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SALSB EXECTIVE COMMITTEE

(2024)

From the Editor-in-Chief. . . .

This is the 16th 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 sixteenth 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 start of the Journal. The publishing of this journal is an intense educational experience which I continue to enjoy.

Many of the papers herein were presented at the Southern Academy of Legal Studies in Business meeting in San Antonio, Texas, March, 2024. Congratulations to all our authors. I extend a hearty invitation to the next meeting of the SALSB in San Antonio, Texas, Feb. 27-March 1, 2025.

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

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

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

Our Reviewers

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

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

Reviewers for this issue in alphabetical order were:

Jennifer Barger Johnson, University of Central Oklahoma

Darrell Ford, University of Central Oklahoma

Dinah Payne, University of New Orleans

Laura Sullivan, Sam Houston State University

Kristopher Tilker, Midwestern State University (TX)

Lee Usnick, University of Houston - Downtown

Aubree Walton, Cameron University (OK)

Notes for Authors:

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

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

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

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

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

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

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

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

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

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

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

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

Mark Your Calendars

Feb. 27-March 1, 2025

Southern Academy of Legal Studies in Business

San Antonio, Texas

Find the details at:

www.SALSB.org

Dedication

Dr. Charles Ramser

We are sad to announce the loss of a Dear Friend of the Southern Academy of Legal Studies in Business. **Dr. Charles David Ramser**, a distinguished professor of Business Management at Midwestern State University, passed away peacefully on June 3, 2024.

Charles was born on September 11, 1941 in Omaha, Nebraska. After receiving his doctoral degree from the University of North Texas in 1968, Charles began teaching at Midwestern State University. His passion for teaching and mentorship touched the lives of over 17,000 students during his tenure of 55 years. Charles wrapped up his final semester as Professor Emeritus this past May.

He will be remembered at MWSU for his kindness, wisdom, and unwavering dedication to his family, students, and colleagues.

Charles had participated in SALSB in San Antonio for over a decade, his final presentation in March, 2024. He published numerous articles in the Southern Journal of Business and Ethics with his Midwestern State co-authors Charles Bultena and Kristopher Tilker on the topic of Mediation, his final contribution appearing in this issue of the journal. We dedicate this issue to our friend and colleague.

Donations can be made to the Dillard College of Business Administration marked for the Dr. Charles Ramser Scholarship at Midwestern State University in his memory. (https://giving.msutexas.edu/campaigns/dr-charles-ramserscholarship).

MEDIATION METRICS IV: THE ARTIFICIAL MEDIATOR – OPPORTUNITY OR OXYMORON?

CHARLES BULTENA
CHARLES RAMSER
KRISTOPHER TILKER
Midwestern State University

This is the fourth in a series that examines emerging issues and opportunities in mediation. The rise of artificial intelligence (AI) over the past few years is impacting nearly every aspect of society. Mediation is no exception. Some foresee advances in AI and Robotics leading to the emergence of "artificial mediators" while others question whether machines can ever replace human mediators. This paper examines what AI can and cannot do in mediation and how to marshal AI as a tool to enhance mediation. Specifically, it examines the capacity of AI to open the classic Johari Window and whether AI can emulate key components of emotional intelligence that are vital for mediation success. Regardless of whether AI can replace the human mediator, marshalling AI capabilities is vital to success in modern mediation. Recommendations and an update on mediation settlement rates are also provided.

I. INTRODUCTION

Once considered "alternative" dispute resolution (ADR), mediation is now the dominant form of dispute resolution in civil cases (Edwards, 2020). Mediation offers an alternative to the rigors of formal litigation in a courtroom. It has exploded as a successful conflict resolution tool because, according to Gene Valentini, director of the Texas Dispute Resolution System, it provides an opportunity to resolve virtually any issue in "a cost effective and timely manner" (2010, p. 2). 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" (p. 2). Business leaders must understand the dynamics of the process in order to prepare for successful mediation.

After decades of stability, technology has beset the field of mediation in two waves. First, the recent COVID-19 pandemic ushered in the age of virtual or zoom mediation, which quickly became the norm as mediators, attorneys, and parties adapted to and expressed satisfaction with the process (Van Winkle, 2023). Second, OpenAI introduced its innovative artificial intelligence (AI) chatbot called ChatGPT. With 100 million active users in less than two months, AI began to shape every aspect of society (Lammertyn, 2024). The march of AI gained momentum with release of OpenAI's more powerful ChatGPT-4 and Microsoft's AI Copilot. The advent of these

powerful chatbots and AI assistants as well as new developments in avatars and AI robotics have profound implications for the practice of mediation and for the role of mediators.

This paper examines the impact of AI on mediation and projects these advances into the future in the Evolution of AI in Mediation Continuum. Then, it examines what AI *Can Do* in mediation in an analysis of the Impact of AI on the Mediation Window derived from the classic Johari Window. Next, the paper examines what AI *Cannot Do* in mediation, specifically whether it can emulate the four dimensions of emotional intelligence in human mediators. Here, AI capabilities are examined in the Artificial Intelligence versus Emotional Intelligence Model. Finally, the challenges of AI in mediation are discussed, and a Strategy for Deploying AI in Mediation is provided, as are updates on mediation settlement rates.

Recognizing the impact of AI on the interpersonal dynamics of mediation can determine the success or failure of the process. Before examining these effects using the models in this paper, it is important to examine the meaning of mediation, its use, and its success in resolving conflict.

II. THE MEANING 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 (Texas Civil Practice, 2008).

Unfortunately, this statutory definition offers little insight into what mediation actually can and should be. When successful, mediation can be characterized as proactive, forward-looking, and problem-solving in nature. As a process, it is enlightening, flexible, confidential, and, typically, evokes less stress than does formal litigation. 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 (Lovenheim, 1998). Mediation basically involves negotiation through a disinterested third party, and it effectively can defuse emotional time bombs. 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 avoid costly settlements and potentially expensive litigation. Given the number of lawsuits filed, heavy reliance on compulsory mediation by the courts, and rapid technological change, business leaders must understand and know how to prepare for and conduct successful AI-based virtual mediation.

III. THE USE OF MEDIATION

Over the past two decades, the use of mediation has exploded. Business leaders and the courts have discovered its value as a cost-effective alternative to litigation in the traditional

adversarial system. The number of mediation cases in Texas, Oklahoma, and Nebraska is staggering. Cases received by Texas ADR centers in the most recent three-year period for which records were kept average almost 20,000 annually, with a total of more than 58,000 from 2003 to 2005 (Annual Report Texas, 2005). The same situation is true of Oklahoma. As shown in Table 1, on average, more than 5,000 cases have been referred annually to the ADR system there, with more than 75,000 cases referred and an impressive settlement rate of 65% over the past 15 years (Annual Report Oklahoma, 2023). Farther north, results in Nebraska (see Table 2) are also impressive. An average of nearly 2,000 cases are referred annually to that state's ADR system with an average settlement rate of 80% over the past 15 years (Annual Report Nebraska, 2023). These regional settlement rates are mirrored across the nation: Better Business Bureau, 78% (4 Disputes.com); U.S. Equal Employment Opportunity Commission (EEOC), 75% (eeoc.gov); and Financial Industry Regulatory Authority, 85% (finra.org). High settlement rates also can be seen internationally. The World Intellectual Property Organization exceeds 70% across its 179 member-nations (wipo.int), and the Bangalore Mediation Centre tops 65%, with more than 100 cases per day (MediatorsBeyondBorders.org). Thus, the widespread use of mediation and its potential for cost-effective conflict resolution are well established.

Table 1: Oklahoma Alternative Dispute Resolution System Cases Referred and Settlement Rate

Date	***Cases***	***Settlement Rate***
2008	5,766	64%
2009	6,275	71%
2010	6,375	63%
2011	6,535	64%
2012	5,704	62%
2013	5,261	61%
2014	5,046	63%
2015	4,852	63%
2016	*No*	*Report*
2017	4,559	68%
2018	4,168	70%
2019	4,419	65%
2020	3,677	62%
2021	3,361	62%
2022	5,014	62%
2023	4,207	74%
Total	75,219	65%

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

Table 2: Nebraska Alternative Dispute Resolution System Cases Referred and Settlement Rate

Date	*Cases*	*Settlement Rate*
2008	1,171	84%
2009	1,467	83%
2010	1,604	85%
2011	1,723	83%
2012	1,876	81%
2013	1,948	79%
2014	2,133	79%
2015	2,083	78%
2016	2,271	80%
2017	2,367	79%
2018	2,303	77%
2019	2,411	77%
2020	1,472	78%
2021	1,580	77%
2022	1,443	79%
2023	1,714	79%
Total	29,566	80%

Source: *Office of Dispute Resolution Annual Report - Fiscal Year 2023* from the Nebraska Office of Dispute Resolution

IV. PURPOSE

AI has transformed ADR in recent years. It is used extensively in Online Dispute Resolution (ODR), which is particularly useful for resolving disputes related to material assets without a mediator. One ORD success story is eBay's Online Resolution Center, which settles 60 million cases annually with a 90% settlement rate, all without human involvement (Foit, 2022). Other examples include SmartSettle, which replaced human mediators in a public court in England and Wales; AssetDivider and Split-Up, which are used to settle divorces in Australian family court; and the Internet Court of Beijing, which resolved 29,728 cases in its first year (Foit, 2022; Garg, 2023). This paper is concerned with the role of AI in traditional mediation that involves settling disputes **with** the help of an impartial, third-party mediator. AI is viewed either as an **Opportunity** to assist the mediator in this process or as an **Oxymoron** in which disputes are settled **without** the mediator as we know them in favor of using an artificial mediator.

Before 2020, mediation was conducted in person in all but a few specialized cases (Scheindlin, 2022; Galton, 2021). Technology developed rather slowly in the field and was limited to what the mediator could do in Microsoft Office, Google, or Bing via standard internet and cell-phone service. Then, two watershed events changed the landscape of mediation forever: the rise of virtual mediation and the advent of AI in mediation. In-person mediation generally

was suspended in Spring 2020 when the COVID-19 pandemic began and has not regained popularity since, even as health and safety concerns have waned (Van Winkle, 2023). With the introduction of the Zoom videoconferencing platform, virtual mediation became the norm as mediators, attorneys, and parties adapted to and expressed satisfaction with the process (Van Winkle, 2023). It quickly became the dominant form of ADR and is here to stay (Edwards, 2020).

Zoom was just the beginning of the technological transformation of mediation. Eighteen months later, on Nov. 30, 2022, OpenAI introduced its innovative AI chatbot called ChatGPT. Considered a novelty initially, it skyrocketed to 100 million active users in less than two months (Lammertyn, 2024). Then, in Spring 2023, OpenAI released the ChatGPT-4 for subscribers only, and Microsoft released Microsoft Copilot, which was based on the GPT-4 natural language processing model. Copilot is billed as an "everyday AI companion." ChatGPT-3 was trained with 175 billion parameters and 45 terabytes of text (Bergman, 2023). Newer versions will likely eclipse this level of machine learning. A note of possible interest for attorneys is that ChatGPT-3.5 surpassed only 10% of humans sitting for the Uniform State Bar Exam, while ChatGPT-4 beat 90% of them (Lammertyn, 2024).

For all its potential, ChatGPT also has some known flaws. It is not entirely reliable because it "hallucinates facts and makes reasoning errors…and poses risks for generating harmful advice, buggy code, or inaccurate information" (Lammertyn, 2024, p. 12). In one instance, ChatGPT was asked if surgery can be done with churros. The response indicated that churros are not designed for this purpose and that the sharpness of the churro could cause damage or injury (Bergman, 2023). ChatGPT has been banned in several countries and recently became the target of an AI executive order issued by the Biden Administration in the United States because of copyright infringement in the training process and because of its misuse in creating advanced malware. Nevertheless, the presence of ChatGPT (and of AI, in general), are starting to impact many elements of society, including mediation. AI has not replaced the mediator, but it has transformed mediation practice.

The impact of technology on the practice of mediation over the past few years is significant, and the advent of AI has profound implications for the practice of mediation and the role of human mediators over time. This paper examines the current state of AI in mediation and projects these advances into the future in the Evolution of AI in Mediation Continuum. Then, it examines what AI *Can Do* in mediation in an analysis of the Impact of AI on the Mediation Window derived from the classic Johari Window. Next, the paper examines what AI *Cannot Do* in mediation, specifically whether it can emulate the four dimensions of emotional intelligence in human mediators. Here, AI capabilities are examined in the Artificial Intelligence versus Emotional Intelligence Model. Finally, the challenges of AI in mediation are discussed, and a Strategy for Deploying AI in Mediation is provided, as are updates on mediation settlement rates.

V. ARTIFICIAL INTELLIGENCE IN MEDIATION – OPPORTUNITY OR OXYMORON?

A. EVOLUTION OF AI IN TRADITIONAL MEDIATION

AI systems "are designed to behave rationally and are able to quickly store, analyze, and access vast amounts of data," and their "hunger for big data" is well documented (Foit, 2022, p. 47). This raises the question of the role of AI in mediation, specifically whether AI be used to complement or assist mediators or whether AI robots can and will become artificial mediators, one day replacing human mediators.

