarding rule-breaking and moral ambiguity. In each case, we apply foundational concepts of good and evil to contemporary business practices, providing a revealing, useful account of the contemporary commercial world.

INTRODUCTION

The concept for this interdisciplinary paper came from several intersecting events. First, the son of a social science professor announced that he wanted to major in business. His mother’s reaction might have been that to a child announcing that he wished to become a Nazi prison guard – oh the dismay that her son would become a filthy capitalist! At the same time, a philosophy professor was developing a special course, “The Philosophy of Good and Evil,” using both religious and secular texts to examine the underpinnings of good and evil and whether they can exist alongside one another. The topic became even more germane with the financial crisis which started in 2008 and continued with news stories about people greedily seeking wealth in the business sector, even while being the victim of their own greed in cases, such as that of Bernard Madoff (Bandler, Varchaver, and Burke 2009). Hence, the paper presents a philosophical discussion of good and evil to illuminate understanding of contemporary business practices. Obviously, there is a good aspect to business, since businesses provide for our basic needs through the manufacture, distribution, and sale of clothing and food and the provision of shelter and healthcare. In addition to having basic needs met, any reader of this paper likely has many of his or her “wants” or higher level needs met through the global commerce system. Notably, in our culture’s story of the earliest family, Cain and Abel recognized the productivity benefit of specialized labor and skills (Harrelson 2003, 13-14). One farmed the land and raised the grain, and the other tended the herds, so trade and commerce, or business, began with our most ancient ancestors. However, on a daily basis the media carries stories of evil that exists in business, such as the lack of child labor laws in some countries or a lack of enforcement in others, as well as other issues related to worker safety, or products being sold with no concern
for the health and safety of the consumer, with examples in our lifetime from the Ford Pinto in the 1970’s (Dowie 1977; Dardis and Zent 1982; Wolfe 1990) to the recent peanut butter contamination by Peanut Corporation of America (Harris and Belluck 2009; O’Rourke 2009; Malovany 2009).

Describing business practices in terms of good and evil may seem hyperbolic, or likely to produce only platitudes. However, attention to the logic of these ideas provides depth and clarity to the understanding of business. Mazar, Amir, and Ariely (2008) have recognized the good and evil, as defined by honesty and dishonesty, in human behavior. They conducted six independent experiments using college students to investigate why people are dishonest. They found that many will be dishonest enough to gain from a situation, but only to the extent that it does not violate their personal sense of integrity. Ariely (2009) commented further on honesty in personal behavior. He reported an experiment using 500 people, which found that once people cheated the first time, such as with a counterfeit fashion item, the easier it was for them to cheat again. In a study on gifts from pharmaceutical companies to influence physicians in the medications they prescribe, Elliott (2006) refers us to a study by the Canadian Medical Association. The latter showed “one way to convince doctors that they cannot be influenced by gifts may be to give them one; the more gifts a doctor takes, the more likely that doctor is to believe that the gifts had no effect.”

This paper presents an overview of classic philosophical, religious, and literary perspectives on good and evil in three sections: Genesis and Milton on goodness and rules; Leibniz and Voltaire on idealism versus pragmatism; and then Nietzsche on rule-breaking and moral ambiguity. Each section presents several general ideas about good and evil as derived from these thinkers and texts, and then the ideas are illustrated with examples from contemporary business practices. These business examples and others in the paper have been widely publicized, but only limited references are provided, since the examples are considered general knowledge.

**PHILOSOPHICAL DISCUSSION OF GOOD AND EVIL**

**Creation and Fall: A Garden Spoiled**

Genesis 1-3, provides several basic ideas concerning goodness and evil (Harrelson 2003). The first is that of the priority of goodness with respect to evil. All that God makes is good, a paradise, a Garden. In particular, the sacred quality of the earth, the heavens, living organisms, and humanity is asserted. Evil, by contrast, is secondary, an aberration. First, there is the Garden and all of God’s creation, which are good. Then come the snake, temptation, and the Fall. So a basic idea is that goodness is logically prior to evil, or that evil is a perversion or disruption of a pre-existing good. Without the original good, there can be no evil, for there is nothing to be corrupted.

Second, in Genesis, God’s creation is a cosmos – an ordered world. God replaces the “formless void” (1:2) (Harrelson 2003) with ordered being. The “separations” of heaven from earth, light from darkness, day from night, etc. impose fundamental, logical divisions where otherwise there is chaos – i.e., the lack of order. Humans, too, are part of the natural order; their place of “dominion” established by divine command. And human behavior is ordered as well. A single rule is made explicit: that Adam and Eve may eat from any but the tree of knowledge of good and evil. Furthermore, the ideas of order and goodness are clearly connected. The ordered garden is itself a good thing – a beautiful place of peace and plenty. Observing the primary rule of the garden is also good, insofar as it implies understanding of the concept of a rule, and that of
“correct” (and hence good) versus “incorrect” conduct with respect to the rule. And further, the result of following the rule of the Garden is again good, the goodness of ordered human life in a peaceful paradise.

So the first idea is that goodness is prior to evil, and the second basic idea concerning evil reiterates and elaborates this idea. Where the developed notion of goodness involves order and rules of conduct, the correlative notion of evil will again be parasitic on and corruptive of this prior order. This is the idea of evil as rule-violation. Where principles of order (rules) exist in order to create a good, ordered being, violation of these principles corrupts goodness, thereby producing or constituting evil. This idea is evident in the account of the Fall in Genesis 3 (Harrelson 2003). The single explicit rule of the garden, not to eat of the tree of knowledge of good and evil, is violated by Adam and Eve, resulting in their punishment, itself an evil: pain in childbirth and subservience for Eve, toil and anxiety for Adam.

The Genesis text also provides a third idea: the Garden contains a snake. That is, while the Garden is intrinsically and wholly good, there exists within it, inexplicably, a source of evil. This evil takes the form of a serpent which tempts Eve to eat of the tree of knowledge of good and evil, precipitating the Fall. The presence of the serpent in the Garden goes unexplained, as does the capacity of Eve and Adam to disobey God’s command. Given the suggested perfection surrounding and embodying them, one might wonder on what basis or by what means either chose disobedience over obedience. And this, seemingly, is precisely the knowledge that Adam and Eve lack, having not yet acquired knowledge of good and evil. In other words, while obeying God’s word may be judged “right” and “good”, neither Adam nor Eve would seem capable of knowing it: they are innocents.

We apply these ideas to business practices as follows. In the beginning, there was a good idea: cooperative business exchange. Businesses help us lead better lives with the goods and services they provide. Rules and laws, both formal and informal, define good and fair business practices, such as commerce itself, in all of its variety, including:

- The laws and customs of commercial enterprise and exchange;
- Selling an automobile;
- Buying tomatoes at an untended roadside stand.

Corruption of goodness involves violation of rules or laws specifying the good. The inclination to corruption seems to be intrinsic to the human condition. Evil in business corrupts and disrupts ideal cooperative exchange, and the rules of good and fair exchange are broken. Humans are readily tempted to violate the business trust, such as:

- Deceptive, unfair, false, business practice;
- Violation of trade laws, of contracts, of trust;
- Falsifying automobile history;
- Taking a tomato without paying for it.

John Milton (1962) offers a further explanation for the Fall in *Paradise Lost*. The serpent is a creature of Lucifer, who himself has fallen and wages war upon God in heaven. Lucifer’s own fall is the product of pride, according to Milton’s account:

… he of the first,
If not the first Arch-Angel, great in Power,
In favor and preeminence, yet fraught
With envy against the Son of God, that day
Honor’d by his great Father, and proclaim’d
As in Genesis, Milton’s principal goods appear first to be God himself and all his products. And also as in Genesis, obedience is a good, for Milton, and in particular, humility, the reverse of pride – i.e., a sense of one’s own limitations and a willingness to observe them. Pride brings about Lucifer’s fall, and Lucifer then tempts Eve to her own prideful fall. Interestingly, in Milton’s account, Eve is herself not without prior pride; she resists Adam’s offer of protection when the pair are informed of the presence of the serpent in the Garden, wishing to demonstrate her strength and autonomy.

Again, as in Genesis, the reader is left to wonder how pride emerges in an otherwise wholly good environment. Short of an explanation, however, both accounts may be taken as descriptive of a fundamental human condition. While we may be well aware of the goodness that surrounds us and of the rightness of proper and humble conduct, we are nevertheless given to pride, to selfishness, to an elevated sense of our abilities and privileges, to the disregard of established law and the welfare of others. A number of parallels may now be drawn with our more particular behavior in the context of business practices good and evil.

In the beginning, there was a good idea: cooperative business exchange that would benefit all parties involved. The entrepreneur would offer a good or service to satisfy the needs or wants of the buyer. The seller or provider would use the profits to support his or her own wants and needs. The price would be fair and mutually determined. In the U.S., a host of rules and laws define good business practices to ensure that products are as advertised, produced in a way that is safe for the worker, environmentally sound, and safe to the consumer. Violation of the rules and laws of good business results in corruption of good business, its products, and those it is intended to serve. Then, the basic business evil is corruption or disruption of the good business exchange. In some cases, this disruption is extensive. The recent fiscal crisis illustrates the kind of damage that business evil can wreak when there is a broad violation of the rules, whether legal regulations or rules of commonsense. The housing crisis provides multiple examples of what started as good becoming evil. Individuals being able to own their homes, build equity, and have investment in their community were good things. But the falsification of records by builders, real estate appraisers, and real estate attorneys were evil. Further evils then resulted when persons who had bought homes that they could not afford, lost the homes to foreclosure. They lost the modest funds they had invested, which in many cases represented their life savings, and some found themselves homeless. The impact rippled through the communities, as these foreclosed and abandoned homes caused other homes in the neighborhoods to decrease in value. A further, significant impact was on tax payers across the US, because in many cases these mortgages had been backed by the federal government (Inside Job 2010).

A primary cause of business evil is what Milton identifies as pride: placing oneself above or beyond the reach of law, owing to an inflated or false sense of one’s importance or abilities. The Bernard Madoff scandal may also be represented in these terms. The extent and audacity of the
Madoff fraud is breathtaking, to say the least. The fact that he thought he could get away with the fraud he perpetrated on investors who sought his advice indicates total disregard for the law, as well as unrealistic assessment of his capabilities. Many of the stories of this case emphasize that he did not seek investors, but rather, one had to know someone to get to him, such was the reputation he created. Many of those whom he was cheating thought of themselves as his friends, so that his pride may be said to have violated both civil and moral statute (Bandler, Varchaver, and Burke 2009).

When applied to modern business, Milton’s points regarding good may be summarized as the willingness to submit to prevailing laws and customs of commercial exchange, which would include every law-abiding, fair-minded exchange of a good or service. For example, Tylenol responded quickly and at great cost to the company to remove all products from the shelf after their famous tampering case (Murray and Shohen 1992).

Milton’s concept of evil applied to business would be placing oneself above or beyond the laws defining human goodness. In addition to the Madoff case mentioned previously, other examples include flouting prevailing laws and customs which define good and fair business exchange, such as:

- Enron leaders willfully deceiving investors and employees (Henderson, Oakes, and Smith 2009);
- The recent, knowing sale of salmonella-contaminated peanut butter (Harris and Belluck 2009; Malovany 2009; O’Rourk 2009);
- American cigarette manufactures’ knowing promotion of a harmful product (Cotton 1990; Slade et al. 1995).

The Best of All Possible Worlds: A Golden Land of Opportunity

A second set of basic ideas in the philosophy of good and evil involves a general intellectual tension holding between rational idealism, on the one hand, and a more pragmatic acceptance of appearances, on the other. Here, the general idea is that humans seek naturally to discover a rationally intelligible structure in their world, whereas the appearance of rational structure is incomplete at best. Some philosophers maintain that such order is indicative of a larger, comprehensive one, while others regard such an ideal with suspicion. Where the terms of the debate include good and evil, the distinction between these views can be striking.

Gottfried Wilhelm Leibniz was a 17th Century idealist philosopher working at the height of the Age of Reason. By his account, this is the “best of all possible worlds,” meaning that however otherwise it might appear, nothing could occur or be different to make the world a better place (Ariew and Garber 1989). Every event, state, and object must be considered not simply good but the best possible, a necessary element in the best possible goodness. For Leibniz, evil is a manifestation of human ignorance: Humans are incapable of understanding the overall complexity of the world, so that certain goods escape our notice – i.e., those reconciling the apparent evils. While we may not have the intellectual power to comprehend all, this is a quantitative problem, not a qualitative one.

It is significant to note that Leibniz’s view does make some sense. Indeed, as illustrated in the examples above, humans face a challenge in making rational sense of evil. For Leibniz, it makes no sense for an evil thing to exist or occur where a good one might otherwise have, for given a choice between the two, no rational creature would choose evil. Hence, the only things whose existence can make sense are good things. And so, if everything makes rational sense, then only good things exist – i.e., this is the best of all possible worlds. In other words, for
Leibniz, either one must believe that the world they live in ultimately does not make rational sense, or one must believe that it is perfectly good. To believe that it is perfectly good would support Adam Smith’s invisible hand or America as the golden land of free enterprise and opportunity, with the following as examples of free enterprise and at work:

- The recent “correction” of real-estate values (Lewis 2009; Inside Job 2010);
- George Soros (http://www.georgesoros.com/);
- Bill Gates (http://www.microsoft.com/presspass/exec/billg/).

When applied to modern business, Leibniz’s view of evil is a mistaken perception obscuring our view of perfect goodness. That is, apparent business evils obscure the reality of a good, such as:

- Charitable contributions by corporations improve public image but also benefit the community;
- Patents help build monopolies as well as promote and reward research and development expense, resulting in better products for all aspects of our lives;
- Ford did not recall the Pinto after executives knew the risk of explosion and fire in a rear-end collision. The estimated cost of lawsuits from loss of life was less than the estimated cost of a recall (Dowie 1977; Dardis and Zent 1982).

As might be expected, Leibniz’s views did not want for criticism. In his satire Candide, Voltaire (1992) portrayed Leibniz’s view as not simply obviously mistaken but offensive and pernicious. The evils of the world are wholly and terribly real, for Voltaire. War, rape, disease, violence, insanity, treachery, etc. are all real features of our world, and it is an insult to such injuries to suggest that they are not truly evil. Voltaire would agree that humans cannot make sense of the evils of the world, but rather than rejecting the appearance of the world as including evil, which is Leibniz’s response, he rejects the rationalist principle that motivates Leibniz’s view. The appropriate response to the evils of the world is not to construct an intellectual “otherworld” in which they are absent, but rather to attend to one’s own life and ambitions. “Cultivate your garden,” is Voltaire’s famous response to the intellectual problem of evil. Don’t look to the starry sky of idealism. One should make the world as pleasing and appealing as possible. So, rather than seeing the world as wholly and perfectly good (and rational), he sees it as it appears to the average person – as including some goods and some evils, and not making anything like complete, rational sense.

In other words, Candide (Voltaire 1992) may be read as a cautionary tale about exceeding one’s reach. When considered in universal terms, the world can be thought of as a whole. Is it good, on the whole? Is it evil? Where do good and evil fit, in the grand scheme of things? Such thought leads to absurdities such as Leibniz’s view, according to Voltaire. This then leads back to the theme of pride and humility encountered above and the importance of recognizing human limitations. Humans are not, in fact, capable of understanding the entire universe, nor do they even come close. And they live better lives with this realization than without it.

Since Voltaire says evil is real, and ignoring the existence of evil is wrong and dangerous, then business evils are real, and ignoring them is wrong and dangerous. Hence, oversight, regulation, punishment of rule-violation, etc., such as these examples are necessary to curb business evil:
• Current packaging standards for food and over-the-counter medications require extra tamper-proof requirements at extra costs, which are ultimately passed to the consumer (Birch 1994; Martin 2002);
• The Sarbanes/Oxley bill tightened financial regulation in response to the Enron scandal (Feldmann and Read 2010; Orin, 2008);
• Regulation of lending practices were stiffened in response to the recent banking crisis (Stachowicz and Temby 2010).

Applying these ideas further to the business world, there exists a similar contrast between idealism and a pragmatic realism. Idealist themes include the free market and its invisible guiding hand, and America as the golden land of economic opportunity, where everyone has the opportunity to ascend the economic ladder, and where everyone is playing fairly by the rules. A more pragmatic eye recognizes that not everyone will behave. While all may wish for – and some even believe in – an ideal world in which business practices are “self-correcting”, etc., the facts appear to be that such a world does not exist, and that efforts to regulate business practices reflect precisely this realization. The Leibniz/Voltaire issue concerns whether the world is perfect or not. While some economists and business leaders seem to think that this is a perfect business world, even if only potentially, the more pragmatically-minded recognize that this is simply a nice idea, and that commercial structures must be protected from their inevitable corruption, if they are to operate effectively.

That is, people may be expected to behave in the ways that are good but, like Voltaire, such expectations must be tempered with prudence. Laws and regulations are passed after people have been caught at some evil act, and the laws are reactive to prevent future violations. The Securities and Exchange Commission (SEC) had complex regulations for the reporting of financial information to the government and shareholders. However, the Enron management team found clever ways to circumvent the reporting regulations by using special purpose entities (SPE), not only to hide losses, but to make it appear the company was profitable. Since the company appeared profitable, investors continued to buy its stock, including Enron employees who put all of their 401k investments into the company. When Enron declared bankruptcy, employees not only lost their jobs, but many of them lost all of their retirement savings. In addition, Arthur Andersen, one of the largest and most respected accounting firms in the country had been responsible for the audits of Enron, but with the scandal and trials associated with this case, they were forced out of business. To prevent this from happening again, the Sarbanes-Oxley bill was passed to further refine the reporting and auditing requirements for publicly traded companies, including provisions for criminal prosecution for corporate officers, board members, and auditors found guilty of fraud (Henderson, Oakes, and Smith 2008; Orin 2008; Feldmann and Read 2010).

The Law of the Jungle

The final view concerns the validity of our concepts of good and evil themselves. While writers such as Milton, Leibniz, and even Voltaire accept the objective reality of good and evil, Friedrich Nietzsche (1974) famously challenges this assumption. He maintains that the designations good and evil reflect only the world-view of a particular people, and that the rules of conduct that they imply are, like all rules, made to be broken.

In general, for Nietzsche, life requires some relatively stable structure if it is to persist. Plants, for example, must develop and maintain roots, stems, and leaves of a certain, orderly sort
if they are to flourish. Human life is no different in this respect, and is distinctive for its use of *reason*, among other things. Rational thought is a kind of organization defining our form of being. This means, in Nietzsche’s view, that one should not mistake the rational organization of the world for absolute or objective *truth*. It is primarily a system of order, distinctive of humanity. Central to the human system of life order are *values* specifying standards of right conduct – rules for behavior, in other words. A glance at the world’s cultural history reveals different peoples, and their differences are defined by their beliefs and values, producing different forms of ordered human life. Further, the world’s cultures are not unchanging, but undergo gradual and sometimes sudden transformation over time. To the extent that a culture can change with the times, it may preserve its essence. In the long run, however, even this essence will run its course, giving way to some other form of ordered human life. Thus, for Nietzsche, human culture involves cycles of development and subsequent destruction of organized social being. We construct rules for living and live accordingly until change brings about a new set of rules.

A number of key consequences about the concepts of good and evil may be emphasized. First, there is the realization that good and evil are relative to a particular species – or race, or culture, or class, or indeed individual. Some things we can all agree to call good, such as food and shelter and relief from pain. But these goods are strictly goods for the party securing and enjoying them. Given the nature of humans’ competing interests, the good accruing to one is not necessarily a good for another. The notion of relative and competing goods and evils is of course readily apparent in our business worlds. Even as they share certain interests, contemporary, Western business practices are also fundamentally competitive, so that one interest’s market gain may be another’s loss.

Second, since life systems must evolve – change – in order to survive, there are continually changes in the standards of good and evil. The business practices of one culture in one age may be intolerable or impracticable in another. It would be difficult to find a twenty-first century resident of the American South promoting a business model based on slavery, not simply owing to its impracticality, but because slavery is now generally regarded as an abomination. Today, of course, we regard this standard as evidence of *progress*, an instance of *improvement* in human society.

For Nietzsche, there are no absolute standards by which to measure progress or define an ideal form of being, so that good is whatever contributes to the power of a thing, where power is defined in terms of the capacity to influence one’s surroundings. So what is good for a business is that its power in the marketplace increase. This power may coincide with or contribute to the power of the host community. For example, where would the US be without the contributions of the automobile industry over the past 100 years? Charles Erwin Wilson, President of GM, 1941-1953, is known for saying, “What's good for the country is good for General Motors, and what's good for General Motors is good for the country.” (Charles Erwin Wilson). But the very practices that for a time made both manufacturer and nation preeminent may now be seen to dull their competitive edge.

However, Nietzsche also saw that in power terms, the bad is simply whatever detracts from a being’s power/capacity to influence the environment. Any entity that becomes too rigid or otherwise fails to keep up with the times is going to fall. Then the ultimate strength of a business may entail its own demise, especially as from the lack of a competitive environment, and the capacity to adapt to change. The very systems and patterns that were once its strength become the bonds preventing GM from reacting successfully to changes in its environment (Horton
As ordinarily used, ‘evil’ means “unholy” – really bad. Are “predatory” business practices “evil” intrinsically, or only in the eye of the beholder? Negotiating the tension between the healthy capacity for growth and managing the costs to human individuals remains a challenge.

**CONCLUSION**

The value in examining contemporary business practices in classical terms of good and evil lies in this: it reveals more clearly the complexity of the moral forces influencing these practices. Each of the above primary ideas informing human thought about good and evil is readily found in contemporary thinking about business practices. The good of commercial exchange is prior to the evil of its corruption. Good business exchanges entail certain rules of order, the violation of which disrupts our common good. But humans are prone to such disruptive behavior. In particular, they are prone to throwing off the humility required for fair business exchange. Pride, hubris, and setting oneself above or beyond the law are constant threats to good business. Further, it is beneficial to see clearly the contrast between the business world ideally conceived and the business world as it in fact exists. In an ideal world, the invisible hand of reason guides practices to that state optimizing the benefit to all parties. And while such a state represents a worthy and proper goal, the pursuit of that goal must be tempered with the prudent expectation that inevitably, if perhaps inexplicably, the human will fall short of the goal. Free exchange of commercial goods and services must be balanced against laws and regulations to protect the common good from very real evils. Finally, while acknowledging the value of the public well-being, one must also recognize its fragile, transient nature, and the extent to which local or individual ends may conflict with those of the greater whole or group. In other words, the general business good is an abstraction of the goods of lesser groups or individuals. In some settings, these goods are at odds with each other. And further, there may be no absolute, unchanging standard of good business practices. Some philosophers have hypothesized that humanity approaches such a stable ideal. However, one of our conclusions here is the recognition that for the present, that world seems far away.

More specifically, it is the confluence of these conceptions of good and evil, as exemplified in the business world, that reveals the value of their consideration. To live and act in the business world, as in human affairs generally is to be confronted with multiple, incompatible standards of good and evil. Arguably, each of the general conceptions of good and evil described above is a conception informing the thought of the businessperson today. These conceptions of good and evil are endemic to our culture. Just as one is called upon to regard evil as a corruption of a good, just as such goods frequently entail general rules applicable throughout a community, just as the good is identified by reference to ideals, and even as one must temper such reference with prudence, so too one must be aware that the standards of good and evil appear to be sensitive to perspective. In other words, the moral world is complex and conflicted. We do not here attempt a resolution of this conflict. On the contrary, with another nod to Voltaire, we seek only to identify and hold it before the businessperson’s gaze, so that decisions might be informed by clear recognition of their actual decision state.

With this in mind, consider a final example, concerning the business practices of a multi-national corporation with respect to child labor (Hartman 2003). A major manufacturer of athletic clothing conducts an audit of its labor force in a developing nation and finds, contrary to company policy, a significant number of child laborers. In the industrial West, child labor is now generally illegal and regarded as a cruelty (Child Labor in U.S. History). From the perspective of an impoverished nation, however, working children may offer an attractive
alternative to more demeaning or dangerous sources of income, such as theft and prostitution, and may provide important financial support to an extended family. In this situation, company executives are faced with these considerations: their product is a good for many consumers; violation of regulations or principles defining good business practice threaten the company’s capacity to create that good; perhaps in an ideal world, conflicts between the rules defining good practice do not conflict, but in this world, they do. Further, the executive has the welfare of his corporation to consider, and the extent to which that set of goods is commensurate with those of others. In this particular case, the company chose a middle course between eliminating its child labor force and preserving the status quo: child labor hours were limited and conditional upon participation in educational programs. We may call this making the best of a difficult situation. Clearly, however, some would say that the company remains in violation of respectable standards of good business, while others would resent the limitations placed on a family’s ability to earn a living. We argue here that there is no single, unifying truth to the matter, if the several conceptions of good and evil identified here all have credibility. Better, again with Voltaire, to recognize the difficult, inexplicable terms of human life in the business world, better to make our decisions under such an apprehension, than to think and act without such illumination.
REFERENCES


ARBITRATION: TRENDING IN THE BUSINESS AND LEGAL WORLD,
BUT IS IT TRENDING IN YOUR BUSINESS SCHOOL?

AMY SMITH*

I. INTRODUCTION

As business law and legal environment professors, we are teaching and training tomorrow’s business leaders – not (necessarily) tomorrow’s lawyers. As such, we have a fundamental responsibility to provide our students with the knowledge and tools to most successfully manage the legal function and succeed in business. The basic purpose of any business law course in undergraduate business schools has been, and continues to be, to teach fundamentals of law in relation to business, as well as the legal significance of the business person’s actions while transacting business.

Because the business world enlarges and becomes more diverse by the year, business school faculty must be “realistic with respect to preparing a classroom of students who will face different legal challenges based on their career choices.” Although recognition of conflict is necessary for any student of business, so too is the ability to resolve conflict and seek avenues for resolution. Business school students must be trained to spot legal concerns, avoid legal problems, and recognize the appropriate time to contact legal counsel. Great value can be added to classes by including or enhancing topics that will educate students on the best practices to prevent, shift, and resolve disputes.

Because we are lawyers who tend to appreciate the minute details of legal procedure as well as the law, we must continually examine our perspective to ensure that we are offering our students up-to-date, practical legal information crucial to any business practitioner instead of complex legal theories best saved for the law school student. In sum, the business law course should “teach the legal tools that every businessman, particularly business managers, must know in order to engage in business safely, soundly, and within the rules of law that bind him and every other businessman.”

II. ONE SHOT

Over the past half-century, many undergraduate business schools have reduced the business law course requirement from two courses to one. In 2011, a study performed by Carol Miller

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* Amy Smith, J.D., Adjunct Professor of Business Law in the College of Business Administration, Belmont University, Nashville, Tennessee.
1 David Mong, Introductory Legal Instructors Can Learn from Joseph Wharton and Albert Bolles, 14 ATLANTA L. J. 34, 55.
4 Lampe, supra note 2, at 5.
5 See Lampe, supra note 2, at 10-12.
6 Mong, supra note 1, at 58.
7 Lampe, supra note 2, at 12.
8 Frascona, supra note 3, at 8.
and Susan Crain found that 87% of undergraduate business students will receive only three credit hours of required legal instruction.\textsuperscript{10} In other words, the introductory legal course will be the one and only required legal course for those students.\textsuperscript{11} Because teachers of business law, in most instances, have one shot to educate students on the varied ways the law can and will affect them, and “because society has imposed constructive notice of that law,”\textsuperscript{12} the most must be made of this single opportunity. Accordingly, instructors must effectively and efficiently make certain that the student has general exposure to all necessary business law topics. Business school law classes should help students become knowledgeable and critical consumers of legal services.\textsuperscript{13} Review of current legal trends faced by business, outside of the business law textbook, is not only important, but it is also imperative. Without such review, how can business law teachers stay abreast of trends in business jurisprudence?

\textbf{III. CURRENT TRENDS IN JURISPRUDENCE}

In 1984, Chief Justice Burger reminded society that we should look for options other than litigation:

The entire legal profession, lawyers, judges, law teachers…has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be ‘healers of conflict.’ For many claims, trial by adversarial contest must go the way of the ancient trial by battle and blood. Our system is too costly, too lengthy, too destructive, and too inefficient for a civilized people.\textsuperscript{14}

Although the legal industry continues to grow vigorously, the resolution of matters by trials has, as intimated by Chief Justice Burger, undergone a sharp decline. A study performed by Mark Galanter showed that the percentage of federal civil cases resolved by trial fell from 11.5% in 1962 to 1.8% in 2002.\textsuperscript{15} Accordingly, one current trend in jurisprudence and business is the utilization of formal or informal processes to resolve disputes by means other than trial – in other words, alternative dispute resolution (“ADR”).

Undoubtedly, ADR has become a central component of business for many reasons, including as an alternative to the high cost and time consumption of litigation.\textsuperscript{16} For years, businesses have implemented arbitration clauses into all manner of contracts from Main Street to Wall Street, both nationally and internationally.\textsuperscript{17} Not only has business embraced ADR, the Supreme Court has continuously and often endorsed it. Since 2000, the Federal Arbitration Act (“FAA”) has been discussed in approximately twenty-five Supreme Court opinions, ten of which have been decided since 2010. With such a high level of judicial attention, we see the Court continuing to express its support of and commitment to ADR, particularly arbitration. This endorsement of

\textsuperscript{10} Id.
\textsuperscript{11} Mong, supra note 1, at 35.
\textsuperscript{12} Frascona, supra note 3, at 9.
\textsuperscript{13} Lampe, supra note 2, at 21.
\textsuperscript{15} Marc Galanter, \textit{The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts}, 1 J. EMP IRICAL LEGAL ST UD. 459, 459 (2004).
\textsuperscript{16} See Lampe, supra note 2, at 25-26.
\textsuperscript{17} Thomas E. Carbonneau, \textit{An Academic Agenda for Arbitration}, 2001 J. ALT. DISP. RESOL. EMP. 15, 18.
arbitration implies a substantial reconstruction of the law, the legal system, and the legal profession.\textsuperscript{18}

Contrary to its label, ADR is no longer an alternative or substitute method of resolution. ADR has become the most desired solution to legal conflict in the United States.\textsuperscript{19} It is expected that the use of ADR procedures will continue to increase in the future.\textsuperscript{20} In particular, arbitration has effectively become a second, privatized civil court system, which handles a great deal of international and domestic litigation.\textsuperscript{21}

Two major studies on ADR, as summarized in \textit{U.S. Business Colleges Still Lag in Teaching ADR}, found that ADR is being utilized for a broad range of disputes, including finance, employment, personal injury, construction, product liability, real estate, intellectual property, environmental, consumer rights, and financial re-organizations and work-outs.\textsuperscript{22} These studies also found that ADR is rapidly becoming a strategic issue for general management.\textsuperscript{23} One of the studies coined the term “dispute-wise” for companies that use ADR programs, and concluded that “companies with dispute-wise management have come to recognize that the use of ADR methods ‘were likely to lessen risk and expense, conserve scarce corporate legal department resources for higher priority matters, and help maintain good (and expensive to build and sustain) relationships with customers, suppliers, and employers…’”\textsuperscript{24}

\textbf{IV. CURRENT TRENDS UNADDRESSSED IN UNDERGRADUATE BUSINESS SCHOOLS}

Although ADR, in some form or fashion, is commonly associated with most of the objectives and subjects taught in any business law course, and it is associated with the current functional areas of every business topic (accounting, information systems, management, marketing and finance),\textsuperscript{25} it has not been taught effectively or efficiently in the classroom. In light of the two major ADR studies cited above,\textsuperscript{26} John P. Kohl, David B. Stephens & Robert D. Stephens performed a study of the 2002-2003 academic year whereby they identified fifty publicly funded accredited undergraduate business schools, which they considered to be the flagship institution of each state in the country, in order to discover the extent to which U.S. business schools were providing instruction in ADR.\textsuperscript{27} They replicated the study for the 2011-12 academic year to gauge any progress.\textsuperscript{28} The study showed some improvement during this time period.\textsuperscript{29} For example, the number of schools that had an ADR course rose from seventeen to twenty-eight (of fifty), or 56%.\textsuperscript{30} However, none of the fifty schools that were studied required all of its business

\begin{thebibliography}{99}
\bibitem{18} Id.
\bibitem{19}Peter Geoffrey Bowen, \textit{Dispute Resolution (ADR) as an Undergraduate Business Subject}, 4 \textit{BUS. EDUC. INNOVATION J.}, 32, 34 (2012).
\bibitem{21}Carbonneau, \textit{supra} note 15, at 16.
\bibitem{22}Kohl et al., \textit{supra} note 18, at 25 (citing studies performed on behalf of the Cornell/PERC Institute on Conflict Resolution in 1998 and the American Arbitration Association in 2003).
\bibitem{23}Id.
\bibitem{24}Id. at 24-25.
\bibitem{25}See Lampe, \textit{supra}, note 2, at 25.
\bibitem{26}See Kohl et al., \textit{supra} note 18, at 25.
\bibitem{27}Id.
\bibitem{28}Id.
\bibitem{29}Id. at 26.
\bibitem{30}Id.
\end{thebibliography}
majors to take an ADR course. In sum, the study found that ADR education in undergraduate business schools is still insufficient.