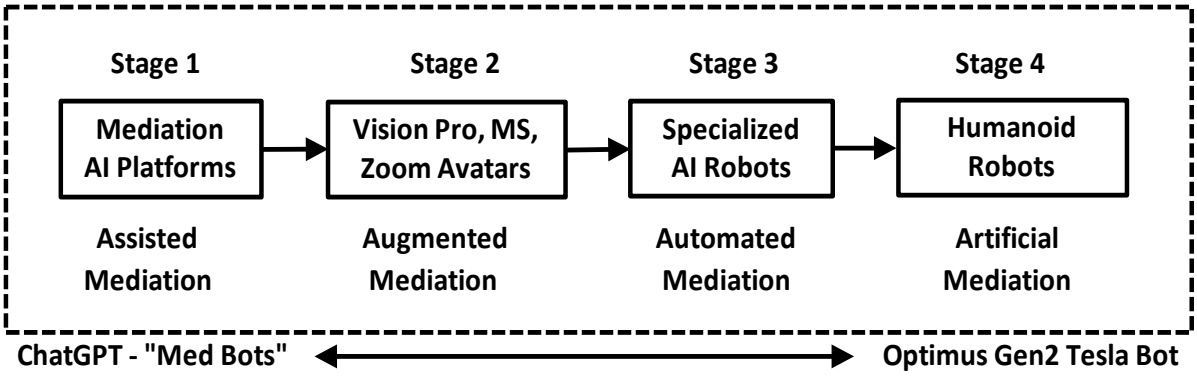
> "Can humanoid robots, attractive avatars, and other relational agents create the requisite level of trust and elicit the truthful, perhaps intimate or painful disclosures often necessary to resolve a dispute or problem? Regardless of whether the reader is convinced that the demise of the human mediator or arbitrator is imminent, one cannot deny that artificial intelligence now has the capability to assume many of the responsibilities currently being performed by alternative dispute resolution (ADR) practitioners." (Larson, 2010, p. 105).

The Evolution of AI in Mediation Continuum in Figure 1 traces the progression of the role of AI in mediation over time. The model consists of four distinct stages. The first three stages are adapted from three forms of AI proposed by Bergman (2023): **Stage 1 – Assisted Mediation**, which supports the work of a human mediator; **Stage 2 – Augmented Mediation**, which allows human mediators to do something they would otherwise have difficulty accomplishing; and **Stage 3 – Automated Mediation,** in which the entire task is done by AI (Bergman, 2023). A fourth stage, **Artificial Mediation** in which humanoid AI robots replace human mediators, was envisioned by David Larson in his visionary work on Advanced AI in 2010. Larson (2010) argued that mediation had already progressed through all these stages, at least in the form of experimental prototypes in use at the time. Significant development has occurred in the subsequent 14 years since his declaration. Nevertheless, as discussed previously, the capabilities of AI are limited, and the fully functional humanoid artificial mediator is not yet a commercial reality. The stages of the model are examined, with a discussion of the limitations of AI in mediation. Then in the next session, what AI *Can Do* in mediation is discussed regarding its impact on the Mediation Window, followed by a discussion of what AI *Cannot Do* with regard to emotional intelligence.

Stage 1 in the Evolution of AI in Mediation Continuum (see Figure 1) is **Assisted Mediation**, whereby machine learning in AI systems expands or enhances the efficiency and effectiveness of mediation. AI relies on chatbots, like Chat-GPT, trained on vast amounts of data, to generate solutions to problems or questions (queries) posed by users. A specialized mediation chatbot (med bot) trained on thousands of mediation cases could greatly enhance the speed, efficiency, and quality of mediation. Mediators could query such a system to obtain valuable information from similar cases and generate useful settlement offers and estimates in seconds (Foit, 2022).

There is no need to reinvent the wheel for every mediation case, and it is doubtful that human mediators could commit even a fraction of a large mediation database to memory with accurate, instantaneous recall. However, an effective med bot may be out of reach in the United States, where mediation AI systems are constrained by privacy laws and the confidentiality of data from mediation cases (Foit, 2022). Some mediators, bound by confidentiality clauses, "treat their expertise like guild knowledge; their power stems just as much from what they know and as from what they choose not to disclose" (Hirblinger, 2023, p. 103). Development may be relegated to private companies, academic and/or nonprofit organizations, and governmental entities, like the EEOC, which has conducted 249,000 mediations in 21 years with a 75% settlement rate (Foit, 2022; EEOC.gov). Moreover, "obtaining informed consent for collecting and reusing such mediation data" and controlling access to the data for prolonged periods of time is problematic (Foit, 2022, p. 82). Use of "privacy-preserving techniques that can mask a person's identity in a dataset, including techniques such as data anonymization and encryption" will be essential in developing effective AI systems (Foit, 2022, p. 82). Relaxed privacy and confidentiality standards for mediation data in the Internet Court of Beijing could give China an advantage in developing an effective large-scale med bot trained on hundreds of thousands of mediation cases over time. Thus, a large-scale med bot would be a quantum leap forward in every-day mediation as an AI assistant in Stage 1.

Figure 1: Evolution of AI in Mediation Continuum



Source: Assisted, Augmented, and Automated forms adapted from Bergman (2023). Application to specific technologies and addition of Artificial Stage by the authors.

Stage 2 in Figure 1 is **Augmented Mediation**, in which AI performs tasks that are difficult for humans to do. This stage became a reality recently with the release of Apple's Vision Pro headset, Zoom's Avatar app, and Avatars for Microsoft Teams. Suddenly it became possible for mediation participants to become avatars – realistic simulated humanoid characters emulating human movement and expression. While virtual mediation eliminated the need for participants to be physically present at the mediation table, avatars are eliminating the need to be present at all. Thus, there may no longer be a need to be physically present while zooming in virtual

mediation. Participants may simply put on their Vision Pro headset wherever they are and interact as avatars with actual mediation participants or other avatars (mixed meeting) in Zoom mediation sessions. Participants would no longer have to be in a specific physical location nor would they have to worry about appearance – avatars are always ready to meet.

The mediator may benefit most from augmented mediation because their avatar could be used extensively and could be ready in a moment's notice. Mediators could even use settings to customize avatars in order to blend in or to better relate to participants in a particular mediation setting (Lande, 2023a). Also, avatar mediators could caucus with both sides simultaneously, thereby saving time (Lande, 2023a, p. 2). Besides potentially saving time, avatars could reduce the cost of clothing and personal grooming as well as costs of maintaining an office (e.g., leasing, cleaning, and utilities). They could also add convenience and flexibility to the conduct of mediation. Mediators who are ill, on vacation, snowed in, or delayed in getting to the office could use their avatars from home or elsewhere to conduct professional mediation meetings. Avatars could even be programmed to automatically handle preliminary instructions and disclaimers to begin and end meetings. There are some concerns over the use of avatars in virtual mediation, as it may be difficult to verify the identity of participants unless the avatar equivalent of a tool such as VeriSign™ is developed to certify avatar authenticity. The authors envision a proprietary Avatar Identity Verification system to connect/certify avatars with their hosts called AvaSign™.

Stage 3 in Figure 1 entails **Automated Mediation**, which employs specialized non-humanoid devices with AI to perform entire mediation tasks. An automated mediator may take the form of a specialized machine ranging from an interactive stationary or mobile kiosk to a virtual hybrid human-mechanical device with varying degrees of functionality and mobility (Larson, 2010). Examples of hybrid human-mechanical devices include Carnegie Mellon's Valerie and the Naval Research Laboratories' George, who present only a human face atop a generic, metallic cylindrical mobile base, or MIT's Mel, a plush stuffed penguin with movable head, beak, and wings on a mobile base who can interact with humans in museums and zoos (Larson, 2010). Elderly patients in a hospital reported favorable reactions to virtual nurses who travelled around the hospital on a mobile kiosk. The virtual nurses' informational AI dialogue was augmented with relational dialogue and relational behavior to demonstrate caring, empathy, and good bedside manner (Larson, 2010, p. 124). Whether such devices can be programmed to conduct an actual mediation is unclear, but automated stationary kiosks and mobile nurses in hospitals are already automating many check-in, diagnostic, and patient care tasks. Such devices likely could be used effectively to automate many tasks in mediation offices.

Finally, Stage 4 in Figure 1 is the ultimate in AI Robotics – the **Artificial Mediator.** This is a fully functional humanoid robot capable of speech, expression, and simulated thought processes. The Optimus Gen 2 Tesla Bot is a close facsimile of this level of AI robotic development. Though not commercially available at this time, such a robot infused with emotional intelligence, sensory capabilities, facial expression (Optimus is lacking here), and extensive training (machine learning) in mediation could perhaps become an artificial mediator

that could replace a human mediator in simple cases. It is also important to note that such an AI robot need not be a full-body one (like Optimus) in mediation – a waist-up, seated version of Optimus would suffice. However, advances in AI robotics may be a moot point because virtual mediation via video conferencing is the norm in modern mediation, and it is unlikely that there will be a move back to in-office mediation anytime soon. Thus, efforts to develop a humanoid artificial mediator may be better spent developing more realistic, capable, AI-enabled mediation avatars. Such development seems to be in reach with the release of Apple's Vision Pro headset, the Zoom Avatar app, and Avatars for Microsoft Teams. What is lacking, however, is the sensory feedback to enable advanced avatars to detect and project real emotion and nonverbal cues and to respond appropriately with empathy, concern, and emotional intelligence. The AI/EI debate is discussed later in this paper as a key barrier to the development of an artificial mediator to replace human mediators.

The next section examines what AI *Can Do* in mediation already. These capabilities are examined in the context of their potential to expand the panes of the classic Johari Window (Luft & Ingham, 1955).

B. What AI Can Do – Opening the Mediation Window

In 1955, Joseph Luft and Harry Ingham proposed the Johari Window as a graphic model of interpersonal awareness (Luft & Ingham, 1955). Since then, scholars, executives, and consultants have used the model as a tool for developing high levels of communication, trust, and openness in a variety of situations. The model describes mechanisms for developing effective working relationships through self-disclosure, feedback, and shared discovery. The model is depicted as a window with four panes. The panes in the original model represented information known only to Self (Hidden), only to Other (Blind), to both parties (Open), and to neither party (Unknown). The model was adapted for use in mediation by the authors in Figure 2 – The Mediation Window. This required a change in perspective from Self/Other to Party A/Party B. Thus, the Blind and Hidden areas were relabeled as "Privileged Areas" for each party. Information in these areas is known only to the respective party. The Open Area (the Settlement Window) is the area in which successful mediation occurs. It consists of perceptions, understanding, and knowledge of relevant information held in common by both mediation parties, a sharing that can bolster common ground (knowledge and understanding), thus closing the gap between parties, reducing the scope of the conflict, and speeding resolution. This pane must be open for effective mediation to occur. The Open Area is small when communications are closed, blocked, or not forthcoming. Research in industry, universities, and among counselors has shown that communications are richer, more authentic, and complete when the Open Area is larger than the Hidden or Privileged areas (Luft & Ingham, 1955).

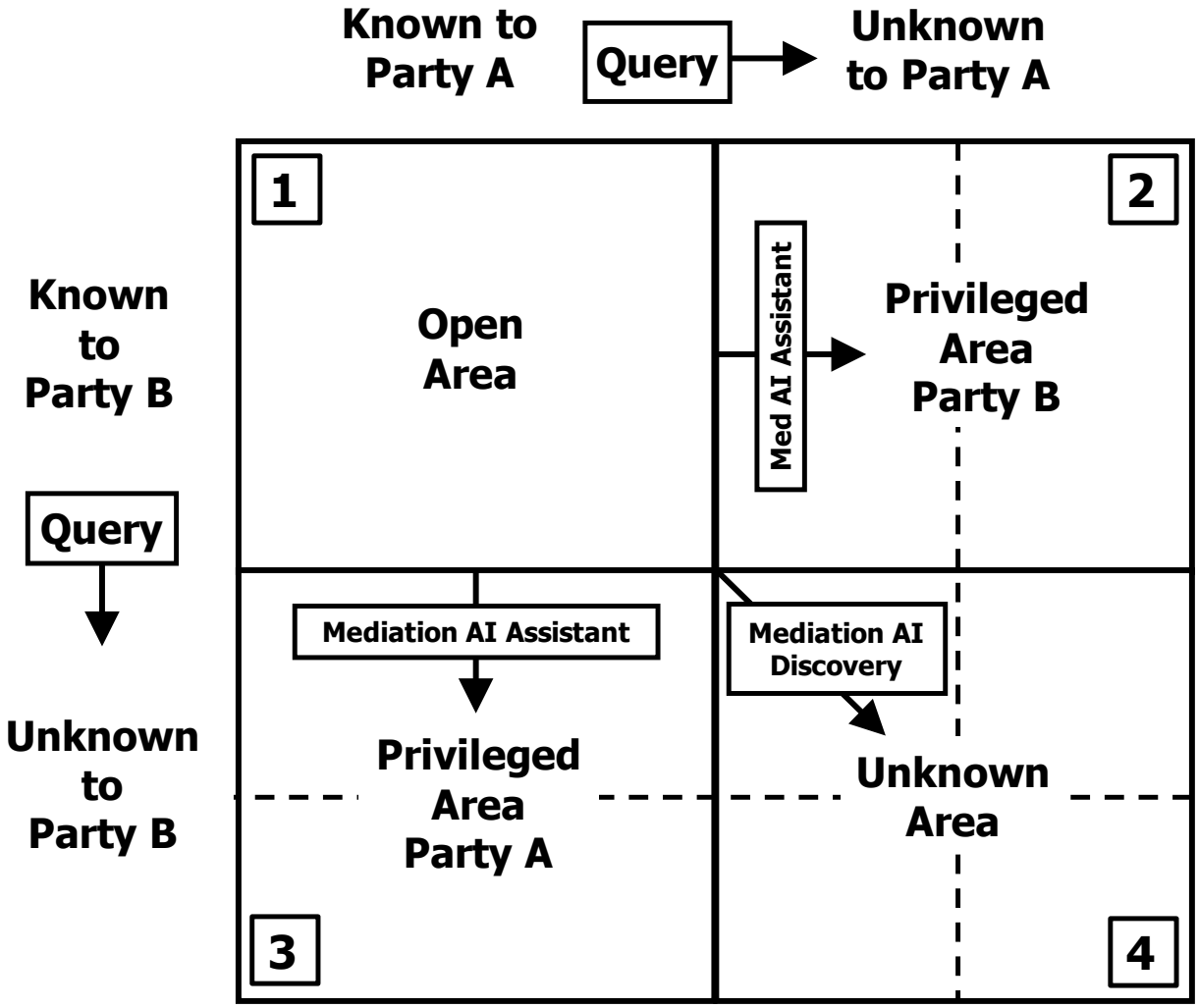
The hidden areas in the Traditional Mediation Window are comprised of the Privileged and Unknown areas. Each Privileged Area is made up of perceptions, knowledge, and information known to one party but not the other. To illustrate, one party may be acting on a false assumption that is blocking resolution of the conflict. Building trust and effective

communication leads to mutual disclosure by the parties, which expands the Open Area, thus revealing faulty assumptions that can be corrected on the path to resolution. What is hidden in the Unknown Area is known to neither party. Shared discovery, which refers to the process by which both parties jointly discover new information, is vital to opening this area.

Thus, the configuration of the four panes can be altered with mutual disclosure and shared discovery in such a way that the Open Area (Settlement Area) expands and the Privileged and Unknown areas shrink, thereby enhancing the potential for effective conflict resolution. These processes are more likely to occur in the collaborative context of traditional facilitative mediation with full participation by the parties. Collaborative dispute resolution depends on honesty, some level of trust among the parties and mediator, and common ground (shared knowledge and understanding). Favorable settlement is unlikely if the panes of the Mediation Window are not altered by the process such that the Open Area expands and the Privileged and Unknown areas shrink or are illuminated. In this sense, AI systems have the potential to expose common ground and expand the Open or Illuminated Settlement Area.

The Strategy for Deploying AI in Mediation in Table 3 is a compilation of the respective uses or benefits of AI-Assisted Mediation (AIM). These are organized according to their impact on the various phases of mediation: Pre-Mediation, During Mediation, and Post-Mediation. A key benefit of AIM is pre-mediation communication and disclosure between the parties and mediator. Such systems have the potential to expand the Open Area dramatically through two distinct tools. First, a Mediation AI Assistant facilitates disclosure by systematically collecting and distributing more information regarding the party's case, values, position, interests, and settlement expectations in pre-mediation screening, communication, and disclosure. This pushes back the respective Privileged Areas of both parties and expands the Open Area in Figure 2. Second, Mediation AI Discovery regarding pertinent case law, settlements in similar cases, and mediator disclosures in pre-mediation and during mediation lead to shared discovery among the parties that pushes back the Unknown Area further expanding the Open or Settlement Area. In general, AI-assisted systems, proprietary med bots trained on a database of mediation cases, and ChatGPT can brainstorm to generate potential settlement offers (Weisheit & Salgar, 2023).

Figure 2: Impact of AI on the Mediation Window



Source: Adapted from the Johari Window, Joseph Luft and Harry Ingham (1955). Figure adapted from Chapman (2003). Adaptation from Self/Other to Mediation Party A/Party B, Privileged Areas, and AI Operations by the authors.

Parties place surprising confidence in such systems, as illustrated in a story recounted by Ryan Searson (2023). An experienced mediator attempting to settle a dispute between a landlord and tenant dealt with a huge gap in party positions. Eventually the parties reached a settlement for $270,000 without the use of AI. Shortly thereafter, ChatGPT arrived at nearly the same figure of $275,000 which served as confirmation to the parties that the settlement was fair. AI systems can not only brainstorm potential solutions, they can generate quality solutions with a high degree of acceptance and party confidence (Weisheit & Salgar, 2023; Searson, 2023). NextLevel™ Mediation determined that the best use of AI in their Mediation AI Assistant was to

generate the right questions to ask both parties and to develop key criteria for assessing party priorities in the case (Bergman, 2023). Parties seem to be willing to do both. Overall, the confidence parties place in AIM systems may reflect a view that AI is truly impartial, less likely to disclose confidential information than humans, and more adept at exploring the full range of similar cases while generating more informed, better-quality settlements.

A full examination of what AIM *Can Do* in all three phases of mediation is provided in the Strategy for Deploying AI in Mediation in Table 3. Its potential impact in "expanding the Open or Settlement area in the Mediation Window in Figure 2 is impressive. Mediators, at the very least, should adopt some form of AI mediation assistant to augment the mediation process.

The next section goes beyond the practical benefits of what AI assistants can offer in mediation today to explore the next step – whether advanced artificial mediators can take the place of human mediators. A common theme is this discussion is the Artificial Intelligence versus Emotional Intelligence (AI/EI) debate.

C. What AI Cannot Do (Yet) – Emotional Intelligence

Despite impressive advancements, it is doubtful whether an AI system, such as ChatGPT, can function as a stand-alone mediator (Weisheit & Salger, 2023). ChatGPT does not "fully understand emotions and consequently is not able to understand the perspective of the conflict parties or how to show empathy and support them emotionally" (Weisheit & Salger, 2023, p. 7). In fact, ChatGPT itself denied its ability to emulate the human qualities found in mediators when asked if it could replace a human mediator:

> "As an AI language model, I can provide information and suggestions based on data and algorithms, but I cannot replace the role of a human mediator…(who) often relies on a combination of ***communication skills, active listening, empathy***, and the ability ***to recognize and address power imbalances*** to help people in dispute find common ground. While I can provide general information on conflict resolution, ***I cannot replace the human qualities*** that a mediator brings to the process. Mediation often involves ***emotional intelligence***, which is an area where AI models, like myself still have limitations." (Weisheit & Salger, 2023, p. 7).

One of the primary limitations of AI is its "inability to fully understand and interpret human emotions and cultural nuances" (Bergman, 2024). Mediators must remain in the loop to protect against hallucinations, biases, inability to think outside the box, lack of transparency, and various legal and ethical issues (Bergman, 2024). Hallucinations refer to the tendency for AI to "overfit," which happens when its decision-making process is so tied to machine learning that the system loses its ability to generalize effectively and generates erroneous results not supported by any known facts (Foit, 2022, pp. 73-74). An example is the query about using churros in surgery previously described.

While AI platforms can be programmed to identify patterns, they are only as good as the data they are fed, which is limited by the parties themselves not fully disclosing everything and by the privacy and confidentiality of mediation data (Berland, 2023, p. 4.). Moreover, AI platforms lack the emotional intelligence of human mediators; cannot respond to nonverbal cues and nuances; are not able to respond emotionally with the creativity, flexibility, and adaptability of a human mediator; and are not able to manage conflict, build trust and relationships and leave both parties feeling they have been heard in the dispute (Berland, 2023).

Some visionaries in the field of AI and robotics disagree with this view. David Larson has written extensively about whether the "human mediator's place at the proverbial mediation table can be assumed by a humanoid robot" (Larson, 2010, p. 112). Others claim the most recent generation of avatars and AI robots have the four critical human capabilities: "engagement, emotion, collaboration, and social relationship" needed to replace human mediators (Rich & Sidner, 2009, p. 30). These capabilities closely mirror Goleman and Boyatzis' (2017) four dimensions of emotional intelligence. An analysis of the capabilities of current AI systems in terms of the four dimensions of emotional intelligence follows (see Figure 3). Each EI dimension is described, and the capability of current AI systems is assessed.

Succeeding in mediation requires more than mere cognitive intelligence and vast stores of knowledge (machine learning in AI). It requires emotional intelligence, which is the ability to perceive emotions and recognize their meaning; to understand emotion-related feelings; and to manage emotions and solve problems on the basis of them (Mayer, Salovey, & Caruso, 2000). Awareness of and the ability to manage one's own and other's feelings and emotions are key elements in effective communication. Daniel Goleman claims EI is twice as important to success in the workplace as raw intelligence or technical know-how (Goleman, 1998). Emotional Intelligence has important implications for communication, conflict management, and mediation success. Mediators with high EI can engage in promoting information sharing, trust, healthy risk taking, and learning, while those with low levels may tend to endorse fear, anxiety, and pessimism (Bagshaw, 2000). Overall, EI allows mediators to connect with others and solve problems.

Goleman and Boyatzis (2017) identified four distinct EI competencies that impact communication and mediation success: Self-Awareness, Self-Management, Social Awareness, and Relationship Management (see Figure 3). These competencies, possessed by most successful mediators, can be developed over time. Whether AI systems are able to "learn" or develop these human capabilities is the crux of the AI/EI debate. The capability of current AI systems to demonstrate each of the four dimensions of EI is analyzed below using Figure 3.

Self-Awareness: This involves reading one's own emotions and recognizing their impact; knowing one's strengths and limitations, and feeling good about them; and appreciating one's personal qualities (Goleman & Boyatzis, 2017). Those who have a high degree of self-awareness are aware of their personality, emotions, mood states, values, and attitudes, and they recognize how their feelings affect themselves, others, and their performance. While ChatGPT of its own admission does not possess these qualities, more advanced avatars and robots in

limited use are increasingly self-aware (Larson, 2010). Thus, AI is **Somewhat** capable of Self-Awareness.

Self-Management: This second dimension of emotional intelligence involves keeping disturbing emotions under control; acting on opportunities; displaying honesty and integrity; recognizing the needs of others; and adapting to changing situations (Goleman & Boyatzis, 2017). Being aware of emotions is one thing; the ability to manage emotions is another. Self-Management requires the ability to sense, interpret, adapt, and act in order to control emotions with honesty and integrity. While AI systems such as ChatGPT seem to keep emotions (if they have them) under control and seem to act with honesty and integrity, their capacity to recognize emotions and nonverbal cues in others and to adapt to the situation is **Limited**. The sensory capabilities of advanced avatars and robots are developing but are currently out of reach for most mediation practitioners.

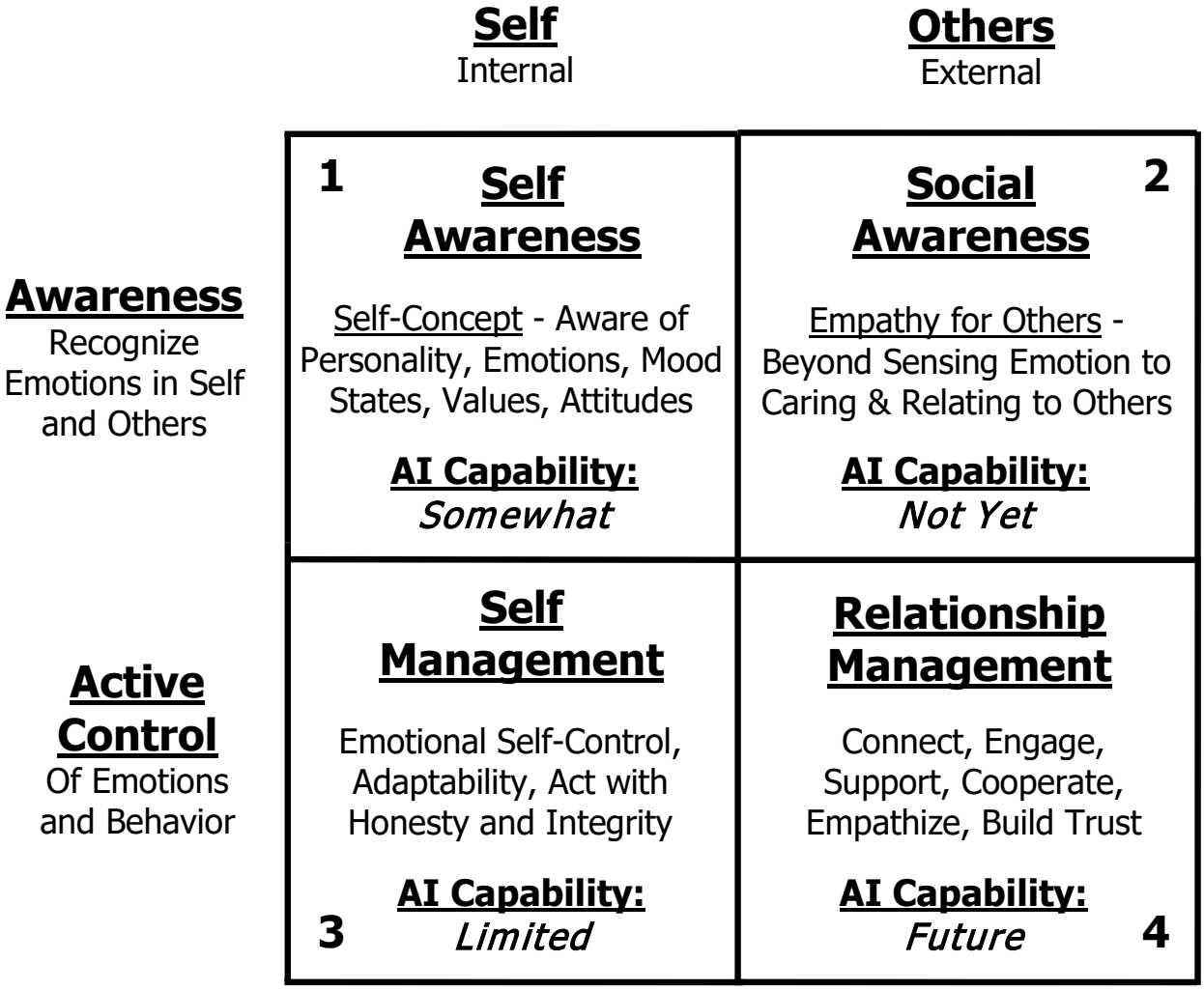
Social Awareness: This includes having empathy for others and having intuition about interpersonal problems. Empathy means thoughtfully considering other's feelings in the process of making intelligent decisions (Goleman, 1998). Emotionally intelligent individuals are aware of the nonverbal cues that exist in social settings and are more capable of understanding, communicating, and establishing relationships of trust and credibility (Goleman & Boyatzis, 2017). The strengths of human mediators lie in "a pronounced capacity for empathy, compassion, and a desire to understand others" (Foit, 2022, pp. 44-45). Ultimately, AI cannot replace "human mediators' interpersonal approach and innovative problem-solving capabilities, nor can it manage emotions like anger, fear, and frustration that may be fueling the conflict" (Panetta, 2023, p. 1). Thus, AI systems, even more advanced avatars and robots, do **Not Yet** possess such capabilities.