V. INTEGRATION OF ADR INTO THE CLASSROOM

In addition to the lack of ADR courses, certain business law and legal environment textbooks for the introductory legal course only offer a short summary of ADR, with little or no overview, procedural description, or presentation of cases. In her article, Negotiation: An Idea Whose Time Has Come, Anna S. Rominger suggests that instructors train their students in conflict resolution skills. She states that “legal coursework is not complete without instruction in dispute resolution skills. A pedagogy that addresses only the cognitive elements of the law may no longer be sufficient to prepare students for the emerging, ADR-based legal environment.”

In light of current business and judicial activity surrounding ADR, it is imperative that, if ADR is not a required course, the business law/legal environment instructor introduces the topic to students procedurally and teaches them the opportunities for, and advantages of, using ADR to settle disputes, as well as the risks associated therewith. Such knowledge also teaches the students how to make educated decisions on which process to utilize when a conflict arises. Accordingly, ADR, especially arbitration, should be covered more extensively and integrated within any undergraduate business law curriculum or other undergraduate course amenable to such programming.

The focus of this article is on arbitration; accordingly, discussion of other ADR methods is not offered herein, and will be taken up in later writings.

VI. ARBITRATION TEACHING MODULE

For those with textbooks lacking specific and detailed instruction of arbitration procedures and current, key legal rulings, the following module is offered as a supplement.

A. General Overview of Alternative Dispute Resolution

ADR has many facets, including the following, most common forms, on which all other methods of ADR are based:

Mediation - private, informal dispute resolution process in which a neutral third party, the mediator, helps disputing parties to reach an agreement; the mediator has no power to impose a decision on the parties (Note: Mediation appears to be somewhat favored over arbitration.)

Arbitration - a process of dispute resolution in which a neutral third party, the arbitrator, renders a final and binding decision after a hearing at which both parties have an opportunity to be heard; requires an agreement to accept and abide

31 Id.
32 Id. at 28.
34 Lampe, supra note 2, at 24.
35 Id. at 26.
37 Kohl et al., supra note 18, at 25.
by the judgment of selected persons in some disputed matter, instead of carrying it to established tribunals of justice; designed to avoid the formalities, the delay, the expense and vexation of ordinary litigation.

**Negotiation** – a process of submission and consideration of offers until an acceptable offer is made and accepted; the deliberation, discussion, or conference upon the terms of a proposed agreement; the act of settling or arranging the terms and conditions of a bargain, sale, or other business transaction.

Additional forms of ADR may include: mediation-arbitration hybrids, in-house grievance systems, mini-trials, summary jury trials, private judging, and peer review programs.

Each form of ADR has strengths and weaknesses. Criteria that practitioners may consider when choosing among resolution methods are: cost, speed, privacy, chances of reaching a result, opportunity for publicity, empowerment and control, satisfaction with process and results, opportunity to salvage relationships, maximization of award, ability to set precedent, and procedural rights, including discovery and appeal.

**B. Overview of Arbitration**

Arbitration is a time-tested, cost-effective alternative to litigation. It is the original alternative dispute resolution mechanism made legitimate under American law. The mantra of arbitration is quick, efficient, economical, and fair resolution of disputes. Arbitration is usually mandatory and binding. Accordingly, parties generally forfeit certain constitutional and civil procedure protections. Arbitration has traditionally been used as a means of resolving disputes concerning specialized and/or technical issues. However, contractual provisions calling for arbitration now occur in various types of contracts, as busy caseloads have slowed the court system and the cost of lawsuits has risen dramatically.

Accordingly, arbitration is strongly favored by public policy. However, there are still questions raised in both state and federal courts about the application and utilization of arbitration. Thus, we continue to see the Supreme Court grant certiorari to further explain and clarify its position on these issues.

**C. Federal Arbitration Act**

The Federal Arbitration Act (“FAA”) was enacted in 1925 in response to widespread judicial hostility to agreements requiring arbitration, and to replace judicial indisposition to arbitration.
with a “national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts.” The FAA reflects an “emphatic federal policy in favor of arbitral dispute resolution.” In fact, the Supreme Court has described the FAA as reflecting a “liberal federal policy favoring arbitration.” Section 2 of the FAA reads as follows:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

D. Uniform Arbitration Act and Revised Uniform Arbitration Act

The National Conference of Commissioners on Uniform State Laws developed the original Uniform Arbitration Act in 1955 (“UAA”). It became the law in 49 jurisdictions, and contains many provisions similar to those of the FAA. The hallmark of the UAA was to bring more certainty to arbitration, to fill in the gaps in the extremely general FAA, and to provide a consistent system for arbitration across the board, subject to the parties’ general right to adopt differing arrangements by way of their contract. Because of the rise in the number of arbitrations and the need for additional procedural provisions, the Revised Uniform Arbitration Act of 2000 (“RUAA”) was enacted. At the time of this writing, twenty-one states have enacted or are in the process of enacting the RUAA. State laws that govern the procedures of arbitration, but do not conflict with the FAA’s prime directive that agreements to arbitrate are to be enforced, are outside the FAA’s preemptive scope. The UAA and RUAA create fundamental substantive law governing agreements to arbitrate—they align state law with federal law, which decreases the potential for litigation on preemption grounds; and they are default acts which may be waived by contractual terms.

51 Concepcion, 131 S. Ct. at 1745 (see also Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).
53 UNIFORM ARBITRATION ACT §§ 1-25 (1956) [hereinafter “UAA”].
54 REVISED UNIFORM ARBITRATION ACT §§ 1-32 (2000) [hereinafter “RUAA”].
55 See UNIFORM LAW COMM’N, supra note 40.
56 Id.
57 Id.
58 Id.
59 Id.
61 See UAA, supra note 51; RUAA, supra note 52; UNIFORM LAW COMM’N, supra note 40.
E. Agreements to Arbitrate

Arbitration is generally known as a creature of contract.62 “Arbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.”63 The courts have held that the parties to an arbitration agreement should be “at liberty to choose the terms under which they will arbitrate.”64 Further, as noted in Section 2 of the FAA, a valid agreement to arbitrate must be in writing.65 The Supreme Court, on numerous occasions, has ruled that the central or “primary purpose” of the FAA is to ensure that effect is given to the contractual rights and expectations of the parties.66

Accordingly, the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed in the contract to arbitrate that dispute. The court is to make this determination by applying the “federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.”67 By enacting Section 2 of the FAA, “Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed ‘upon the same footing as all other contracts.’”68 Thus, generally applicable contractual defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening Section 2.69 In 2012, in Nitro-Lift Technologies, L.L.C. v. Howard,70 the Supreme Court issued a direct reminder that courts are only allowed to test the validity of the contractual provision allowing arbitration, and the validity of the remainder of the contract (if the arbitration provision is valid) is for the arbitrator to decide, even if the contract is against public policy.

F. Types of Arbitration Agreements

Agreements to arbitrate may be entered into by the parties pre-dispute or post-dispute, or may be mandated by the court; and they may be binding or non-binding. Pre-dispute arbitration agreements are the typical means by which parties assent to submit their disputes to arbitration.71 Post-dispute arbitration (i.e. deciding to utilize arbitration after the conflict has arisen) is permissible, but it is an unusual occurrence.72

G. Standard Arbitration Language in Pre-Dispute Arbitration Clauses

In signed contracts, parties can provide for future disputes to be settled by arbitration. Any simple form of a contract clause requiring arbitration for any dispute, or a specific dispute, is

63 Volt, 489 U.S. at 479.
64 Id. at 472.
66 Volt, 489 U.S. at 479.
71 Daly, supra note 41, at 12-13.
72 Id. at 13.
generally sufficient. However, more specificity in the arbitration clause allows the parties more control over the eventual process. Because the arbitration clause affects how the entire arbitration process will proceed, if parties are concerned about the process, careful drafting is required.

By way of example, the standard arbitration clause offered by the American Arbitration Association (“AAA”) is as follows:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

If not drafted according to arbitration agencies’ guidelines, detailed arbitration clauses may address some or all of the following: method of selection and number of arbitrators, arbitrator qualifications, governing law sought to be applied during the arbitration, conditions precedent to arbitration, preliminary relief, document discovery, duration of arbitration proceedings, remedies, type of opinion required, assessment of attorney fees, confidentiality issues, and appeal.

H. Arbitration Agencies

An important decision for parties to a contract is whether to employ an arbitration service or to rely on their own designed arbitration processes. Arbitration agencies that “oversee and administer all aspects of the process” exist, such as the American Arbitration Association, Arbitration Forums, Inc., Federal Mediation and Conciliation Services, International Chamber of Commerce, and National Arbitration Forum. Such neutral agencies have established processes that the parties may rely upon when faced with arbitrating an issue. If desired, parties to the contract may simply note that any dispute will be subject to arbitration under the rules of the specific arbitration entity then in force. Alternatively, parties may choose not to utilize arbitration agencies, and in such cases, the agreement to arbitrate should contain all the rules and regulations related to arbitrating the dispute.

73 Id. at 17.
74 Id. at 14.
76 Daly, supra note 41, at 17.
77 See RUAA, supra note 52, at § 1 cmt. 1 (2000).
79 See AAA GUIDE TO MEDIATION AND ARBITRATION, supra note 72, at 3.
I. General Process of Arbitration

1. Initiation of Arbitration

Generally, arbitration is commenced when one party submits a demand for arbitration, which usually includes a cover letter requesting arbitration, the filing fee (if required by an arbitration agency), and a copy of the contract highlighting the arbitration clause. If utilized, most arbitration agencies simplify the initiation process by handling the preliminary matters. Once a party submits a demand for arbitration, time frames for the process are established. For example, the AAA will acknowledge receipt of the demand and set a 15-day deadline for an answer to be filed.

2. Choosing the Arbitrator

After the arbitration is initiated and a response filed (or time for response has passed), the parties determine who will serve as the arbitrator or arbitration panel. The parties are free to choose the arbitrator or panel pursuant to the guidelines established by the arbitration agency or by the arbitration clause. Because the arbitrator decides the outcome of the case, it is important for the parties to take the time to decide if one individual or a panel is best, and which arbitrator would be best for their dispute, depending on the arbitrator’s knowledge, education and expertise.

3. Preliminary Matters

Parties to an arbitration agreement forego certain procedural rights attendant to formal litigation in return for a more efficient and cost-effective resolution of their disputes. A hallmark of arbitration – and a necessary precursor to its efficient operation – is a limited discovery process. Accordingly, “arbitration involves some information exchange and preparation, but it is intended to be limited because arbitration is a process intended to expedite the resolution of the dispute.”

a. Preliminary Hearing

The preliminary hearing is generally a management meeting conducted by the arbitrator to discuss procedural and evidentiary matters, such as discovery, confidentiality, or difficult

80 Daly, supra note 41, at 28-29.
81 Id. at 19.
83 Daly, supra note 41, at 29.
84 See Id. at 31.
85 COMSAT Corp. v. Nat’l Sci. Found., 190 F. 3d. 269, 276 (4th Cir. 1999) (citing Burton v. Bush, 614 F.2d 389, 390-91 (4th Cir. 1980) (“When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial.”)
86 Id. (citing Burton, 614 F.2d at 391 (concluding that limitations on discovery promote the “policy underpinnings of arbitration [which are] speed, efficiency, and reduction of litigation expenses.”))
87 Daly, supra note 41, at 37.
issues. The parties will identify the steps necessary to prepare for the evidentiary hearing, as well as set a schedule for the remainder of the process.

b. Discovery

Though there may be no formal discovery, document discovery is allowed. The parties exchange information in preparation for the final hearing. Generally, the arbitrator may direct the production of documents and the identification of witnesses to be called at the final hearing.

c. Subpoena Power

The FAA, the UAA, and the RUAA authorize an arbitrator to issue a subpoena requiring a party to testify at the arbitration hearing and/or a subpoena duces tecum to bring materials to the hearing.

4. Hearing

a. Location

Arbitration hearings can be held in any convenient location. Generally, the parties decide which location is most convenient to all involved.

b. Evidence

Although due process requires that parties be afforded the opportunity to present evidence and defenses, arbitrators are generally not bound by State or Federal Rules of Evidence. Arbitrators must “hear evidence pertinent and material to the controversy,” therefore, the best practice is to allow the parties to present all pertinent evidence. In many instances, the arbitrator then determines the admissibility, relevance and materiality of the evidence offered and may exclude evidence deemed cumulative or irrelevant.

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89 See ICC RULES OF ARBITRATION, supra note 85, at § 24; AAA ROADMAP, supra note 79, at 6.
91 9 U.S.C. § 7 (2006) (“The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.”).
92 Daly, supra note 41, at 45.
93 Id. at 48.
94 AAA COMMERCIAL ARBITRATION RULES, supra note 87, at § 31.
96 See AAA COMMERCIAL ARBITRATION RULES, supra note 87, at § 31.
Proceedings

Hearings are conducted with a view to expediting the resolution of the dispute; and, in fact, oral argument may be waived. Like traditional trials, advocates in an arbitration hearing generally make opening and closing statements. Additionally, witnesses may be called to testify, during which conformity to legal rules is not necessary. The person who is claiming a violation of a contract usually carries the burden of proof in arbitration. To the untrained eye, the main difference of an arbitration hearing and a trial is generally the formality utilized.

5. Decision

Arbitrators can “conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition.” Accordingly, they are given a “broad scope” when delivering a final decision. They can disregard the law and/or public policy, and they can make decisions based on their own biased notions of justice and equity. For example, certain AAA rules allow the arbitrator to “grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties…” It should be noted that most parties and lawyers incorrectly assume that arbitrators are bound to follow substantive law. The FAA, UAA, RUAA, and, in most instances, state statutes, do not describe the role that substantive law should play in arbitration. Although parties may include contractual provisions requiring certain substantive law to be utilized, generally, the arbitration process permits an arbitrator ample discretion to discount such provisions in light of his subjective view of fairness.

The necessity of a simple decision, a decision with limited findings, or a fully reasoned written decision setting out the arbitrator’s rationale is dependent upon the circumstances, such as the parties’ request prior to engagement of the arbitrator, the requirements of an industry, or whether the arbitrator determines it is required “based on efficiency, cost, and importance of the decision.”

6. Appeal

Parties should always be mindful that an arbitrator is generally the final judge of both law and fact. This strictly enforced rule, which is certainly a risk factor, may be a reason to decide against arbitration.

Section 10 of the FAA provides four grounds for vacation of the arbitration award:

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97 See ICC RULES OF ARBITRATION, supra note 85, at § 25; AAA COMMERCIAL ARBITRATION, supra note 87, at § 30-31; AAA GUIDE TO MEDIATION AND ARBITRATION, supra note 72, at 23-24.
98 Daly, supra note 41, at 51.
99 RUAA, supra note 52, at § 15(a) (2000).
100 See Moore v. First Bank of San Luis Obispo, 22 Cal. 4th 782, 787 (Cal. 2000).
101 AAA COMMERCIAL ARBITRATION, supra note 87, at § 43.
103 UAA, supra note 51.
104 RUAA, supra note 52.
106 Daly, supra note 41, at 58-59.
107 Id. at 59.
In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
(1) where the award was procured by corruption, fraud, or undue means;
(2) where there was evident partiality or corruption in the arbitrators, or either of them;
(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.\(^{109}\)

Also, Section 11 of the FAA names grounds for modifying or correcting an arbitration award:

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—
(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.\(^{110}\)

\section*{J. Risks of Arbitration}

In recent years, the Supreme Court has continually emphasized the very limited nature of review allowed by Sections 10 and 11 of the FAA. Therefore, review of the following holdings is important for business students to appreciate the risks and rewards of arbitration.

\section{1. Hall Street Associates, L.L.C. v. Mattel, Inc.\(^{111}\)}

In \textit{Hall Street}, the Court held that for claims brought under the FAA, the statute contains the exclusive grounds for vacating or modifying an arbitration award, and parties may not contractually expand those grounds.

\footnotesize{\begin{itemize}
  \item \(^{110}\) Id. at §11 (2006).
  \item \(^{111}\) Hall Street Assoc. v. Mattel, Inc., 552 U.S. 576 (2008).
\end{itemize}}
This case arose as a lease dispute between landlord and tenant. Following a bench trial on the issue of termination, the parties proposed to submit to arbitration the issue of indemnification. The agreement to arbitrate allowed the District Court to “vacate, modify or correct any order (i) where the arbitrator’s findings of facts are not supported by substantial evidence, or (ii) where the arbitrator’s conclusions of law are erroneous.” The parties were unsatisfied with the arbitration award and repeatedly asked the District Court to modify the arbitration order.

The question raised in this case was: “whether statutory grounds for prompt vacatur and modification may be supplemented by contract.” Although the Court noted that other enforcement options are available to parties by way of state courts and the common law, it held that the language of the FAA statute provides the exclusive grounds for vacating or modifying an arbitral award. Any other reading of the statute “opens the door to the full-bore legal and evidentiary appeals that can render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.”

2. Oxford Health Plans LLC v. Sutter

Recently, on June 10, 2013, in Oxford Health Plans LLC v. Sutter, the Supreme Court addressed Section 10(a)(4) of the FAA, one of the most utilized statutory grounds for vacating an arbitration award. Section 10(a)(4) allows vacation of an arbitration award “where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.”

In Oxford, John Sutter, a doctor in New Jersey, filed a putative class action claiming that Oxford Health Plans LLC (“Oxford”) failed to make full payment to him and other physicians in violation of their contract and several state laws. Oxford moved to compel arbitration of Mr. Sutter’s claims based on an arbitration clause in the parties’ contract. The parties agreed that the arbitrator should decide whether their contract authorized class arbitration. The arbitrator determined that the arbitration clause included an intent for class arbitration. Oxford then requested that the arbitrator disallow class arbitration. When its request was denied by the arbitrator, Oxford moved to vacate the arbitrator’s decision on the ground that he “exceeded his powers under Section 10(a)(4) of the Federal Arbitration Act, which allows for limited judicial

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112 Id. at 579.
113 Id.
114 Id.
115 Id. at 580.
116 Id. at 581.
117 Id. at 590.
118 Id. at 592.
119 Id. at 588 (citing LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 889 (C.A.9 1997)).
122 Oxford, 113 S. Ct. at 2067.
123 Id.
124 Id.
125 Id.
126 Id.
review of an arbitrator’s decision.” Each lower court from which Oxford sought relief denied its motion. The Supreme Court granted certiorari to address a federal circuit split about whether Section 10(a)(4) of the FAA authorizes courts to vacate an arbitration award under such circumstances. The Court affirmed the arbitrator’s ruling and, in no uncertain terms, held that the “high hurdle” of Section 10(a)(4) “permits courts to vacate an arbitral decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly.” “It is not enough…to show that the [ arbitrator] committed an error – or even a serious error.” Accordingly, courts should rarely overturn an arbitrator’s interpretation of a contract.

Particularly, the Court noted that the sole question before it was: “whether the arbitrator (even arguably) interpreted the parties’ contract, not whether he got its meaning right or wrong.” Or, said another way: “the question for a judge is not whether the arbitrator construed the parties’ contract correctly, but whether he construed it at all.” As the Court has consistently held:

> It is the arbitrator’s construction [of the contract] which was bargained for; and so far as the arbitrator’s decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different than his. The arbitrator’s construction holds, however, good, bad, or ugly. In sum, Oxford chose arbitration, and it must now live with that choice.

Although arbitration can provide a quicker, more cost-effective method to resolve disputes, arbitration leaves parties with very little opportunity to appeal or challenge an adverse decision. The party seeking relief bears an almost insurmountable burden. “It is not enough…to show that the [ arbitrator] committed an error – or even a serious error,” regarding the facts, the law, or both, and the courts “have no business overruling him.” “The potential for [those] mistakes is the price of agreeing to arbitration.” The parties who chose arbitration must “now live with that choice” – “good, bad, or ugly.”

127 Id. at 2068.
128 Id.
130 Oxford, 133 S. Ct. at 2069.
131 Id.
132 Id. at 2068 (quoting Stolt-Nielson S.A. v. AnimalFeeds Int’l Corp., 559 U.S. 662, 671 (2010)).
133 Id. at 2068; see also n. 2 (“We would face a different issue if Oxford had argued below that the availability of class arbitration is a so-called ‘question of arbitrability.’ Those questions – which ‘include certain gateway matters, such as whether parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy’ – are presumptively for courts to decide.” (citing Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 452 (2003) (plurality opinion))).
134 Id. at 2071.
135 Id. (citing Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960)).
136 Id. at 2068 (quoting Stolt-Nielson, 559 U.S. 662 at 671).
137 See Steelworkers, 363 U.S. at 599.
139 Id. at 2071.
140 Id.
VII. CONCLUSION

Due to the widespread usage of arbitration in the business world, as well as the attention shown to it by the Supreme Court, the failure of undergraduate business schools to integrate ADR into its classrooms does a fundamental disservice to the students by failing to prepare them for one of the most dynamic subjects utilized by businesses, as well as a disservice to the business society for failing to develop and graduate students with professional knowledge and skills.

As business school faculty, our professional obligation is to prepare business students to become business practitioners, well-versed in how the law affects business. Being proactive and continually reviewing that which is trending in business jurisprudence, as well as integrating that knowledge into the classroom, is imperative for those wanting to best prepare the business student to become a successful business practitioner.

APPENDIX: NOTES ON RECENT SUPREME COURT DECISIONS CONCERNING ARBITRATION

The judicial activity surrounding this topic, specifically the FAA, signifies the importance of arbitration in our everyday world and the acceptance granted to it by the Supreme Court. This activity by the highest court in the land should be communicated to business students.

A. AT&T Mobility LLC v. Concepcion\textsuperscript{141} - April 27, 2011

This case arose when plaintiffs brought a class action lawsuit against a telephone company related to individual cell phone contracts which “provided for arbitration of all disputes between the parties, but required that claims be brought in the parties’ ‘individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding,’ ”\textsuperscript{142} AT&T responded that the plaintiffs’ only recourse was to pursue individual arbitration.\textsuperscript{143} The lower courts denied AT&T’s motion to compel arbitration,\textsuperscript{144} finding that the arbitration provision was unconscionable under California’s Discover Bank rule.\textsuperscript{145} The Supreme Court reversed and remanded, holding that the FAA preempted California’s Discover Bank rule.\textsuperscript{146}

B. KPMG LLP v. Cocchi\textsuperscript{147} – November 7, 2011

This case arose from claims brought by nineteen individuals and entities who bought limited partnership interests invested with financier Bernard Madoff.\textsuperscript{148} The plaintiffs sued several parties, including KPMG, for four claims—two of which may have been arbitrable under an audit services agreement—executed between KPMG and one of the plaintiffs.\textsuperscript{149} KPMG filed a

\textsuperscript{141} AT&T Mobility LLC v Concepcion, 131 S.Ct. 1740 (2011).
\textsuperscript{142} Id. at 1744.
\textsuperscript{143} Id.
\textsuperscript{144} Id. at 1745.
\textsuperscript{145} See Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005). (Under the Discover Bank rule, a class action waiver in an arbitration agreement will be unconscionable if three conditions are met: (1) the waiver is found in a consumer contract of adhesion, (2) it involves small amount of damages, and (3) it is alleged that there is a scheme to deliberately cheat consumers out of small amounts of money.)
\textsuperscript{146} Concepcion, 131 S.Ct. at 1753.
\textsuperscript{147} KPMG, LLP v. Cocchi, 132 S.Ct. 23 (2011).
\textsuperscript{148} Id. at 24.
\textsuperscript{149} Id. at 24-25.
motion to compel arbitration of the issues related to the audit services agreement. The Supreme Court found that “the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” A court must do so “even where the result would be the possibly inefficient maintenance of separate proceedings in different forums.” Further, “courts must examine a complaint with care to assess whether any individual claim must be arbitrated.”

C. CompuCredit Corporation v. Greenwood – January 10, 2012

In this case, the plaintiffs, who had agreed in their credit application to arbitrate any dispute, filed suit for a violation of the Credit Repair Organizations Act (“CROA”) alleging, among other things, that a statement in the CROA gives consumers the right to sue in a court of law. The defendant moved to compel arbitration based on the parties’ contract. The Supreme Court held that “[b]ecause the CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms.”


This decision arose from three wrongful death and negligence suits against nursing homes. In each case, a family member acting on behalf of a patient had signed a boilerplate contract which required arbitration of disputes, but brought actions in state court. The West Virginia Supreme Court determined that the arbitration clauses were void as a matter of public policy. The Supreme Court disagreed, unequivocally stating that “[s]tate and federal courts must enforce the [FAA] with respect to all arbitration agreements covered by that statute,” no matter whether it preempts state public policy or not.


When Nitro-Lift Technologies, L.L.C. served two of its former employees with an arbitration demand for allegedly violating a non-compete agreement, the employees sought to have the non-

150 Id. at 25.
151 Id. at 25-26 (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985)).
152 Id. at 26 (quoting Dean Witter, 470 U.S. at 217).
153 Id.
155 Id. at 668.
156 Id. at 669 (The statement in question: “You have a right to sue a credit repair organization that violates the Credit Repair Organization Act.”).
157 Id. at 668.
158 Id. at 673.
159 Id. at 1202.
160 Id. at 1202.
161 Id. at 1202-03.
162 Id. at 1202 (quoting Brown v. Genesis Healthcare Corp., 724 S.E.2d 250 (W. Va. 2011)).
163 Id. at 1202.
compete agreement deemed invalid in a court of law. The Oklahoma Supreme Court ultimately agreed with the former employees and found that the non-compete clause was void as a violation of Oklahoma’s public policy. The Supreme Court rebuked the Oklahoma Supreme Court for determining that the underlying contract’s validity was “purely a matter of state law for state-court determination.” In a succinct, per curiam opinion, the Court stated that the validity of an arbitration provision “is subject to initial court determination; but the validity of the remainder of the contract (if the arbitration provision is valid) is for the arbitrator to decide.” Further, “the FAA forecloses …judicial hostility towards arbitration,” even if the contract contains provisions against the state’s public policy. The Supreme Court was clear: “It is this Court’s responsibility to say what a statute means…it is the duty of other courts to respect that understanding of the governing rule of law.”

F. American Express Co. v. Italian Colors Restaurant - June 20, 2013

This case arose out of a dispute between American Express and a group of merchants who accept American Express cards for payment. The merchants had an agreement with American Express requiring all disputes to be resolved by arbitration. However, the merchants formed a class and sued, arguing that the cost to an individual merchant to arbitrate vastly exceeded the potential recovery possible. The Supreme Court held that the FAA does not permit courts to invalidate arbitration agreements simply because the cost of individual arbitration may be high. According to the Court, nothing in federal law guarantees plaintiffs “an affordable procedural path to the vindication of every claim.”

165 Id. at 502.
166 Id.
167 Id. at 503.
168 Id.
169 Id.
170 Id. (quoting Rivers v. Roadway Express, Inc., 511 U.S. 298, 312 (1994)).
172 Id. at 2308.
173 Id.
174 Id.
175 Id. at 2307-11.
176 Id. at 2309.
ANALYSIS OF ORGANIZATION ETHICS: DO THEY EXIST?
HOW CAN WE THINK ABOUT THEM?

Evan Slavitt

ABSTRACT

Whether an organization is ethical or not has become an increasingly important question both in public and legislative discourse as well as in the application of tort and criminal law. Historical approaches to organizational ethics have either attempted to evade the problem or sought to use paradigms developed for individuals. This Article reviews the various models that have already been proposed and explains why those models are unsatisfactory, focusing particularly on the attempts to articulate an organizational substitute for individual intent. The article then proposes a new framework that differentiates the various aspects of organizations and clarifies how ethical questions should be framed for organizations and how to answer those questions.

But you were always a good man of business, Jacob," faltered Scrooge, who now began to apply this to himself. "Business!" cried the Ghost, wringing its hands again. "Mankind was my business. The common welfare was my business; charity, mercy, forbearance, and benevolence, were, all, my business. The dealings of my trade were but a drop of water in the comprehensive ocean of my business!" 1

I – INTRODUCTION AND OVERVIEW

Introduction

The issue of organizational ethics is not new. According to Philip Pettit, “[i]n 1246, Pope Innocent IV argued that a corporate body, or universitas, cannot be excommunicated, being only a fictional person, not a real one.” 2 Some years later, Blackstone came to the same conclusion. “A corporation cannot commit treason, or felony, or other crime, in its corporate capacity: though its members may in their distinct individual capacities.” 3 Implicit in these assertions is the premise that organizations, as such, are not subject to ethical analysis nor can they be held to ethical standards. The more specific question of the meaning of criminal liability vel non for organizations (at least with respect to crimes involving knowledge or intent) has been a thorn in the scholarly side for as long as courts have permitted corporate prosecutions. 4 It has also plagued courts seeking to identify and apply international law to organizations. 5

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1 Charles Dickens, A Christmas Carol (1843).
2 Philip Pettit, Responsibility Incorporated, 117 Ethics 171, 188 (2007) (citing E. H. Kantorowicz, The King’s Two Bodies: A Study in Mediaeval Political Theology 305–6 (Princeton University Press, 1997)). See also Peter French, Collective and Corporate Responsibility at vii (Cambridge University Press 1984) (“For centuries, the standard minimum entrance qualifications for membership in the moral community have included being a natural person (a human being . . . .”).
5 See, e.g., Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2nd Cir. 2010) (“The question of corporate liability has been identified as recently as 2009 in Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d
The problem is that there is no satisfactory account of ethics as applied to organizations. For some, such as Pope Innocent IV, even the phrase “organizational ethics” is a meaningless one, the equivalent of saying “desk ethics” or “chair ethics.”\(^6\) As the Second Circuit recently explained the state of current international law, 

From the beginning, however, the principle of individual liability for violations of international law has been limited to natural persons--not "juridical" persons such as corporations--because the moral responsibility for a crime so heinous and unbounded as to rise to the level of an "international crime" has rested solely with the individual men and women who have perpetrated it. As the Nuremberg tribunal unmistakably set forth in explaining the rationale for individual liability for violations of international law: “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." *The Nurnberg Trial (United States v. Goering)*, 6 F.R.D 69, 110 (Int'l Military Trib. at Nuremberg 1946) (rejecting the argument that only states could be liable under international law).\(^7\)

More recently, during the establishment of the International Criminal Court, the proposal to grant it jurisdiction over organizations was rejected.\(^8\)

For many, however, intuition\(^9\) indicates that the phrase is meaningful.\(^10\) In the last decade, for example, Enron has become such a symbol for organizational evil that the phrase “Enron scandal” triggers over 200,000 Google hits. Such usage strongly suggests that it is the corporation Enron itself that is being referred to in moral

\(^6\) This position is by no means purely historical. See, e.g., Manuel Velasquez, Debunking Corporate Moral Responsibility, 13 Bus. Ethics Q. 531 (2003); John Ladd, Persons and Responsibility: Ethical Concepts and Impertinent Analyses, in SHAME, RESPONSIBILITY, AND THE CORPORATION 77 (Hugh Culler ed., 1986) (arguing that if we give corporations moral status we reduce the value of moral responsibilities as it applies to people); John R. Danley, Corporate Moral Agency: The Case for Anthropological Bigotry, in BUSINESS ETHICS 202 (W. Michael Hoffman & Jennifer Mills Moore eds., 2d ed. 1990) (arguing that to give moral status to corporations would create profound problems in our moral discourse); Michael Keely, Organizations as Non-persons, 15 J. Value Inquiry 149 (1979); Larry May, Vicarious Agency and Corporate Responsibility, 43 Phil. Studies 69 (1983) (suggesting that corporations cannot be morally responsible because they can only act vicariously).