Relationship Management: This, the highest form of emotional intelligence, involves the ability to persuade others; to guide and inspire with a convincing vision; to develop abilities in others; to act as a catalyst for change; and to manage conflict and build bonds with others (Goleman, 1998). Effective mediators connect, engage, empathize, cooperate, and build trust and relationships with parties. These will be the most difficult capabilities to develop artificially – they lie in the **Future** for AI.

Overall, impressive advances in AI are enabling increasing Self-Awareness and Self-Management in AI systems, avatars, and AI robots, but the highest levels of emotional intelligence (Social Awareness and Relationship Management) remain elusive. Our conclusion regarding whether artificial mediators will replace human mediators is the same one reached by Maverick in the movie *Top Gun Maverick*. When his commander reminded him that fighter jets will soon fly themselves, Maverick simply replied, "Not today, sir!"

So, what is the role of AI in mediation today? The next section offers a Strategy for Deploying AI in Mediation in Table 3 with guidance in all three phases of mediation.

Figure 3: Artificial Intelligence versus Emotional Intelligence



Source: Adapted from Daniel Goleman & Richard E. Boyatzis, *Emotional Intelligence has 12 Elements. Which do You Need to Work On?* Harvard Business Review*, Feb. 8, 2017, pp. 1-6.* Adaptation to AI and AI Capability Assessment by the authors.

D. Strategy for Deploying AI in Mediation

The Strategy for Deploying AI in Mediation in Table 3 is a roadmap for deploying AI-based systems in all phases of mediation, from pre-mediation to mediation and post-mediation. It is a compilation of recommendations from a variety of sources (see Table 3). In the pre-mediation phase, AI systems can be used to collect party information, upload documents, and disseminate information and instructions from the mediator. Such disclosures aid the mediator in case selection, screening, prioritizing, and scheduling, and they help prepare parties and the mediator for mediation. AI-based systems may also facilitate exchange of information between the parties and mediator and provide information on pertinent case law and similar cases. Finally, the mediator may use an AI-based training system to assess party needs and provide appropriate training as needed for virtual mediation.

During mediation, mediators may employ an AI system to quickly analyze documents uploaded by the parties. In addition, mediators may query a med bot trained on a large number of mediation cases – should one exist. This could be used to generate settlement offers and settlement agreements once accepted. AI-based systems may also be used to monitor cameras used in virtual mediation as a means to verify participant identity and to scan for visitors or changes in the mediation space.

Finally, AI-based systems can be used to assess the mediator, venue, technology, process, and outcome after mediation ends. This can provide valuable feedback to improve the process and build a Mediation Case Database and Mediator Assessment/Selection System to aid parties in mediator selection.

Table 3 outlines a host of new AI tools that mediators may add to their AI toolbox to assist or augment virtually every phase of the process. The most useful tool is a well-trained med bot that can be used to extract case information and formulate settlement offers from a large database of cases. Care must be taken, however, to prevent mediator bias inherent in these cases from seeping into the med bot during training (Lande, 2023b). In this sense, med bots are only as good as what they are fed (Lande, 2023b). Training data for med bots may be scarce in the United States, given privacy laws and confidentiality of mediation cases. "Obtaining informed consent for collecting and reusing such mediation data" and controlling access to the data for prolonged periods of time is problematic (Foit, 2022, p. 82). Use of "privacy-preserving techniques that can mask a person's identity in a dataset, including techniques such as data anonymization and encryption" will be critical elements in the development of AI systems in mediation (Foit, 2022, p. 82).

Table 3: Strategy for Deploying AI in Mediation

	Pre-Mediation Tasks
1.	**Case Management/Screening allows parties to enter information and upload documents. Mediators may use pre-mediation data to select, prioritize, and schedule cases to mediate, match qualified mediators to cases, and manage the calendar.**
2.	**Document Management provides a searchable repository for uploading and analyzing case information and documents. May be substantial in complex cases.**
3.	**Facilitate Communication between parties who may be willing to share information, interests, positions, and expectations before mediation. AI systems may aid both parties in disclosing case law and settlements in other similar cases.**
4.	**Technology Assessment/Testing/Training prior to mediation. This may include party use of cameras, microphones, and the Zoom app in virtual mediation or even Vision Pro headset and the Zoom Avatar app for Avatar Mediation in the future.**
	Tasks During Mediation
5.	**AI Monitoring of Cameras in Virtual Mediation to verify participant identity and scan for potential visitors and changes in the virtual meeting. Video doorbells already have this capability. One day mediators will have to authenticate Avatars.**
6.	**Analysis of Large Amounts of Data during mediation to provide valuable insights into the strengths and weaknesses of each party's case.**
7.	**Generation of Settlement Offers providing more options for resolving the conflict and providing potential confirmation of existing offers. Med Bots trained on a vast array of mediation cases could greatly enhance this capability.**
8.	**Drafting Documents during mediation. This may include written offers between parties and automated generation of settlement agreements.**
	Post-Mediation Tasks
9.	**Post-Mediation Assessment of the mediator, venue, technology, and outcome by the parties. Feedback can be used to improve mediation and to set up a Mediation Case Database for training a potential AI Med Bot and in a Mediator Selection System.**
10.	**Mediator Assessment/Selection – mediation providers and the courts in court-ordered mediation should develop an AI-based Mediator Assessment/Selection system to provide accountability/feedback, and to aid parties in mediator selection.**

Source: Compilation of recommendations from: Zeleznikow (2021), Garg (2023), Cloke (2023), Berland (2023), and Foit (2022). Additional recommendations by the authors.

VI. SUMMARY

The advent of AI, particularly OpenAI's release of its powerful AI chatbot, ChatGPT, two years ago revolutionized alternative dispute resolution. Impressive advances were made in online dispute resolution, and a host of new AI-based tools to assist and augment mediation were quickly introduced. The march of AI gained momentum with release of OpenAI's more powerful ChatGPT-4 and Microsoft's AI Copilot. These powerful chatbots and AI assistants as well as new developments in avatars with the release of Apple's Vision Pro headset, Zoom's Avatar app, and Avatars for Microsoft Teams and advances in AI robotics have profound implications for the practice of mediation and the role of mediators.

Four levels of AI development in mediation were traced in the Evolution of AI in Mediation Continuum in Figure 1. Then, what AI *Can Do* in mediation was explored using the Impact of AI on the Mediation Window (see Figure 2) derived from the classic Johari Window. Next, what AI *Cannot Do* in mediation, namely, whether it can emulate the four dimensions of emotional intelligence in human mediators, was considered. Here AI capabilities were examined in the Artificial Intelligence versus Emotional Intelligence Model (see Figure 3) to determine whether artificial mediators are ready to displace human mediators. Last, guidance for identifying, developing, and deploying AI-based tools in all three phases of the mediation process was provided in the Strategy for Deploying AI in Mediation in Table 3, and mediation settlement rates were updated.

VII. CONCLUSION

The resilience of mediation in the wake of the dramatic shift to artificial intelligence has been noted; the stages of development of AI in the process have been outlined; the opportunities and limitations AI in mediation have been examined; and several tools to help mediators and participants respond appropriately to ensure success in mediation have been supported. Business leaders can use these tools to deploy AI appropriately among mediation participants, leading to a more efficient and effective process. Artificial intelligence has become a vital tool in ADR. It is most likely to succeed when participants recognize its potential and respond appropriately to challenges and limitations it presents.

The volume, variety, and settlement rates of mediation cases suggest a bright future for this form of conflict resolution if its usefulness is recognized. With the use of AI 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.

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WHY STUDY ETHICS?

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ABSTRACT

Our laws have sought to promote "and enforce a sense of morality in the business community. Well-settled laws regulating fraud, undue influence, fiduciary relationships, confidential information, truth-in-advertising, fair reporting practices, etc., have their origins in moral codes and philosophies." Professor Dan Herron has observed that, "managerial ethics and corporate social responsibility is an aspect of business functions which *should not nor cannot* be studied in isolation. Any course which deals with business decision-making, whether it be from personnel problems to marketing decisions to corporate strategy formation must incorporate the ethical/social component as *an integral facet of the decision-making process itself*. A productive approach to the study of ethics focuses on "the origins, justifications, and applications of morality in the market place by analyzing the concepts *and* applying them in real-life situations." This can be examined from two perspectives: the manager/employee as a decision-maker; and the corporation as a moral agent." In the pages to follow, we present an overview of the various ways ethics impact our everyday lives. The authors believe this article contributes to a discussion about ethics and exploration of how these issues may be considered deserves everyone's attention. The history of business illustrates that ethical failures often result in widespread suffering and economic destruction.

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OVERVIEW

Our laws have sought to promote "and enforce a sense of morality in the business community. Well-settled laws regulating fraud, undue influence, fiduciary relationships, confidential information, truth-in-advertising, fair reporting practices, etc., have their origins in moral codes and philosophies."[14] Professor Dan Herron has observed that, "managerial ethics and corporate social responsibility is an aspect of business functions which *should not nor cannot* be studied in isolation. Any course which deals with business decision-making, whether it be from personnel problems to marketing decisions to corporate strategy formation must incorporate the ethical/social component as *an integral facet of the decision-making process itself.*[15] A productive approach to the study of ethics focuses on "the origins, justifications, and applications of morality in the market place by analyzing the concepts *and* applying them in real-life situations."[16] This can be examined from two perspectives: the manager/employee as a decision-maker; and the corporation as a moral agent."[17] Ethics play a major role in both our personal and business lives. An ongoing saga of ethical challenges continue to be reported at such companies as: Budweiser;[18] Disney;[19] and Target;[20] just to name a few.

Business-related ethical challenges are found in almost all aspects of society: accounting; corporate governance; education; government; healthcare; law practice; management; military; and daily personal life. Professor Kathleen A. Lacey writes that a goal of the study of business ethics, "is to provide… an understanding of the rights, duties, and social responsibilities of Businesses operating in local, national, and world markets."[21] In addition:

Many of these rights and duties have legal and/or ethical considerations. In order to closely examine some contemporary issues in business ethics and provide a foundation in the role of ethics and ethical business decision-making topics to be discussed include: the ethical justification of the free market, deontological and teleological ethical models and their advantages and disadvantages, the application of ethical decision-making in the specific contexts of corporate responsibility, advertising, business and the environment, product liability and preferential hiring practices. The larger goals of this course are (1) to get you thinking critically about the ethical dimensions of business and (2) to provide tools to enhance your ability to frame business dilemmas in accordance with legal and ethical principles learned in this course in order to make informed and responsible decisions in the workplace.[22]

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[21] Kathleen A. Lacey, Syllabus for Business Ethics (CBA/Philosophy 4001) Offered at California State University, Long Beach) (Spring 2007).
[22] *Id.*

In the pages to follow, we present an overview of the various ways ethics impact our everyday lives. This Article proceeds in fifteen parts. First, we explore the recurring historical fraud problem and cost to society. Second, we discuss corporate responsibilities. Third, is the subject "Why Do Good People Do Bad Thanks"? Fourth, we note that frauds continue on a daily basis. Fifth, globalized business and personal ethics is addressed. Sixth, is the impact of rapid technological change. Seventh, a few thoughts about corporate employment and social responsibilities. Eighth, the tension between ethics and the political environment is discussed. Ninth, the impact of artificial intelligence (AI) is discussed. Tenth, is the importance of environmental and sustainability management. Eleventh, the ethical challenge of managing a diverse workforce is presented. Twelfth, explores white collar crime. Thirteenth, we write about the SEC, investment promoters, shams, and frauds. Tax evasion is discussed next. And last, we conclude.

The authors believe a discussion about ethics and exploration of how these issues may be considered deserves everyone's attention. The history of business illustrates that ethical failures often result in widespread suffering and economic destruction. We hope you find this article thought provoking.

I. THE REOCCURRING PROBLEM

Although fraudulent situations have been with us throughout civilization, a discussion about serious ethical failures will help to provide constructive thinking about this repetitive problem. During recent years, the following ethical failures have made the news: Enron; General Motors ignition switch failure; Adelphia Communications; WorldCom; and Bernard Madoff. We will now briefly explore each.

Enron

A major driver for the study of business ethics has been a series of major ethical failures, including some large corporations. In the largest bankruptcy at the time, Enron's filing in late 2001 is often viewed as a key turning point for the focus on business ethics. What followed were significant job losses in the Houston, Texas, area, where a large part of its 21,000 employees were based. Later, there were highly publicized trials of the key executives in US District Court in Houston. Enron's high profile CEO, Key Lay, was given a lengthy prison sentence, but died before he reported for prison.

Disclosed after the failure was that these Enron executives sold millions of dollars' worth of Enron stock while employees were prevented from selling their own stock in the 401(k) plan. This compounded the losses for the employees who lost not only their jobs and benefits, but for most, a large part of their savings. Adding to the scandal, Enron's auditing firm, Arthur Andersen, was accused of shredding large amounts of auditing records to conceal their part in the failure.[23]

The significance of the Enron scandal was that there was not simply an isolated incident in a part of this large corporation. The unethical activities disclosed during the

[23] Due to the infamy of Enron, there are many sources for detailed information. See the book (2003) and the documentary movie (2005), "The Smartest Guys in the Room," https://www.pbs.org/independentlens/documentaries/enron/ . Also see the testimony of former Arthur Andersen Director, Dorsey Baskin, before Congress, Enron Financial Collapse | January 24, 2002 | C-SPAN.org.

aftermath were spread throughout various divisions of the corporation. The major motivation by senior management was to cause earnings to increase each quarter so the stock price would continue to increase. When the corporation did not actually meet its earning objectives, it used accounting maneuvers to make the earnings look better.

WorldCom

Just seven months after the Enron scandal hit the headlines, Worldcom filed for bankruptcy in July 2002, with losses almost twice as great and impacting over 60,000 employees.[24] Parallel to Enron, its CEO, Bernie Ebbers, was found guilty of securities fraud and other crimes. He was sentenced to 25 years in prison, although only served half of his sentence due to being released due to poor health.