\(^7\) **Kiobel, supra** at 119.

\(^8\) *Id.* (citing The Rome Statute of the International Criminal Court ("Rome Statute") art. 25(1), *opened for signature* July 17, 1998, 37 I.L.M. 1002, 1016 (limiting the ICC's jurisdiction to "natural persons"); see also Albin Eser, **Individual Criminal Responsibility, in 1 The Rome Statute of the International Criminal Court** 767, 778-79 (Antonio Cassese et al. eds., 2002)).

\(^9\) This article will frequently refer to “intuition” or “the common intuition.” The use of intuition in philosophy has a long history. See, e.g., Michael DePaul, William Ramsey, Rethinking Intuition: The Psychology of Intuition and its Role in Philosophical Inquiry (Studies in Epistemology and Cognitive Theory) Rowman & Littlefield Publishers, Inc. (October 9, 1998). Indeed, Plato asserted that the more significant forms such as Equality, Beauty, Truth, and the Good itself can best be apprehended by intuition (Gk. νοῆσις [nôësis]). In this context, the common intuition is informed by thousands of years of analysis and discussion of individual ethics in philosophy, religion, law, and social science. It should be noted that there is also a long tradition of casting doubt on the value of intuition in various contexts. See, e.g., Louis Kaplow & Steven Shavell, Fairness v. Welfare (Harvard University Press 2002); R.M. Hare, Sorting out Ethics (Oxford University Press 2000). Even Hare, however, who profoundly dislikes appeals to intuition, cannot deny that intuition is part of the moral process. R. M. Hare, Moral Thinking: Its Levels, Methods and Point 40 (Oxford University Press 1982).

terms rather than the several individuals whose misconduct has become widely known. As one commentator explained,

The naive argument for corporate criminal liability begins with the premise that corporations are treated as separate legal entities for many purposes. Corporations can enter contracts, sue and be sued, and own property in their own name. They even possess a broad range of constitutional rights, including a First Amendment right of expression. Corporations are also liable for the torts of their employees in many circumstances under the tort law doctrine of respondeat superior. Is it not a trivial extension of these principles to hold that corporations are also criminally liable for crimes committed by their agents?

Even amongst those who accept the notion that ethical standards can be applied to organizations, however, there is a dramatic lack of agreement on how to do so or what standards to apply.

This confusion creates problems in numerous contexts. In the context of criminal law – at least that subset in which intent or specific intent is implicated – it is essential. In the free market, whether or not some entities should be shunned notwithstanding pure economic considerations is a matter of importance both to buyers and sellers. Finally, members of organizations must grapple with these issues whether they want to do so or not as they make daily decisions on corporate conduct and strategy.

Overview

Part I lays the groundwork for the analysis in this article. First, it briefly addresses why the issue of organizational ethics is important, some concepts central to the history and analysis of the problem: what is an “organization,” what are “ethics,” and when and how can ethical responsibility be assigned? Part II then establishes several paradigms that will be used to test various approaches to organizational ethics.

Part III first focuses on the importance of distinguishing the concept of organizational intent as distinct from individual intent. It then reviews the leading approaches to analyzing corporate intent and evaluating the ethics of organizations:

- **Evasion** – Redefining the problem to avoid corporate intent
- **Corporate Policy** – Using the organizations policies as a proxy for intent
- **Corporate Character** – Ascertaining the “character” of an organization as a proxy for intent
- **Corporate Culture** – A variation of the Corporate Character approach that instead uses an organization’s “culture” as a proxy for intent
- **Corporate Response** – Substitution of the organizational response to wrongdoing for pre-action intent
- **Collective Intent/Aggregation Theory** – This approach seeks to meld the individual intent of some or all of the members of an organization into a distinct intention of that organization
- **Corporate Process/Strategic Model** – This approach seeks to analyze how an organization makes decisions to determine an intent

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11 It is true that from a grammatical perspective “Enron scandal” could either mean the scandal caused by Enron or the scandal that occurred at Enron. Even a cursory review of a few of these sites strongly suggests the former reading which attributes a moral judgment rather than a merely referential use. This is also consistent with the treatment of other organizations. “We can credibly blame the financial institution known as “Goldman Sachs” because we believe, on multiple levels, that Goldman Sachs is an identifiable entity. It means something to refer to “Goldman Sachs” and not “Citibank” or “Morgan Stanley . . . .” Baer at 4-5.

12 Further, the ‘evil corporation” has become an entrenched mise en scene in fiction. E.g., SPECTRE (James Bond books and movies); KAOS (Get Smart series and movie); THRUSH (Man from UNCLE series); LexCorp (DC Comics); Tyrell Corporation (Blade Runner), Weyland-Yutani (Alien films); Cyberdyne Systems Corporation (Terminator films); Soylent Corporation (Soylent Green); The Company (Dr. Who series); and GeneCo (Repo! The Genetic Opera).

13 Daniel R. Fischel and Alan O. Sykes, Corporate Crime, 25 J. Legal Stud. 319, 321 (June 1996). A somewhat more sophisticated phrasing of this idea is set forth in Julian Velasco, The Fundamental Rights of the Shareholder, 40 U.C. Davis L. Rev. 407, 455 (2006) (“Communitarians insist that corporations have political and social dimensions as well as the obvious economic dimension.”). Peter French notes that even some very sophisticated moral philosophers such as John Rawls share that intuition as well. French, supra at 33-34.

14 See TAN .

15 See TAN .

16 See TAN .
During the course of that analysis, continuing reference is made to the body of law addressing criminal intent not because it is identical with ethical analysis, but because both the theory and the practicality of determining corporate intent has often been analyzed and discussed in applying statutes with an intent element. This section demonstrates that each approach suffers from flaws that are either incurable or that can only be cured by foregoing generality, concordance with common ethical intuition, or the distinguishing characteristics of the approach itself.

Part IV discusses other possible solutions. The solution of redefining the issue of organizational ethics to avoid the problems plaguing historical approaches is rejected because it fundamentally fails to address the issue either practically or from the perspective of the common intuition. Next, the Utilitarian ethic is examined as a way of evading the issue of corporate intent. While that approach has some benefits in very specific contexts such as social engineering and organizational ethics, it too fails to address the issue comprehensively or consistently. Finally, Part IV proposes a new approach which addresses the fundamental differences between organizations and individuals. Instead of attempting a direct organizational proxy for individual intent as it is customarily used in ethical analysis, this approach distinguishes four different aspects of organizational activity: ultimate ends, intermediate ends, means, and internal conduct. The section then draws on historical ethics to evaluate ultimate ends and intermediate ends as well as a synthesis of ethical approaches to analyze organizational means and internal conduct. This approach, while sacrificing conceptual simplicity, accomplishes the twin tasks of preserving generality and coordination with common intuition. Finally, Part V draws some tentative conclusions.

II – FOUNDATIONAL ISSUES

Why Are Organizational Ethics Important?

Whether ethics, in general, are important or worthy of study is beyond the scope of this article. Instead, the importance is taken as given. Nonetheless, that does not necessarily imply that organizational ethics are important. There are, however, several plausible answers to this question.

At the most abstract level, one could reason as follows: ethics in general is worthy of study, organizations are ubiquitous in modern society, therefore their ethics are worthy of study. It would seem inconsistent to accept the first premise but disregard a substantial segment of the modern world.

At a more practical level, important policy and societal decisions are premised on ethics. Traditionally, criminal law is based on moral judgments about conduct. As Judge Kozinski recently explained:

Civil law often covers conduct that falls in a gray area of arguable legality. But criminal law should clearly separate conduct that is criminal from conduct that is legal. That is not only because of the dire consequences of a conviction – including disenfranchisement, incarceration and even deportation – but also because criminal law represents the community’s sense of the types of behavior that merits the moral condemnation of society. See United States v. Bass, 404 U.S. 336, 348, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971) (“[C]riminal punishment usually represents the moral condemnation of the community . . . .”); see also Wade v. United States, 426 F.2d 64, 69 (9th Cir. 1970) (“[T]he declaration that a person is criminally responsible for his actions is a moral judgment of the community . . . .”)18

Even outside the legal context, consumers often factor into their purchasing decisions judgments about the ethical quality which, consequently means that businesspersons must also take ethics into account.

It is beyond the scope of this article to describe how society should react to moral or immoral organizations, or whether sanctions should be imposed, or what those sanctions should be. Those reactions depend on what judgments are made. The focus below is not on what judgments are made but on how they can be reached in a way that allows for meaningful discussion and debate. Otherwise, each person arrives at his or her own perspective without any way of reconciling that view with another person’s differing viewpoint. Accordingly, the balance of this article attempts to develop a framework for such discussion.

18 United States v. Goyal, 629 F.3d 912, 922 (9th Cir. 2010).
What Is An Organization?

The legal definitions of an organization vary. They range from overly narrow definitions that require legal organization to those that contain no meaningful limits at all. The first category fails to include many entities that would be commonly recognized as organizations but which are not formally constituted. For example, many political organizations, social clubs, youth groups, and the like are clearly organizations, but few of them have government issued charters. An organization can be permanent or temporary; it can be established in some formal way or be created by happenstance. The Catholic Church, having its own nation state, is an organization, but so is an ad hoc team of children formed during recess to play basketball against other ad hoc teams. Thus, any definition that requires a particular legal formulation is too narrow for purposes of understanding the ethical nature of organizations as a whole.

In contrast, the definition in 18 U.S.C. § 18 – “‘Organization’ means a ‘person other than an individual.’” – is, at least on its face, just a bit too broad. Although the courts occasionally cite this provision, they seem never to have actually construed it. In the absence of some sort of internal coordination, a group of people is merely an assortment of individuals. For example, the set of riders on a particular subway car at rush hour would be defined as more than one individual; to treat them, however, as an organization stretches the notion of ‘organization’ too far. Further the coordination must have some internal aspect. The audience at a particular performance of a play are coordinated in the sense that the theatre sold tickets ensuring that only one person would be assigned to one seat, but the audience members, as such, are not engaged in any coordinated activity.

Even within the legal context, the classification of organizations is a kaleidoscope without any real meaningful consistency. For example, although there are a number of formal legal distinctions made between partnerships and corporations, the practical difference between a limited liability partnership with freely alienable partnership shares and a privately-held corporation is inconsequential. On the other hand, the only real point of similarity between a one- or two-person professional corporation (“P.C.”) and a publicly-held corporation is the legal liability shield. The problem becomes even more complex when international forms of organization are taken into account.

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19 See, e.g., 8 U.S.C. § 1182(a)(3)(B)(vi)(III) (defining a terrorist organization as “a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv).”); 18 USCS § 513(c)(4) (“the term ‘organization’ means a legal entity, other than a government, established or organized for any purpose, and includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, society, union, or any other association of persons which operates in or the activities of which affect interstate or foreign commerce.”); Alaska Stat. § 11.81.900 (2011) (defining an organization as “a legal entity, including a corporation, company, association, firm, partnership, joint stock company, foundation, institution, government, society, union, club, church, or any other group of persons organized for any purpose.”); OR Ann. 2901.23(D) (“As used in this section, ‘organization’ means a corporation for profit or not for profit, partnership, limited partnership, joint venture, unincorporated association, estate, trust, or other commercial or legal entity. ‘Organization’ does not include an entity organized as or by a governmental agency for the execution of a governmental program.”).
20 E.g., Alaska Stat. § 11.81.900 supra.
22 E.g., the new “Tea Parties” are clearly organized but few, if any, have officially organized as political parties under relevant state law.
24 Peter French’s name for these types of groups is “aggregate collectivity” to make clear that only a collection of individuals with some common characteristic is being designated. French, supra at 5. He contrasts this with a “conglomerate collectivity” which means more that such a shorthand designation of an assortment of individuals. Id. at 13.
For purposes of this analysis, therefore, an organization will be defined as any group of two or more individuals who are, in some coordinated fashion, doing something. Because of their special status, however, governments and governmental entities will be excluded from this definition. It is important to note that words suggesting the existence of an organization—e.g., “team,” “gang,” “club”—can be used even when there is no real organization as such. For example, the “Larry Miller Drinking Society” issues membership cards, but there is no actual coordinated activity (either directed from above or cooperative); the cards are used only as a symbol of individual support for a particular podcast.

A Brief Review of Ethics and the Organization

“The field of ethics (or moral philosophy) involves systematizing, defending, and recommending concepts of right and wrong behavior.” This formal definition corresponds to the common use of the term to mean a systemic attempt to define morally defensible behavior. For purposes of this analysis, no more precise definition is needed.

Historically, the field of ethics has examined the notion of individual ethics. From the pre-Socratics, Socrates and the various Greek schools of philosophy through the religious philosophers to modern Existentialism, the discussions historically center on how a person should (in the sense of “ought”) conduct himself or herself and when such person should be blamed (or condemned) for such behavior. In part, this reflects the priority such philosophers gave to the individual; in part it results from the fact that the idea that organizations have an existence separate and apart from their constituent individuals is relatively new.

Setting aside governments and governmental entities, it appears that the first European entity with something like a modern legal corporate nature was the Great Copper Mountain (“Stora Kopparberg” in Swedish), a

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25 This is consistent with other definitions such as “a group of people who work together in a structured way for a shared purpose,” Cambridge Advanced Learner’s Dictionary, or “an organized group of people with a particular purpose,” World Dictionary, Oxford University Press, or “[a]n organization is a deliberate arrangement of people to accomplish some specific purpose.” S.P. Robbins & M. Coulter, Management at 17, (Prentice Hall 9th ed. 2007). Except for the exemption for governmental entities, it is also consistent with the current approach in Canada that defines an organization as:

(a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or

(b) an association of persons that

(i) is created for a common purpose,
(ii) has an operational structure, and
(iii) holds itself out to the public as an association of persons.

Section 2 Canada Criminal Code.

26 This Week With Larry Miller (Ace Broadcasting). Similarly, neither the “Mickey Mouse Club” nor the “Green Team” are real organizations.

27 For obvious reasons, this summary is intended merely to establish the context of this inquiry rather than constitute a free-standing history of the field of ethics.


29 E.g., Aristippus of Cyrene (435-354 B.C.) (Hedonism), Antisthenes (444-369 B.C.) and Diogenes of Sinope (414-324 B.C.) (Cynicism), Zeno (336-264 B.C.) (Stoicism).

30 E.g., Albert the Great (1193-1280), Thomas Aquinas (1225-1274), Bonaventure (1221-1274), and Duns Scotus (1274-1308).

31 Sartre.

32 The inclusion of women within the scope of historical ethical analysis is conceptually correct albeit somewhat ahistorical.

33 There is not always complete overlap between “bad” behavior and behavior that is condemned. Not every person is a saint or hero, but the failure to meet such exalted standards is generally not grounds to condemn them for such failure.

34 Vikramaditya Khanna points out in “A New View of the Economic History of Organizations: Evidence from Ancient India, that entities similar to the modern corporation may have existed in India as long ago as 800 B.C.E. The existence of these entities, however, appear not to have had much impact on the development of ethical analysis in the Western tradition not only because of the limited awareness of such entities in the West, but also because they
mining community in Sweden, which was given a charter from King Magnus Eriksson in 1347. Thus, the first iteration of the innovation of organizations as conceptually separate from their constituent individuals were privately run, but were often extensions of governmental activity. For example, the British East India Company had its own army and navy and was the de facto government of what is now modern India, Pakistan, Bangladesh, among others. To the extent their ethics were considered at all, it was as governmental agents rather than autonomous entities.

The first formal studies of corporations (in English) began in the late 1700's with Adam Smith's "Wealth of Nations" and Stewart Kyd's "A Treatise on the Law of Corporations." By the 1800's, the explosion in organizations was notable to Alexis de Tocqueville. "Americans of all ages, all stations of life and all types of disposition are forever forming associations," he noted. "There are not only commercial and industrial associations in which all take part, but others of a thousand types-religious, moral, serious, futile, very general and very limited, immensely large and very minute."

The increasing importance of organizations in society did not lead to examination of the field of ethics as it relates either to corporations specifically or to organizations in general. Even in the specialized field of criminal law, the notion that corporations, as such, are proper subjects of prosecution is a comparatively recent development even in the United States and not without some continuing controversy. Indeed, that concept is still unaccepted in international law today. Further, much of the scholarly analysis relating to organizations and criminal law focuses either on the practical aspects of prosecuting organizations or on the policy issues of such prosecution. Very little of the literature addresses any underlying ethical theory.

References:

35 S. Rydberg, Stora Kopparberg - 1000 Years of an Industrial Activity at 13 (Gullers International AB 1979).
37 Reference needed.
38 For a good recounting of the history of corporations as subjects of criminal prosecution, see W. Laufer, Corporate Bodies and Guilty Minds, 43 Emory L.J. 648 (Spring 1994) (“In the middle 1800s, the conventional wisdom was that there must be a proper distinction between the innocent and guilty, that when a crime or misdemeanor is committed under color of corporate authority, the individuals acting in the business, and not the corporation, should be indicted.” citing Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819)).
39 See James R. Elkins, Corporations and the Criminal Law: An Uneasy Alliance, 65 Ky. L.J. 73, 107 (1976) (“Although corporations from the mid-1830's have been liable for crimes of agents which did not require intent, that was not true for specific intent crimes until the beginning of the 20th century. The early courts were willing to impute the criminal acts of employees and agents to the corporation only in cases of crimes which did not require specific intent.”).
40 See, Kiobel, supra at 320 (“it was accepted at common law and until the early 1900s in the United States that only people could commit crimes.”). Indeed, as late as 1942, La. Rev. Civil Code of 1870, Article 443 expressly stated that a corporation could not be convicted of any crime.
42 See, Kiobel, supra. As the Second Circuit noted, although organizations could be designated as criminal during the Nuremberg proceedings, that designation was only in aid of individual prosecutions. The organizations were not themselves punished or assessed liability. Thus, they were treated more as large conspiracies as to which individuals were punished for participation. Id. at 135 .
44 Daniel R. Fischel and Alan O. Sykes, Corporate Crime 25 J. Legal Stud. 319, 320 (1996) (“The doctrine of corporate criminal liability has developed, however, without any theoretical justification. The law and economics literature, for example, is largely devoid of any discussion of vicarious criminal liability.”)
45 There was some analysis of organizational responsibility in the post-WWII era focusing on various Nazi organizations, It is not clear that this analysis is generalizable.
What Is Ethical Responsibility?

For purposes of determining whether responsibility can be allocated under any ethical system the individual or entity must have some ability to both understand the circumstances and exercise some level of free will. As Philip Pettit summarizes:

there are three conditions that must be satisfied if someone is fit to be held responsible in a given choice. These conditions correspond to the requirements outlined in some Christian catechisms as conditions necessary and sufficient for a deed to constitute a serious sin. There must have been grave matter, it is said, full knowledge of the guilt, and full consent of the will. The first condition stipulates that the agent faced a morally significant choice; the second that the agent was in a position to see what was at stake; and the third that the choice was truly up to the agent – it was within the domain of the agent’s will or control. 44

This accords with common intuition. A gun cannot be said to engage in ethical misconduct. Even if a grave matter is at stake – human life or death – guns neither have a way of understanding a situation or exercising free will. 45 Thus, the gun is simply an instrumentality rather than an actor whose actions can be evaluated according to ethical standards. 46 This leads to two key questions:

1. Corporate knowledge – How do organizations “know” and “understand” matters for purposes of ethical analysis? Put another way, since organizations cannot “know” things in the way individuals do, 48 can we use these words at all and, if so, how?

2. Corporate intent – How do organizations engage in autonomous behavior, that is, how can they be understood to form intent or exercise free will? 49

Although each question could be analyzed separately, there is no need to do so for the purposes of this article. Intent presupposes knowledge. Something that does not have the capability to “know” will not have the capacity to “intend,” at least for purposes of ethical analysis. Accordingly, any discussion of organizational intent will necessarily subsume discussion of the meaning of organizational knowledge.

44 Philip Pettit, Responsibility Incorporated, 117 Ethics, Vol. 171, 174 (2007). Compare Brent Fisse & John Braithwaite, Corporations, Crime and Accountability at 26 (Cambridge University Press 1993) (“Blameworthiness requires essentially two conditions: first, the ability of the actor to make decisions; second, the inexcusable failure of the actor to perform an assigned task” (cites omitted)).

45 Hence the commonplace, “guns don’t kill people, people kill people.” In some sense, it is clearly true that the immediate proximate cause of the death of a shooting victim is the gun’s discharge of a bullet, but the motive cause is the person who pulled the trigger. The counter-argument is not that the guns are ethically to blame rather than the persons who use them, but is a practical, outcome-driven view that if guns are not available to such persons, there will be some reduction in murder because some fraction of those persons will be unwilling or unable to use another modality such as a knife, candlestick, rope, lead pipe, etc. This article takes absolutely no position on this discussion. Similarly, sharks and tigers may have some ability to comprehend actions and consequences, but in practice they are largely governed by instinct. When a shark or tiger attacks a person, it is not sensible to attempt an ethical evaluation of the animal. The further up the ladder of intelligence one proceeds, the more that some level of ethical behavior can attach. 45 Thus, notion of a “bad dog” is not facially ludicrous and is based on a belief – accurate or not – that dogs are smart enough to understand their actions and conform their behavior to a set of norms, at least a sufficient approximation of rudimentary ethics to allow use of the term “good dog” and “bad dog.” This might also be conceptually true of dolphins and whales but the situation in which such a phrase might be appropriate rarely arises. In contrast, it is unlikely that anyone has ever seriously contemplated saying “good shark” or “bad shark” either directly to the animal or in describing its actions.

46 For a good discussion of the distinction between causation and responsibility, see Celia Wells, Corporations and Criminal Responsibility at 43-52 (Oxford University Press 1993).

47 Celia Wells, however, observes “A philosophical account might entertain doubts about the appropriateness of mentalism and autonomy in establishing responsibility; such doubts might be seen as having their origin in Wittgenstein’s hermeneutic skepticism, which asserts that behavior gets its characteristics through the observers interpretive stance.” Wells, supra at 64. The author has nothing to add to this observation.


49 Indeed, it may be that these terms are entirely inapplicable in their classic sense. See Cressy, supra at 49 (“Corporations and organizations, being inanimate, cannot formulate criminal intent.”)
Test Case Organizations

The following are various types of organizations that will be used to test various approaches to organizational ethics. For purposes of the analysis, some aspects are idealized or modified from the specifics of any specific historical event or organization.

Pirates/Privateers

Although piracy and pirate ships have been glamorized in the public literature, there has been a consistent consensus that the activity of pirate crews – that is, piracy – is unethical. On the other hand, when it comes to dealing with each other, the pirate crew operates in a way not dissimilar to any warship of the same era with strict discipline and clear hierarchy. There are internal norms that dictate how the members relate to each other, often imposing relatively high standards. Further, most of the time pirate crews are not engaging in piratical acts. Like any ship’s crew, they engage in a mundane daily shipboard routine.

Privateers were a special subset of pirates. A privateer is a private person or ship authorized by a government by letters of marque to attack foreign shipping during wartime. They were established as “for profit” enterprises and, at least as far as any target merchant ship was concerned, were little different from pure pirates. Indeed, even for the participants, there was little practical difference.

Mercenaries Group

A mercenary group is an organization that hires its services as a private, for-profit military organization. For example, the Swiss Guard that protects the Pope is a mercenary organization provided by the government of Switzerland. The United States itself has employed mercenary groups in Iraq and Afghanistan. Traditionally, between engagements, membership is voluntary. Once an engagement is accepted, all the members must obey the orders and obligations of the group even at personal risk of safety or loss of life. Such mercenary groups generally do not take into consideration the relative moral positions of putative employers in a conflict; they focus solely on the other factors that determine whether a contract is advantageous. Thus, whether the objective of the group is ethical may depend on how one views the controversy.

Organized Crime

Without specifying any particular organized crime organization, the essentials are a moderately hierarchical organization that has both core members and associates. Once core members have joined, they may not easily leave. Not only are the objectives of the organization unethical, its methods (“means”) are consistently unethical. Further, the internal interactions of its members tend not to be characterized by ethical conduct.

Lax Corporation

The idealized Lax Corporation as an exemplar has perfectly ethical objectives – profits for its shareholders – but has very little concern about the conduct of its employees. It may or may not have a written code...
of compliance, but does not make any significant effort to verify conformance. Such entity is characterized by the standard hierarchy, the extent of which is governed by the size of the company.

**Strict Corporation**

For purposes of its use as a paradigm in this article, the Strict Corporation is, in general, similar to the Lax Corporation, but engages in significant efforts to ensure compliance with law and internal compliance policies. It is the archetype of the corporate model that the Sentencing Guidelines seek to encourage. The strict corporation operates in many jurisdictions and scrupulously obeys the laws and regulations in each such country. Accordingly, in some countries it employs persons who are only sixteen years old, pays the prevailing wage which is lower than what it pays in the United States, and does not permit unions in countries which permit such policies.

**Law Partnerships**

Law partnerships are, in concept, non-hierarchical at the partnership level with little distinction made between partners. In addition to laws and regulations, lawyers hold themselves out as being held to very high self-imposed standards of conduct. In general, lawyers draw clear distinctions between their own ethical nature and that of their clients. Thus, a highly ethical lawyer is not only permitted but encouraged to represent unpopular and even unethical clients.

**Bird-Watching Club**

For purposes of this article, the bird-watching club has both an entirely legal object with entirely unobjectionable techniques. Membership is entirely voluntary and the organization has minimal or no hierarchy or formal policies and procedures.

**Robin Hood and his Merry Men**

The popular vision of the Robin Hood’s band (the “Hood Organization”) is that of a relatively informal organization that has a leader by consensus. Its overall objectives, which center on assistance to the poor, are admirable but its methods are illegal. Internally, each member treats the other members honorably and with respect, although some practices (e.g., the exclusion of women as active members) would be questionable under current standards.

**Idealized Drug Cartel**

For purposes of this analysis, the Idealized Drug Cartel operates in a country in which the manufacture of cocaine is entirely legal as is the use, possession, and sale of cocaine. The organization operates as a family business and its internal operations are highly monitored and consistent with the laws of its home country. Some of its drug sales, directly or indirectly, are made into the United States which still maintains its current ambivalent attitude towards drug use.

### III – APPROACHES TO ORGANIZATIONAL INTENT

**The Problem of Intent**

Many, although not all, ethical systems focus on intent. The traditional concept is that there can be no crime without some intentional action. While this concept has been watered down by the enactment of laws that do

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58 This model has been eroded by the increasing numbers of mega-law firms that are run more like typical corporations than real partnerships. In those organizations, most partners are little more than highly-paid employees, at least for purposes of ethical analysis.

59 This attitude is not universal. As noted below, those lawyers representing the Guantanamo prisoners came under personal attack as, more recently, did the lawyers defending the Defense of Marriage Act.

60 In the criminal context, this is generally referred to as *mens rea*.

61 *E.g.*, *Staples v. United States*, 511 U.S. 600, 605 (1994) (“the requirement of some *mens rea* for a crime is firmly embedded” in “the background rules of the common law”); *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978) (“The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American jurisprudence.”) (quoting *Dennis v. United States*, 341 U.S. 494, 500 ) (1951)); *Morissette v. United States*, 342 U.S. 246, 250 (1952) (“The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.” See, H. L. A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 114 (1968) (“All civilized penal systems make liability to punishment for . . . serious crime dependent not merely on
not require intent or even action, there is a strong correlation between this concept and the concepts applicable in ethical theory. Thus, the developments in criminal law are suggestive – although not controlling – in application of ethics to organizations.

Organizations have no will, no mind, and no emotion. Thus, organizations cannot have “intent” as it is traditionally understood. This presents a challenge in how to approach the concept of intent in the context of organizational ethics.

Boiling down possible approaches to the problem, they reduce the solution to two possibilities: avoid the notion of organizational intent entirely or create an alternative concept that will substitute for organizational intent.

Avoiding the Problem of “Organizational” Intent

The first solution essentially redefines the problem by equating corporate ethics and corporate intent with the ethics and intent of the individuals within the organization. In corporate law, this concept is called vicarious liability or respondeat superior.

Just over a century ago, the Supreme Court first ruled that a corporation could be held criminally liable for the acts, omissions, or failures of an agent acting within the scope of his employment. This fundamental concept continues to flourish.

In order to determine whether the organization is responsible for the acts of the individual, the courts determine whether he or she was acting within the scope of his or her employment.

A similar result obtains under French law. Article 121-2 of the French Penal Code states that “organizations . . . are criminally liable . . . for the offenses committed on their behalf (pour compte) by their organs ou

the fact that the person to be punished has done the outward act of a crime, but on his having done it in a certain frame of mind or will.

For those who are unable to accept legal concepts unless they are stated in Latin, the relevant phrase is “actus non facit reum, nisi mens sit rea.”

See United States v. 7326 Highway 45 North, 965 F.2d 311, 316 (7th Cir. 1992) (“As a legal fiction, a corporation cannot 'know' like an individual "knows."); 2 Int'l Commission of Jurists, Corporate Complicity & Legal Accountability 57-58 (2008) (“National criminal laws were developed many centuries ago, and they are built and framed upon the notion of the individual human being as a conscious being exercising freedom of choice, thought and action. Businesses as legal entities have been viewed as fictitious beings, with no physical presence and no individual consciousness.”); L.H. Leigh, The Criminal Liability of Corporations and Other Groups: A Comparative View, 80 Mich. L. Rev. 1508, 1509 (1982) (“These arguments [against corporate criminal liability] may be summarized quickly: a corporation has no mind of its own and therefore cannot entertain guilt; it has not body and therefore cannot act in propria persona; . . .”).

It is clear, therefore, that the first challenge to any theory of corporate criminal liability lies in the ability to go beyond the confines of the human person and identify other attributes which enable an entity to be capable of being a responsible actor.” Quaid supra at 71. See also C. Wells, Corporations and Criminal Responsibility n. 6 at 88-89 (Oxford: Clarendon Press, 1993) (“If intentions are taken broadly as reasons for acting, then this requires the identification of a corporation's reasons for acting, over and above the reasons of the individuals.”).

Strictly speaking, this is a problem only for deontological ethics – as discussed below, any consequentialist theory (e.g. utilitarianism) would have no problem with this because intent would not be relevant to ethical value.

“Respondeat superior, a doctrine centuries old, is predicated on the assumption that a master, employer, or principal will be held responsible for the acts of a servant, employee, or agent respectively. The rationale for this view is succinctly expressed by the maxim qui facit per alium facit per se.” American Federation v. Equitable Life, 841 F.2d 658 at ___ (______).


See United States v. A & P Trucking Co., 358 U.S. 121, 126 (1958) (holding that “the treasury of the business may not with impunity obtain the fruits of violations which are committed knowingly by agents of the entity in the scope of their employment”); Mylan Lab., Inc. v. Akzo, N.V., 2 F.3d 56, 63 (4th Cir. 1993) (holding that for corporation to be liable for employee's act, the act must be within scope of employment); D & S Auto Parts, Inc. v. Schwartz, 838 F.2d 964, 967 (7th Cir. 1988) (same); Automated Med. Labs, 770 F.2d at 406 (same); Bi-Co Pavers, Inc., 741 F.2d 730, 737 (5th Cir. 1984) (same); Basic Constr. Co., 711 F.2d at 573 (same); United States v. Cincotta, 689 F.2d 238, 241 (1st Cir. 1982) (same); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1007 (9th Cir. 1972) (same).
représentants.” The French legal literature speaks of “responsabilité par ricochet” to describe this mechanism. That is, the attribution of crime to the personne morale, the moral character, starts with the individual person and only then affects the legal entity. The criminal liability of the individual is a precondition to the criminal liability of the organization; there is no separate concept of corporate culpability as distinct from that of the underlying individual.

A similar approach is taken by English law. Called the “alter ego” theory or the “identification” theory, it was set forth in Tesco Supermarkets, Ltd. v. Nattrass. This theory assumes that all legal or illegal acts committed by high-level managers can be properly identified with the activity of the corporation. Many state laws use a similar approach. Thus, the offenses charged against such high-ranking personnel inherently are also those of the organization. Unlike the alter ego approach, those who are in the requisite management positions are not simply agents of the corporation, they embody the corporation itself. This conceptual approach is typified by Lord Denning’s description of the organization:

A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.

These attributory approaches, although simple, are not conceptually satisfactory. First, criminal law—opposed to civil or regulatory laws—traditionally contains some element of moral disapproval. That means that the imposition of a criminal sanction inherently constitutes a moral judgment about the entity accused of the crime.

69 C. PÉN. art. 121-2 (1994) (Fr.). (Essentially, “employees or agents.”).
70 Id. (Essentially, “responsibility by attribution.”).
74 ARIZ. REV. STAT. ANN. § 13-305 (West 1989); ARK. CODE ANN. § 5-2-502 (Michie 1993); COLO. REV. STAT. ANN. § 18-1-606 (West 1990); DEL. CODE ANN. tit. 11, § 281 (1995); HAW. REV. STAT. § 702-227 (1995); 720 ILL. COMP. STAT 5/5-4 (West 1993); IOWA CODE ANN. § 703.5 (West 1993); KY. REV. STAT. ANN. § 502.050 (Michie 1990); MO. ANN. STAT. § 562.056 (West 1979); MONT. CODE ANN. § 45-2-311 (1995); N.J. STAT. ANN. § 2C:2-7 (West 1995); N.Y. PENAL LAW § 20.20 (McKinney 1987); OHIO REV. CODE ANN. § 2901.23(A)(4) (Anderson 1996); OR. REV. STAT. § 161.170 (1990); 18 PA. CONS. STAT. § 307 (1983); TENN. CODE ANN. § 39-11-404 (1996); TEX. PENAL CODE ANN. § 7.22 (West 1994); UTAH CODE ANN. § 76-2-204 (1995); WASH. REV. CODE ANN. § 9A.08.030 (West 1988). While the remaining states have not adopted specific statutory requirements, some have adopted similar common law requirements. See, e.g., State v. Smokey's Steakhouse, Inc., 478 N.W.2d 361, 362 (N.D. 1991) (holding that for corporation to be liable for its agents' criminal acts, corporate management must have “authorized, tolerated, or ratified” the criminal acts); State v. Christy Pontiac-GMC, Inc., 354 N.W.2d 17, 20 (Minn. 1984) (stating that conviction of corporation was justified partly because middle manager had engaged in illicit conduct); State v. Adjustment Credit Bureau, Inc., 483 P.2d 687, 691 (Idaho 1971) (holding that a corporation could not be held liable for actions of its agents unless it was “requested, commanded performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.”).
76 See Albert W. Alschuler, Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand, 71 B.U. L. Rev. 307, 313 (1991) (“The study of corporate criminal responsibility too long has been led astray by commentators seeking to fashion fashion retroactive justifications and anthropomorphic analogies.”).
77 It is true that it is increasingly common in the United States and elsewhere to impose criminal sanctions for actions that are not morally reprehensible per se, but this blurring of the distinction between criminal and regulatory violations is irrelevant to the issues examined here. See John C. Coffee, Jr., Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law, 71 B.U. L. REV. 193 (1991); James R. Elkins, Corporations and the Criminal Law: An Uneasy Alliance, 65 KY. L.J. 73 (1976). For purposes of this analysis, the focus will be on the more traditional view of criminal law.
When an attributory theory is employed, however, then person or entity A is not judged for its own moral conduct, but only for the immoral conduct of person or entity B.

In general, we do not accept such an approach when both A and B are natural persons. If Mr. Smith hires Mr. Jones as a gardener and, without instruction or assent by Mr. Smith, Mr. Jones then kills someone for walking on Mr. Smith’s lawn, Mr. Smith might be civilly liable for Mr. Jones’s actions under a doctrine of respondeat superior, but would not be accused of murder. Nor would the common intuition find Mr. Smith blameworthy simply because he happened to hire someone then engaged in criminal behavior.

Taking exactly the same scenario, with the exception that Smith Corporation is substituted for Mr. Smith as the employee, one can test the attributory theories. Under such theories, however, the actions of the gardener might well be grounds for conviction of Smith Corporation because Mr. Jones’ actions are automatically attributed to, and deemed to be the actions of Smith Corporation. Such an antipodal ethical evaluation cannot be justified by the mere replacement of an individual by an organization. Put another way, if this approach does not correspond to ethical judgments about people, then it cannot be used to make ethical judgments about organizations which demonstrates that attributory theories tend to be over-inclusive.

A similar problem arises when two people with different motives are both involved in the same action. For example, postulate a company in which a purchasing decision requires the independent recommendation of two different persons of the same rank in the organization. Mr. Smith has taken a bribe to recommend a particular purchase. Mr. Jones has carefully evaluated the purchase, and recommends it entirely on its merits. Under this scenario, Mr. Smith is individually blameworthy, but attributory theory leads to contradictory results. Attributing Mr. Smith’s intentions to the entity leads to the conclusion the organization is also morally tainted. The very same analysis with respect to Mr. Jones leads to the antipodal result. Pure attributory theory does not explain how to resolve this conflict. Of course, one could impose an ad hoc rule that the taint trumps to innocent, but such rule is not organic to the attributory approach.

A second problem with the attributory approach is that it fails to account for the distinction between the knowledge of an individual and the composite knowledge of an organization. Except for extraordinarily rare psychological syndromes, all the knowledge accumulated by an individual is simultaneously accessible to that individual. On the other hand, since organizations have no unified mind, then person or entity A is not judged for its own moral conduct, but only for the immoral conduct of person or entity B.

For example, take for example, a chemical company that is manufacturing a pesticide. The engineer who designs the production facility might have no idea what was going to be produced. As a result, he might intentionally cut corners building an unsafe facility. The plant manager knows that what is being produced is hazardous, but does not know that the facility is unsafe. The foreman who intentionally exceeds the pre-set capacity of the piping might not be aware of either the defects in the design nor of the precise product flowing through the pipes. When the pipes rupture killing the inhabitants of the nearby town, no individual can be said to have sufficient knowledge to be subject to criminal sanction. Using an attributory theory, that would mean that the organization also cannot be prosecuted. Such an outcome, however, appears to exonerate the organization of moral blame even though the cumulative knowledge of all the chemical company’s employees, if attributed to the organization as a separate entity...

80 Some counterexamples exist in fiction. For example, the Borg as portrayed in Star Trek: The Next Generation and Star Trek: Voyager, have a collective mind representing a unified consciousness. To the extent that the Borg are considered an organization rather than one large individual, it would have knowledge similar to that of an individual.
81 “The greater difficulty with the doctrine, however, is that liability is predicated upon the existence of at least one human actor possessing the requisite mental state for the offence from within the limited class described above. If no one person can be imputed with the mental element of the offence, the prosecution fails. The result is that system failures and objectionable corporate policies which cause harm are left outside of the scope of criminal responsibility.” Jennifer A. Quaid, The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis, 43 McGill L.J. 67, 97
would be more than enough to show intent. When compared to the actual ethical judgments about companies such as Union Carbide after the Bhopal incident or BP after the Gulf of Mexico incident, the attributory approach does not seem satisfactory as an account of organizational ethics.

A third problem arises from its failure to distinguish between types of corporations. Under an attributory theory, both the lax corporation and the strict corporation would be judged exactly the same way. No matter what effort is made by the strict corporation to ensure high standards of conduct, if one employee transgresses, the same knowledge and intent will be attributed to both entities. Even the managerial variation of the attributory approach does not solve this issue; a “rogue” chief financial officer would still lead to the same evaluation of the two organizations. Any attempt to ameliorate such an outcome by taking into account all the other differences between the two corporations – their policies, internal procedures, character, and the like – would constitute a serious modification of the approach. Such modifications would no longer constitute a straightforward attributory approach and, therefore, would lose all the benefits of this type of theory from the avoidance of the issue of determining the intent of the organization qua organization. Accordingly, even when narrowly applied only to traditional corporations, the attributive model, which cannot fit the concept of a rogue employee whose actions are not those of the corporation into its strict rules, is not congruent with common intuition.

When it comes to non-traditional corporations, the analysis becomes even less satisfactory. For example, many entities now contract out even essential operations, creating a “virtual” company. In such circumstances, determining whether an individual is acting on behalf of this entity when he or she is either an independent contractor or an employee of an independent contractor becomes problematic. In United States v. Parfait Powder Puff Co., 163 F.2d 1008, 1009-10 (7th Cir. 1947), cert. den. 332 U.S. 851 (1948), the Seventh Circuit affirmed the use of the respondeat superior approach to impose criminal liability on a company for violations of the federal Food, Drug and Cosmetic Act committed by its independent contractor. Two points are of note, however, about this case. First, although still viable precedent, it has not spawned any real trend to consider how the doctrine should be applied outside the corporate context. Second, the underlying law is clearly regulatory and is well-known for its lack of any mens rea element. Therefore, the ethical implications of the case are very limited.

It seems counter-intuitive that a company can contract out ethical responsibility. At the same time, the more attenuated the connection between the corporation and the individual malefactor, the harder it is to equate the individual conduct with that of the organization. As a tool of ethical analysis (as opposed to pure legal application), therefore, an attributive approach is not easily generalized to non-corporate forms of organization.

Outside the corporate format, matters become even less clear. The pirate crew and the criminal organization are sufficiently hierarchical that even an attributorial theory limited to managers is logically consistent. Applying this model to the bird-watching club, however, leads to problems. It is hard to assert that every person who holds a membership card can really be said to “be” the corporation as the attributory theory implies. On the other hand, there may not actually be an identifiable group of core actors. Even those who are nominal officers may not really have any deeper involvement than the other members. Thus, either the attributory approach is over-inclusive or so limited that there may not actually be anyone whose actions embody the club. That would either mean that the club must be deemed not to be an organization or it must be conceded there is no way of making any ethical judgments about it. Such a group does, however, meet the definition of an organization and would be considered an organization by a reasonable person using common intuition. That leads to the conclusion that, at least for some types of organizations, the attributory model fails as an ethical approach.

82 See TAN
83 See TAN
84 See TAN
87 United States v. Dotterweich, 320 U.S. 277 (1943) (proof of the defendant's intent to commit a violation is not required). See also T. Gilman and B. McCormick, Federal Food and Drug Act Violations, 38 Am. Crim. L. Rev. 819, 821 (Summer 2001) (“Convictions under the FDCA require proof of various elements. First, the object of the violation must be a “food,” “drug,” “device,” or “cosmetic.” Second, the item must be “adulterated” or “misbranded.” Third, the item must have been introduced into interstate commerce. Additionally, the introduction into interstate commerce of “new drugs” that are not safe or effective for their intended use is subject to prosecution under the FDCA. Generally, establishing the above three statutory elements is sufficient to obtain a misdemeanor conviction.”)
88 See TAN __.
Problems also arise when it comes to the Idealized Drug Cartel test case. In the view of all those in the cartel’s home country, the organization is acting entirely legally and appropriately. Accordingly, judging those persons under an attributory theory would lead to the conclusion that the cartel is perfectly ethical. For those whose actions are within the jurisdiction of the United States laws, their conduct is not only illegal but, according to many, unethical. It is hard, however, to see why the cartel’s ethical status could be so dependent on which employee’s conduct is examined or where. That does not mean that the conduct of the individual subject to the United States laws might not be individually prosecuted or subject to ethical criticism; it does suggest, however, that the attributory model is not satisfactory for purposes of evaluating the conduct of the organization as a whole.

A fourth, and perhaps most problematic, difficulty with using an attributory theory as the basis for application of ethical theory to organizations is that it is so profoundly antithetical to common intuition, as well as to a great deal of scholarship, about the actual functioning of organizations. Implicit in any pure attributory theory is the assumption that ethical judgments simply cannot be made about organizations, as such. This directly conflicts with common intuition. For example, one could not say that the German Nazi Party or the Ku Klux Klan were inherently evil – that is to say, immoral – organizations, only that their members engaged in unethical conduct. In practice, however, there is little doubt that common moral judgment would view them as morally corrupt as organizations, not just as collections of individuals who committed crimes.

Turning to scholarship about corporate decision-making, there is substantial support for the proposition that no one individual’s intent can truly represent the organization. Ann Foerschler89 summarizes two important models of organizational behavior: the Organizational Process model and the Bureaucratic Politics model.90 Both models suggest that any significant corporate action or decision is the result of an amalgam of forces within the organization. Whether the result of the task specialization in organizations or of a bargaining process among individuals, what a corporation does simply cannot be traced to one individual. That also means that any particular individual may have a purpose or intent that varies widely from the vast majority of the other individuals within the corporation, even if only the intent and motivations of each of the individuals involved in the decision are considered. By adding in all the others who may have secondary involvement, it is almost certain that multiple motives and intentions are involved.

The common notion of the “rogue employee”91 demonstrates the issue of multiple, and inconsistent, motives.92 Inherent in the notion of a rogue employee is that he or she is out of control; i.e., .that the actions of the employee are not the same as the intentions of the organization.93 Under the attributive theory, however, by definition the actions of the employee embody the actions of the organization. Put another way, the very articulation of the “rogue employee” concept requires a divergence between what the corporation wants and what such rogue employee wants. Such divergence, however, is not possible when there is a definitional identity between the intent of the individual and that of the corporation. Accordingly, in order for the well-entrenched notion of a rogue employee to maintain viability – which seems to be the case – then an attributory theory is neither a satisfactory method to determine corporate intent in criminal law nor a useful framework for organizational ethics nor.

Ultimately, therefore, a purely attributory approach does not appear satisfactory as a framework for organizational ethics even if it is convenient for legal prosecution of organizations. Thus, the next step is to review existing models of organizational intent to see if they fare any better.

To evaluate these models, several criteria are relevant:

**Scope** – Given the broad variety of organizational types, a model that has more general applicability is stronger than a model that can only be used for certain categories of organizations.

For example, a model that can only deal with publicly held corporations leaves out a substantial range of organizational forms.

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91 See TAN __.
93 Compare, for example, the concept of a “rogue elephant” or its use in S. Palin, Going Rogue: An American Life (HarperCollins November 17, 2009).
Need for Supplemental Rules – An approach that can only work with arbitrarily added rules is weaker than an approach that does not.

Useability – For the reasons set forth above, a theory that can only be used by professional philosophers is less valuable.94

Corporate Policy Model

Under the corporate policy or pro-active95 fault96 model, a corporation is criminally culpable if it has corporate policies that intentionally or foreseeably enable illegal actions, and either the policies are illegal per se or they permit or encourage criminal conduct. “Although it is often said that corporations cannot possess an intention, this is true only in the obvious sense that a corporate entity lacks the capacity to entertain a cerebral mental state. Corporations exhibit their own special kind of intentionality, namely corporate policy.”97 In some versions of this model, in addition to the policies themselves, the internal procedural rules for making decisions and taking action are also considered. 98 As Peter French explained, “when the corporate act is consistent with an instantiation or implementation of established corporate policy, then it is proper to describe it as having been done for corporate reasons, as having been caused by a corporate desire coupled with a corporate belief and so, in other words, as corporate intentional."99 Under such a broader construction of this model, a managerial stance tolerating, or showing systematic blindness toward, criminal conduct would support a finding of corporate culpability.

To some extent, this concept has infiltrated into the law of criminal corporate liability. In United States v. Basic Construction Co.,100 the Fourth Circuit approved a lower court instruction that “[a] corporation may be responsible for the action of its agents done or made within the scope of their authority, even though the conduct of the agents may be contrary to the corporation's actual instructions, or contrary to the corporation's stated position. However, the existence of such instructions and policies, if any be shown, may be considered by you in determining whether the agents, in fact, were acting to benefit the corporation.”101 Such instruction clearly implicates an underlying acceptance of the corporate policy model.102

Unlike the attributory approach, this model does accept the notion that an organization is more than an accumulation of individuals. It implicitly accepts a theoretical framework which accepts that (i) corporations have an existence which transcends the individual personalities of its employees, directors, agents and original founders, and (ii) that organizational decisions are the result of procedures and internal bargaining processes which cannot always be traced back to the individuals who contributed to them.103 “Strategic mens rea therefore reflects the truly corporate nature of the acts of corporations.”104

This model appears to depart from the corporate culture model105 because it addresses a specific set of practices rather than a collage of actions, intentions, and the like. Focusing on these specifics has the advantage of some level of clarity, at least on the surface. Deeper examination, however, suggests that such increase in clarity still does not result in a meaningful paradigm to evaluate the ethics of an organization.

94 There can be some disagreement about this criterion. Nonetheless, for the purposes of this article, this will be given substantial weight.
95 Although originally a term from psychology, the sense of “proactive” as an antonym of “reactive” apparently dates to 1951. See www.oed.com.
97 Corporations, Crime and Accountability supra at 26.
99 French supra at 44.
101 Id. at 573.
102 See also, United States v. Beusch, 596 F.2d 871 (9th Cir. 1979) (“a corporation may be liable for acts of its employees done contrary to express instructions and policies, but that the existence of such instructions and policies may be considered in determining whether the employee in fact acted to benefit the corporation.”).
104 Id.
105 TAN ___
First, the strictly construed notion of the corporate policy model seems to miss the difference between general principles and the evaluation of a particular intent associated with a particular act. For example, a person may truly believe that “honesty is the best policy” while at the same time occasionally varying from that rule. When that person does so in order to gain a pecuniary advantage – by defrauding a victim – that conduct is ethically suspect. In contrast, when a police officer goes undercover to infiltrate a criminal conspiracy, that conduct may be ethically defensible. In both circumstances, the individual may have a policy and then vary from it, but the ethical evaluation of his or her conduct does not depend on the existence of a policy as such.106

Second, the concept of an organization’s “policy” is elusive, at least in part because there is no clear analogy established in individual ethics. Individuals do not adopt “policies,” they have intentions and engage in actions. Otherwise, they would be simply automatons acting according to pre-set programming. If organizations were composed of robots, then it might be possible to evaluate intent according to policies, but the intent would be that of the programmer, not of the robots or the organization. Since organizations are not, as yet, made up of robots, the formal set of organizational policies is neither all-inclusive nor dispositive.

This leads to a more broadly construed notion of organizational policy to include not just the written policies in the book labeled “Official Policies,” but also includes all the informal, indeed unwritten policies of the organization. This immediately leads to the possibility – if not the near-certainty – that such actual policies broadly construed are not only inconsistent with the subset of official policies but inconsistent with each other.

Indeed, at a fine enough level of resolution, the complete set of policies and procedures varies as widely as the number of individuals in the organization, each one of which has a slightly different understanding of the practices and policies of the organization. Accordingly, broadly construed, the corporate policy model becomes incoherent and unable to constitute a particular organization’s “intent.”

The proponents of this approach would, of course, suggest that there is a line between the very narrow and unrealistic construction as set forth above and a more realistic but incoherent broad construction. For purposes of practical application in sentencing or legal culpability, this is probably true. As a tool in fundamental ethical analysis, however, any such ad hoc line drawing is useless. At most, an organizational policy is an expression of aspiration rather than of actual intent as it relates to actual actions.

A simple thought experiment confirms that conclusion. Suppose that the Board of Directors of EvilCorp. promulgates a virtuous set of policies that no one in the company actually observes while engaging in cutthroat, illegal, and vicious behavior. Meanwhile, the Board of Directors of SaintCo promulgates no such policies, but the actual conduct of the business of SaintCo. turns out to be spotless. It is unlikely that any ethical intuition would praise EvilCorp. and condemn SaintCo.107 Indeed, the fact that EvilCorp. has a perfect set of policies as its employees cut a swath of destruction would, for many, make its ethical situation worse; the sin of hypocrisy could also be laid at EvilCorp.’s doorstep. If, on the other hand, one ignores the existence vel non of formally promulgated policies and instead attempts to deduce the “real” policies of EvilCorp. and SaintCo. from the conduct of their employees, the analysis just reduces either to an attributary approach or one of the other approaches discussed infra.

Turning to the test cases, the corporate policy model generally fails. It might suffice for the paradigm of the Strict Corporation, but it appears to fail elsewhere. The Lax Corporation may not have any explicit policies as narrowly construed. Unless the proponents of this approach are willing to establish a blanket rule that any organization that does not have a set of official policies are inherently unethical – a position that would also

106 Indeed, as one commentator notes, it may be in society’s interest for corporations to promulgate aspirational codes of conduct, and yet such interest would be undermined if variations from that code are inherently deemed to constitute unethical Conduct. Elizabeth F. Brown, No Good Deed Goes Unpunished: Is There a Need for a Safe Harbor for Aspirational Corporate Codes of Conduct?, 26 Yale L. & Pol’y Rev. 367 (Spring, 2008) (“If a corporation adopts a code of conduct with aspirational standards - or standards higher than ones prescribed normally under existing statutes, regulations, or the common law - some courts will allow stakeholders to sue the corporation if it fails to meet those standards in its code of conduct. Thus, the law creates a perverse set of incentives that encourage corporations to do the legal minimum rather than aspire to do more for their stakeholders.” (citations omitted)).

107 See, e.g. United States v. Hilton Hotels, 467 F.2d 1000, 1007 (9th Cir. 1972), cert den. sub nom. Western International Hotels Co. v. United States, 409 U.S. 1125 (1973) (Court concludes that existence of abstract corporate policy against antitrust violations was not a defense if employees are acting within their scope of employment because it is the actions of the company that are at issue.)
implicate the bird-watching club – then, as noted above, the approach either merges into a corporate culture approach or becomes so amorphous as to evade definition.

**Corporate Culture Model**

Under the corporate culture model for criminal law, the concept of corporate intent is founded on the assumption that corporations have personalities and that such personalities either encourage or discourage members of the corporation to commit crimes. This model emerged slowly in the United States beginning in the 1970s. In 1975, Christopher Stone characterized the corporation as “a community[,]” with “its own attitudes, norms, customs, habits, and mores.” Similarly, Wally Olins asserted that corporations have their own distinct personalities according to which they express their identity. In 1982, Terrence Deal and Allan Kennedy identified the elements that characterize a corporate culture: the environment in which business is done, the values inspiring the corporation, the main actors of the corporation, and the cultural background. The assertion that “corporate culture” exists continues to this day.

Although the corporate culture model has made some inroads in the context of sentencing in the United States, it has made relatively little progress as part of the determination of corporate intent. Outside the United States, it has been adopted in Australia. “‘Corporate culture’ is an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or within the area of the body corporate in which the relevant activities take place.”

Although there is no bright line distinction between this approach and the proactive model, it appears from the literature that its proponents seek to consider every aspect of the operation of the organization – formal and informal – to determine the culture of a particular organization. This includes, and often focuses on, how individuals within the enterprise treat each other as much as it addresses how they deal with those outside the organization.

It is this approach, whether adopted explicitly or implicitly by those sitting in judgment, that allows for such activities as ranking organizations by how “family friendly” they are, or distinguishing entrepreneurial from bureaucratic organizations, or asserting that some organizations are “socially responsible” while others are not. Indeed, its prevalence suggests that it cannot be dismissed out of hand.

The problems with using culture as a proxy for intent are legion, and have not been solved by any of its proponents. As a starting point, there is the fact that only organizations can have a “culture”; it makes no sense to talk about an individual’s culture. That means that every use of this idea in legal or philosophical systems developed primarily with individuals in mind must be carefully examined to ensure that no false comparison or assumption arises. Put another way, for example, the Stoics developed an entire concept of how individuals should behave. The structure of this philosophy depended on concepts of individual intent and character that, as noted above, are not meaningful when applied to organizations. Even if “corporate culture” might be useful in some contexts (such as deciding levels of criminal culpability), that does not mean it can automatically be redeployed as a direct substitute for the Stoic notions of individual intent and character to evaluate an organization. Even if it were usable in that specific context, it might not map to the Epicurian approach to ethics. In short, even if corporate culture is a meaningful concept, it is not a generally applicable substitute for individual intent in the broader context of ethics.

Setting aside such systemic objections, there are a plethora of more practical problems. For example, assume that Lax Corporation has a *laissez-faire* corporate culture. That does not, however, mean that every interaction it has with the outside world is unethical; it only means that it has, for want of a better phrase, a cavalier attitude toward the conduct of its employees. Accordingly, to determine the ethical nature of a particular transaction it is necessary to examine the specifics of the circumstances. As soon as the specifics are called into question, however, corporate culture appears to dissolve into a modified attributory approach. First, the ethical quality of the individual’s conduct is examined and determined to be ethical or non-ethical. Only then is the culture examined to determine whether it encouraged, permitted, or discouraged that individual conduct. As a gloss on the attributory approach, it might have some value, but it also suffers from all the defects of that approach as well.

A related problem comes from the determination of corporate culture. As a collage of different factors no one of which is dispositive, it appears to depend far too much on the person or entity making the judgment. What one person perceives as aggression may be perceived by another as diligence. In the absence of some objective standard, even the determination of what an organization’s culture is becomes mired in ambiguity.

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For example, in the late 1800’s and early 1900’s, arms dealers were called “merchants of death” and were generally viewed as amoral, selfish organizations. This conception arose not just from their products, but from their willingness to sell to all customers rather than simply their “home” country. Very clear judgments were made about them as organizations, not just as collections of individuals.

It is hard to detect the same level of disapproval in current times.\textsuperscript{113} As long as the sale is approved by the federal government, arms dealers in the United States feel unconstrained to sell simultaneously to India and Pakistan, Israel and Saudi Arabia, China and Taiwan. Indeed, it is often the case that government policy mandates that they do so. There seems to be no incremental disapproval (over and above any generic opposition to the sale of arms) from this approach. It is not the organizations that have changed, but simply society’s view of those activities.

The response may be made that temporal changes in ethical judgments this applies to individuals as well. Washington and Jefferson owned slaves, an activity that was socially accepted at the time but is now abhorrent. Yet closer examination reveals the false analogy. When it comes to Jefferson’s intent in drafting the Declaration of Independence or completing the Louisiana Purchase, one can examine his intent with respect to those actions without specifically considering his ownership of slaves. If anything, such ownership goes to an evaluation of his general character. Character, as discussed below, however, is very different from intent. Even today, we can examine his specific intentions in connection with those specific actions on the same basis as we examine the intent of those still alive. Thus, the concept of corporate culture, like the concept of beauty, seems to depend as much or more on the beholder as it does on the entity itself.

When considering organizations that are less hierarchically structured than the modern corporation, additional problems arise. Does the bird-watching club have a culture as such? It is hard to see how to apply the corporate culture concept to an organization in which all members are only casual participants and the constituents and operation of the club can be variable over short periods of time. Any approach that is not applicable to all organizations which must be supplemented by another approach has obvious drawbacks. Making this problem worse, there is nothing in the corporate culture model that gives any indication of when it is and is not applicable.

Similarly, it might be possible to make a generic judgment about the corporate culture of the exemplar criminal organization because it appears to be consistently unethical in every aspect of its operation. The same might not be true of the pirates or of the Hood Organization. Within each entity, the members treat each other with respect and fair dealing. Each has made a particular judgment about outsiders and has determined that they need not deal with outsiders on the same basis as they deal with each other. One might be more sympathetic to the objectives of the Hood organization – assuming one is not the Sheriff of Nottingham – than that of the pirates, but from a corporate culture point of view, it is very hard to distinguish them as a matter of principle.

Issues also arise in connection with the Idealized Drug Cartel and the Strict Corporation. In the Idealized Drug Cartel test case, the range of actions of employees in each job category are the same, only the jurisdiction in which they act changes. Unless there is total equivalence between what is legal and what is ethical – which appears to be contrary to the general consensus – then an ethical judgment should not depend on pure geographical location. If ethics encompasses more than mere legality, it becomes very hard to explain why the Idealized Drug Cartel has a “bad” (or a “good”) corporate culture. Similarly, the Strict Corporation not only requires adherence to strict codes of conduct, it is posited to be a culturally sensitive and non-imperialistic entity. That means that its corporate culture varies to some degree from country to country. It may be somewhat more formal in Japan and somewhat less formal in Australia. The corporate culture model appears to assume that one cultural evaluation is made of an organization as a whole. When it comes to multinational organizations, this approach unravels.

Even at the level of core values, there is no unanimity even among relatively similar cultures. In the United States, for example, the SEC and the Sentencing Guidelines encourage corporations to set up whistleblower hotlines that permit employees to report allegations of misconduct anonymously because disclosure of wrongdoing is given a priority over issues of privacy. In Europe, however, where privacy is given comparatively greater value, the laws strongly discourage anonymous reporting. Thus, regardless of which approach a company picks, it will be inconsistent with the value system of either the EU or the US. On the other hand if it picks two different approaches depending on location, then it can hardly be said to have a unified corporate culture.

As currently articulated, the corporate culture model does not seem particularly helpful in discerning a useful praxis for evaluating the ethics of an organization. Nonetheless, given the ubiquity of the perception that some corporations seem to have good or bad cultures, this approach will be re-examined in Part IV.

\textsuperscript{113} This is not to say that there is no disapproval, but only that it has substantially receded from this earlier apex of condemnation.
Corporate Character Model

In 1991, in an attempt to reformulate the corporate culture model into something more akin to traditional ethical concepts for individuals, Pamela Bucy articulated a model based on the character – or ethos114 as she called it – of a corporation.115 As she explained it, “a corporation’s ethos or ‘characteristic spirit’ toward employees’ rights, competitors, research and development, marketing, and the like is relevant only to the extent it sheds light on whether there exists a corporate ethos that encouraged the particular conduct at issue.”116 Determining such an ethos, will require a resort to circumstantial evidence, as does proof of intent in every criminal case. Although the actual evidence available will always turn on the particular facts of each case, there are certain guides for every factfinder. When the defendant is an individual, the factfinder looks to the statements and actions of the defendant before, during, and after the crime as well as corroboration for and explanations of such statements and actions. From this information, the factfinder assesses the defendant’s mens rea for the criminal conduct charged. By comparison, in applying the corporate ethos standard of liability, the factfinder should look to the following types of facts to determine whether a corporate ethos existed which encouraged corporate employees to commit the criminal conduct. If so, the government has proven the corporate mens rea. These facts concern the internal, formal and informal, structure of the corporation.117

The balance of her article catalogs specific facts that are asserted to be determinative of a corporate ethos in particular circumstances. Whether this approach is valid depends entirely on two premises:118 (i) that the perception that different organizations seem to have different characters is both valid and meaningful, and (ii) that such corporate character, however precisely determined, can substitute for intent.119

As noted above, there is support in the literature for the proposition that different organizations do have different cultures. In any event, since that question is more a problem for sociologists and behavioral economists, it is beyond the scope of this article. For present purposes, the existence of different organizational cultures is assumed. Whether such differences support the ethos approach or are meaningful for the purpose of ethical analysis is a separate question and one which Ms. Bucy does not address.

In ethical discussions about individuals, there is a clear difference between a person’s character and the ethics of his or her conduct. Take as an example a demanding, unemotional, unrelenting person such as Mr. Spock from the original Star Trek series.120 Without being demeaning, in his case it is clear that from a human point of view he had a number of questionable character traits. As portrayed by Leonard Nimoy, he was generally insufferable and unpleasant. On the other hand, his actions were ethically immaculate.121 In contrast, a person of disreputable character can still act ethically, whether out of fear of discovery, a need to fit in, or some other motive that may not be admirable but still leads to ethical conduct. Put another way, there is a significant difference between the generic character of an actor and the ethical quality of some specific action. For example, imagine a pirate who, in general, acts in a piratical way. Such a person might nonetheless risk his or her

114 Ethos (ἦθος) is a concept derived from Ancient Greek Philosophy and can be thought of as the character or disposition of a community, group, person, etc. It is also the root of the word ethics.  
116 Id. at 1128 .  
117 Id.  
118 Strictly speaking, it also depends on the ability to discern such an ethos, but that is more of a problem of application than inherent validity. Nonetheless, some scholars have questions whether such an inquiry is possible. Corporations, Crime and Accountability at 28 (“The difficulty with the Bucy proposal, however, is that, as a general requirement, it may be impractical to expect the state to marshal all the evidence needed to prove that a corporate defendant had a criminal ethos.”).  
119 For a discussion of this factor, see TAN ____ .  
120 Star Trek (Desilu Studios) originally ran from 1966-69.  
121 There can be some disagreement about his actions in The City on the Edge of Forever in which he prevented Captain Kirk from saving the life of one woman in order to avoid changing history to one in which the world was destroyed by nuclear war. Arguably, these actions violated Kant’s Universal Imperative never to use individuals as instrumentalities. Nonetheless, given that his situation involved time travel – the ethics of which are unclear at best – this is not clear evidence of unethical conduct.
own life to save an innocent child drowning at sea. When evaluating the ethics of such an act, it is the circumstances and motives relevant to that act that determine its ethical value, not the generally disreputable character of the actor.