Adelphia Communications and Others

During this period, several other major corporate scandals were exposed, including Adelphia (2002), Tyco (2002) and HealthSouth (2003). Overall, well over 100,000 employees were impacted and investors and vendors lost billions of dollars.

Sarbanes-Oxley

In response to Enron, Worldcom, Adelphia and others, the US Congress enacted the Sarbanes-Oxley Act in 2002.[25] The law, also referred to as "SOX," was intended to prohibit specifically the various fraudulent acts that were exposed in the scandals noted above. Enron and its auditor, Arthur Andersen, had the most impact on the structure of the law. As an example, the law prohibited auditing firms for public corporations from providing most other services to the corporations. The intent here was to avoid conflicts of interest by these firms.

Bernard Madoff

Unfortunately, SOX did not stop major financial scandals from occurring. In late 2008 and continuing into 2009, the stock market experienced a major decline, which is often referred to as the "Subprime Crisis." The time period was also labeled the "Great Recession." The stock price decline triggered the exposure of a Ponzi scheme by an investment firm operated by Bernie Madoff. Such a scheme relies on new investors investing in the venture and providing new funds to give to earlier investors, even though the scheme has not produced a profit. The Madoff scandal is estimated to have cost investors at least $17.5 billion.[26]

General Motors Ignition Switch

Starting as early as 1999, was a scandal involving General Motors and what was referred to as the "ignition switch problem." While the term sounds innocent, the results were not, and it is estimated that at least 124 deaths were attributable to the vehicle suddenly stopping while operating when the ignition switch slipped into the "off"

[24] Luisa Beltran, WorldCom files largest bankruptcy ever, CNN Money, July 22, 2002, WorldCom files largest bankruptcy ever - Jul. 19, 2002 (cnn.com) .

[25] The text of the act may be found at: Text - H.R.3763 - 107th Congress (2001-2002): Sarbanes-Oxley Act of 2002 | Congress.gov | Library of Congress .

[26] Chase Peterson-Withorn, *The Investors Who Had To Pay Back Billions In Ill-Gotten Gains From Bernie Madoff's Ponzi Scheme,* April 14, 2021, FORBES, The Investors Who Had To Pay Back Billions In Ill-Gotten Gains From Bernie Madoff's Ponzi Scheme (forbes.com) .

position. This also disabled the air bags in the GM vehicles. Instead of quickly resolving the problem, GM ignored it for over a decade. Due to the Great Recession, GM experienced significant financial problems, which were used to partially rationalize the delay in fixing the problem. GM finally confronted the problem in 2014 with 30 million cars recalled and a settlement of $900 million with the US Government.[27]

II. THE CORPORATION'S RESPONSIBILITIES

One of the foundational questions in business ethics is: "How should managers manage the corporation?" This question has two parts: (1) "In whose interests should the corporation be managed?;" and (2) "What obligations do corporations owe to third parties?"

No corporation can exist without customers, employees, suppliers, and capital providers. Each of them is absolutely necessary for its success. This has led some scholars to argue that a corporation should be managed in the interest of all its stakeholders (Freeman 2017).[28] Although attractive in theory, this view faces a significant difficulty. Stakeholders have different and often conflicting goals. Shareholders want higher profits, customers cheaper products, and employees better working conditions. In some cases, these goals need not conflict.[29] Offering cheaper products or better working conditions may increase profits by attracting consumers and employees. Managers, of course, should do what they can to pursue these win-win situations. But trade-offs are inevitable, and there will be many cases where managers will need to confront them. If automating a process is profitable but requires widespread layoffs, the manager will need clarity on whether to promote the interests of shareholders or employees.[30]

Many scholars have suggested that managers should privilege the interest of only one single stakeholder group. Some of these scholars have argued that the corporation should be managed in the interest of its employees. Jobs play a significant role in workers' lives,[31] and this has led some scholars to argue that worker democracy is necessary for providing workers with meaningful jobs.[32] Other scholars have defended that, because employees are governed by managers, they should have the right to democratically determine how to be governed.[33]

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

[28] R. Edward Freeman, *Managing for Stakeholders, In:* Business in Ethical Focus, an Anthology. Ed. by Fritz Allhoff, Alexander Sager, and Anand J. Vaidya. Petersborough: 93 (Broadview Press., 2017).

[29] R. EDWARD FREEMAN, L. PARMAR BIDHAN & KIRSTEN MARTIN, THE POWER OF AND: RESPONSIBLE BUSINESS WITHOUT TRADE-OFFS. (N.Y., Columbia Bus. Sch. Pub., 2020).

[30] Michael C. Jensen,. *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 12 BUS. ETHICS Q. 235 (2002).

[31] Santiago Mejia, The Normative and Cultural Dimension of Work: Technological Unemployment as a Cultural Threat to a Meaningful Life, 185 J. BUS. ETHICS 847 (2023).

[32] RUTH YEOMAN, MEANINGFUL WORK AND WORKPLACE DEMOCRACY: A PHILOSOPHY OF WORK AND A POLITICS OF MEANINGFULNESS. (Palgrave Macmillan, 2014).

[33] CHRISTOPHER MCMAHON, AUTHORITY AND DEMOCRACY: A GENERAL THEORY OF GOVERNMENT AND MANAGEMENT (Princeton Univ. Press, 1994); Iñigo González Ricoy, *Firms, States, and Democracy: A Qualified Defense of the Parallel Case Argument*, 2 LAW, ETHICS, & PHILOSOPHY 32 (2014); Iñigo

Another group of scholars has argued that corporations should be managed in the interest of shareholders because shareholders are the corporation's owners;[34] the constituency that will maximize the firm's social benefits;[35] or because shareholders negotiated to get the corporation's (variable and often risky) benefits, while the other stakeholders preferred to transact with the firm through (safer but relatively fixed) contractual agreements.[36]

The view that managers should promote shareholders' interests is widely held among businesspeople and the general public. In what follows, I will focus on it. However, what I say about "shareholders" below can be substituted for any other stakeholder (or group of stakeholders) that the manager is supposed to serve.

Executives sometimes claim that they engaged in unethical business practices because they are obligated to pursue the interests of shareholders. This view fails to recognize the second part of the foundational business ethics question mentioned above. The manager is not required to doggedly pursue the interests of shareholders (or another stakeholder group) without regard to how this affects third parties.[37] Morality limits *which* interests should be pursued and *how* to pursue them.

Properly speaking, a manager is not hired to merely serve the interests of shareholders; she is hired to act on their behalf. Thus, the manager should refrain from engaging in activities that would be prohibited to shareholders if they were to manage the company directly.[38] This entails that various moral obligations limit the interests one may promote on behalf of a particular stakeholder. For instance, a higher profitability does not justify exploiting vulnerable consumers or disregarding the firm's environmental impact.

Corporate ethical behavior is frequently identified with doing good. However, the most significant moral obligations that corporations must discharge concern avoiding evil. This is not to deny that morality imposes positive duties on corporations.[39] It is to emphasize that the paradigmatic and most important corporate moral obligations are rooted in what one may call "basic decency." These include obligations such as fulfilling one's contracts, being transparent in one's interactions, avoiding fraud, respecting other people's dignity, upholding human rights, and abiding by the rule of law.

González Ricoy, *The Republican Case for Workplace Democracy*,40 SOCIAL THEORY & PRACTICE 232 (2014).

[34] Milton Friedman, Capitalism and Freedom. (U. Chicago Press, 1962); Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*. N.Y. TIMES MAG. 33 (Sept. 13, 1970).

[35] John R. Boatright, "Ethics and Corporate Governance: Justifying the Role of Shareholder, *In* The Blackwell Guide to Business Ethics, Norman Bowie. Ed. 38 (Blackwell Publishers, 2002); John R. Boatright, *What's Wrong—and What's Right— With Stakeholder Management*, 21 J. PRIV. ENTER. 106 (2006); HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE, (Harvard U. Press, 1996); Jensen, *supra* note 30.

[36] Hansmann, *supra* note 35.

[37] *See* Santiago Mejia, *Moral Obligations to Third Parties Required by Fiduciary Duties to Principles: A Reflection Through Shareholder Primacy." In:* RESEARCH HANDBOOK ON CORPORATE GOVERNANCE AND ETHICS.,Till Talaulicar, Ed., (Edward Elgar 2023).

[38] Kenneth E. Goodpaster, *Business Ethics and Stakeholder Analysis*, 1 BUS. ETHICS Q. 53 (1991); Santiago Mejia, *Weeding Out Flawed Versions of Shareholder Theory: a Reflection on the Moral Obligations That Carry over from Principals to Agents,* 29 BUS. ETHICS Q. 519 (2019); Hasko Von Kriegstein, *Professionalism, Agency, and Market Failures,* 26 BUS. ETHICS Q. 445 (2016).

[39] Santiago Mejia, *Which Duties of Beneficence Should Agents Discharge on Behalf of Principals? A Reflection Through Shareholder Primacy,* 31 BUS. ETHICS Q. 421 (2021).

III. WHY GOOD PEOPLE DO BAD THINGS?

Ethical Judgement vs. Ethical Behavior

Mary C. Gentile who pioneered the "Giving Voice to Values" curriculum suggests that rather than focus on the ethical decision-making of the individual, instructors should focus on how we act on our values to be most effective. Her curriculum starts from the premise that "most of us already want to act on our values, but also want to feel we have a reasonable change of doing so successfully." [40] So, the question for this section is, if we, as a society, generally agree on what the ethical decision/action is (such as don't cheat, don't lie, don't steal, etc.) why do good people do bad things?

Susan S. Silbey in 2018, then Faculty Chair at MIT, suggested that the standard model of teaching ethics wrongly characterizes ethical lapses as "problems in individual decision-making, personal values, and choices." [41] The natural focus then is the rules of professional conduct and considerations of social responsibility. She suggests that the reason that we repeatedly see unethical behavior in corporate America is because we assume "that corporate and professional misconduct are problems caused by rotten apples; some few weak, uninformed, or misguided individuals making independently poor choices," relying on assumptions of individual agency, choice, and personality. However, she points to sociologist Edwin Sutherland who, in his book, White Collar Crime, described criminal behavior as "normal learned behavior", "habits learned in interactions with others…That learning includes the motivations, drives, and rationalizations for the action as well as the techniques of committing the [unethical] act which can be complex."[42]

So, the focus on ethics should be two-fold. Yes, ethical judgment at the individual level is necessary to engage in ethical behavior. But, as managers, we also need to be aware of the cultural and structural impacts that may lead one who has ethical judgment to demonstrate unethical behavior.

When thinking about why people do unethical acts, we might consider the often used "Fraud Triangle". The Fraud Triangle illustrates that if financial need, opportunity, and rationalization are all present, then individuals are motivated to commit fraud. Humans have pressures that cause them to act in ways that they know are not right. Addiction and financial pressure such as personal debt can cause unethical behavior. A more recent adaption of this concept is the "Fraud Diamond" which adds capability to the mix where capability represents the tactical knowledge/skill needed to manipulate or exploit system weaknesses.

Culturally, the normative behavior that is part of a company (corporate culture) or an industry (finance is notoriously problematic with its competitive focus and glamourous portrayal in film) has a great deal of influence on the behavior of those

[40] Giving Voice to Values How to Speak Your Mind When You Know What's Right, https://givingvoicetovaluesthebook.com/ (last visited July 15, 2023).
[41] Susan S. Silbey, *How not to teach ethics,* MIT FACULTY NEWSLETTER, September/October 2018, at 1, 4-6.
[42] Edwin H. Sutherland, White Collar Crime: The uncut version (1983).

working within. Aristotle believed that ethics were inherently social which is consistent with the idea that to be a good person, one should surround yourself with good people.

Structural impacts are especially helpful for business managers to consider, because this is where proactive steps, in the form of policy adoption, can be taken to protect an organization from one employee's unethical behavior. Here we need to look to the social sciences to consider why one's behavior is not aligned with their understanding of what is right and wrong. Causes for this split can include such structural policies as incentive structures that reward unethical behavior, the lack of conflict of interest policies, the lack of whistleblower protection, not dealing with group think, etc.

For example, incentive structures that incentivize unethical behavior are so rampant in business that they become the norm. Consider an incentive structure such as commission-based sales where an employee's pay is based on the number or dollar amount of sales made. These types of incentive structures can normalize aggressive sales techniques that are not in the best interest of the customer/client. For example, in the Wells Fargo case, entry-level employees were pressured into opening unauthorized customer accounts in order to meet aggressive sales targets and avoid being fired.

One helpful exercise is to consider an incentive structure that may encourage bad behavior and think about how it can be redesigned to encourage ethical behavior. For example, what if sales professionals were rewarded based on customer satisfaction with the sales experience rather than dollar amount of sales generation? Might this lead to more ethical behavior? Generally, if we can focus incentive structures and policy creation on what is best for the customer/client, business managers will create an ethical company with a profitable future.

IV. FRAUDS CONTINUE

There appears to be no shortage of fraudulent activities committed against businesses, customers, financial institutions, government entities, investors, suppliers, and society in general. A brief discussion is now presented about: FTX, Binance, and Theranos. Other examples, making the headlines, too numerous to cover in detain here, include the Boeing 737 Max case,[43] Sackler Opioid crisis,[44] and Wells Fargo.[45]

During the last decade, development of blockchain technologies[46] have brought dramatic growth in: Internet of Things (IoT) devices;[47] and virtual currencies.[48] Then,

[43] H. Justin Pace & Lawrence J. Trautman, Mission Critical: *Caremark. Blue Bell,* and Director Responsibility for Cybersecurity Governance, 2022 WISC. L. REV. 887, 925 (2022), http://ssrn.com/abstract=3938128; H. Justin Pace & Lawrence J. Trautman, Climate Change and *Caremark* Doctrine, Imperfect Together, 25 U. PA. J. BUS. L. 777 (2023), http://ssrn.com/abstract=4202412

[44] The Role of Purdue Pharma and the Sackler Family in the Opioid Epidemic, Hearing Before H. Comm. On Oversight and Reform, 116th Cong. 116-113 (Dec. 17, 2020), https://www.congress.gov/event/116th-congress/house-event/LC65831/text?s=1&r=10.