In short, there seems a general recognition that no human is entirely good or entirely bad. That means that a person of good character may still, on occasion, act unethically and a bad one may act ethically. Indeed, the phrase “out of character” would be meaningless if such events never occurred. This means that there is a distinction between the judgment of the act and the judgment of the character of the individual. At most, character suggests a tendency toward acting in one fashion, not a certainty.

Ms. Bucy seems to recognize this problem implicitly. She first defines the key question as whether the corporation “encourages” the bad conduct. She then asserts that

To apply this standard of liability, it is not necessary to ascertain the overall and complete ethos of an organization. The corporate ethos standard is concerned only with the ethos relevant to the criminal conduct in question. Thus, a corporation’s ethos or “characteristic spirit” toward employees’ rights, competitors, research and development, marketing, and the like is relevant only to the extent it sheds light on whether there exists a corporate ethos that encouraged the particular criminal conduct at issue.

Not only does this not solve the problem, it creates further difficulty. If the character to be judged is not general but relates only to a particular action, then it is not really character as such. As noted above, a person generally of good character may do something unethical. Using Ms. Bucy’s approach, however, such a person could be transmuted into a person of “bad” character because the focus would only be on the specific motives and intent leading to the specific act. When considering such a person, no one would say that he or she has a good character when they do something good and a bad character when he or she does something bad.

Further, it is inconsistent with her earlier discussion of the notion of a general corporate culture that can be distinguished from one entity to another. Those organizational studies were explicitly not action-specific, but instead addressed overall ways of doing business – the same way that one speaks of an individual’s character. At most, therefore, this notion of ethos devolves into an examination of the act itself broadly construed, rather than a separate ethical standard.

The problem of character or ethos becomes even more acute when one attempts to evaluate a non-hierarchical organization. Ms. Bucy’s specialized concept of “encouraging” implicitly assumes that there are senior persons who encourage subordinates to engage in one kind of behavior or another. Many of the specific factors that go into this sort of evaluation apply only in organizations that have structures that correspond to this approach’s criteria. As a result, like the corporate culture approach it purports to replace, the ethos model requires supplementation with other approaches, substantially reducing its value.

A second problem is that some of the factors adduced do not appear to have any significant ethical component. For example, two factors asserted to be relevant to ethos are whether the entity educates employees about legal standards and whether it monitors their compliance with such standards. Here, the pure issues of adherence to law creep into what is otherwise a discussion of character. Presumably, even an “evil” corporation might want to educate its employees about legal standards, if only to ensure that they engage in the evil conduct when it is profitable from a risk-reward point of view. For example, a team of bank robbers might very well have a strong desire that the driver of the getaway car be familiar with traffic rules and regulations to avoid being stopped for improper lane changes or to avoid driving on the wrong side of the road and colliding with other vehicles. Similarly, money-laundering organizations are very aggressive in instructing the persons engaging in transactions that avoid reporting obligations as to the rules that the banks must follow in order for the scheme to be successful. They may even have managers who ensure that, in engaging in the overall money laundering scheme, they do not violate other laws in order to avoid law enforcement scrutiny.

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122 For example, even in the Bible, Moses lost his temper, [CITE], and Paul denied Jesus, [CITE], but each is still considered to be of generally high character.
123 Bucy at 1127.
124 Id. at 1127-28.
125 Id. at 1124 (“In their popular work, Corporate Cultures, Deal and Kennedy identify five elements of a company’s culture: business environment, values, heroes, rites and rituals, and cultural network.”).
126 It is, of course, the case that there can be “encouraging” behavior among peers. This is not the specialized usage of the corporate ethos approach and simply transmutes the idea into a corporate culture approach, discussed TAN n
127 The “wheel man” in common parlance.
128 The “smurfs” in common parlance.
All things considered, the corporate ethos model may be relevant for purely legal questions under the laws and sentencing guidelines as currently constituted and interpreted. It does not, however, shed light on the underlying problem of determining if corporations can be judged ethically and, if so, how to do so.

Corporate Response

Andrew Weissmann suggests an alternative to the proactive approach. He proposes “[a] carefully constructed limitation of criminal corporate liability to those situations where a company reasonably should have taken steps to detect and deter the criminal action of its employee.” Under this concept of responsibility, an organization’s intent is essentially reconstructed based on its response to the discovery of a questionable act.

The Corporate Response approach may have some analytical use as part of a larger effort to establish corporate culpability in a criminal context. If, for example, the Lax Corporation does nothing when an allegation of suspect conduct comes to the attention of its management, that could be construed as suggestive that the organization condones or approves of such conduct. On the other hand, such failure to act could result from paralysis of decision-making or an inability to formulate a response. Thus, the Corporate Response paradigm is open to too many contradictory interpretations.

The problem of using the Corporate Response model outside the standard hierarchical organization becomes even more apparent in the context of the bird-watching club. Because the organization is so unstructured, it may simply lack the ability to respond to an allegation that one of its members has acted unethically. To avoid unfairly characterizing the organization as unethical, it would have to be excluded entirely from consideration by this model. Nor is this limited to social clubs. Partnerships, family businesses, charitable organizations, and other non-hierarchical entities may also fail to respond, not as a result of ethical deficiency, but because of internal paralysis or organizational power.

Inversely, a positive action might not be motivated by ethically approved considerations. The fear of punishment, of lawsuits, of individual impact all affect the organization’s actual response. As a result, even the lax corporation could have an apparently admirable reaction to allegations of improper conduct.

In sum, the Corporate Response model might have some use in the context of a larger framework, or as part of a sentencing protocol, but it does not itself constitute a satisfactory approach to organizational intent.

Collective Intent/Aggregation Theory

There is a substantial body of literature that asserts that there exists a collective intent separate and distinct from the organization’s constituent individuals. As one writer explained,

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129 There are some questions even as to this limited usefulness. “Bucy's proposal provides few standards, invites prosecutors to appeal to the anti-corporate sentiments of some jurors, and probably would yield outcomes based mostly on the jurors' proclivities, the trial lawyers' rhetoric, and how much harm the defendant's agents had caused.” Albert W. Alschuler, Two Ways To Think About The Punishment Of Corporations, 46 Am. Crim. L. Rev. 1359, 1379 (Fall, 2009).

130 There is some ambiguity whether his proposal is entirely “reactive” or is a mix of the proactive and the reactive. To the extent it contains an element of the proactive, it suffers from all the defects of that approach discussed supra.


132 French, Types of Collectivities and Blame, 56 THE PERSONALIST 160 (1975). See also J. LUCAS, THE PRINCIPLES OF POLITICS 281 (1966) (corporate morality is not merely the sum of individual moralities); Attfield, Collective Responsibility, 32 ANALYSIS 31, 31 (1971) (“a necessary condition of government being morally responsible is that some relevant individual or set of individuals could have acted otherwise”) (emphasis in original); Cooper, Collective Responsibility, 43 PHILOSOPHY 258 (1968) (explaining that collective responsibility exists and is not reducible to individual responsibility); Goodpaster & Matthews, Can a Corporation Have a Conscience?, HARV. BUS. REV., Jan.-Feb. 1982, at 132, 133 (corporations are as morally responsible as individuals); Gross, Organization Structure and Organizational Crime, in WHITE COLLAR CRIME: THEORY AND RESEARCH 52 (G. Geis & E. Stotland eds. 1980) (describing organizational criminal tendencies and organizational responsibility); Ozar, The Moral Responsibility of Corporations, in ETHICAL ISSUES IN BUSINESS 294, 296-97 (T. Donaldson & P. Werhane eds. 1979) (corporations can be held responsible qua corporations). For criticisms of the notion of corporate responsibility, see F. ALLPORT, INSTITUTIONAL BEHAVIOR 219-39 (1933); Benjamin, Can Moral Responsibility be Collective and Non-distributive?, 4 SOC. THEORY & PRAC. 93, 95 (1976) (in “distributive” collective responsibility, responsibility may be distilled to that of the group's individual members); Downie, Collective Responsibility, 44 PHILOSOPHY 66, 66-69 (1969); Epstein, Is Pinto a Criminal?, REGULATION, Mar.-Apr. 1980, at 15, 21. For a collection of views on collective
Conglomerate collectivities can be justifiably held blameworthy . . . and hence differ significantly from aggregate collectivities. . . . When we say that a conglomerate collectivity is blameworthy we are saying that other courses of collectivity action were within the province of the collectivity and that had the collectivity acted in those ways the untoward event would not likely have occurred and that no exculpatory excuse is supportable as regards the collectivity. That is not to say that an individual member or even all individual members of the collectivity cannot support excuses. In fact, that is never really at issue.133

The collective intent or aggregation theory, if valid, would be the closest analogy to individual intent in traditional ethical theory.

The leading134 articulation of this approach in the case law135 is United States v. Bank of New England,136 In that case, the Bank of New England was convicted for willfully violating the Currency Transaction Reporting Act, although there was no proof that any individual employee had willful intent at the moment of the actus reus.138 The First Circuit's rationale was based upon the difficulty in identifying an individual offender who operates within a complex and decentralized structure. Under these circumstances, a finding of the collective intent is "not


133 Types of Collectivities and Blame, supra at 166.


135 There were some earlier articles asserting this theory in the legal community. See, e.g., Kathleen F. Brickey, Corporate Criminal Liability 1:04 (1984); Kathleen F. Brickey, Conspiracy, Group Danger and the Corporate Defendant, 52 U. Cin. L. Rev. 431, 448-51 (1983); Developments in the Law - Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions, 92 Harv. L. Rev. 1227, 1248 (1979).

136 821 F.2d 844 (1st Cir. 1987). There is some dissent from the assertion that this case actually stands for this proposition. Thomas A. Hagemann and Joseph Grinstein, The Mythology of Aggregate Corporate Knowledge: A Deconstruction, 65 Geo. Wash. L. Rev. 210, 218 (1997)("For two key reasons, popular comprehension of Bank of New England has been flawed. First, the Bank of New England court itself analyzed the underlying facts of the case in a manner destined to lead to confusion. What emerges from a clearer factual analysis of the Bank's prosecution is something quite unlike the different employees with different knowledge scenario addressed at some length by the court. Second, however, and more important, subsequent interpretation of Bank of New England has entirely ignored the driving factor behind the court's opinion - namely, the section not on knowledge but on specific intent that showed the Bank's employees and the Bank itself had acted in a quite culpable fashion. Taken together, these two flaws cry out for a reexamination of Bank of New England and the myth of collective knowledge that it has spawned.").

137 The Currency Transaction Reporting Act, 31 U.S.C. §§ 5311 –5322 (1982), requires banks to report certain cash transactions. At the time, the limit above which reports were required was $10,000. There were, therefore, attempts to evade this limit by structuring transactions so the trigger limit would never be reached in any one event. Such intentional structuring was also illegal. A detailed discussion of the events leading up to the prosecution is set forth in Thomas A. Hagemann and Joseph Grinstein, The Mythology of Aggregate Corporate Knowledge: A Deconstruction, 65 Geo. Wash. L. Rev. 210 (1997).

138 For a strong counterargument that the case does not stand for the collective intent approach, see Hagemann supra. Whether the case does or does not stand for this proposition is not directly relevant to this article. The fact that it is asserted to be so is sufficient.
only proper but necessary.” In its view, any other rule would allow a company to compartmentalize information and thereby avoid criminal liability. Thus, if one assumes a crime with elements A, B, and C, where A is known to officer A, B is known to officer B, and C is known to officer C, then, for the purpose of criminal liability, all elements are known by the corporation.

Neither the academic articulation nor the legal articulation of the collective intent theory appears to suffice as an ethical approach on close examination. First, under the collective intent approach, an organization could be judged unethical even if each and every one of its members acted ethically. That result seems counterintuitive.

As an initial example, consider the situation in which a company makes two lines of products that are otherwise identical except that one line contains lead and the other is lead-free. A salesperson signs a contract with a customer promising to delivery lead-free products. At quality control, the tester confirms that the product meets the specifications for the company’s line of products which contain lead. A person in the shipping department misunderstands coding protocols and prints out a label indicating that one box of product is lead-free when it is not. Finally, a person at the warehouse puts that box on a truck to be delivered to that customer.

Under the collective intent model, since the salesman knows the customer wants lead-free product, the tester knows the product contains lead, and the warehouse employee knows that the product is being delivered to that customer the organization, as a whole, has the “collective” knowledge that it is sending non-conforming conduct. Given that knowledge, then the collective intent approach would conclude that the organization “intended” to send out lead-containing material. Thus, the company appears to be knowingly delivering lead containing

139 821 F.2d 844, 856 (1st Cir. 1987).
140 This should be distinguished from the situation in which one or more persons intentionally withhold information from other members of the organization or go out of their way to avoid learning information.
141 Shortly after the case was handed down, there was an avalanche of commentary, largely supporting its approach of collective intent. See, e.g., H. Lowell Brown, Vicarious Criminal Liability of Corporations for the Acts of Their Employees and Agents, 41 Loy. L. Rev. 279, 300-02 (1995) (noting that predicate knowledge for corporate criminal offenses can be possessed by more than one person within the corporate structure and citing Bank of New England); Eric Colvin, Corporate Personality and Criminal Liability, 6 Crim. L.F. 1, 19 (1995) (noting that U.S. courts accept aggregation of corporate knowledge and citing Bank of New England); Dana H. Freyer, Corporate Compliance Programs for FDA-Regulated Companies: Incentives for Their Development and the Impact of the Federal Sentencing Guidelines for Organizations, 51 Food & Drug L.J. 225, 228 & n.20 (1996) (“A corporation can be

product to a customer to whom it promised lead-free product. If an individual engaged in such “bait and switch”
conduct, there is no doubt that the person would be acting unethically. Under the collective knowledge model,
therefore, the company’s conduct should also be deemed unethical; yet that seems inappropriate. Intuition suggests
that the corporate actions At most, this would be characterized as an error, perhaps even negligence, but not
intentional, unethical conduct.

There can also be a problem in the other direction. Assume a similar situation except that the shipping
employee intentionally puts a misleading label on the goods with knowledge that the customer wants lead free
product. When it gets to the warehouse, however, the box is dropped and damaged. One of the employees, seeking
to cover up this problem, takes another box of product that contains lead free product (without knowing what the
customer actually wanted) and secretly substitutes it for the damaged box.

At least two employees in this set of circumstances engaged in conduct that they intended to be deceitful.
From a collective knowledge point of view, the company still knew that the customer wanted lead-free products and
that the box containing lead-free products was delivered to the customer. Thus, although two employees acted in an
underhanded fashion, the organization’s superior collective knowledge means that it engaged in no unethical
behavior even though the reality is that two intentional acts of malfeasance accidentally cancelled each other out.

A response could be made that an organization cannot be acting ethically if one or more of its employees
act unethically, but then the collective knowledge approach is, at least implicitly, either being supplemented with or
replaced by the attributory approach, that simply takes each individual’s actions and directly makes the corporation
responsible. These inherent defects suggest that the collective knowledge model cannot be used as the direct
organizational substitute for individual intent.

A second solution would be to impose an overarching obligation on the organization to ensure that its
members are fully knowledgeable. Accordingly, when the problem results from distribution of knowledge, the
organization is still responsible for failure to provide the members with adequate information.

While this supplementation has some surficial appeal, it suffers from several fatal defects. From an ethical
perspective, failure of a company to give full information to all of its members appears to be more of an operational
problem than it is an ethical problem. There are few, if any corporations that give all corporate information to all
employees. It seems inappropriate, therefore, to assert that such decision is itself unethical.

From a practical perspective, this solution also fails. Even smaller organizations accumulate enormous
amounts of information and full distribution would be impractical; for global organizations, it would be impossible.
Indeed, given the legal restrictions imposed on distribution of information, such practice would itself be unethical.

Corporate Process/Strategic Model

Peter French asserts that corporate intent can be discerned by use of a concept he describes as corporate
internal decision (“CID”) structure. This structure has two elements: an organizational flowchart that sets out
levels within the corporate structure, and corporate decision-recognition rules. French asserts that the CID structure
most accurately describes how the actions and intentions of individual human persons within the corporation
become a corporate decision. Through the rules set out by CID structure, it becomes possible to identify whether or
not a given action or decision has been made “for corporate reasons”. Only corporate decisions that are made
according to this procedure and which are in basic accord with company policies qualify as corporate decisions to
which intent can be attributed.

This approach has the benefit of being comparatively objective. Assuming that sufficient attention and
information are available, the CID can be determined with some level of precision. Thus, as is not the case with the
impressionistic corporate culture, character, and ethos models, rather less depends on the person engaging in the
analysis.

Several key problems arise when considering this approach for purposes of ethical analysis. First, although
CID can determine whether an action was taken for a corporate purpose or for a purely selfish, individual reason,
that is only one step in an ethical inquiry and it is not the first step which requires understanding the ethical value of

142 E.g., HIPAA, ITAR, EU Privacy Directove.
143 Fisse makes a similar case for what he calls a strategic analysis, see Fisse, supra at 41-52.
144 It is only comparatively objective in that the determination as to which policies should be considered to ascertain
whether an action is “in basic accord” with company policy has a subjective element as discussed supra.
that corporate purpose. Take, for example, the pirate crew. Attacking and robbing the passengers of a ship is clearly well within the basic company policies of the pirate organization. Further, the attack and robbery were instituted within the normal decision-making process of the organization.\textsuperscript{146} CID can tell us, therefore, that the actions were for the purposes of the pirate crew as a whole, but does not discern whether the underlying purpose is ethical, or indeed whether the conduct itself is ethical nor whether it should be deemed an individual or organizational ethical judgment.

CID also appears to assume that any decision that is not in accord with the organizational process is not relevant to the evaluation of the organization’s ethics.\textsuperscript{147} When looking at the lax corporation, its decision-making process may be so unconstrained that many, if not most, of the actions of individuals are largely independent of any formal process. One possibility would be to characterize such anarchy as the CID structure in which case all actions, however motivated, would be attributed to the corporation. The other possibility would consider other factors – such as individual motive or legal compliance – in which case the discipline and objectivity of the CID model is lost with little incremental benefit. In either case, the CID model as an independent technique fails either because it fails to accord with ethical intuition or because it requires supplementation in order to work. Similar problems arise in applying this model to the Idealized Drug Cartel. All employees are assumed to work toward the corporate objectives. Under the CID, this would result in ethical approval. On the other hand, that seems in conflict with the judgment of those persons who sell drugs in jurisdictions in which such actions are viewed not only as illegal, but unethical.

Another problem arises when the CID model treats potentially unethical circumstances that arise from the failure to act. Not every ethical issue arises from an affirmative positive action. For example, there may be no affirmative decision not to provide a safe workplace, but the unaddressed existence of an unsafe workplace could be deemed unethical. To the extent that CID traces how decisions are made, it will fail to deal with most forms of inaction which are not the consequences of an actual decision, or even a decision about the decision-making process. To the extent it attempts to reconstruct how decisions are not made that should be made, it moves from an objective approach to a much more subjective one in deciding what decisions “should” have been made. The only way to make that determination is to apply a separate ethical framework.

Finally, some criminal laws make distinctions between types or levels of intent as do some versions of ethical theory. CID lacks such nuance. It can only determine if an action is in accordance with corporate process. Thus, either all such distinctions must be ignored, or some supplement to CID must be supplied.

IV – POSSIBLE SOLUTIONS

Can The Problem Be Resolved By Redefinition?

One possible solution to the problem of organizational ethics is to modify the definition of an organization. A narrowly drawn definition could reduce the problems with some of the above approaches. Thus, for example, limiting the definition to organizations that have a clearly defined hierarchical structure, could focus the attributive approach only on those at the top of the pyramid. Similarly, the issue of corporate defining the intent of the organization becomes more tractable – although still problematic – if only the intent of those who run the entity is considered.

In addition to a defined hierarchy, other criteria that could be considered include: formal organizational documents such as charters or bylaws, existence of formal procedures and rules of conduct, and explicit mechanisms to become a member or end membership in the organization, depending on the particular analytic approach at issue. The tighter the definition, the easier it is to apply an approach to evaluate the ethics of an organization.

There are two fundamental issues with the definitional solution. First, while it may ameliorate the problems discussed in Part __, it does not eliminate them. For example, the fewer the people considered with respect to corporate knowledge, the less likely there will be significant divergence between the collective knowledge of the organization and the specific knowledge of each individual. Nonetheless, even a smaller possibility of such divergence still requires consideration of the implications of such divergence.

More generally, however, the narrower the definition, the less it overlaps with the common intuition. This is not a problem for Pope Innocent, Blackstone, and their current intellectual inheritors; in their view the concept of

\textsuperscript{146} In such a case, it is very likely that the decision-making process is essentially the captain of the pirate crew saying “Attack that ship.” There is nothing in CID that requires a detailed process.

\textsuperscript{147} E.g., French, \textit{supra} at 54-55.
organizational ethics is incorrect and the common intuition is wrong. To the extent they accept the existence of such an ethical evaluation, they would apply it to a very narrow range of entities.

In the alternative, since the common intuition does recognize a broad array of organizational forms, the definitional solution appears excessively cramped. It trades applicability for ease of use. If there is a way of solving the problem while still maintaining a broad scope for application, that course appears preferable.

**Should Any Moral Standard Be Applied?**

Another possible approach is to discard entirely the concept of organizational ethics, and instead treat organizations entirely from an instrumental point of view. In this approach, whether organizational ethics exist or not is irrelevant. Blame – or criminal liability – would be assigned as a matter of public policy whenever such action would, on balance, improve society. Thus, for example, the Lax Corporation would be subjected to societal condemnation not because it is ethically deficient, but only because society would prefer that it be more like Strict Corporation. In short, organizational ethics is set aside in favor of a pure outcome-determinative (consequentialist) approach. Such an approach is consistent not only with a utilitarian system, but with any ethical system that only prohibits the use of natural persons as tools to accomplish ultimate goals but does not extend that prohibition to whole organizations.

In effect, all those who use “deterrence” to justify the application of laws or norms to organizations are implicitly using a utilitarian justification. Application of criminal liability or ethical blame is justified by practical reasons, such as the complexity of attempting to discern which individual in a large organization is responsible for some improper activity. An alternative formulation is that if an act is beneficial, the organization’s conduct is deemed “ethical” in a very specialized sense that is unrelated to traditional notions of moral judgment. Their reasoning is as follows:

1. Society will be benefited if organizations refrain from $X$.
2. If we pass laws – criminal or otherwise – to penalize organizations from doing $X$ or to reward organizations for doing not-$X$, such organizations’ cost-benefit analysis will change the behavior of such organizations toward that objective.
3. Whether such penalties/rewards are applied in the context of social pressure, civil lawsuits, or criminal prosecution is simply a function of the tactic’s effectiveness.
4. The only test of the course of action is whether it does or does not achieve the outcome desired.

Notice that such analysis never requires anyone to determine if the organization’s conduct was good or bad, moral or immoral, except as the outcome is or is not achieved.

Two examples may demonstrate the application of this approach. Suppose a Sentencing Commission clearly believed that it would save investigative resources and result in better information if corporations voluntarily reported violations of law. Accordingly, under the Guidelines, self-reporting is taken as a mitigating circumstance that tends to reduce criminal fines. The expectation would be that corporations would be more likely to self-report if there were a clear financial benefit from doing so. If, in fact, such a provision did increase self-reporting, then it is appropriate; if it does not, then it is inappropriate. It would be odd to assert that failure to comply with this provision inherently makes a company immoral; it only means that it does not get the benefit of this circumstance. On the other hand, even without the action of the Sentencing Commission, some may attribute ethical value to self-reporting even if it does not result in any societal benefit. This suggests that the utilitarian approach is not necessarily identical to the common ethical intuition.

Similarly, in recent California legislation, companies are required to describe the efforts they undertake to avoid the use of forced or child labor in their supply chains. Strictly speaking, the law does not prohibit the use of

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148 “Responsibility . . . is a device for achieving social control that does not depend on metaphysical or intrinsic qualities of ‘moral persons’ or human agents.” Corporations, Crime and Accountability at 133.

149 See, e.g., Samuel Buell, The Blaming Function of Entity Criminal Liability, 81 Ind. L.J. 473, 491 (2006) (“Further, the criminal process can impose a unique form of reputational sanction, the effects of which can flow through to institutional members in ways that promise to deter individual wrongdoing and promote group endeavors toward compliance. No non-criminal legal process can fully replicate these effects.”).


151 California Supply Transparency Act, CITE NEEDED.
such labor, but the expectation is that the public’s disapproval of such use will affect the attractiveness of products sold directly or indirectly into the public market. Whether the indirect use of labor makes a company evil is beside the point; there is a clear incentive to be entirely conflict mineral-free from a marketing perspective.

There is, of course, some moral judgment that the use of child or forced labor is bad, but the point of the law is simply to get corporations to stop purchasing directly or indirectly from entities that employ such methods. A company that makes the judgment to eliminate such practices from its supply chain is not doing so (or at least, not necessarily doing so) because it wants to do the “right thing.” It is doing so for the same pragmatic reasons that might lead it to make a product that was “green” or “energy efficient” even if its officers and directors actually had no concern for the environment as such.\textsuperscript{152} Indeed, at some point, such decisions may even make the directors liable for breach of their fiduciary duty to the shareholders.\textsuperscript{153}

The simplicity of this approach has a great deal to recommend it. For example, it is hard enough for politicians to agree on existing facts and probable outcomes. Asking them to agree on ethical judgments may require more from them than is reasonably possible. The entire analysis resolves into a purely technical, factual question of whether incentive A will result in outcome B. This is a questions for sociologists and economists; philosophers need not apply. An examination of the literature confirms that much discussion of the application of criminal law to organizations tends to take place on this level. From a public policy perspective, this reductionist approach may be appropriate.

For everyone to set aside the possibility of ethical judgments of organizations may, however, be too much to ask. Indeed, this purely functional view does not appear to be entirely consistent with the common ethical intuition. Enron is not used as a technical example of an organization whose incentives were not properly designed; it is viewed as an example of an “evil” company. Similarly, the recent public discussions of the Deepwater Horizon Oil Spill in the Gulf of Mexico do not generally compare the economic value of a non-spill Gulf with a spill Gulf and proceed from there.\textsuperscript{154} Instead, there is an implicit assumption that the act of pollution (or the negligence leading to the pollution) had a non-economic moral component. For example, the media’s repeated use of a picture of an oil-drenched bird was not intended to suggest that the problem was the loss of the market value of that bird, or even similar birds, but to suggest that the conduct was immoral. In sum, a purely instrumental, outcome-determinative may be useful, but it does not displace an ethical analysis if one is possible.

\textbf{What Can Be Evaluated?}

The starting point for a meaningful system for organizational ethics must be to confront the reality of artificial constructs that are not natural persons. Specifically, there are two aspects that must be recognized and incorporated into any approach. First, organizations are instrumentalities by nature, and cannot be Kantian, rational beings who exist as ends in themselves and not merely as a means to be arbitrarily used by this or that will.\textsuperscript{155} That does not necessarily mean that that organizations are the same as a hammer. It does, however, mean that corporations function in different ways for different purposes. As a result, corporations can be dissected into different aspects. Thus, meaningful analysis must attend to a variety of aspects of the organization; no Procrustean “one size fits all” test will work.

\textsuperscript{152} That does not mean that some companies may not eliminate child and forced labor from their supply chains or make “green” products because their officers and directors believe in the moral advantages of such actions, only that organizations can rationally engage in these acts without making any moral judgments at all.

\textsuperscript{153} In the movie Iron Man, the CEO, Tony Stark, makes the unilateral decision that Stark Industries – largely a weapons manufacturer – would immediately cease making such products, not only driving the value of the shares down directly, but potentially subjecting the corporation to multiple claims of breach of contract. A shareholder suit reverses that decision. In the context of the movie, the audience is supposed to root for Stark and despise Obadiah Stane who seizes control of Stark Industries. For corporate lawyers in the audience who recognize the impact on the workers, other companies, and those to whom promises of delivery were made and on which lives of troops in harm’s way critically depend, these actions of the ostensibly evil Obadiah Stane are, in fact, praiseworthy. Given the profits of the film, the producers apparently were correct that they could ignore this demographic group.

\textsuperscript{154} A purely economic approach would take this difference and then compare it to the costs of a regulatory scheme that would be strict enough to prevent this pollution and determine the optimum amounts of pollution and regulation. For many, even the notion of an optimal amount of pollution is anathema, suggesting that they do not use an economic approach to evaluate corporate activities.

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This also explains much of the confusion in articulating the meaning of organizational ethics. Any attempt to treat them as if they were individuals leads analysts to design models that can substitute on a one-for-one basis for individual intent in order to use existing ethical approaches. Such efforts are, however, doomed to failure.

A better approach abandons any attempt to create direct correspondence between organizational ethics and individual ethics. Instead, it uses ethical theories to evaluate separately the four principal aspects of organizations and the way they operate: ultimate ends, intermediate ends, means, and internal conduct. To determine whether an organization is ethical, each aspect must be separately evaluated before making any meaningful judgment. It is only at that point that a specific question about an organization can be answered.

The “ultimate ends” of an organization are its final goal or goals, that is, its raison d’être. Thus, for example, the ultimate ends of both Strict Corporation and Lax Corporation are the same: to maximize the financial gain of its owners. Such an ultimate end is not possible by definition for a non-profit entity. Its ultimate ends will depend on the nature of the organization. Thus, a university hospital may have two ultimate ends: increasing the health of its patients while at the same time engaging in medical research.

Very few ultimate ends are immediately achievable. Instead, organizations set intermediate goals – or “intermediate ends” – that will lead to the final ends. Thus, an organization may set a 10% increase in annual sales as an intermediate end anticipating that achievement of that objective will be a waypoint to the creation of value for the owners. Similarly, the non-profit hospital may seek to establish a transplant unit in the hope that both heart patients and other surgical patients will benefit from a center for excellence.

For purposes of analysis, the way an organization acts with respect to the external world will be defined as its “means” of reaching its ends. An organization may engage in a variety of types of conduct from designing a better advertising campaign and cutting prices to industrial espionage and bribery. Such strategies are not confined to hierarchical for-profit organizations; even non-profit or informal organizations may engage in legal or illegal conduct.

In addition to interacting with the external world, an organization’s individuals must also deal with each other. Such activities constitute the organizations “internal conduct.” There is no necessary connection between the quality and nature of an organization’s internal conduct and its external means. An organization can be scrupulous in its dealings with the outside and entirely unscrupulous in the way its members relate to each other (or vice-versa). This is the most significant difference between organizations and individuals. Individuals do not have any internal conduct as such; this ethical evaluation applies only to multi-individual organizations.

Given these four organizational aspects, it becomes possible to evaluate each one separately. Indeed, there is no inherent necessity that each aspect be subjected to the same ethical framework. It also allows for the question to be honed to be more meaningful than “Is the entity ‘good’?”. Some examples may flesh out this approach.\footnote{It must be emphasized that some examples use organizations that are clearly indefensible. Nonetheless, because they are so extreme, they help clarify the analysis.}

As a first example, the Ku Klux Klan (“KKK”) is an organization. Its ultimate end is the oppression of ethnic and religious minorities. The intermediate ends appear to be marginalizing the political and societal power of such groups. These also are almost certainly characterized as unethical. The means of the KKK include or have included lynching, violence and intimidation, but, for purposes of the analysis, assume that not all branches that are nominally part of the KKK use all of those means. Thus, depending on the particular branch at issue, its methods could be deemed either ethical or unethical. Internally, however, there is no necessity for any branch that the dealings within the organization between members are other than honest and direct. Accordingly, taken on its own, its internal conduct cannot be designated as unethical.

In making ethical judgments about the KKK, it is likely that most focus on its ultimate ends and intermediate ends. For them, the key question is “Are the KKK’s goals ethical?”. Even if the focus is on a branch that does not use unethical means and which also has good internal conduct, ultimate and intermediate ends would predominate. That does not mean that means or internal conduct are not relevant, only that are not dispositive. On the other hand, for purposes of analysis, one can imagine a KKK that has the same ultimate and intermediate ends as above, but which only uses legal means to accomplish its goals. It is unlikely that such a change in the hypothetical case would change the evaluation of the ethics of that organization for most people. Nonetheless, on several occasions the American Civil Liberties Union has defended branches of the KKK who seek to accomplish their ultimate ends by legal means. From its point of view, the KKK’s ends are within the acceptable range of societal discourse. As a result, the question that the ACLU believes is pre-eminence is only about the means of the organization; it is less interested in ultimate ends or the internal conduct of the KKK. From this, it is reasonable to
infer that the ultimate and intermediate ends of an organization are also not necessarily dispositive. Instead, when the question changes, the answer changes.

Take as another example the Hood organization. It has as its ultimate goal an ethically unchallengeable objective: assisting the poor. Its intermediate end was obtaining resources from the rich. In and of itself, that goal is not unethical. All charitable organizations also seek money from the rich. The means employed by the Hood organization was (allegedly) theft limited to wealthy persons. The ethical evaluation of those means is ambiguous; much depends on the framework applied to the conduct. By all accounts, the internal dealings between Robin Hood and the Merry Men and among the Merry Men was forthright, and entirely honorable. Thus, the internal conduct of the organization were exemplary.

Accordingly, if the question is “Was the Hood organization’s attempt to seek social justice good?”, then the answer might well be yes. On the other hand, for those with strict notions that an organization cannot be ethical if it breaks the law, then the ethical evaluation of the Hood organization depends, therefore, on one’s stance toward stealing in the context of English society at that time. Even with entirely admirable ultimate and intermediate ends, it would not be unreasonable to assert, based on the illegality of the means used, that the organization was no better than the group of thieves in “Ali Baba and the Forty Thieves”, an organization generally considered to be unethical not only because of their violations of the law, but also for other reasons as well. This leads to the conclusion that means and ends – both intermediate and ultimate – are separate points of ethical consideration of organizations.

Now consider an organization that seeks to achieve ethical ends, both intermediate and ultimate, and deals with the external world ethically. Internally, however, the employees of the organization routinely engage in trickery and deceit against each other. Promotions and terminations are unfair, albeit not illegal. The consensus of all outside observers of such of such organization is that it is a snake pit, par excellence.

If the question is simply “Is this organization ethical?”, traditional methods based on individuals will not work because individuals do not have anything similar to the internal conduct of an organization. Any attempt to simply tweak historical approaches is destined for failure. If, on the other hand, the question is “Does the organization treat its employees ethically? or “Does the organization encourage its employees to act ethically towards each other?”, then ethical judgments can be made.

Because organizations are instrumentalities, it is impossible to evaluate them entirely in the abstract. Organizations need to be contextualized with the totality of their surroundings in order to engage in a meaningful ethical analysis. In order to truly understand the Hood organization, it must be placed in the context of medieval England. In those circumstances, there could be an argument that its means are defensible because of the injustice inherent in feudalism. Were that organization to operate in present-day England, it becomes substantially less likely to be viewed as ethical. Put another way, the question should not be “Was the Hood organization ethical?”, but “Were the Hood organization’s means justifiable under King John’s England?”.

The mercenary organization poses the same problems. Without knowing the context in which this instrumentality operates, it becomes impossible to make a meaningful ethical evaluation. In Afghanistan or Iraq, as a supplement to regular army forces, the ultimate ends of the organization might very well be considered to be justifiable. On the other hand, capitalizing on internecine conflicts in Africa, the very same ultimate end of assisting the local armed forces becomes much more questionable. Even conceding the ethical value of the ultimate end, if the question is “Does the mercenary organization act consistently with international ethical norms for armed conflict?”, the answer could be very different.

Using the test cases, the following could be one set of outcomes.

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<td>E</td>
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<td>Mercenaries</td>
<td>U or E</td>
<td>E</td>
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<td>Organized Crime</td>
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<td>Lax Corporation</td>
<td>E</td>
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<td>U or E</td>
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<td>Strict Corporation</td>
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<td>Law Partnerships</td>
<td>U or E</td>
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<td>E or U</td>
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<td>Bird Watchers</td>
<td>E</td>
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<td>Hood/Merry Men</td>
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<td>Idealized Cartel</td>
<td>E</td>
<td>U or E</td>
<td>U or E</td>
<td>E</td>
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157 The thieves in the classic story steal for personal gain, murder or attempt to murder those who become aware of where they stored their proceeds.
E = Ethical
U = Unethical
U or E = Depends on values applied and context

From this chart, a few conclusions become evident. First, only the strict corporation and the bird-watching club are unambiguously ethical and the organized crime unambiguously unethical. Even the Hood organization’s status depends on whether the commission of serious crimes is ever justified. If the answer is no, then the status of that organization depends on the question. Similarly, depending on one’s view of the ethics of providing legal representation to evil clients, and one’s view of the actual operation of law partnerships, those organizations could either be completely ethical or no better than the Idealized Drug Cartel.

The concept that whether an instrumentality is good or bad depends on the nature of the question is not unfamiliar. To take a simple example, the Land Rover, the Dodge Caravan and the Lamborghini Gallardo are all cars. To ask the question whether one of them is a “good” car is, in the abstract, almost meaningless. Without context, such a question assumes absolute standards that simply do not exist. Instead, it is meaningful to ask “Is this car good as a utility car for a family of five?” or “Is this car good for exploring the Serengti?” or “Is this car good for going incredibly fast and looking unbelievably cool?” When contextualized, the question can be answered and would be different for each specific context. By separating out the relevant aspects of an organization, then it may be possible to use ethical techniques. Thus, for those persons who are considering how an organization treats its employees, the question would be “Are the internal operations of the organization ethical?” On the other hand, if the interest is focused on what the organization does for society, the question would be “Are the ultimate goals of the organization ethical?”

Under such an approach, one could look at the ultimate ends of strict and the lax corporations. Both are in operation to make profits for their shareholders, a goal that is both legal and generally accepted as ethical or at least ethically neutral. Thus, it could be meaningful to say that both entities have ethical ends. Along the same lines, one could examine the ultimate ends of the pirates and the Hood organization and discern that helping the poor is laudatory, but attacking and commandeering ships for personal gain is not.

On its own, this does not necessarily answer the questions set forth in Part I about corporate knowledge or corporate intent. It does, however, pose the questions so that meaningful progress is possible.

What Ethical Standards Can Be Applied To Aspects of the Organization?

Even if the standards will be applied individually to each aspect of the organization, there still remains the issue of the standards to be applied. Dissecting the aspects of an organization may not answer the question, but it does make answering easier. Thus, in answering some questions, using ethical systems derived for individuals may be plausible. For example, there are some ultimate ends that individuals have that can never be justified. No one really asks whether a genocidal tyrant gives to charity or is good to his or her family. The inquiry stops with articulation of the ends themselves. Here, at least, there can be a direct application of traditional ethical theory. Some ends are inherently immoral whether individual or organizational. Some techniques – intermediate ends – are susceptible to that analysis as well. For example, it does not matter whether an individual or an organization kills poor children to harvest their organs; that is immoral even if the goal is to help individuals needing transplants.

On the other hand, when a moral judgment requires evaluation of intent, the comparison breaks down. Organizations simply do not have intent in the way that individuals do. As noted above, trying to conjure up a simulacrum for organizations – whether culture, character, ethos, or the like – fails. A mercenary organization, for example, cannot be characterized as brave or cowardly. To ask any question framed in those terms cannot be meaningfully answered. Instead, it may have brave or cowardly members whose actions have implications for the employer of the mercenary organization. This means that, for at least some possible questions, the use of classical ethical approaches must be rejected by rejecting the question sought to be answered.

This tends to explain the difficulty in evaluating the Hood organization. Except for rare individuals such as Inspector Javert, most people recognize that theft may be justifiable in extreme circumstances. Considerations such as the motives of the particular individual are, therefore, examined. Did the person believe that no other course of action was possible? Was the person acting out of avariciousness or to benefit another? More simply, what was the intent behind the theft?

With the Hood organization, however, the organization, as such, had no intent or motive to examine. As a result, direct application of traditional ethical analyses that consider motive the organization will not work.

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158 Utility vehicle – Caravan, Serengeti – Land Rover, overall coolness – Gallardo.
159 Victor Hugo, Les Miserables.
Accordingly, an appropriate approach must either be one that does not consider motive, such as a pure Utilitarian approach, or one that is categorical, or some other method. There may, of course, be substantial differences of opinion as to which of these is correct, but at least those debating the question can have a more meaningful discussion.

In the same way, asserting that the Lax Corporation is immoral simply because it is lax implicitly is condemning an organizational intent (that is, the intent to be lax) that does not exist. Few if any organizations are (or can be) rigorous in all ways at all times. Thus, the difference between Lax Corporation and Strict Corporation is one of degree. Lax Corporation, therefore, is lax because of the failure of senior management, not because the organization as a whole intends immoral conduct. This has consequences for the moral judgment that results from Lax Corporation’s conduct. If one takes the former view that laxity is the result of the intent of the organization, then the impulse could be to condemn the corporation; if one takes the latter view, then the focus of the condemnation is on the senior managers. Again, this is not dispositive of what society should or should not do; but whatever it does should be based on a clear understanding of the moral judgments being made.

Finally, there are simply no good analogies between the ethical evaluation of individuals and the ethical analysis of internal corporate operations. Characterizations such as “cutthroat” or “family friendly” can only be seen as descriptive rather than standing for any moral judgment. Indeed, such judgments often turn out to be expressions of personal preference and not application of objective standards. The distinction between a cutthroat organization and one that strives for excellence may lie in the eye of the beholder. Accordingly, extreme caution should be exercised before condemning an organization with ethical ultimate ends, intermediate ends, and means, but with questionable internal conduct.

A second level of issues arises from the possibility of nesting organizations. Individuals are, for the most part, unitary. Turning back to the definition of an organization, there is no necessity that the organization being evaluated is always identical to the legal entity. Instead, a legal entity or organization may consist of a variety of identifiable organizations. A simple example would be a conglomerate of diverse companies owned by a holding company. For some purposes, the “organization” would be the entire collection of entities; for other purposes, the “organization” would be limited to one of the constituent companies. Generalizing, that suggests that a deeper analysis of the nature of the question and the operation of the entity may be required before any judgments are made.

Indeed, examination of the nominal organization may reveal several de facto component organizations. Thus, it may make sense to isolate “senior management” as an organization in fact. As such, the way such an organization deals with outside entities – including the lower echelons of the corporation itself – may permit some ethical judgments to be made. While characterizing an entire company as deceptive may fail, there could be circumstances when such description might apply to senior management or the board of directors. Under such a focus, then such implicit organization’s ends, ultimate ends, and means may be subject to evaluation as described above.

This can be seen in a situation in which there is a labor/management dispute and management engages in unfair labor practices. In such circumstances, members of the corporation are both the victimizers (employee-managers) and the victims (employee-union members). Implicitly, society already recognizes that in such circumstances, there are two separate “organizations” subsumed in the single corporation. Legally, the same distinction is made in derivative suits against boards of directors. At some level, boards are the final operational authority within a public corporation. One possible conclusion, therefore, would be that as a matter of definition, the board cannot act against the wishes of the corporation because they embody such wishes. In contrast, in some circumstances the board can be characterized as a de facto organization and the relationship between such entity and those outside – including the owners or the employees – may be subject to ethical evaluation.

Nonetheless, the result is not a judgment that the corporation is good or bad as such, but only that the de facto group’s means, ends or ultimate ends are unethical. This lays blame (or praise) where it most accurately belongs and avoids trying to apply ethical standards developed over millennia to judge individuals to matters beyond their scope.

V – CONCLUSIONS

Although “organizational ethics” is an important concept, it is not co-extensive with individual ethics. Fundamental differences in knowledge and intent as those terms are applied to organizations must be taken into account. Rather than attempt a comprehensive ethical evaluation of an organization as if it were an individual by

160 For purposes of this analysis, the unique problems posed by multiple personality disorder and conjoined twins will be set aside.
trying to create an organizational substitute for individual intent, much more satisfactory results are available if the ethical question is contextualized and if it focuses on one of the four key aspects of organizations, internal operations, means, intermediate ends, and ultimate ends. Finally, attempts to apply ethical norms to internal operations of complex organizations are much more likely to be robust if a nuanced approach parses out sub-organizations within the notional organization under consideration.

This suggests that the discourse about a variety of topics – application of criminal law to organizations, approaches to sentencing of corporations, application of punitive damages in civil law, and others – can be clarified and sharpened if their underlying or implicit ethical foundation is made explicit. Otherwise, much of the discussion will be ships passing in the night.
INTRODUCTION

The Human Genome Project (HGP), a joint endeavor of the National Institutes of Health (NIH), the Department of Energy and international partners, was launched in 1990 with the goal of sequencing the human genome, the complete set of DNA in the human body.1 Completed in 2003, the HGP has resulted in the discovery of almost three thousand disease genes2 and the development of genetic tests for more than 2,200 diseases, of which 2,000 are currently available for use in clinical settings.3

As genetic testing becomes more widely available, it is necessary to examine both the advantages and limitations4 of predictive genetic testing as well as the ethical and legal issues that these tests raise. This analysis is particularly crucial in the context of the genetic testing of children. This article considers whether parents should be able to authorize the genetic testing of their children. Part I provides an overview of genomic medicine, including a discussion of the types of genetic disorders, the purposes of genetic tests, and the special attributes of genetic information. Part II examines the unique issues raised by the genetic testing of minors and the risks and benefits of testing, including a discussion of psychosocial consequences, the impact on family dynamics, the autonomy of the child and potential employment and insurance discrimination. Part IV concludes that genetic testing of minors should not be permitted unless it provides a clear benefit to the child.

I. GENOMIC MEDICINE

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4 One commentator notes that “[t]he human genome has had a certain tendency to incite passion and excess [including]…breathless promises from Wall Street and the press about the imminence of genetic ‘crystal balls’ and genome-based panaceas…”Lander, supra note 2 at 187. Noting that this assessment “overstates the maturity of the scientific research,” Palmer observes that “[g]enetic tests, while powerful, are flawed crystals.” Jessica E. Palmer, Genetic Gatekeepers: Regulating Direct-to-Consumer Genomic Services in an Era of Participatory Medicine, 67 FOOD DRUG L.J. 475, 478 (2012).
A. Genetic Disorders

Genetic disorders are caused entirely or partially by variations in the DNA sequence from the normal sequence and are classified as single gene or multifactorial disorders. A Mendelian (single gene or monogenic) disorder is one where a variation in the DNA sequence on one or both chromosomes (one chromosome inherited from each parent) has such a severe effect that its presence usually results in disease.\(^5\) Monogenic diseases can be either “dominant” or “recessive.” Dominant diseases are caused by the presence of the disease on just one of the two inherited parental chromosomes. The chance of a child inheriting a dominant disease is 50 percent. Recessive diseases require the presence of the disease gene on both of the inherited parental chromosomes. The chance of a child inheriting a recessive disease is 25 percent.\(^6\) Examples of monogenic diseases are cystic fibrosis (CF)\(^7\), Huntington’s disease (HD)\(^8\) and Tay-Sachs disease.\(^9\) While devastating, monogenic disease are relatively rare.\(^10\)

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\(^6\) NGRI, FREQUENTLY ASKED QUESTIONS, supra note 5.

\(^7\) Cystic fibrosis (CF) is an inherited chronic disease that affects the lungs and digestive system of about 30,000 children and adults in the United States (70,000 worldwide). A defective gene and its protein product cause the body to produce unusually thick, sticky mucus that clogs the lungs, leading to life-threatening lung infections. Mucus can also obstruct the pancreas and stop natural enzymes from helping the body break down and absorb food. Cystic Foundation, About Cystic Fibrosis, What Is Cystic Fibrosis?, at http://www.cff.org/AboutCF/ (last visited June 7, 2013). CF is a “recessive” disease, meaning that to have CF, a person must inherit two copies of the defective CF gene — one copy from each parent. Those who have one gene with a CF mutation are unaffected carriers of the recessive disorder. If two carriers produce a child together, there is a 25% chance that the child will be affected by CF. Id.

\(^8\) Huntington's disease (HD) is an inherited neurological illness causing involuntary movements, severe emotional disturbance and cognitive decline. In the United States alone, about 30,000 people have HD. In addition, 35,000 people exhibit some symptoms and 75,000 people carry the abnormal gene that will cause them to develop the disease. There is no cure for this fatal disease. National Human Research Institute, *Learning About Huntington’s Disease*, at http://www.genome.gov/10001215 (last visited June 7, 2013). HD affects an estimated 3 to 7 per 100,000 people of European ancestry. It is less common in some other populations, including people of Japanese, Chinese, and African descent. U.S. National Library of Medicine, Genetics Home Reference, Huntington disease, at http://ghr.nlm.nih.gov/condition/huntington-disease (last visited June 7, 2013).

A single abnormal gene on chromosome 4 produces HD. Since the gene that causes HD is dominant, the child needs only one copy of the gene from either parent to develop the disease. Each child of an HD parent has a 50 percent chance of inheriting the HD gene. A person who inherits the HD gene, and survives long enough, will sooner or later develop the disease. If the child does not inherit the defective gene, the child will not get the disease nor pass the gene on to subsequent generations. Symptoms of HD generally appear in mid-life. National Human Research Institute, *Learning About Huntington’s Disease*, at http://www.genome.gov/10001215 (last visited June 7, 2013).

\(^9\) Tay-Sachs disease is a rare inherited disorder that causes progressive destruction of nerve cells in the brain and spinal cord. Tay-Sachs is caused by the absence of a vital enzyme called hexosaminidase-A.
Multifactorial (complex) disorders are caused by the presence of variants in one or more genes, acting together with environmental factors. Many commonly occurring diseases, such as cardiovascular disease, psychiatric disorders, asthma, diabetes and most cancers are examples of such disorders. Since no single gene determines whether a person will develop a multifactorial disorder, these diseases are more difficult to understand and predict. To study these diseases, geneticists conduct large-scale association studies involving thousands of subjects and thousands of DNA markers (SNPs). Researchers then aggregate SNP data from the study participants to identify statistical associations between SNPs and various health conditions. More than 1,100 genetic variants linked to more than 165 diseases and traits have been identified, nearly all since 2007.

(Hex-A). Without Hex-A, a fatty substance, or lipid, called GM2 ganglioside accumulates abnormally in cells, especially in the nerve cells of the brain. This ongoing accumulation causes progressive damage to the cells. Tay-Sachs condition is a “recessive” disease, which means that both copies of the gene in each cell have mutations. The parents of an individual with a recessive condition each carry one copy of the mutated gene, but they typically do not show signs and symptoms of the condition. U.S. National Library of Medicine, Genetics Home Reference, Tay-Sachs disease, at http://ghr.nlm.nih.gov/condition/tay-sachs-disease (last visited June 7, 2013).

10 NGRI, FREQUENTLY ASKED QUESTIONS, supra note 5.
11 NHRMC, MEDICAL GENETIC TESTING, supra note 5, at 5.
12 An estimated 80 million Americans have one or more types of heart disease. The Heart Foundation, Heart Disease Facts, available at http://www.theheartfoundation.org/heart-disease-facts/heart-disease-statistics/ (last visited June 7, 2013). According to the CDC, about 600,000 people die of heart disease in the United States every year. Furthermore, heart disease is the leading cause of death for both men and women.


15 In 2011, diabetes affected 25.8 million Americans (8.3% of the U.S. population.) Of this amount, 18.8 million people were diagnosed and 7.0 million people were undiagnosed. Centers for Disease Control and Prevention, National Diabetes Fact Sheet, 2011, available at http://www.cdc.gov/diabetes/pubs/pdf/ndfs_2011.pdf (last visited June 7, 2013).

In its 2013 Annual Report, the American Cancer Society estimates that approximately 1,660,290 new cancer cases will be diagnosed in 2013 and that about 580,350 Americans will die of cancer, almost 1,600 people a day. Cancer remains the second most common cause of death in the U.S., accounting for nearly 1 of every 4 deaths. American Cancer Society, CANCER FACTS AND FIGURES 2013, available at http://www.cancer.org/research/cancerfactsstatistics/cancerfactsfigures2013/index (last visited June 7, 2013).

17 Lander, supra note 2, at 191.
18 Id. It is important to note that due to the complexity of genetic inheritance, a disease can be both Mendelian and multifactorial:

For example, mutations in the BRCA1 gene are associated with the development of breast and ovarian cancer and exhibit an autosomal dominant pattern of inheritance. The
B. Genetic Tests

Genetic tests provide DNA sequence information that can be used to detect gene variants associated with specific diseases or conditions. 19 Significantly, one’s genotype (genetic code) does not always predict one’s phenotype (physical state). The relationship between genotype and phenotype is measured by the penetrance of the genetic disorder. When the disorder is highly penetrant, 100% of the individuals with the genetic mutation will develop the disease; nevertheless, it is not possible to predict when and to what degree the disease will manifest itself in the individual. 20 Since Huntington’s disease is highly penetrant, the presence of a mutated gene correlates with an estimated 100% lifetime risk of developing the disease. 21 Most diseases, however, have a range of penetrance that is determined by environmental factors, the gene’s protein product and the influence of other genes. 22 Individuals with a mutated gene for a less penetrant disease may never develop any symptoms of the disease; furthermore, since genetic diseases have “variable expressivities,… individuals who do develop the disease will experience symptoms of varied severity.” 23 Genetic tests are typically classified based upon the following purposes for which the tests are performed:

- **Somatic cell genetic testing** entails testing tissue (usually cancer) for non-heritable mutations for diagnostic purposes or to enable medical professionals to select the best treatment for a known cancer. 24
- **Diagnostic testing for heritable mutations** is conducted on an affected person to identify the underlying mutation(s) responsible for a heritable mutation. 25
- **Predictive testing for heritable mutations** is the use of a genetic test to predict future risk of the disease. It is typically conducted on an asymptomatic person who, based on his or her family history, is at risk for developing a disorder. 26

mutation places the person at greatly increased risk of developing cancer, but some women with such a mutation will never develop breast cancer. This mutation and the associated predisposition demonstrate a Mendelian pattern of inheritance. However, there are other non-Mendelian factors which may influence whether a woman will develop breast or ovarian cancer by a certain age, including lifestyle and pregnancy history. The inheritance of other genetic variants can modify the cancer risk. In other words, the cancer predisposition is inherited in a Mendelian fashion, but the development of cancer in this context is still a multifactorial process.


21 Palmer, *supra* note 4, at 479. For a description of HD, see *supra* note 8.
23 Palmer, *supra* note 4, at 479.
25 *Id.*
• **Carrier testing for heritable mutations** involves testing for the presence of a mutation that does not place the person at increased risk of developing the disease but does increase the risk of having a child who will be affected by the disease. 27

• **Pharmacogenetic testing** is conducted to uncover genetic variants that alter the way a drug is metabolized and is used to determine the safety and efficacy of drugs. The aim of pharmacogenomics is to improve therapeutic responsiveness and reduce the incidence of adverse drug reactions. 28

C. The Nature of Genetic Information: Genetic Exceptionalism

Genetic exceptionalism is the concept that because of the special social, economic and psychological ramifications of genetic information, it should be treated differently from other forms of personal or medical information. 29

1. Familial Nature of Genetic Information

Genetic information is not merely personal to the individual, but also has implications for his or her genetic family members in past, present and future generations. By definition, an inherited genetic variant has “…the potential to be passed on to that person’s children, has usually been inherited from the person’s parents, and may also be present in other genetic relatives (e.g., siblings, cousins).” 30 The familial nature of genetic information raises significant ethical issues, including whether the individual diagnosed with a genetic disorder should inform his or family members that they may be at risk and whether the health professional who has diagnosed the patient has a duty to warn those known to be at risk of avoidable harm from a genetically transmissible condition. 31

2. Psychological Repercussions of Genetic Information

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27 NHRMC, MEDICAL GENETIC TESTING, supra note 5, at 8.


30 NHRMC, MEDICAL GENETIC TESTING, supra note 5, at 16. For a discussion of the nature of genetic disorders, see supra notes 5-10 and accompanying text. One commentator has referred to the shared nature of genetic information as the “group ownership theory.” Mary L. Kovalesky, Comment: To Disclose or Not to Disclose: Determining the Scope and Exercise of a Physician’s Duty to Warn Third Parties of Genetically Transmissible Conditions, 76 U. CIN. L. REV. 1019, 1036 (2008).

31 For a discussion of these issues, which are outside the scope of this article, see Kovalesky, id. at 1029-1041 and accompanying notes. See also Susan M. Denbo, What Your Genes Know Affects Them: Should Patient Confidentiality Prevent Disclosure of Genetic Test Results to a Patient's Biological Relatives?, 43 AM. BUS. L. J. 561 (2006).
Genetic testing may cause psychological risks, including anxiety and impaired self-esteem and perception.\(^{32}\) These psychological implications are exacerbated in situations involving the diagnosis of genetic disorders for which there are no treatments or measures to prevent the development of the disease.\(^{33}\) Genetic disorders may also create guilt for the individual who may worry about passing the gene on to his or her children.\(^{34}\)

3. Limitations of Genetic Information

In most cases, genetic information has limited predictive power. Even with highly penetrant diseases, it is not possible to predict when and to what degree the disease will manifest in the individual.\(^ {35}\) For multifactorial disorders, which result from the interaction of genetic and environmental factors, accurate predictions about whether the disease will develop or the severity of its manifestation are not possible.\(^ {36}\) Individuals whose genetic testing reveals disease susceptibility but who do not have any symptoms of the disease are, in effect, in “disease limbo.” Some medical ethicists refer to these persons as *unpatients*\(^ {37}\) or *patients-in-waiting*.\(^ {38}\)

4. Genetic Discrimination

Individuals found to have genetic susceptibility to serious conditions may face discrimination due to the lack of effective and comprehensive health privacy and nondiscrimination legislation. The only federal health privacy legislation, the Health

\(^{32}\) American Academy of Pediatrics, Committee on Bioethics, *Ethical Issues with Genetic Testing in Pediatrics*, 107 PEDIATRICS 1451, 1451 (2001). Testing can also provide false reassurance from a negative result. *Id.*

\(^{33}\) Di Pietro, Giuli and Spagnolo coined the phrase “the prophecy precedes the cure” to describe the situation where “DNA testing may predict diseases long before we are able to prevent, treat or cure them.” M. L. Di Pietro, A. Giuli & A.G. Spagnolo, *Ethical Implications of Predictive DNA Testing for Hereditary Breast Cancer*, 15 ANNALS OF ONCOLOGY 65, 66 (2004). They posit that this situation “often places the persons involved in a difficult or even a tragic situation, and raises doubts about the very legitimacy of diagnosing a future disease when effective preventive/therapeutic measures are not available or are highly speculative.” *Id.*

\(^{34}\) See Andrews and Zuiker, *supra* note 18, at 810.

\(^{35}\) See *supra* notes 5-10 and accompanying text.

\(^{36}\) See *supra* notes 11-18 and accompanying text. Andrews and Zuiker note that “[t]he genetic test for complex disease is not a diagnostic tool, but rather an imprecise measurement of increased risk when compared to the general population.” Andrews and Zuiker, *supra* note 18, at 807.

\(^{37}\) Di Pietro, Giuli and Spagnolo, *supra* note 33, at 67. The authors contend that the detection of a predisposition to a genetic disease “can promote the view that a person ‘in actual fact’ is already sick, with an adverse affect (sic) on that person’s zest for life and general behavior as a result.” *Id.* See also Robert Steinbrook, *The Promise and Perils of New Genetic Screening: Science: More Diseases Will be Diagnosed and Better Therapies Developed. But How Should the Tests Be Used?*, L.A. TIMES, NOV. 1, 1993, at A1 quoting medical ethicist Albert Jonson:

> The “unpatient” is a little like the “undead” in horror movies. They are both dead and not dead. Unpatients may develop severe anxiety and believe that they are under a death sentence. They may visit doctors frequently, seeking monitoring and reassurance. In extreme cases, they may contemplate suicide. They may be ostracized by friends and family….

*Id.*

Insurance Portability and Accountability Act (HIPAA), prohibits group health insurers from using genetic information in determining eligibility or setting premiums and from treating genetic information as a preexisting condition. HIPAA does, however, provide individuals with a private remedy if their privacy is breached and “does little to limit the secondary uses of health information.” The Genetic Information Nondiscrimination Act of 2008 (GINA), a federal law that prohibits discrimination in health coverage and employment on the basis of genetic information, was signed into law on May 21, 2008, after thirteen years of debate. Title I of GINA prohibits health insurers from using genetic information to determine eligibility, set premiums, or exclude a preexisting condition. A health plan may, however, use genetic information to determine the medical appropriateness of the treatment for which a policyholder is seeking benefits. Additionally insurers may not request or require individuals or their family members to undergo genetic testing or to provide genetic information. The law defines “genetic information” to include family medical history and information regarding individuals’ and family members’ genetic tests. GINA does not cover the areas of life, disability or long-term care insurance. Title II of GINA prevents employers (with fifteen or more employees) from using genetic information in employment decisions such as hiring, firing, promotions, pay and job assignments. It also prohibits employers from requiring or requesting genetic information and/or genetic tests as a condition of employment. Significantly, GINA does not prohibit insurers or employers from

44 Id. §§101(a)(2), 102(a)(2), 103(a)(2), 104(b), 201(4)(A)(i)-(iii).
46 Genetic Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 §208 (2008). The Equal Employment Opportunity Commission (EEOC) filed its first lawsuits against employers under GINA in May 2013. The EEOC sued Fabricut, Inc. in Oklahoma federal court, alleging that Fabricut had withdrawn an offer of employment because the company believed the applicant had or was predisposed to develop carpal tunnel syndrome on the basis of a post-offer medical examination that required disclosure of family medical history that included genetic information. The lawsuit and consent decree settling the case were filed at the same time on May 7, 2013 in U.S. District Court for the Northern District of Oklahoma (Civil Case No.: 13-CV-248-CVE-PJC). In addition to the $50,000 payment, Fabricut has agreed to take specified actions designed to prevent future discrimination, including the posting of an anti-discrimination notice to employees, dissemination of anti-discrimination policies to employees and providing anti-discrimination training to employees with hiring responsibilities. See http://www.eeoc.gov/eeoc/newsroom/release/5-7-13b.cfm (last visited June 7, 2013). On May 16, 2013, the EEOC filed its second lawsuit, and first class
considering manifested medical conditions (including those with a genetic basis) when pricing insurance or making employment decisions.\textsuperscript{47} In other words, while GINA protects individuals with a predisposition for a disease, that protection vanishes once the individual experiences symptoms of, is being treated for, or has been diagnosed with, a disease or condition.\textsuperscript{48} Commentators have decried this “worrisome” aspect of GINA, noting that “the exact moment of disease manifestation [is not] always obvious, [since] diseases often develop in a predictably non-predictable manner, and doctors often find it difficult to pinpoint the root cause of symptoms at the beginning stages of a disease or condition.”\textsuperscript{49} The Patient Protection and Affordable Care Act (PPACA)\textsuperscript{50}, passed in 2010, will not supersede the protections afforded by GINA. While PPACA prohibits insurance companies from discriminating on the basis of pre-existing conditions, genetic information is not considered a preexisting condition under the Act.\textsuperscript{51} Furthermore, unlike PPACA, which only applies to health insurance, GINA applies to both employment and health insurance.\textsuperscript{52}

5. Necessity for Genetic Counseling

In light of the foregoing potential implications of genetic information, it is imperative that individuals receive genetic counseling prior to deciding whether or not to undergo genetic testing, especially if the test is likely to provide uncertain results and/or have significant implications for the patient and his or her family.\textsuperscript{53} It is also necessary after the administration of predictive genetic tests, following a positive genetic carrier test and following an abnormal result on a prenatal diagnostic or screening test. The American Board of Genetic Counseling (ABGC), the credentialing organization for the genetic counseling profession in the United States and Canada\textsuperscript{54}, enumerates the following

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\textsuperscript{48} Id.
\textsuperscript{50} Patient Protection and Affordable Care Act, Public Law 111-148, 124 Stat.119 (2010).
\textsuperscript{51} 42 U.S.C.A. §300gg-3(b)(1)(B) (2010) (“Genetic information shall not be treated as a condition described in subsection (a)(1) of this section in the absence of a diagnosis of the condition related to such information.”)
\textsuperscript{52} For a thorough analysis of the of the PPACA, \textit{see generally} Hall, Render, Killian, Heath & Lyman, P.C., \textit{Survey of Recent Developments in Health Care Law}, 44 IND. L. REV. 1287 (2011).
\textsuperscript{53} For a discussion of the familial nature of genetic information, \textit{see supra} notes 30-31 and accompanying text.
\textsuperscript{54} American Board of Genetic Counselors, \textit{About ABGC}, \texttt{http://www.abgc.net/About_ABGC/GeneticCounselors.asp} (last visited June 7, 2013). (“The ABGC credentialing process establishes quality standards for knowledge and performance for individuals entering the profession, as well as for experienced practitioners throughout their genetic counseling career.” \textit{Id.})
responsibilities of a genetic counselor: (i) to provide expertise in clinical genetics; (ii) to counsel and communicate with patients on matters of clinical genetics; and (iii) to provide genetic counseling services in accordance with professional ethics and values. The ABGC notes that genetic counseling involves more than simply providing information to clients; rather, it encompasses both educating them about genetic testing and discussing and exploring the implications of the testing for them and their families. The American College of Medical Genetics and Genomics (ACMG) also recommends both pre-and post-test counseling for asymptomatic individuals undergoing genetic screening. Since many physicians are unable to keep abreast of the continually evolving field of genomics and most laypersons do not understand the complicated nature of genetic information, genetic counselors play a vital role in helping patients and...