[45] Jeremy C. Kress, *Board to Death: How Busy Directors Could Cause the Next Financial Crisis,* 59 B.C. L. REV. 877 (2018), https://ssrn.com/abstract=2991142.

[46] Brian Elzweig & Lawrence J. Trautman, When Does A Nonfungible Token (NFT) Become A Security?, 39 GA. ST. U. L. REV. 295 (2023), http://ssrn.com/abstract=4055585; Lawrence J. Trautman, *A Primer for Blockchain*, 88 UMKC L. REV. 239 (2019), arXiv:1904.03254, https://ssrn.com/abstract=3324660; Lawrence J. Trautman, *Virtual Art and Non-fungible Tokens,* 50 HOFSTRA L. REV. 361 (2022), http://ssrn.com/abstract=3814087.

during early 2023, artificial intelligence enabled ChatGPT4 presented another investor frenzy that will no doubt present genuine opportunities, along with opportunities for investor fraud.[49] It is the role of the Board of Directors, often operating through its Audit Committee,[50] to conduct corporate governance designed to mitigate fraud and other risks.[51]

FTX

During November 2022, reports emerge that "In less than a week, the cryptocurrency billionaire Sam Bankman-Fried went from industry leader to industry villain, lost most of his fortune, saw his $32 billion company plunge into bankruptcy and

[47] Mohammed T. Hussein & Lawrence J. Trautman, *The Internet of Things (IoT) in a Post-Pandemic World,* 9 J. L. & CYBER WARFARE (2024), http://ssrn.com/abstract=4149477; Lawrence J. Trautman, Mohammed T. Hussein, Louis Ngamassi & Mason Molesky, *Governance of The Internet of Things (IoT)*, 60 JURIMETRICS 315 (Spring 2020), http://ssrn.com/abstract=3443973.

[48] Timothy T. Hsieh, Robert W. Emerson, Larry D. Foster II, Brian A. Link, Cherie A. Sherman & Lawrence J. Trautman, Intellectual Property in the Era of AI, Blockchain, and Web 3.0, http://ssrn.com/abstract=4392895; Lawrence J. Trautman, *Bitcoin, Virtual Currencies and the Struggle of Law and Regulation to Keep Pace,* 102 MARQ. L. REV. 447 (2018), https://ssrn.com/abstract=3182867; Lawrence J. Trautman, *Is Disruptive Blockchain Technology the Future of Financial Services?,* 69 CONSUMER FIN. L. Q. RPT. 232 (2016), http://ssrn.com/abstract=2786186; Lawrence J. Trautman & Alvin C. Harrell, *Bitcoin Versus Regulated Payment Systems: What Gives?*, 38 CARDOZO L. REV. 1041 (2017), http://ssrn.com/abstract=2730983; Lawrence J. Trautman, *Virtual Currencies: Bitcoin & What Now After Liberty Reserve, Silk Road, and Mt. Gox?,* 20 RICH. J. L. & TECH. 13 (2014), http://www.ssrn.com/abstract=2393537.

[49] Neal Newman & Lawrence J. Trautman, *Securities Law: Overview and Contemporary Issues*, 16 OH. ST. BUS. L.J. 149 (2021), http://ssrn.com/abstract=3790804; Neal Newman & Lawrence J. Trautman, *Special Purpose Acquisition Companies (SPACs) and the SEC*, 24 U. PA. J. BUS. L. 639 (2022), http://ssrn.com/abstract=3905372; Lawrence J. Trautman & George P. Michaely, *The SEC & The Internet: Regulating the Web of Deceit*, 68 CONSUMER FIN. L. Q. RPT. 262 (2014), http://www.ssrn.com/abstract=1951148.

[50] Hon. Bernice Donald, Brian Elzweig, Neal F. Newman, H. Justin Pace & Lawrence J. Trautman, Crisis at the Audit Committee: Challenges of a Post-Pandemic World, REV. BANKING & FIN. L. 119 (2023-2024), http://ssrn.com/abstract=4240080; Lawrence J. Trautman, *Who Qualifies as an Audit Committee Financial Expert Under SEC Regulations and NYSE Rules?,* 11 DEPAUL BUS. & COMM. L.J. 205 (2013), http://www.ssrn.com/abstract=2137747.

[51] Robert W. Emerson & Lawrence J. Trautman, *Lessons About Franchise Risk From YUM! Brands and Schlotsky's*, 24 LEWIS & CLARK L. REV. 997 (2020) http://ssrn.com/abstract=3442905; Lawrence J. Trautman, Seletha Butler, Frederick R. Chang, Michele Hooper, Ron McCray & Ruth Simmons, *Corporate Directors: Who They Are, What They Do, Cyber and Other Contemporary Challenges*, 70 BUFF. L. REV. 459 (2022), http://ssrn.com/abstract=3792382; Lawrence J. Trautman & Janet Ford, *Nonprofit Governance: The Basics*, 52 AKRON L. REV. 971 (2018), https://ssrn.com/abstract=3133818; Lawrence J. Trautman, *The Board's Responsibility for Crisis Governance,* 13 HASTINGS BUS. L.J. 275 (2017), http://ssrn.com/abstract=2623219; Lawrence J. Trautman, *Who Sits on Texas Corporate Boards? Texas Corporate Directors: Who They Are and What They Do,* 16 HOU. BUS. & TAX L.J. 44 (2016), http://ssrn.com/abstract=2493569; Lawrence J. Trautman, *Corporate Boardroom Diversity: Why Are We Still Talking About This?*, 17 SCHOLAR 219 (2015), http://www.ssrn.com/abstract=2047750; Lawrence J. Trautman, Jason Triche & James C. Wetherbe, *Corporate Information Technology Governance Under Fire*, 8 J. STRAT. & INT'L STUD. 105 (2013), http://ssrn.com/abstract=2314119; Lawrence J. Trautman & Kara Altenbaumer-Price, *D&O Insurance: A Primer*, 1 AM. U. BUS. L. REV. 337 (2012), http://www.ssrn.com/abstract=1998080; Lawrence J. Trautman, *The Matrix: The Board's Responsibility for Director Selection and Recruitment,* 11 FLA. ST. U. BUS. REV. 75 (2012), http://www.ssrn.com/abstract=1998489; Lawrence J. Trautman, *Present at the Creation: Reflections on the Early Years of the National Association of Corporate Directors,* 17 DUQ. BUS. L.J. 1 (2015), http://ssrn.com/abstract=2296427.

became the target of investigations by the Securities and Exchange Commission and the Justice Department."[52] The rapid demise of FTX and its' many related crypto entities created contagion and collateral damage for other financial institutions in the United States and investors in the worldwide cryptocurrency community. The bankruptcy proceedings of many FTX related entities are scattered across many worldwide jurisdictions, and may take years to sort out.[53]

Binance

The world's largest cryptocurrency exchange, privately held Binance, is not required to file financial statements and other disclosure items with either the U.S. Securities and Exchange Commission or similar regulatory agency in another country.[54] By mid-2023, the SEC "secured emergency relief in which the all the defendants in its litigation against Binance Holdings Limited… and Changpeng Zhao agreed to repatriate to the United States assets held for the benefit of customers of the Binance U.S. crypto trading platform."[55] Mr. Gurbir S. Grewal, SEC Director of the Division of Enforcement states, "Given that Changpeng Zhao and Binance have control of the platforms' customers' assets and have been able to commingle customer assets or divert customer assets as they please, as we have alleged, these prohibitions are essential to protecting investor assets."[56]

Theranos

On January 3, 2022, Elizabeth Holmes was convicted by a federal jury "on four of eleven charges that she conducted a years-long fraud scheme against investors while running Theranos Inc., which ended up as one of Silicon Valley's most notorious implosions."[57] After appeals and sentencing, Ms. Holmes began her more than eleven-year sentence in a Texas Federal prison.[58]

[52] Lawrence J. Trautman & Larry D. Foster II, FTX Crypto Debacle: Largest Fraud Since Madoff?, 54 U. MEMPHIS L. REV. 289 (Winter 2023), http://ssrn.com/abstract=4290093, *citing* David Yaffe-Bellany, *FTX Founder Says He Expanded Too Fast and Missed Warnings,* N.Y. TIMES, Nov. 15, 2022 at A1, https://www.nytimes.com/2022/11/14/technology/ftx-sam-bankman-fried-crypto-bankruptcy.html.
[53] *See* discussion § IV *Infra*.
[54] Trautman & Foster, FTX Crypto Debacle, *supra* note 52.
[55] PRESS RELEASE 2023-110, SEC Secures Emergency Relief to Protect Binance.US Customers' Assets, SEC (June 17, 2023), https://www.sec.gov/news/press-release/2023-110.
[56] *Id*.
[57] Lawrence J. Trautman, Larry D. Foster, II., Lora J. Koretz, Clyde McNeil, Eric Yordy & Ashley Salinas, Ethical Failure at Theranos, http://ssrn.com/abstract=4040181, *citing* Sara Randazzo, Heather Somerville & Christopher Weaver, *Theranos's Holmes Found Guilty,* WALL ST. J., Jan. 4, 2022 at A1.
[58] Erin Griffith, *Elizabeth Holmes reports to Prison to Begin More Than 11-Year Sentence*, N.Y. TIMES, May 30, 2023, https://www.nytimes.com/2023/05/30/technology/elizabeth-holmes-theranos-prison.html.

ChatGPT4

Year 2023 begins with stock market frenzy surrounding the promise of artificial intelligence, large language data models, and ChatGPT.[59] We highlight this development to illustrate the likelihood of novel ethical issues that are destined to surround this disruptive technological development.[60]

V. GLOBALIZED BUSINESS AND PERSONAL ETHICS

Cultures Are Different

While living in the United States of America, and no matter where one goes around the world, it is evident that place and its people have their unique culture. You can learn a country's ethics by observing its culture. Culture tells us how people live, socialize, what is, and is not acceptable, what are the values and beliefs, and traditions. When teaching ethics, we must bring to light the fact that where we work, where we worship, where we shop, and wherever we attend school/university, the evidence of differences will be around us.

We live in a globalized world and if we look closely enough, we can see evidence that the world is at any time where we are witnessing and becoming aware of merging cultures. Ordinary people can recognize a country's food, music, native dress, leaders, etc. without ever traveling to that country. This is due to the advent of the Internet, the mass ownership of personal computers, the fact that more and more people are traveling to destinations that they have never seen before, as well as the ability to listen to and read news from any country in the world daily.

No longer is a country's culture and tradition a secret from the public. The internet mediums like Facebook, Tik-Tok, Instagram, to name a few, have become avenues for people to share their culture to others around the world. Moreover, if you walk into most university classes, there are people of different backgrounds, religions, race, and ethnicities.

A word sentence to remember is that "Ethics" stands for– Every Thought Has Its Consequence(s)". Therefore, we must first change how we think about others and their culture in our minds. What we think when we encounter cultural differences will be revealed in our treatment of people who are not like us.

"Several empirical research works show that beyond specific moral judgments there can be found basic values or principles underlying those judgments, and these

[59] Lawrence J. Trautman, W. Gregory Voss & Scott Shackelford, *How We Learned to Stop Worrying and Love AI: Analyzing the Rapid Evolution of Generative Pre-Trained Transformer (GPT) and its Impacts on Law, Business, and Society*, 34 ALBANY L.J. SCI. & TECH. (forthcoming), http://ssrn.com/abstract=4516154.

[60] Lawrence J. Trautman, *Rapid Technological Change and U.S. Entrepreneurial Risk in International Markets: Focus on Data Security, Information Privacy, Bribery and Corruption,* 49 CAPITAL U. L. REV. 67 (2021), https://ssrn.com/abstract=2912072;

common values and principles appear in the major religions and wisdom traditions worldwide".[61]

In all, changing the unethical behavior in the workplace, while we develop employee's skills and professionalism should be the goal of every organization. Therefore, it is up to the companies' leaders to incorporate awareness of the richness diversity brings to the workplace. But diversity cannot exist in a vacuum. Individuals must partake in going beyond tolerance of others, and should move to understanding cultures, then to accepting people of diverse cultures, and lastly, move to embracing in awe, the beauty of our differences. We must recognize that "talent" in the workplace exists across all cultures, therefore, teaching students to recognize and embrace different cultures is a positive thing.