56 Specifically, genetic counselors perform the following tasks:
1. Explain the nature of genetics evaluation to clients. Obtain and review medical and family histories, based on the referral indication, and document the family history using standard pedigree nomenclature.
2. Identify additional client and family medical information relevant to risk assessment and consideration of differential diagnoses, and assist in obtaining such information.
3. Research and summarize pertinent data from the published literature, databases, and other professional resources, as necessary for each client.
4. Synthesize client and family medical information and data obtained from additional research as the basis for risk assessment, differential diagnosis, genetic testing options, reproductive options, follow-up recommendations, and case management.
5. Assess the risk of occurrence or recurrence of a genetic condition or birth defect, using a variety of techniques, including knowledge of inheritance patterns, epidemiologic data, quantitative genetics principles, statistical models, and evaluation of clinical information, as applicable.
6. Explain to clients, verbally and/or in writing, medical information regarding the diagnosis or potential occurrence of a genetic condition or birth defect, including etiology, natural history, inheritance, disease management and potential treatment options.
7. Discuss available options and delineate the risks, benefits and limitations of appropriate tests and clinical assessments. Order tests and perform clinical assessments in accordance with local, state and federal regulations.
8. Document case information clearly and concisely in the medical record and in correspondence to referring physicians, and discuss case information with other members of the healthcare team, as necessary.
9. Assist clients in evaluating the risks, benefits and limitations of participation in research, and facilitate the informed consent process.
10. Identify and access local, regional, and national resources such as support groups and ancillary services; discuss the availability of such resources with clients; and provide referrals, as necessary.
11. Plan, organize and conduct public and professional education programs on medical genetics, patient care and genetic counseling issues.

Id.


58 Explaining complex genetic information to patients in a way that they can understand is difficult because many test results involve probabilities instead of definitive findings and studies show that many people find it difficult to understand probabilities. Andrews and Zuiker, supra note 18, at 810. In a study to determine whether women who had undergone genetic testing or had cancer could correctly interpret the National Cancer Institute’s (NCI) message about lifetime risk of developing cancer for a woman with altered BRCA1 and BRCA2 genes, researchers found that 40% misunderstood NCI’s information. Yaniv Hanoch,
clinicians “understand genotypic information” so that they can make informed individual health and prevention decisions. 59

6. Informed Consent

If an individual decides to proceed with genetic testing, he or she must make an informed choice to do so. The National Human Genome Research Institute (NHGRI) participated in policy development in the area of informed consent as it relates to genetic/genomic studies, concluding that because of the often profound impact of genetic testing, patients should be adequately counseled about the specifics of that test: 60

Before an individual agrees to participate in a clinical trial, research project or undergo a genetic test, he or she must be informed of the test's purpose, medical implications, alternatives, and possible risks and benefits. Patients should additionally be made aware of their privacy rights, including where their DNA will be stored and who will have access to their personal information. An informed consent document, requiring the patient's signature, should articulate all of these details. Even after signing, the patient may still opt out of the test or study; the informed consent document is not a contract. 61

The aim of the consent process is to enable those considering genetic testing to make a free and informed choice based upon what is best for them. 62

Talya Miron-Shatz and Mary Himmelstein, Genetic Testing and Risk Interpretation: How Do Women Understand Lifetime Risk Results? 5 JUDGMENT AND DECISION MAKING 116 (2010), available at http://journal.sjdm.org/10/91110/jdm91110.html (last visited June 7, 2013). These findings support the concern of many about the inability of patients to understand and use the probabilistic information that genetic testing provides. See, e.g., I.M. Lipkus, G. Samsa, & B.K. Rimer, General Performance on a Numeracy Scale Among Highly Educated Samples, 21 MEDICAL DECISION MAKING 37 (2001) (women often overestimate or underestimate their probability of developing cancer); Palmer, supra note 4 at 482-83 (“Clinicians may have difficulty explaining the limitations of the underlying science to patients who hope for crystal balls.”)


61 Id.

62 The American Academy of Family Physicians recommends the following guidelines for discussing and obtaining informed consent for predictive genetic testing:
1. Obtain an accurate family history and confirm diagnoses before testing.
2. Provide information about the natural history of the condition and the purpose of the test.
3. Discuss the predictive value of the test, the technical accuracy of the test and the meaning of a positive or negative test.
4. Explore the options for approximation of risk without genetic testing.
5. Explore the patient's motives for undergoing the test, the potential impact of testing on relatives and the risk of passing a mutation on to children.
6. Discuss the potential risk of psychosocial distress to the patient and family, even if no mutation is found.
7. Explain the logistics of testing and fees involved for testing and counseling.
8. Discuss issues involving confidentiality and the risk of unemployment and insurance discrimination.
II. GENETIC TESTING AND SCREENING OF MINORS

A. Types of Genetic Tests

Despite concerns about the potentially harmful effects of genetic testing, the professional consensus is that patient autonomy requires that competent adults be afforded the choice of assuming these risks. The genetic testing and screening of minors, however, raises significant ethical issues because they are a vulnerable population unable to provide their own informed consent. For this reason, most professional organizations advocate genetic testing for children only when such testing is in their best interests. In order to analyze whether genetic tests do, in fact, provide a benefit to the child, it is necessary to first discuss the purpose of, and setting in which, these tests are administered.

1. Newborn Screening

Once born, almost all children in the United States immediately undergo multiple tests for genetic and metabolic abnormalities under newborn screening programs in effect in all 50 states and the District of Columbia. These programs were originally designed to detect serious conditions that could be discovered by a simple blood test before

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9. Describe the patient's medical options, the efficacy of available surveillance and prevention methods and recommendations for screening if test results are negative.
10. Provide a written summary of the content of the counseling session.


63 See supra notes 32-34 and 39-52 and accompanying text.
64 The term “professional consensus” encompasses relevant professional review panels and professional organizations. Loretta M. Kopelman, Using the Best Interests Standard to Decide Whether to Test Children for Untreatable, Late-Onset Genetic Diseases, 32 J. OF MED. AND PHILOSOPHY: A FORUM FOR BIOETHICS AND PHILOSOPHY OF MEDICINE 375, 376 (2007).
66 Genetic screening “denotes assays undertaken on a population-wide basis to identify at-risk individuals.” AM. COLL. MED. GENET. AND GENOMICS POLICY STATEMENT, Technical Report: Ethical and Policy Issues in Genetic Testing and Screening of Children, 15 GENETICS IN MEDICINE 234, 234 (2013) [hereinafter ACMG POLICY STATEMENT]. Genetic testing “denotes assays designed to provide a definitive diagnosis; these are performed because of positive screening results, family history, ethnicity, physical stigmata, or other reasons.” Id.
67 For a discussion of informed consent for minors, see infra notes 116-126 and accompanying text.
68 Kopelman, supra note 64, at 377.
69 Timmermans and Buchbinder, supra note 38, at 408. The tests are administered by health professionals who obtain blood samples via a heel prick from each newborn and then test the samples for various metabolic and genetic disorders. See Ellen Wright Clayton, Screening and Treatment of Newborns, 29 HOUS. L. REV. 85, 95 (1992).
symptoms developed in order to intervene early in the child’s life. Newborn screening became possible due to advances in testing methods for phenylketonuria (PKU), a rare genetic disorder that can cause mental retardation but, if detected early, can be treated by dietary modifications. The ACMG recommends that states screen for 29 core conditions and most now do so. These conditions were deemed appropriate for newborn screening because they have “a screening test, an efficacious treatment and adequate knowledge of natural history.” Expanding the screening panel to include diseases for which there is no treatment or tests that detect the presence of genetic sequences that merely correlate to disease susceptibility carries potential harms:

With every added condition, the frequency of false-positive results increases. Confirmatory testing is likely to avert unneeded medical interventions, but other possible adverse effects include psychosocial and emotional distress and the potential distortion of parental perceptions about the child. Similarly, expanded screening may also give rise to “patients in waiting”: individuals with a genetic diagnosis who have no signs or symptoms and may remain asymptomatic for years or decades.

In light of these potential dangers of newborn screening, the programs must be designed to insure that their “central criterion” is medical benefit to the child.

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70 Clayton, supra note 69, at 96 & n.48.
73 Michael S. Watson, Michele A. Lloyd-Puryear, Marie Y. Mann, Piero Ronaldo & Rodney R. Howell, Newborn Screening: Toward a Uniform Screening Panel and System, 8 GENETICS IN MEDICINE S296, S302 and Table 2, p. S305 (2006). However, even testing for “treatable” diseases, like PKU, may not achieve the intended results:

The history of PKU shows that it is easy to exaggerate the ease and efficacy of treatment and to underestimate the costs. It was said that dietary therapy would be inexpensive, brief, and easy to manage. Unfortunately, it is none of these. Further, this shows that once the idea of newborn screening became established, the program could be rapidly routinized and, once routinized, easily expanded for other screening purposes. Thus, a “technological imperative” has combined with unrealistic assumptions about benefits, and that drives the expansion of screening programs. The lesson that such wholesale expansion is unwarranted has been repeatedly drawn since the early 1960s. Surely it is time to heed it.

74 ACMG POLICY STATEMENT, supra note 66, at 235-36 (footnotes omitted). For a discussion of “unpatients” and “patients in waiting,” see supra notes 37-38 and accompanying text. For a discussion of the possible adverse consequences of predictive genetic testing of minors, see infra notes 127-151 and accompanying text.
75 Jeffrey R. Botkin, Assessing the New Criteria for Newborn Screening, 19 HEALTH MATRIX 163, 183-84(2009). The American Medical Association recognizes the need to analyze and standardize newborn screening programs:

In spite of the fact that newborn screening programs have been in place for more than 40 years in this country, much of the evidence demonstrating screening program
Carrier Screening

Carrier testing and screening permits the identification of persons who are carriers for mutations in genes responsible for a variety of conditions, including Tay-Sachs disease\(^{76}\) and cystic fibrosis.\(^{77}\) To determine whether there was professional consensus regarding carrier testing of minors, Borry and colleagues reviewed fourteen normative and ethical guidelines emanating from 24 different groups, including genetic associations and societies, medical and pediatric associations and institutes and government-related organizations\(^{78}\) and found “that there is a consensus on postponing carrier testing until the child can give proper informed consent.”\(^{79}\) All of the guidelines concluded that decisions regarding carrier testing in minors should take into account the minors’ best interests\(^{80}\) and that the child should decide whether to be tested at some stage later in life.\(^{81}\)

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\(^{76}\) See footnote 9 supra for a discussion of Tay-Sachs disease.

\(^{77}\) See footnote 7 supra for a discussion of cystic fibrosis.

\(^{78}\) These organizations included, among others, the American College of Medical Genetics, the American Medical Association, the British Medical Association, the European Society of Human Genetics, and the German Society of Human Genetics. Institute. P. Borry, P. Schotsmans, JP Fryns, & K. Dierickx, Carrier Testing in Minors: A Systematic Review of Guidelines and Position Statements, 14 EUR. J. HUM. GENET. 133, 134 (2006).

\(^{79}\) Id.

\(^{80}\) The ACMG notes that the rationale against carrier screening of minors is altered when carrier status can potentially affect the health of the child during his or her minority. For example, The National Collegiate Athletic Association screens all Division I athletes for the sickle cell trait because this trait has been shown to increase the risk of exercise-related health problems. Carriers of Duchenne muscular dystrophy and fragile X premutation have also been found to be at risk of health conditions. ACMG POLICY STATEMENT, supra note 66, at 237 (footnotes omitted). The ACMG also suggests that carrier screening may be appropriate for adolescents who are pregnant or considering reproduction. Id.

\(^{81}\) Borry et al., supra note 78, at 134. The child’s future autonomy tended to be the main ethical argument at stake:

As carrier testing performed during childhood only affects the future of the child, not that of his parents or guardians, the guidelines stated that it was wiser to defer testing until the child himself is able to give proper informed consent than to acquiesce to the wishes of his parents or guardians to go forward with testing. The child’s personal consent takes precedence over the wishes of third parties, including parents, either to carry out or to refuse genetic testing.

Id. For a discussion of informed consent for minors, see infra notes 116-126 and accompanying text.
3. Predictive Genetic Testing

Predictive\(^{82}\) and presymptomatic\(^{83}\) genetic testing, which refers to the possibility of tracing a genetic defect before the presentation of symptoms, can occur in many contexts. For example, genetic technology provides the means to diagnose disorders that will become manifest only in adulthood. While treatment is available for some of these adult-onset disorders, for others there is no currently available treatment to prevent or forestall the development of the condition. These latter diseases are commonly referred to as untreatable, adult-onset disorders.\(^{84}\) Predictive testing can also be conducted to diagnose both treatable and untreatable childhood-onset conditions.

After analyzing 27 different guidelines or position papers (emanating from 31 different organizations) on the appropriateness of the predictive genetic testing of minors,\(^{85}\) Borry and colleagues observed “a remarkable degree of unanimity” among them:

It is clear that the availability of medical benefit is the most important justification to perform predictive and presymptomatic genetic testing in minors, regardless of the onset of the disease. The absence of medical benefit is the most important justification to defer testing until the adolescent or adult is able to make a personal decision on this matter after a full discussion and exploration of the issues.\(^{86}\)

Testing for childhood-onset diseases differs from other genetic testing during childhood in one very significant respect: since the disease develops during childhood, it is not possible to preserve the child’s ability to decide about testing when he or she reaches adulthood. According to the American Medical Association (AMA), this makes concerns about the child’s individual autonomy irrelevant and shifts the focus to whether the testing would be in the child’s best interests.\(^{87}\) Current AMA guidelines state that genetic

\(^{82}\) Predictive genetic testing refers to a broader range of situations where genetic tests identify genetic factors that increase the probability (but do not imply any degree of certainty) that common disorders, such as cardiovascular disease, psychiatric disorders, diabetes and some forms of cancer (for example, hereditary breast cancer) will develop (often referred to as susceptibility testing). P. Borry, L. Stultiens, H. Nys, J-J Cassiman & K. Dierickx, *Presymptomatic and Predictive Genetic Testing in Minors: A Systematic Review of Guidelines and Position Papers*, 70 CLIN. GENET. 374, 375 (2006). For a discussion of these multifactorial disorders, see supra notes 11-18 and accompanying text.

\(^{83}\) Presymptomatic genetic testing refers to those situations in which an abnormal test result will almost certainly lead to the development of the disease later in life. The genetic test for Huntington’s disease is a presymptomatic genetic test. *Id.* See footnote 8 supra for a discussion of Huntington’s disease.

\(^{84}\) Boyce & Borry, supra note 65 at 380.

\(^{85}\) These organizations included international and national organizations, national bioethics committees and professional associations, including, among others, the American College of Medical Genetics, the American Medical Association, the American Society of Human Genetics, the British Medical Association, the European Society of Human Genetics, and the National Human Genome Research Institute. Borry, Stultiens, et al., supra note 82 at 375-377.

\(^{86}\) *Id.* at 378.

testing for childhood-onset diseases for which preventive or other therapeutic measures are available is recommended and, in some cases, required. The ACMG concurs, noting that in these cases, “parental authority to determine medical treatment supersedes the minor’s preferences with regard to liberty and privacy.” If no treatment is available for a childhood-onset disease, the AMA and ACMG both believe that parents should have discretion to decide whether or not to have their child tested. Nevertheless, the AMA warns that because parents may not always act in their child’s best interests, a physician who suspects that parents are seeking genetic testing inappropriately should not undertake testing “until there are assurances that testing will not unduly compromise the child’s interests.”

All professional medical and ethical guidelines recommend postponing testing minors for adult-onset disorders that cannot be prevented or ameliorated until the child can consent to testing as a competent adolescent or adult. The justification for this recommendation is that childhood testing for these disorders does not provide any medical benefit to the child.

4. Adoption
The genetic testing of minors in the adoption context presents even more complex issues than the genetic testing of biological children. Some prospective adoptive parents now request that the potential adoptee undergo genetic testing during the adoption process, including testing for untreatable adult-onset diseases. The rationale for requesting this testing is to guard against future problems if the child later develops a disorder that could have been anticipated.\(^{94}\) In their joint policy statement on this topic, the American Society of Human Genetics (ASHG) and the ACMG recognize that the interests of “numerous parties” must be balanced in determining when to allow genetic testing of newborns and children in adoption.\(^{95}\) While the best interests of the child are paramount, the interests of the adoptive parents,\(^{96}\) birth parents,\(^{97}\) adoption agencies\(^{98}\) and the public\(^{99}\) must also be considered. After weighing the interests of all parties, the ASHG

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Many times a lack of medical information has tragically affected new familial relationships physically, emotionally, financially, and it is the belief of most adoptive parents that these tragedies could have been prevented if accurate health information regarding the adoptee had been disclosed to them during the adoption process. Due to this unfortunate reality, wrongful adoption suits have arisen in recent years because of the adoption agency’s failure to disclose important health-related information about the adoptee.

*Id.* (footnotes omitted).


\(^{96}\) Arguments in favor of giving adoptive parents the right to seek genetic testing of the child include: testing enables them to make an informed decision on whether to adopt; certain adoptive parents lack the emotional or financial means to care for a child with special needs; predictive genetic information is needed to monitor the child’s health and seek appropriate treatment; and adoptive parents need genetic information for estate or financial planning purposes. *Id.* at 765 (footnotes omitted). While acknowledging that adoptive parents have some legitimate reasons to request genetic testing, the ASHG and ACMG reject the proposition that they should be able to test a prospective adoptive child for untreatable adult-onset disorders:

Children do not come with guarantees. If adopted children are required to present evidence that they are free of genetic diseases, what tests will not be allowed? Clearly, adoptive parents should be apprised of known illnesses, but predictive genetic testing is well beyond this standard and is neither advisable nor necessary.

*Id.* (footnotes omitted).

\(^{97}\) Since the child’s genetic test could reveal genetic information about the birth parents, their privacy interests would be violated if adoptive parents were able to request genetic testing of the potential adoptee. *Id.* at 765-66 (footnotes omitted).

\(^{98}\) The adoption agency has the following interests: placing children and ensuring that those children remain placed with the adoptive parents; ensuring the privacy of the child, the birth parents, and the adoptive parents; and shielding itself from potential liability. *Id.* at 766. The liability issue is a considerable one since adoption agencies have been sued for wrongful adoption for failing to disclose a child’s known health or genetic history and for failing to test a child for a genetic condition. Recognizing that adoption agencies will feel increasing pressure to test based on fear of litigation, the ASHG and ACMG nevertheless conclude that adoption agencies should not test children for untreatable adult-onset disorders. *Id.* (footnotes omitted).

\(^{99}\) The ASHG and ACMG recognize the public’s interest in “facilitating and encouraging adoptions and in insuring a good fit between the adopting parents and the child,” opining that “[i]n attempting to protect the best interests of the child, public policy should not so restrict access to medical information in adoption that prospective parents decline to adopt in America and instead pursue adoptions overseas.” *Id.*
and ACGM conclude that genetic testing should only be conducted in the adoption process if it is
(1) consistent with preventive and diagnostic tests performed on all children of a similar age, (2) generally limited to testing for medical conditions which manifest themselves during childhood or for which preventive measures or therapies may be undertaken during childhood, and (3) not used to detect genetic variations within the normal range.¹⁰⁰

5. Direct-to-Consumer Genetic Testing

Direct-to-consumer (DTC) genetic testing involves either the marketing and/or offering of genetic tests directly to the public, usually without any involvement of health care professionals.¹⁰¹ Consumers who utilize DTC testing provide the DTC company with a saliva sample that is processed by a clinical laboratory. The DTC company then sends the consumer a personalized genomic report that typically includes disease risk estimates, some pharmacogenomics information,¹⁰² carrier status for simple heritable diseases and/or ancestry information.¹⁰³ While advocates of DTC genetic testing contend that it increases consumer autonomy, supports self-determination, helps consumers improve their health and make beneficial treatment and lifestyle decisions¹⁰⁴ and provides a privacy advantage over testing through a healthcare provider,¹⁰⁵ opponents decry its lack or poor quality of genetic counseling,¹⁰⁶ the absence of individualized medical supervision,¹⁰⁷ the quality of the tests, the accuracy and adequacy of the information

¹⁰⁰ Id. For a discussion of the ACMG position with respect to the genetic testing of biological children, see supra notes 66-93 and accompanying text. A Working Party of the Clinical Genetics Society (United Kingdom) noted that there might be “particular considerations that might justify the genetic testing of a child being considered for adoption.” A. Clarke, The Genetic Testing of Children: Working Party of the Clinical Genetics Society (UK), 31 J. MED. GENET. 785, 789 (1994) While most prospective adoptive parents are involuntarily infertile, “some will have made a conscious decision to limit their family because of a heritable disorder. Their personal experiences are likely to affect their views on genetic conditions in a prospective adoptive child.” Id. For a thorough analysis of the issues raised by genetic testing in the adoption context, see Schlee, supra note 94 and Lori Andrews & Nanette Elster, Adoption, Reproductive Technologies, and Genetic Information, 8 HEALTH MATRIX 125 (1998).

¹⁰¹ Heidi Carmen Howard, Denise Avard & Pascal Borry, Are the Kids Really All Right? Direct-to-consumer Genetic Testing in Children: Are Company Policies Clashing with Professional Norms?, 19 EUROP. J. HUM. GENET. 1122, 1122 (2011). The Food and Drug Administration (FDA) does not currently regulate DTC genomic tests but notified DTC companies in June 2010 that their services constituted medical devices within the statutory purview of the FDA and that it might increase its regulatory control over them. Palmer, supra note 4, at 476.

¹⁰² For a discussion of pharmacogenetic testing, see supra note 28 and accompanying text.

¹⁰³ See website for 23andMe, the best-known DTC genomic service, https://www.23andme.com/ (last visited June 7, 2013).

¹⁰⁴ See, e.g., V. Collier, Home DNA Tests Create Medical, Ethical Quandaries, SAN FRANCISCO CHRONICLE, Aug., 21, 2007 at C1.


¹⁰⁶ For a discussion of the importance of genetic counseling, see supra notes 53-59 and accompanying text.

provided by companies and the risk that consumers may misunderstand their results\textsuperscript{108} or be misled by false or misleading claims and make harmful healthcare decisions on the basis of the test results.\textsuperscript{109} Of particular concern is the possibility that parents will subject their minor children to DTC genetic testing without considering whether the tests will provide a medical benefit to their children.\textsuperscript{110} In a survey of 37 DTC genetic testing companies regarding their policies for testing in children, Howard and colleagues found that a clear majority of companies do perform genetic testing in minors for adult-onset diseases.\textsuperscript{111} These policies permitting the genetic testing of asymptomatic minors for adult-onset diseases are in clear violation of professional guidelines that recommend against testing minors for adult-onset disorders for which there is no available treatment.\textsuperscript{112} This is particularly troubling because there is not yet empirical data on the harms of DTC genetic testing in children, including whether they differ from harms in a medical delivery model or whether they differ across populations and reasons for obtaining the service.\textsuperscript{113} In light of the potential dangers that DTC genetic testing poses

\textsuperscript{108} See Palmer, \textit{supra} note 4 at 491 (footnotes omitted) ("Because predictive testing involves complex science and statistics, many critics fear consumers will misunderstand their results. These fears appear well-founded, given that public health literacy is unfortunately low, and even educated consumers have trouble understanding relative risk data. A 2010 study found that most US adults would have trouble reading and using genomic service websites.") In a survey of social networkers, McGuire and colleagues found that only 42\% of respondents were confident that they understood the risks and benefits of DTC genetic testing and knew enough about genetics to understand the results. The majority (76\%) of all respondents agreed that DTC companies should provide a medical expert to help interpret results. Only 30\% agreed that DTC companies provide enough information for consumers to make informed decisions about using their services. Amy L. McGuire, Christina M. Diaz, Tao Wang & Susan G. Hilsenbeck, \textit{Social Networkers’ Attitudes Toward Direct-to-Consumer Personal Genome Testing}, 9 \textit{AM. J. BIOETHICS} 3, 6-7 (2009). \textit{See also supra} note 58 and accompanying text.

\textsuperscript{109} Stuart Hogarth, Gail Javitt, & David Melzer, \textit{The Current Landscape for Direct-to-Consumer Genetic Testing: Legal, Ethical, and Policy Issues}, 9 \textit{ANNU. REV. GENOMICS HUM. GENET.} 161 (2008) (footnotes omitted). \textit{See, e.g.}, Palmer, \textit{supra} note 4 at 491-92 (footnotes omitted) ("These fears were heightened by a 2006 GAO report concluding that DTC nutrigenomic companies deceived consumers into buying overpriced nutritional supplements.")

\textsuperscript{110} In their survey of social networkers, McGuire and colleagues found that 63\% agreed that parents should be able to have their children tested and 52\% reported that they would test their own child. McGuire et al., \textit{supra} note 108, at 9.

\textsuperscript{111} Howard et al., \textit{supra} note 101, at 1124. The authors report that 69\% of the companies have received requests from parents or legal guardians to test minors and 77\% do perform genetic testing in minors under parental or legal guardian requests. \textit{Id.} at 1123. Only a minority of companies claims to require a consultation with a qualified medical doctor in order to purchase a genetic test. \textit{Id.} One of these companies insists that it is the consumer’s responsibility to consult a health care professional:

\begin{quote}
Each person ordering a test from our company must agree to the terms and conditions of the transaction, and these terms and conditions include an acknowledgement that the results of any tests performed will be interpreted in consultation with a qualified physician. Company S.
\end{quote}

\textit{Id.} at 1124.

\textsuperscript{112} Tabor and McGuire and colleagues report significant parental acceptance of genetic testing for their children for "genetic associations of uncertain clinical significance for complex disorders, many of which do not present until adulthood, if at all. The attitudes of these survey respondents toward pediatric testing are inconsistent with professional guidelines that discourage genetic testing of children for adult onset disorders." McGuire et al., \textit{supra} note 108, at 9. For a discussion of these guidelines, see \textit{supra} notes 92-93 and accompanying text.

\textsuperscript{113} Tabor & Kelley, \textit{supra} note 107, at 32.
for minors, the American Academy of Pediatrics and the ACMG “strongly discourage” its use.

B. Informed Consent

While competent adults have the right to direct their own medical care, minors are not afforded a comparable right to make their own medical treatment decisions due to their lack of decision-making capacity. Although they are entitled to the right of bodily integrity and self-determination, surrogates (parents or the state) typically exercise informed consent on their behalf because they are unable to assess the risks, benefits and alternatives of medical procedures on their own. Since parents control the upbringing of their children and are presumed to act in their best interests, they are usually considered the best surrogates to direct their minor children’s medical care. Parents’ rights and interests are not absolute, however, and the state may intervene under the doctrine of parens patriae if necessary to protect a child’s health and welfare.

114 The negative consequences of DTC genetic testing for minors include inaccurate results, inaccurate interpretations, potentially harmful interventions, and altered family dynamics. ACMG POLICY STATEMENT, supra note 66, at 241.
115 Id. Tabor and Kelly opine that more research is needed into the immediate and long-term effects of DTC genetic testing in children so that empirical data can inform guidelines specific to this type of genetic testing for minors. Until that time, DTC genetic testing companies “should act with caution to protect the best interests and autonomy of children and to minimize any potential harms resulting from the use of their services in children.” Tabor & Kelley, supra note 107, at 33.
116 This right is premised on an individual’s right to bodily integrity, which Justice Cardozo characterized as essential:

No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. Union. Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891); see also Cruzan v. Director, Mo. Dep’t of Health, 497 U.S. 261, 268 (1990). If health professionals perform medical procedures without receiving informed consent from the patient, they may be liable for battery. Botsford, 141 U.S. at 251. See also supra notes 60-62 and accompanying text.
118 See, e.g., Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) (minors are entitled to the right to privacy in the abortion setting).
120 Feigenbaum, supra note 117, at 853; Parham v. J.T., 442 U.S. 584, 602 (1979). Parents have a constitutional right under the First and Fourteenth Amendments to the U.S. Constitution to raise their children as they see fit, which includes the right to provide or refuse medical treatment for them, unless the health of the child is in danger. See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972)(Amish parents have the right to refuse to send their children to public schools); Pierce v. Society of Sisters, 268 U.S. 510 (1925)(invalidating a state statute that required children to attend public school); Meyer v. Nebraska, 262 U.S. 390 (1923)(striking down a state statute that prohibited public school teachers from teaching German).
121 Prince v. Massachusetts, 321 U.S. 158, 161 (1944) (the doctrine of parens patriae permits the state to restrict the parents’ control by requiring school attendance or regulating a child’s labor in other ways).
122 Jennifer Fouts Skeels, In re E.G., The Right of Minors to Refuse Medical Treatment, 21 LOY. U. CHI. L.J. 1199, 1202 (1990). Courts have enunciated the following state interests as justifications for the doctrine of parens patriae: preserving human life (Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417,425 (Mass. 1977); protecting those, including minors, who cannot protect themselves (Siemieniec v.
Nevertheless, unless the minor has a life-threatening illness where his or her life is in immediate danger, the courts typically will not override the parents’ medical care decision.\(^\text{123}\)

The “mature minor” doctrine permits minors who demonstrate an ability to understand the risks and benefits of a medical treatment or procedure to give consent on their own behalf without their parents’ consent.\(^\text{124}\) In determining whether a minor is sufficiently mature to make his or her own medical decisions, courts examine the child’s age, ability, experience, education, degree of maturity and demeanor.\(^\text{125}\)

Genetic testing raises significant issues regarding whether the rights of parents to control the medical care of their minor children should be curtailed when they seek genetic testing for their children in situations when such testing provides no medical benefit for them.\(^\text{126}\) It also raises questions about whether mature minors should be permitted to request genetic testing on their own. Resolving these issues requires an examination of the risks and benefits of carrier and predictive genetic testing of minors.

**C. Risks and Benefits of Predictive Genetic Testing and Screening of Minors for Adult-Onset Disorders**

Since predictive genetic testing for untreatable adult-onset disorders provides no medical benefit to the minor,\(^\text{127}\) the relevant issues surrounding this form of testing include the psychosocial risks and benefits of these tests to the minor and his or her family, how

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\(^{123}\) See, e.g., In re Green, 292 A.2d 387 (Pa. 1972) (court refused to order surgery that would correct a curvature of sixteen-year-old boy’s spine that impeded his ability to stand or walk due to a lack of evidence that his life was in immediate danger); In re Seiforth, 127 N.E.2d 820 (N.Y. 1955) (court refused to order corrective surgery for a harelip and cleft palate because the child’s life was not in danger).

\(^{124}\) In re E.G., 549 N.E. 2d at 327-28: “If the evidence is clear and convincing that the minor is mature enough to appreciate the consequences of her actions, and that the minor is mature enough to exercise the judgment of an adult, then the mature minor doctrine affords her the common law right to consent to or refuse medical treatment.”

\(^{125}\) The application of the mature minor doctrine requires a subjective evaluation of when each minor is sufficiently mature to make his or her own medical decisions because there are no definitive guidelines that provide an exact range of ages for when minors satisfy the requirements of the mature minor doctrine. Borry et al., *supra* note 78, at 134: The differences that distinguish children from adolescents refer to the gradual development of a child’s cognitive skills and moral reasoning and the fact that as children progress through successive states of development, they become capable of greater participation in decisions about their own welfare. When adolescents meet conditions of competence, voluntariness, and adequate understanding of information, are able to participate in the decision as an autonomous individual, have decision-making capacity, or are mature enough to take control of his or her own healthcare, they can be considered mature enough to request a [genetic] test. *Id.* (footnotes omitted).

\(^{126}\) There is little debate about the benefits of genetic testing for childhood-onset disorders for which preventive or other therapeutic measures are available. See *supra* notes 88-89 and accompanying text. The controversy surrounds testing for untreatable childhood- and adult-onset disorders. See *supra* notes 90-91 and *infra* notes 127-151 and accompanying text.

\(^{127}\) See *supra* notes 92-93 and accompanying text.
genetic testing affects the autonomy and future autonomy of the minor, and the possibility that genetic testing will result in genetic discrimination.

1. Psychosocial Harms and Benefits

Some of the predicted psychosocial harms of genetic testing of minors for adult-onset disorders for which no treatment is available include stigmatization and anxiety. Of primary concern is that minors who learn that they will or could develop a serious genetic condition later in life will experience “devastating emotional damage.” While relatively few studies have examined whether predictive testing has a negative effect on the self-esteem of minors, the limited empirical data that have emerged suggest “that children who received genetic test results, whether indicative of increased risk or not, did not experience significant changes in psychosocial wellbeing.” The applicability of these studies to all minors has, however, been questioned since they disproportionately represent well-educated, English-speaking individuals of higher socioeconomic status and the effects of such testing on “lower educated and underserved populations” are largely unknown.

Studies on the psychological reaction of adults to a positive genetic test for a late-onset disorder have produced mixed results. Adults who learned that they tested positive for the HD gene have had adverse psychological reactions to the news. Other studies have concluded that adults who test positive for a genetic disease rarely experience abnormally high levels of, nor increase in, emotional distress at any point during three years after predictive testing.

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128 Boyce & Borry, supra note 65, at 381 (footnotes omitted).
129 Cynthia B. Cohen, Wrestling with the Future: Should We Test Children for Adult-Onset Genetic Conditions?, 8.2 KENNEDY INST. OF ETHICS J. 111, 113 (1998). Cohen observes that minors who test positive for late-onset disorders may suffer a “diminished sense of self-esteem and worth.” Additionally, since they have a limited understanding of illness, “they might come to view themselves as sick and damaged and might blame themselves for having inadvertently done something to alter their genes.” Id. (footnotes omitted).
132 See supra note 8 and accompanying text for a discussion of HD.
133 Cohen, supra note 129, at 114 (footnotes omitted).
134 Marita Broadstock, Susan Michie & Theresa Marteau, Psychological Consequences of Predictive Genetic Testing: A Systematic Review, 8 EUROP. J. HUM. GENET. 731, 735 (2000). The authors note that the results may reflect response bias because the study samples are of self-selected individuals and that individuals who choose to undergo genetic testing are “more resourceful and emotionally more robust than others.” Id. Since only a small percentage of at-risk individuals choose to undergo predictive genetic testing, the conclusions drawn from the current evidence may not be widely applicable. Id. For example, less than 20% of adults at risk for HD choose to be tested, fearing that receiving information about their future condition would be too traumatic. ACMG POLICY STATEMENT, supra note 66, at 238. The Huntington’s Disease Society of America (HDSA) states: “…while many at risk individuals say they wish to know their gene carrier status, far fewer actually undergo testing. The majority of people find the emotional burden of knowing, or risks to confidentiality e.g. parents demanding to know the results, outweigh the benefits of learning that they carry the changed gene.”
Some commentators point to the positive effects of predictive genetic testing of children. Children who test negative may experience reduced uncertainty and anxiety and even some who test positive will be relieved to have the uncertainly of their genetic status resolved, especially if they realize that the gene mutation runs in their family.\(^{135}\)

Consideration of the potential psychosocial benefits and risks for children of predictive genetic testing leads to the conclusion that it is not in the child’s best interests. This is consistent with the professional consensus\(^ {136}\) as well as the recommendation of the Huntington’s Disease Society of America (HDSA) that anyone under the age of 18 not undergo testing for HD.\(^ {137}\)

2. Effect on Family Dynamics

Another concern raised about predictive genetic testing of minors is that it will disrupt the child-parent bond because parents will most likely treat the child who tests positive differently throughout his or her life.\(^ {138}\) Parents can react to positive test results in their children in a variety of harmful ways. Some parents may shift resources away from children with a positive diagnosis, thus restricting their future options. Wertz and colleagues opine that parents who request genetic testing of their children usually envision the benefits of a negative test: reduction in anxiety for themselves and the child and ability to make firm plans for the future. They are less likely to be aware of the potential harms of a positive rest result:

“Planning for the future,” perhaps the most frequently given reason for testing, may become “restricting the future” (and also the present) by shifting family resources away from a child with a positive diagnosis. It may mean implicitly limiting the parents’ expectations…. They may not expect a child who tests positive for a genetic disorder with a shortened life expectancy to train for a profession. Such children grow up in a world of limited horizons and may by psychologically harmed even if treatment is subsequently found for the disorder.\(^ {139}\)

Malpas argues that while this may “strike some as uncaring and callous, if we believe that parents generally want to do what is in their child’s best interests… a parent may comment that they would not save for their affected child’s college education, intending instead to use that money to ensure that the child had a very positive and memorable

\(^{135}\) Cohen, supra note 129, at 114 (footnotes omitted).
\(^{136}\) See supra notes 92-93 and accompanying text.
\(^{137}\) HDSA GENETIC TESTING INFORMATION, supra note 134.
\(^{138}\) Boyce & Borry, supra note 65 at 381(footnotes omitted).
\(^{139}\) Dorothy C. Wertz, Joanna H. Fanos & Philip R. Reilly, Genetic Testing for Children and Adolescents. Who Decides?, 272 JAMA 875, 878 (1994). See also Ellen Wright Clayton, Genetic Testing in Children, 22 J. MED. PHILOS. 233, 243 (1997)(commenting that a parent may request testing “with the expressed intention of not sending Brenda [her child] to college if she has the mutation because ‘it would be a waste of money.’”
childhood.” While this interpretation may be true, refusing an educational opportunity for a child who tests positive for the HD gene clearly limits that child’s future since HD does not usually manifest until middle age and the afflicted child could have led a productive life until that time.

Another possible parental reaction to a child’s positive test result is guilt, which can lead to “overindulgence and protectiveness.” The affected child may also receive preferential treatment, leading to strained and jealous relationships with siblings who may resent the disproportionate care and attention that their affected sibling receives. Due to these potential impacts on family dynamics, the HDSA recommends against the genetic testing of minors:

Research tells us that when a person finds out they are a gene carrier, or not, people’s attitudes can change towards them, including family members. For example if you were found to be a carrier of the changed HD gene when you were young you’re (sic) parents may become incredibly overprotective and as a result you don’t grow up living a ‘normal’ childhood. In order to avoid this happening when a child is growing up it is advised that young people do not take the test until they are older.

3. Autonomy and the Right to an Open Future

A significant concern raised by critics of predictive genetic testing of minors for adult-onset disorders is that the practice violates the child’s right to an “open future” by denying the child the right to make a choice about such testing as an autonomous adult. As such, it violates the principle of autonomy. Proponents of predictive genetic testing of children contend that while it is a serious wrong to deny a child the freedom to choose as an adult to have children or to deny a child a life-saving medical procedure on the basis of a parent’s religious beliefs, “a choice about whether to be tested for a genetic condition that might appear later in life… is not a life choice as significant as these others. It does not affect the basic activities important to human functioning, such as having children, remaining alive, or selecting a way of life.” Furthermore, some commentators opine that predictive genetic testing during childhood can actually enhance the welfare of children by expanding important choices for the child and the adult-to-be:

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142 HDSA GENETIC TESTING INFORMATION, supra note 134.
144 Cohen, supra note 129, at 119.
The adult autonomy of children who undergo predictive testing is not violated by such testing, for it allows them time to grow in their understanding of their situation and options, thereby increasing the likelihood that they will exercise their capacity for autonomous choice in an informed and even wise way when they reach adulthood.145

The arguments supporting predictive genetic testing of children fail for a very compelling reason, namely, most at-risk adults do not want testing when it is offered. For example, only 10-15% of at-risk adults opt for HD genetic testing.146 Studies examining the factors for this low uptake identify the following important reasons for not being tested: increased risk to children if one was found to be a gene carrier; absence of an effective cure; potential loss of health insurance; financial costs of testing; and the inability to “undue” the knowledge.147 Relevant to this discussion is the notion of the “right not to know,” recognized by the European Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, which states that “[e]veryone is entitled to know any information collected about his or her health. However, the wishes of individuals not to be so informed shall be observed.”148 Testing a minor eliminates the possibility that the minor can exercise his or her “right not to know” when he or she becomes an adult. It is important to preserve this freedom for children,149 especially since, as one commentator notes, the decision not to be tested does not seem irrational:

145Id. at 122. See also Rosamond Rhodes, Why Test Children for Adult-Onset Genetic Diseases?, 73 MT. SINAI J. MED. 609 (2006):

In the situation of deciding about whether or not to pursue genetic testing of a child for an adult-onset condition, those who choose to leave the decision to the future adult are also actually choosing the course of raising the child in a cloud of dread and uncertainty about their genetic status. That, in itself, is a clear and certain harm.

146Boyce & Borry, supra note 65 at 383(footnotes omitted).

147Id.


149The HDSA concurs that testing should be deferred until the age of majority to protect a young person’s autonomy:

This [autonomy] means having the right or power to govern oneself i.e. to determine things for yourself. Research has shown that during adolescence young people may be influenced by many things that can change what decisions they make e.g. family, friends, media etc. Of course this is true for adults too, but young people may be strongly influenced by other people’s opinions. In order to avoid this it is advised that young people put off testing until they are older and can be certain that it is their choice to take the test. Also, recent research shows that the part of our brain that helps us make decisions and judgements only fully matures once we have reached early adulthood. Because of this it is advised that teenagers put off making such an important life decision until their brain has fully matured. Overall, professionals want to make sure that people who take the test for HD are choosing to do it themselves, and that they are certain this is the right choice for them.

HDSA GENETIC TESTING INFORMATION, supra note 134.
Informed and reasonable people of good will may decide they do not want testing because they do not envision the results changing how they want to plan their lives; or they may fear the information would distress them and dominate their lives and so would rather live with uncertainty; or they may dread bad news more than they would be relieved by good news.\textsuperscript{150}

4. Genetic Discrimination

A final objection to the predictive genetic testing of minors for adult-onset, serious, untreatable diseases such as HD is that it could expose them to risks of insurance and employment discrimination. Given these legitimate concerns,\textsuperscript{151} such testing should not be performed in the absence of a compelling medical benefit for the minor.

III. RECOMMENDATIONS AND CONCLUSION

While genetic testing offers many benefits, it comes with considerable risks as well. Genetic testing in childhood raises particularly sensitive concerns implicating the rights of parents to direct the medical treatment of their children as well as the rights of children to an open future. Unless genetic testing will provide a benefit to the minor, testing should not be allowed. Genetic testing should be available for childhood- or adult-onset diseases for which preventive or other therapeutic measures are available. Genetic testing for carrier status should be deferred until the minor reaches maturity or needs to make reproductive decisions. Furthermore, children being considered for adoption should be accorded the same rights as other children. All genetic testing of children should include both pre-and post-test genetic counseling and the involvement of qualified medical professionals. For this reason direct-to-consumer genetic testing should not be available for children.

\textsuperscript{150} Kopelman, \textit{supra} note 64, at 385.

\textsuperscript{151} For a thorough discussion of genetic discrimination, see \textit{supra} notes 39-52 and accompanying text.
THE IMPORTANCE OF SELF-EFFICACY IN ETHICAL EDUCATION FOR BUSINESS UNDERGRADUATES

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Abstract

Events over the past decade or so have resulted in new efforts to expand ethics education in business schools throughout the United States. While the debate rages on concerning the viability of teaching ethics and the potentiality for making a difference in the ethical decision making thought process, the need to influence ethical decision making in the business community cannot be underestimated. Self-efficacy is one area that has proven to influence both academic achievement and ethical decision making. This article reviews selected scholarship on self-efficacy in regards to the learning process and in relation to ethics. While results indicate a significant link between self-efficacy and academic achievement as well as a significant link between self-efficacy and ethical behavior, further empirical study is needed to build on the body of available research.

Key Words
Ethics, Motivation, Self-Efficacy, Self Regulated Learning, Business Ethics

Introduction

Over the past decade, we have rediscovered the importance of developing and maintaining ethical reasoning skills in business. This rediscovered interest in ethics came as a result of a number of highly publicized ethical failings in the business community. Perhaps the poster child of unethical behavior in business was Enron, a former one hundred billion dollar energy trading company, which went bankrupt in December of 2001.\(^1\) Enron created a culture of unethical behavior from the energy traders who manipulated energy markets (to the detriment of consumers and municipalities) to the higher levels of management who signed off on fraudulent financial statements.\(^2\)

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It is interesting to note that Enron was not without a corporate code of ethics. In fact, the Enron code of ethics was sixty-four pages long and was based on several Boy Scout values. However, while some corporate codes of ethics provide for enforcement and are effective at helping build an ethical culture within the company, this code of ethics was apparently only for show. As demonstrated in a segment of the CBS evening news, the culture at Enron was one of manipulation, fraud, greed and arrogance. In the news segment, Enron energy traders were shown moving energy out of markets and causing power plants to go down so that they could capitalize on resulting higher energy prices.

Although the collapse of Enron was not directly due to the arrogance and manipulation of the energy traders, those actions were symbolic of the unethical corporate culture rampant at the company. In fact, the failure of Enron was directly due to fraudulent financial statements reflecting a certain level of performance that was simply not accurate. When the fraud came to light, investors bailed and the stock price dropped from over eighty dollars a share to ten cents a share. Eventually Enron could not pay its debt to its shareholders and was forced to file for bankruptcy.

The Sarbanes-Oxley Act of 2002, also known as the Corporate and Auditing Accountability and Responsibility Act, was enacted in response to the scandals of Enron, Worldcom, Tyco and others. The Act addresses eleven important elements of corporate ethical behavior including Corporate Responsibility, Independent Auditing, Enhanced Financial Disclosures, among others. The long term effect of Sarbanes-Oxley has been widely debated, with support from those who feel that the Act helps rebuild investor confidence in publicly traded companies and opposition from those who see the Act as an unnecessary interference into corporate management. Whatever the view on Sarbanes-Oxley, it cannot be denied that a business without an ethical foundation is a business that will ultimately fail due to distrust and suspicion. The importance of developing ethical business leaders cannot be underestimated for the future of American business.

Teaching Ethics to Business School Students

With this newly re-discovered interest in developing ethical business leaders, most college undergraduate business programs have expanded their offerings in business ethics and/or have incorporated ethics into their academic program. When it comes to teaching ethics to business school students there are two major questions to be answered concerning the appropriateness of ethical training and instruction. One, can “ethics,” or moral reasoning, be taught in the first place? Two, what is the most effective means by which ethics is taught?

The ancient Greek philosopher Socrates was perhaps the first academic to believe that ethics could be taught. Most Greeks in the fifth century B.C.E. would argue that doing the right thing involved simply following requirements directed by the gods and goddesses. Socrates, however,

3 Michael Miller, Enron’s Ethics Code Reads Like Fiction, Columbus Business First. April 1, 2002.
4 Roberts, supra. note 2.
5 Healy and Palepu, supra. note 1.
6 Roberts, supra. note 2.
8 Id.
9 Id.
would eagerly debate this hypothesis in the public square emphasizing the importance of critical thinking over superstition in matters of ethics and morality. The citizens of Athens enjoyed witnessing Socrates debate other intellectuals and they learned something from the process. This form of educated debate became known as the Socratic method of instruction. When issues are discussed or debated, a hypothesis that leads to contradictions can be eliminated and a better hypothesis can take its place. Socratic instruction is used in American law schools today to stimulate the student’s ability to think and argue logically. It is this form of instruction that works well in helping students develop ethical/moral reasoning skills.

Socrates was perhaps the first to theorize that ethical reasoning, as part of the critical thinking process, was something that could be learned, but he was certainly not the last. Psychologist James Rest, following up on research originally produced by Lawrence Kohlberg in his 1958 dissertation which laid out the stages of moral development, also expressed the value of ethical education and training. James Rest conducted his own research in moral and ethical development, and developed the Defining Issues Test which uses a Likert-type scale to provide quantitative rankings to five moral dilemmas.

The original Defining Issues Test consists of six ethical questions designed to stimulate ethical reasoning. For example, should a man steal a drug from an inventor in town to save his wife who is dying and needs the drug? With each question participants are given twelve issue statements that are applicable to the situation and then asked to rate those issue statements in terms of importance. The data is used to identify the particular schema the participants use to make moral decisions.

Through his research Rest also identified four key psychological components that need to be developed in order for a person to become morally and ethically mature. The four required components are moral sensitivity, moral judgment, moral motivation and moral character. Rest believed that moral education should be involved in each one of these components. Rest supported a partnership between psychologists and ethics instructors in order to help students improve understanding and proficiency in these four areas, and most especially in the areas of moral sensitivity and critical thinking. An improvement in sensitivity/awareness and critical thinking should lead to an improvement in ethical behavior. While many scholars have debated whether or not ethical education actually does lead to ethical behavior, psychologists such as James Rest and Lawrence Kohlberg as well as ancient philosophers such as Socrates, certainly emphasized the impact ethical awareness and understanding can have on moral behavior.

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12 Id.


14 Knox, supra., note 11


17 Id.

18 Id.

19 Id.

20 Id.
have on behavior. Educating business school students in ethical decision-making is an important aspect of their overall educational experience, and is just as meaningful to future business success as management, finance, accounting and marketing courses. However, one question remains: what are factors that can make ethics education more successful in impacting the future decisions of business school students? If business schools really want to equip students for ethical leadership, educators have to understand the important dynamics that can affect the learning process. In this paper, the importance of self-efficacy is linked to a student’s understanding of ethical sensitivity and their personal motivation to make ethical decisions. Just as self-efficacy has been shown to have a strong connection to academic performance self-efficacy also bears a strong positive relationship to ethical motivation and decision making.

The Importance of Self Efficacy in Learning

There have been a limited number of academic research studies specifically examining the importance of self-efficacy in the learning process, although such research has steadily been increasing. Self-efficacy refers to an individual’s judgment of their own capability to achieve a certain performance benchmark. Related to the social learning theory and self regulated learning theory, self efficacy reflects an internal conviction that the student has the ability to reach a desired outcome if they engage in certain behavior. For example, high self efficacy individuals describe those individuals who believe that they have meaningful control over their lives and have confidence that they can meet certain goals through their own efforts.

In 2007, Kitsantas and Zimmerman studied the impact of homework, and also the student’s attitude concerning homework, on grades among a group of college students using self efficacy as one of their mediated variables. A total of 223 college students from a major state university, enrolled in six sections of an introductory educational psychology, participated in the study. The study was a qualitative study in nature which included survey instruments such as: personal data questionnaire, homework survey, quality of homework scale, self-efficacy for learning form, perceived responsibility for learning scale. The scales were administered during a regular class at the beginning of the fall semester and the students’ grades were obtained from school records at the end of the semester. Results of the study indicated that the quality of students’ homework is significantly related to their development of better study habits. Overall, the results also revealed significant mediational roles for self-efficacy for learning. As the authors state: “Assigning and encouraging college students to complete their homework can

24 Id.
25 Anastasia Kitsantas & Barry Zimmerman, College Students Homework and Academic Achievement: The Mediating Role of Self Regulating Beliefs, Metacognition and Learning. 4-2: 97-110 (2009).
26 Id.
27 Id.
28 Id.
improve their self-efficacy beliefs about learning, which in turn leads students to take more responsibility for their academic outcomes.”

In sum, the Kitsantas-Zimmerman study found that high self-efficacy beliefs led to higher quality in the student homework which led to higher grades. They found further that self-efficacy for learning was a better predictor for academic success than perceived responsibility, one of their other mediated variables, recording that “the findings of the present study indicate that there are important psychological benefits of homework on college students’ development, as independent learners with better study skills and greater self-efficacy beliefs and responsibility toward learning.”

The Kitsantas study supports the proposition that self-efficacy is closely related to motivation. When students feel a certain autonomy and control for their own success, the motivation they develop to succeed at certain tasks is increased. In their article entitled The Psychology of Academic Achievement, Phillip Winne and John Nesbit conduct a literature review to examine psychological influences behind the learning process and discuss the important connection of metacognition and self-regulated learning. In discussing the motivation factor, the authors state that: “motivation is conceptualized as a factor that influences learning.”

The specific motivational elements they address in the article include achievement goals, interests, and epistematic beliefs. While self-efficacy is not specifically addressed as one of the motivational elements, self-efficacy is suggested with the discussion of epistematic beliefs. Epistematic beliefs “describe views a learner holds about features that distinguish information from knowledge, how knowledge originates, and whether and how knowledge changes.”

In another study examining academic motivation, Van Ettan, Pressley and MacInerney used an ethnographic interview process to study factors impacting motivation among college seniors. While this study was limited in scope, consisting of ninety-one seniors in a selective admissions college in the Northeastern United States, the results revealed some salient perspectives about motivation. Students, through the self-reporting interview process, reported that there were many variables that can and do affect their academic motivation. The students suggested that their personal goals of graduating and earning good grades became their primary target goals during their senior year.

Pertinent to the discussion of self-efficacy and learning is one important underlying factor that a student’s personal thoughts regarding autonomy greatly impact their desire to perform well in the classroom. The seniors in this study reported that their thinking was very important in determining academic motivation. This category comprises five different beliefs or thinking process. The first category was student belief about control. The seniors in this study contended

29 Id.
30 Id.
31 Winne, supra note 22.
32 Id.
34 Id.
35 Id.
that they were more motivated when they believed that they had control or choices in their academic work.”

They continued this line of discussion to address the impact of effort and academic strategy on performance. This study of college seniors further reveals the connection between self-efficacy and academic performance. In the students self-reporting, they reflected a belief in the strong connection between effort and academic performance as well as the importance of an adequate and efficient study strategy. As the authors report: “Although the seniors recognized that ability can affect academic performance, they believed that with effort and efficient strategies, most college students can do well.” The internal viewpoint that most college students are in control of their own academic destiny cannot be underestimated in the link between self-efficacy and academic performance. While, the researchers freely admit that this is one area that is in need of further study, there is solid affirmation regarding that strong connection.

Given the limited scope of these two empirical studies and the research limitations addressed in the Winne-Nesbit article, additional studies with different student demographics would enhance the evidenced link between self-efficacy and motivation as well as the link between motivation and academic success. Notwithstanding this research void, the studies do reveal the importance of a student’s own perception concerning their role in the learning process. A student’s belief that they can achieve success if they put forth the effort, greatly impacts their reception of knowledge and resulting academic achievement.

The Importance of Self-Efficacy in Ethical Behavior

Although there has been an ever-evolving interest in studying the link between self-efficacy and academic achievement, there have been a very limited number of studies examining the connection between self-efficacy and ethical behavior. Albert Bandura, in a groundbreaking work on self-efficacy written in 1977, described four component of self-efficacy: past performance, vicarious experience and social observation, communicative persuasion, and psychological state. These four components greatly impact the learning process, and that link has been studied over the past thirty to forty years, but little research has been conducted to demonstrate a link between self-efficacy and ethical behavior.

One research study from Griffith University in Australia conducted by James Ogilvie and Anna Stewart, used a scenario-based questionnaire to study the impact of situational factors and individual differences on ethical behavior. Participants for the study were undergraduate university students non-randomly recruited across all academic disciplines and year levels. While 964 questionnaires were returned, only 536 were included in the study (first semester students and students who did not complete the questionnaire in its entirety were excluded).

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36 Id.
37 Id.
38 Id.
39 Id.
41 Id.
42 Id.
The study was designed to analyze the relationship between student self-efficacy and academic misconduct while also discussing the rational choice model of perceptual deterrence theory. According to the authors, “the primary aim of the present study was to improve knowledge concerning how individual differences and situational factors interact to influence engagement in misconduct, using individual-level constructs directly relevant to explaining academic behavior (i.e., academic self-efficacy to explain plagiarism).” The scenario-based questionnaire, given through an online survey website, incorporated four scenarios randomly distributed, and designed to manipulate both the certainty of detection and the severity of sanctions. The four scenarios utilized the concepts of certainty and severity put together in four different combinations including: high certainty and high severity, high certainty and low severity, low certainty and high severity and low certainty and low severity. The independent variables consisted of academic self-efficacy (measured with the Academic Self-Efficacy Scale), perceived sanction, perceived benefit, perceived shame, prior behavior and demographic information, while the dependent variable reflected the student’s self-report concerning the probability of personal participation in plagiarism. This intent to engage in plagiarism was measured on a 0 to 10 point scale.

The results of the study revealed an inverse relationship between academic self-efficacy and plagiarism, and provided evidence that academic self-efficacy actually moderated the effects of deterrence perceptions on intentions to engage in plagiarism. In the words of the researchers, “low academic self-efficacy was found to be a significant predictor of higher probabilities of engaging in plagiarism, even in the presence of situational-level deterrence perceptions. This finding lends further support to the utility of self-efficacy as a predictor of student misconduct in university settings.” In addition, deterrence perceptions basically had no effect on plagiarism intentions among low academic self-efficacy students but significant effects on moderate to high academic self-efficacy students. The results highlight the significance of the interaction between situational and individual characteristics on decisions to engage in unethical behavior.

In another study examining the link between self-efficacy and ethical behavior, Jonathan Nelson, Laura Wheeler Poms, and Paige Wolf, all from George Mason University, conducted survey based research using a large class of organizational behavior students. A total 564 students participated in the research by completing a pre-class and post-class survey addressing diversity and ethics, self-efficacy and attitudes. The ultimate goal of the study was to assess techniques and methods for developing self-efficacy in regards to ethics for undergraduate management students.

44 Id.
45 Id.
46 Id.
47 Id.
48 Id.
49 Id.
50 Id.
51 Id.
53 Id.
54 Id.
For the purpose of the study, Nelson, Poms and Wolf specifically targeted efficacy beliefs related to ethics and diversity. The researchers presented two learning modules on ethics and diversity to a class of undergraduate management students and included a critical thinking writing assignment requiring students “to propose and evaluate a program that appropriately managed ethics or diversity.” Two modules were designed and instructed, as part of a comprehensive course in management, touching on the specific issues of (1) ethics and (2) diversity. As part of the instructional method, examples were shown, via video, to demonstrate appropriate handling of ethics and diversity issues. The two primary hypotheses were as follows: “Self-efficacy for dealing with ethics management will increase over the course of the class and that self-efficacy for dealing with diversity management will increase.” Similarly, the researchers also hypothesized that the completion of the writing assignment would lead to greater self-efficacy in managing ethics and that completion of the writing assignment on the topic of diversity would lead to greater self-efficacy for managing diversity.

The results of the study supported both of the primary hypotheses as well as the secondary hypotheses. The authors record that: “Students’ self-efficacy for ethics management improved between the beginning and end of the course. Likewise, students’ self-efficacy for managing diversity improved between the beginning and end of the course.” Results also indicated that completion of the critical thinking writing assignment, whether in ethics or in diversity, led to higher posttest scores in the respective areas.

The authors do recognize several limitations with the study. There was a lack of a strict control group, students were not randomly assigned to either ethics or diversity coursework, and the research did not allow for actual observance within a workplace. Despite these limitations, the authors “found considerable support that ethics and diversity management efficacy beliefs could be developed through course content and a focused writing assignment.” The study provides specific evidence that self-efficacy in ethics and diversity bears a significant impact on ethical behavior and/or interest in diversity initiatives.

In 2012, Mark Bing, H. Kristl Davison, Scott J. Vitell, Anthony P. Ammeter, Bart L. Garner, and Milorad M. Novicevic, all from the University of Mississippi, conducted a study of 104 business undergraduates in a sophomore-level management information systems course to examine the interactive impact of situational presentations and self-perceived cognitive ability on cheating. Throughout the semester, students, as individuals, were required to complete online homework exercises in Microsoft Word, Excel, Access and Powerpoint. The online homework assignments included an embedded code that would be analyzed at the end of the study to reveal any instances of cheating.
At the beginning of the course, the students were divided into four different groups. The control group was Group 1 and the members of this group were shown a video of the course instructor simply thanking them for taking the surveys without any statement regarding the honor code or any warning as to the repercussions for cheating. Group 2 was shown a video of the course instructor reciting the Business School’s Academic Integrity Statement (the honor code) verbatim, however the instructor did not provide a warning concerning the detection of cheating. Group 3 was shown a video of the course instructor providing a realistic course warning of how cheating is detected. In this version, however, there was no reminder of the honor code. Group 4 was shown a video of the course instructor, which provided both a recitation of the Academic Integrity Statement as well as a warning of how cheating is detected and punished.

Results of the study demonstrate a couple of revealing concepts regarding a student’s probability of cheating. One, the results indicate that an honor code alone is not enough to prevent students from cheating, and, two, students with higher perceived cognitive ability had the fewest incidents of cheating. The study revealed that nearly fifty percent of students who did not receive either an honor code reminder or realistic course warning cheated on one or more assignments while only eleven percent of the students who received both an honor code reminder and a realistic course warning cheated on the assignments. The students who received an honor code reminder only had a twenty-eight percent occurrence of cheating.

While the Bing, et. al. study did not specifically measure self-efficacy, the study did address a more general determinant of unethical behavior, self perceived cognitive ability. These findings with respect to self-perceived cognitive ability suggest other potential avenues for the reduction of academic cheating, as well as future research directions. Students who perceive their cognitive ability to be higher cheat less, presumably because they do not feel the need to cheat in order to receive a good grade in a course. In contrast, those students who perceive their cognitive ability to be lower cheat more, again most likely because they feel they lack the ability to be successful in the course without cheating. The authors conclude that: “It is possible, therefore, that an intervention at the beginning of a course to increase students’ perceived academic ability, or perhaps their self-efficacy, might reduce cheating.”

Further empirical data regarding the link between self-efficacy and ethical behavior comes from a 2003 study of 939 adult students in executive management programs which found that self-efficacy directly influences the potentiality for internal whistleblowing. Researchers Brent McNabb and Reginald Worthley, with the University of Sydney and University of Hawaii respectively, used two survey instruments incorporating a Likert scale to measure general self efficacy beliefs and attitudes for internal whistleblowing. Resulting data revealed a direct relationship between self-efficacy and whistleblowing however results were inconclusive in determining whether management and work experience bear a significant direct relationship to whistleblowing.

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66 Id.
67 Id.
68 Id.
69 Id.
70 Id.
71 Id.
72 Id.
internal whistleblowing. The authors recognize that while their research effort “breaks new
ground in verifying links between self-efficacy and whistleblowing, there is still a need for more
understanding.”

Conclusion

While current research is limited in volume and in scope, the hypothesis that self-efficacy impacts
ethical behavior cannot be overlooked. Just as a student’s self-efficacy impacts academic performance,
a small number of empirical studies have revealed that self-efficacy plays an important role in ethical
decision making for students and professionals alike. Results examined in this paper indicate a
significant link between self-efficacy and academic achievement as well as a significant link between
self-efficacy and ethical behavior. However, further empirical study is needed to build on the body of
available research. With the continued debate over the viability of teaching ethics, understanding the
impact of self-efficacy can aid teachers in providing the most appropriate instruction for business school
students in the areas of ethics and ethical decision making.

74 Id.

75 Id.
Notes for Authors:

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

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

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

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

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

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