Those values that we must exhibit and share with, and towards others of different cultures do exist in some form or practice in other countries and are not always newly introduced to them; such values are honesty, integrity, professionalism, kindness, and trustworthiness. But what we must do is emphasize the importance of ethical treatment towards others that can be adaptable by people of all cultures, through actions that can be copied and mimic by anyone of any culture, even if they were not practiced in their country. Consider that more importantly, "the last few decades have witnessed the development of cross-cultural management, which focuses on cultural differences and their effect on organizational and managerial decision-making."[62]

We must recognize that the world has become a global society--- "Businesses today are well intertwined and much more diverse than in the past. For example, major business hubs like Dubai, Toronto, London and Hong Kong are made up of incredibly diverse workforces."[63] We must prepare our workers' minds to embrace diversity in a compassionate way. Therefore, we should support written policies that demonstrate that the company's core values, include diversity. According to Birsen Tomar, a writer for Forbes Los Angeles Business Council, "businesses that employ people from various nationalities, working together under one roof and all facing the same challenges and critical decision-making moments, reap untold benefits from the diversity of their approach."[64]

FCPA

Much has been written during recent years about the problem of pervasive global bribery and corruption.[65] Trautman and Altenbaumer-Price have previously stated, "in

[61] Domènec Melé & Carlos Sánchez-Runde, Cultural Diversity and Universal Ethics in a Global World, 116 J. BUS. ETHICS 681 (2013), https://link.springer.com/article/10.1007/s10551-013-1814-z#Sec2.
[62] *Id.*
[63] Birsen Tomar, The Importance of Cross-Cultural Management, FORBES, Apr. 23, 2019, https://www.forbes.com/sites/forbeslacouncil/2019/04/23/the-importance-of-cross-cultural-management/?sh=2a6f959c1b5c.
[64] *Id.*
[65] Lawrence J. Trautman & Joanna Kimbell, *Bribery and Corruption: The COSO Framework, FCPA, and U.K. Bribery Act,* 30 FLA. J. INT'L L. 191 (2018), http://ssrn.com/abstract=3239193, *citing* Bruce W. Bean, The Perfect Crime? FIFA and the Absence of Accountability in Switzerland, 32 U. MD. J. INT'L L. 68 (2017), https://ssrn.com/abstract=2972209; Rachel Brewster, Enforcing the FCPA: International Resonance and Domestic Strategy , 103 VA. L. REV. (2017), https://ssrn.com/abstract=3095633; Maria T. Caban-Garcia , *Antibribery Efforts in Brazil*, 98 (9) STRAT. FIN. 48-53, (2017), https://ssrn.com/abstract=2938230;

any of its various forms, bribery, extortion, or corruption exacts an unacceptable toll on all citizens of the world."[66] In addition, "thinking about the difficult issues surrounding corruption produced a realization that the global and domestic culture of bribery, extortion, and corruption is an amorphous cancer eating away at our societies with the very real potential to destroy commerce between nations and produce destructive global civil unrest."[67]

The Foreign Corrupt Practices Act (FCPA) primarily addresses the two distinct activities of: bribery and improper record keeping.[68] In relevant part, the Statute prohibits (1) payments of anything of value to foreign officials "in order to assist [the payor] in obtaining or retaining business for or with, or directing business to, any person;"[69] and (2) failing to keep records and books "which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."[70] As the Fifth Circuit observed in *United States v. Kay,* "When the FCPA is read as a whole, its core of criminality is seen to be bribery of a foreign official to induce him to perform an official duty in a corrupt manner."[71]

Nishant Dass, Vikram K. Nanda & Steven Chong Xiao, Is There a Local Culture of Corruption in the U.S.?, (Paris December 2017 Finance Meeting EUROFIDAI – AFFI, https://ssrn.com/abstract=2981317; Eugen Dimant & Guglielmo Tosato, *Causes and Effects of Corruption: What Has Past Decade's Empirical Research Taught Us? A Survey,* 32(2) J. ECON. SURVEYS, 335 (2018), https://ssrn.com/abstract=3139047; M. Shahe Emran, Asad Islam & Forhad Shilpi, Distributional Effects of Corruption When Enforcement is Biased: Theory and Evidence from Bribery in Schools in Bangladesh (2018), https://ssrn.com/abstract=3125495; David Hess, Business, Corruption, and Human Rights: Towards a New Responsibility for Corporations to Combat Corruption, 2017 WISC. L. REV. 641 (2017), https://ssrn.com/abstract=3045188; Yujin Jeong & Jordan I. Siegel, Threat of Falling High Status and Corporate Bribery: Evidence from the Revealed Accounting Records of Two South Korean Presidents, STRAT. MGMT. J. (Forthcoming), https://ssrn.com/abstract=3095764; Robert W. McGee, *The Panama Papers: A Discussion of Some Ethical Issues*, 3(3) J. INS. & FIN. MGMT. 1 (2017). https://ssrn.com/abstract=3030750; Sharon Oded, *Coughing Up Executives or Rolling the Dice?: Individual Accountability for Corporate Corruption,* 35 YALE L. & POL'Y REV. (2016), https://ssrn.com/abstract=2915867 ; Jamie Bologna Pavlik, *Corruption: The Good, the Bad, and the Uncertain,* 22 REV. DEV. ECON. 311 (2018), https://ssrn.com/abstract=3107341; Andrew Brady Spalding, *Restoring Pre-Existing Compliance Through the FCPA Pilot Program,* 48 U. TOLEDO L. REV. (2017), https://ssrn.com/abstract=3029452; Lawrence J. Trautman, *Grab 'Em By The Emoluments: The Crumbling Ethical Foundation of Donald Trump's Presidency*, 17 CONN. PUB. INT. L.J. 169 (2018), https://ssrn.com/abstract=2999769; Lawrence J. Trautman, *Following the Money: Lessons from the Panama Papers, Part 1: Tip of the Iceberg,* 121 PENN ST. L. REV. 807 (2017), https://ssrn.com/abstract=2783503; Lawrence J. Trautman, *American Entrepreneur in China: Potholes and Roadblocks on the Silk Road to Prosperity,* 12 WAKE F. J. BUS. & INT'L PROP. L. (2012), https://ssrn.com/abstract=1995076; Lawrence J. Trautman & Kara Altenbaumer-Price, *The Foreign Corrupt Practices Act: Minefield for Directors*, 6 VA. L. & BUS. REV. (2011), https://ssrn.com/abstract=1930190.

[66] *See* Lawrence J. Trautman & Kara Altenbaumer-Price, *Lawyers, Guns and Money – The Bribery Problem and U.K. Bribery Act,* 47(3) INT'L LAW 481, 483 (2013).

[67] *Id.*

[68] *See* Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1 et. seq.). *See also* Lawrence J. Trautman & Kara Altenbaumer-Price, *Foreign Corrupt Practices Act: An Update on Enforcement and SEC and DOJ Guidance,* 41 SEC. REG. L.J. 241 (2013), http://ssrn.com/abstract=2293382.

[69] 15 USC § 78dd-1(a)(1)(B).

[70] 15 USC § 78m (b)(2)(A).

[71] *United States v. Kay*, 359 F.3d 738, 761 (5th Cir. 2004).

VI. RAPID TECHNOLOGICAL CHANGE

Personal Attacks in Social Media

We are living in a "cancel culture" where if someone, often a celebrity, does something either illegal or unethical, society is quick to "cancel" them, or lessen their celebrity standing or cultural capital.[72] For example, Kevin Hart's dream came true when he was chosen as the host for the 2019 Oscars, saying "I am blown away simply because this has been a goal on my list for a long time…. To be able to join the legendary list of host[s] that have graced that stage is unbelievable."[73] Within hours of the announcement, social media was filled with cries for apologies for homophobic jokes Hart had made ten years prior; people believed that without these, his soon to be fulfilled hosting dream should be cancelled.[74] Comedian Billy Eichner said at the time that people should not rush to judgment and permanently cancel someone over something like this, but instead, people should be able to "[own] up to past mistakes, acknowledging blind spots and hurtful remarks, talking through it, discussing it, learning, moving past it and making progress together."[75]

Leah Asmelash of CNN says, "Some people argue that cancel culture is justified because celebrities are facing repercussions for their actions. Other[s] complain that it's an unfair form of 'gotcha.' "[76] Either way, it is fans letting celebrities and other public figures know that they will be held accountable for their actions. Often, "cancel culture … treats conjecture as fact,"[77] which is particularly dangerous if the allegations are not true.[78] But even if the allegations are true, why dig up decade old misstatements that may have been made in youthful ignorance? It is the societal interest in "gotcha" that is troubling. Why is society so interested in either pointing out or relishing the past misdeeds of others? And who does not have skeletons in their closet that they would not want to be judged by today?

[72] Leah Asmelash, *Why 'Cancel Culture' Doesn't Always Work*, CNN (Sept. 21, 2019), https://www.cnn.com/2019/09/21/entertainment/cancel-culture-explainer-trnd/index.html; *see also* Aja Romano, *Why We Can't Stop Fighting About Cancel Culture*, VOX (Dec. 20, 2019), https://www.vox.com/culture/2019/12/30/20879720/what-is-cancel-culture-explained-history-debate (explaining that a person being canceled means "culturally blocked from having a prominent public platform or career").

[73] Stephen Daw, *A Complete Timeline of Kevin Hart's Oscar-Hosting Controversy, from Tweets to Apologies*, BILLBOARD (Jan. 10, 2019), https://www.billboard.com/articles/events/oscars/8492982/kevin-hart-oscar-hosting-controversy-timeline.

[74] Kristopher Tapley, *Kevin Hart Steps Down as Oscar Host*, VARIETY (Dec. 6, 2018), https://variety.com/2018/film/awards/kevin-hart-says-the-film-academy-has-given-him-an-ultimatum-apologize-or-well-find-another-oscars-host-1203083698/ ("Guys, I'm nearly 40 years old. If you don't believe that people change, grow, evolve as they get older, I don't know what to tell you. If you want to hold people in a position where they always have to justify the past, do you. I'm the wrong guy, man.").

[75] Billy Eichner (@billyeichner), TWITTER (Dec. 9, 2018, 8:14 PM), https://twitter.com/billyeichner/status/1071936262422949888/photo/4.

[76] Asmelash, *supra* note 72.

[77] Noe Padilla, *"Cancel Culture" Should Be Cancelled,* BOTTOM LINE (May 23, 2019), https://thebottomline.as.ucsb.edu/2019/05/cancel-culture-should-be-cancelled.

[78] *Id*.

Internet Use While Driving

The pandemic brought about a new form of distracted driving—Zoom.[79] With more people working from home, the number of people using Zoom skyrocketed.[80] People who had never heard of Zoom were suddenly spending hours each day on Zoom meetings.[81] Unfortunately, just as people conduct business by cell phone calls while driving, some of them decided to Zoom while driving.[82] University Hospital's Trauma Medical Director Dr. Mark Muir said, "[w]e've seen a few folks here [and] there who have been injured while trying to participate in some sort of remote meeting."[83] He went on to admit that "I've even had … meetings I've been on where I'm pretty sure some of the participants were driving and trying to navigate the roads while Zooming or WebEx chatting."[84]

Kyle Close, a student at the University of Mary Washington (UMW) shared that "[o]ver the past month I have noticed … students driving while in class and on Zoom."[85] He asserts that "UMW not only has a moral and ethical responsibility to keep students off the road while in class, but potentially a legal obligation as well."[86] While liability for distracted driving was initially placed on the driver, it has been expanded to accommodate today's technology that provides opportunities for someone to distract a driver even when they are not physically present in the car.[87] The Internet has also brought about increased privacy concerns[88] and cybersecurity threats and harm.[89]

[79] Jeremy Baker, *Zoom is Adding to Distracted Driving During the Pandemic, Safe2Save Says*, KENS5 (Aug. 25, 2020 9:14 AM), https://www.kens5.com/article/news/local/safe2save-says-zoom-is-adding-to-distracted-driving-during-the-pandemic/273-93bfea50-8aa6-4258-86e0-5f2b1aa41337 [https://perma.cc/UF8P-CQQV]. Self-described as a "marketplace for immersive experiences," Zoom was named "the Preferred Video App for the 2nd Straight Year." Aleks Swerdlow, *Introducing OnZoom: A Marketplace for Immersive Experiences*, ZOOM BLOG (Oct. 14, 2020), https://blog.zoom.us/introducing-onzoom-a-marketplace-for-immersive-experiences/ [https://perma.cc/DRL6-MNKQ]; *Zoom the Preferred Video App for the 2nd Straight Year* (2021), ZOOM, https://explore.zoom.us/docs/lp/most-popular-apps-2021.html [https://perma.cc/V2UU-JV45]. "2020 will be remembered as the 'year Zoom became a household name.' For the first time, the app became part of many people's daily lives." *Okta's Businesses at Work 2021*, OKTA.COM (2021), https://www.okta.com/sites/default/files/2021-02/Businesses-at-Work-2521.pdf [https://perma.cc/6BH7-7VPR]. Zoom was developed by Chinese software engineer Eric Yuan in 2011. Natalie Sherman, *Zoom Sees Sales Boom Amid Pandemic*, BBC.COM (June 2, 2020), https://www.bbc.com/news/business-52884782 [https://perma.cc/2T3W-FB7E].

[80] Sherman, *supra* note 79 ("Use of the firm's software jumped 30-fold in April [2020], as the coronavirus pandemic forced millions to work, learn and socialize remotely.").

[81] *See* Jason Aten, *Zoom Is Now Worth $130 Billion. The Reason Why is Simple,* INC.COM (Sept. 2, 2020), https://www.inc.com/jason-aten/zoom-is-now-worth-130-billion-reason-why-is-simple.html [https://perma.cc/NB2V-JR3T]; Sherman, *supra* note 79 ("Sales jumped 169% year-on-year in the three months to 30 April to $328.2m, as it added more than 180,000 customers with more than 10 employees since January—far more than it had expected. It also turned a profit of $27m in the quarter—more than it made in all of the prior financial year.").

[82] Baker, *supra* note 79.

[83] *Id.*

[84] *Id.*

[85] Kyle Close, *Don't Zoom and Drive*, BLUE & GRAY PRESS (Oct. 1, 2020), https://blueandgraypress.com/2020/10/01/dont-zoom-and-drive/ [https://perma.cc/GNW9-X6WH].

[86] *Id.* Close expressed concern that students have been through a lot in 2020 and 2021 due to the pandemic, and "the last thing anyone needs is seeing a classmate get into a car accident live during a lecture." *Id.*

[87] *Kubert v. Best,* 75 A.3d 1214, 1229 (N.J. Super. Ct. App. Div. 2013); Shekida A. Smith, *Texting While Driving Liability Now Extends To Remote Texters, According To New Jersey Appellate Court*, U. MIA. L. REV. (Sept. 28, 2013), https://lawreview.law.miami.edu/texting-driving/ [https://perma.cc/B8WG-7FJR]

VII. CORPORATE EMPLOYMENT & SOCIAL RESPONSIBILITIES

In today's complex corporate world, job discrimination and social discrimination continue to be persistent challenges that individuals face. This section explores the interconnected issues of job discrimination, corporate employment, and social discrimination. We will delve into specific subtopics such as sexual harassment, consumer protection, truth in advertising, pharmaceuticals, and product liability & torts, to shed light on the diverse dimensions of these issues.

("In theory the [*Kubert*] opinion demonstrates that legal ramifications for being a knowing and active nuisance to a driver who might possibly end up in a serious or fatal crash are not obsolete when the nuisance is 'electronically present,' rather than physically present, in the driver's car.").

[88] Peter C. Ormerod & Lawrence J. Trautman, *A Descriptive Analysis of the Fourth Amendment and the Third-Party Doctrine in the Digital Age!,* 28 ALBANY L.J. SCI. & TECH. 73 (2018), https://ssrn.com/abstract=3005714; Lawrence J. Trautman, *Following the Money: Lessons from the "Panama Papers," Part 1: Tip of the Iceberg*, 121 PENN ST. L. REV. 807 (2017), http://ssrn.com/abstract=2783503; Lawrence J. Trautman, Tik Tok! TikTok: Escalating Tension Between U.S. Privacy Rights and National Security Vulnerabilities, http://ssrn.com/abstract=4163203; Lawrence J. Trautman, *Governance of the Facebook Privacy Crisis,* 20 PITT. J. TECH. L. & POL'Y 41 (2020), http://ssrn.com/abstract=3363002; Lawrence J. Trautman, *How Google Perceives Customer Privacy, Cyber, E-Commerce, Political and Regulatory Compliance Risks,* 10 WM. & MARY BUS. L. REV. 1 (2018), https://ssrn.com/abstract=3067298.

[89] Michael J. Conklin, Brian Elzweig & Lawrence J. Trautman, *Legal Recourse for Victims of Blockchain and Cyber Breach Attacks*, 23 U.C. DAVIS BUS. L.J. 135 (2022-2023), http://ssrn.com/abstract=4251666.; Neal Newman & Lawrence J. Trautman, *A Proposed SEC Cyber Data Disclosure Advisory Commission*, 50 SEC. REG. L.J. 199 (2022), http://ssrn.com/abstract=4097138; David D. Schein & Lawrence J. Trautman, *The Dark Web and Employer Liability*, 18 COL. TECH. L.J. 49 (2020), http://ssrn.com/abstract=3251479; Lawrence J. Trautman & Peter C. Ormerod, *WannaCry, Ransomware, and the Emerging Threat to Corporations*, 86 TENN. L. REV. 503 (2019), http://ssrn.com/abstract=3238293; Lawrence J. Trautman & Peter C. Ormerod, *Industrial Cyber Vulnerabilities: Lessons from Stuxnet and the Internet of Things,* 72 U. MIAMI L. REV. 761 (2018), http://ssrn.com/abstract=2982629; Lawrence J. Trautman & Peter C. Ormerod, *Corporate Directors' and Officers' Cybersecurity Standard of Care: The Yahoo Data Breach,* 66 AM. U. L. REV. 1231 (2017), http://ssrn.com/abstract=2883607; Lawrence J. Trautman, *Is Cyberattack The Next Pearl Harbor?,* 18 N.C. J. L. & TECH. 232 (2016), http://ssrn.com/abstract=2711059; Lawrence J. Trautman, *Managing Cyberthreat,* 33 SANTA CLARA HIGH TECH. L.J. 230 (2016), http://ssrn.com/abstract=2534119; Lawrence J. Trautman, *E-Commerce, Cyber and Electronic Payment System Risks: Lessons from PayPal,* 16 U.C. DAVIS BUS. L. J. 261 (Spring 2016), http://www.ssrn.com/abstract=2314119; Lawrence J. Trautman, *Congressional Cybersecurity Oversight: Who's Who & How It Works,* 5 J.L. & CYBER WARFARE 147 (2016), http://ssrn.com/abstract=2638448; Lawrence J. Trautman, *Cybersecurity: What About U.S. Policy?,* 2015 U. ILL. J. L. TECH. & POL'Y 341 (2015), http://ssrn.com/abstract=2548561; Lawrence J. Trautman, Scott Shackelford, Brian Elzweig & Peter C. Ormerod, Cyber Threats to Business: Identifying and Responding to Digital Attacks, https://ssrn.com/abstract=4262971; Lawrence J. Trautman, *Posted: No Phishing* (with Mohammed T. Hussein, Emmanuel U. Opara, Mason J. Molesky and Shahedur Rahman), 8 EMORY CORP. GOV. & ACCT. REV. 39 (2021), http://ssrn.com/abstract=3549992; Lawrence J. Trautman & Kara Altenbaumer-Price, *The Board's Responsibility for Information Technology Governance*, 28 J. MARSHALL J. COMPTR & INFO. L. 313 (2011), http://www.ssrn.com/abstract=1947283; Lawrence J. Trautman, *How Law Operates in a Wired Global Society: Cyber and E-Commerce Risk*, PROCEEDS OF THE KOREA LEGISLATION RESEARCH INSTITUTE (KLRI), 2017 LEGAL SCHOLAR ROUNDTABLE, Seoul, Korea, 21-22 Sept., 2017, https://ssrn.com/abstract=3033776.

Sexual Harassment: Ensuring Safe and Inclusive Workplaces

Sexual harassment remains a grave concern in corporate employment. It is crucial to establish a workplace environment that is free from discrimination and promotes gender equality. Organizations must implement robust policies that condemn all forms of harassment, provide safe reporting mechanisms, and offer necessary support to victims. Training programs can also educate employees on respectful behavior, consent, and the legal consequences of sexual harassment. By fostering a culture of respect and accountability, companies can effectively address this pervasive issue.

Consumer Protection: Safeguarding the Rights of Consumers

In today's consumer-driven society, protecting the rights of consumers is of paramount importance. Companies have a responsibility to ensure that their products and services meet the highest standards of quality, safety, and reliability. Regulatory bodies play a vital role in monitoring and enforcing consumer protection laws to prevent deceptive practices, false advertising, and unfair contractual terms. By holding businesses accountable for their actions, consumer protection laws help build trust and confidence in the marketplace.

Truth in Advertising: Ethical Marketing Practices

Truth in advertising is essential to maintaining the integrity of corporate communication. Misleading claims, deceptive marketing tactics, and false representations can harm both consumers and competitors. Governments and regulatory agencies must enforce stringent regulations to ensure that advertisements are accurate, transparent, and do not manipulate consumers. By promoting ethical marketing practices, businesses can cultivate a culture of trust and credibility, fostering healthy competition in the market.[90]

Pharmaceuticals: Balancing Public Health & Corporate Responsibility

The pharmaceutical industry plays a critical role in promoting public health, but it also faces unique challenges. Ensuring accessibility, affordability, and safety of medications while maintaining profitable business models is a delicate balance. Government regulations, such as drug approval processes and price controls, aim to strike this balance and protect the interests of both patients and pharmaceutical companies. Collaborations between the industry, healthcare providers, and regulatory bodies are essential to addressing social disparities and ensuring equitable access to life-saving drugs.

Product Liability & Torts: Holding Corporations Accountable

Product liability and tort laws provide legal remedies for individuals who have been harmed by defective or dangerous products. Corporations are held accountable for any harm caused by their products, ensuring that consumers' rights are protected. These laws incentivize companies to prioritize safety and quality, as negligence can result in significant financial consequences. By upholding product liability and tort laws, societies promote consumer welfare and encourage responsible corporate behavior.

[90] Kenneth J. Sanney, Lawrence J. Trautman, Eric D. Yordy, Tammy W. Cowart, & Destynie Sewell, *The Importance of Truth Telling and Trust,* 37 J. LEGAL STUD. EDU.7 (Winter 2020), http://ssrn.com/abstract=3430854.

Job discrimination & Employment

Job discrimination, corporate employment, and social discrimination are multifaceted issues that require continuous efforts to address effectively. By exploring subtopics such as sexual harassment, consumer protection, truth in advertising, pharmaceuticals, and product liability & torts, we have examined the various aspects of these challenges. Companies, regulatory bodies, and individuals must work together to create inclusive work environments, protect consumer rights, uphold ethical marketing practices, ensure public health, and hold corporations accountable for their products. Only through collective action and a commitment to fairness can we create a society where discrimination and unfair practices are minimized, promoting a more equitable and just corporate landscape.[91]

Social Issues

As just one example of difficult corporate social issues, *The Wall Street Journal* reports that "In May [2023], clothing company the North Face released a video for Pride Month featuring drag performer Pattie Gonia. The ad was similar to the one the performer appeared in for the outdoor-apparel maker a year earlier. The reaction was not."[92] According to the account:

Within hours, calls for a boycott of the company spread on social media. "The North Face wants to be the next Bud Light!" one user wrote. "Aren't you supposed to learn from others' mistakes?" another user said.

CEOs spent the past few years adjusting to a world in which investors, customers and employees expected corporate leaders to align themselves with social causes. Today, that has made companies targets in the U.S. culture wars, where one step can turn a social-media storm into a corporate crisis that cripples businesses and wrecks careers.

Some CEOs are rethinking how—or whether—to weigh in on sensitive political or social matters, with trans and other LGBT issues particularly in the spotlight. At PPG Industries, a Pittsburgh maker of Glidden paint, coatings and other products, Chief Executive Tim Knavish… [said] 'We run a business. We don't run a political organization. We don't run a religious organization, and we don't run a social organization,'… 'However, [we] recognize that we operate in a society. We hire employees with opinions and views. We work with customers that have opinions and views. So we have to take all that into account.'

Leaving everyone unhappy

Executives are finding out how easy it is to leave everyone unhappy. After a Bud Light promotion with a transgender social-media influencer sparked a boycott of the beer, the brewer put two marketing executives on leave and still took a hit on sales, while also rankling employees and supporters of the LGBT community. Days after Target's LGBT retail displays sparked a social-media backlash and confrontations between store visitors and employees, the company said it would remove certain items and move some displays to less-visible locations, drawing criticism from LGBT supporters.

[91] Eddie Bernice Johnson & Lawrence J. Trautman, *The Demographics of Death: An Early Look at Covid-19, Cultural and Racial Bias in America*, 48 HASTINGS CONST. L. Q. 357 (2021), http://ssrn.com/abstract=3677607.

[92] Chip Cutter & Lauren Weber, *Companies Rethink Embrace of Social Issues,* WALL ST. J., June 7, 2023 at A1.

Over the past decade, companies have become more vocal on causes such as immigration, voting access, abortion, gay rights and racial equity, often taking stances shared by progressives. Many executives said they felt pushed by employees or customers to express an opinion on issues rippling through society.

What is changing now, executives and corporate advisers said, is that conservative groups and political leaders are pushing back against companies more forcefully. Consumers are also more openly expressing frustration that companies are airing views in ways some don't welcome.[93]

VIII. ETHICS AND THE POLITICAL ENVIRONMENT

Ethics and politics jointly and individually affect government, business, education, and individuals. Exploring those components shows us why ethics and politics should be studied.

Governmental Issues

Looking at governmental issues, there is no question that ethical practices regarding respect for differing opinions have deteriorated significantly, impacting both economic and non-economic factors. Societal and market reactions with embedded proposed emerging laws/regulations demand close attention. For example, laws involving alleged indoctrination have been introduced in Florida (House Bill (HB-7) and Ohio (SB 83), among others. Exploring them is an important function of citizenship.

Business Impact

Looking at business, an Aristotelian approach promulgates a theory that a business organization is formed to support the decision-maker participating in a good life, making decisions involving different stakeholders' interests. (Wijnberg 2000) [94] This approach leads to implications regarding the role of organizational politics, company goals, and governmental political influence.

Anheuser Busch's stock recently experienced the impact of a political issue with ethical tangents. As of 7/5/2023, the stock price of Bud Light's parent company Anheuser Busch dropped 15.2% (4/5/2023 $66.57 to $56.69 on 7/5/2023) when the S and P Index increased 8.2 %. No longer the number one American beer, sales decreased 28%.

One can easily see the ethical, political quagmire with which their managers and Board members struggle. The catalyst for the unprecedented drops is the unending repercussion of the brand's decision to hire transgender influencer Dylan Mulvaney as a spokesperson. Once the hire took place, a boycott began. Adding to the issue's complexity, Dylan Mulvaney is openly critical of what is becoming known as the Bud Light fiasco. Anheuser's CEO, Brendan Whitworth, said: "We never intended to be part of a discussion that divides people. We are in the business of bringing people together over a beer."

[93] Chip Cutter & Lauren Weber, *Companies Rethink Embrace of Social Issues,* WALL ST. J., June 7, 2023 at A1.

[94] N. M. Wijnberg, *Normative Stakeholder Theory and Aristotle: The Link between Ethics and Politics*, 25 J. BUS. ETHICS, 329 (2000), http://www.jstor.org/stable/25074321.

Analyzing the dilemma utilizing ethical theories produces varying results. Virtue ethics can be used to argue for keeping the spokesperson by doing the morally right thing. Alternatively, utilitarianism can be discussed to support "retiring" the spokesperson using settlement methodology.

Education

Looking at education, the evening news illustrates some Board Meetings deteriorating into shouting matches about indoctrination. Bills are being introduced that eliminate curriculum topics, including historical events. Virtue ethics and utilitarianism support the preservation of history. Legislating without an ethical framework can be likened to swimming with man-eating sharks. If one does not support an intellectual exploration of any issue from an ethical, political perspective, one risks being devoured by sharks or boiled in a cauldron of ignorance in a world without a moral compass.

Individuals

Looking at individuals, ethics and politics are encountered in their daily personal and professional lives. Responsibility becomes key. (Trnka & Trundle 2017) [95] Without regard to this essential topical study, one's moral thermometer may plummet below freezing, leading to consequences limiting one's freedoms and the respect of those important to the involved individual.

IX. ARTIFICIAL INTELLIGENCE (AI) AND ETHICS

Few technological advances in human history raise as many complex ethical issues as artificial intelligence (AI). AI refers to the ability of a machine to perform cognitive functions associated with the human mind or perform physical tasks using cognitive functions.[96] While the concept of AI is decades old,[97] AI has rapidly evolved past simplistic rules-based systems to include machine learning algorithms (which "learn" from training data using statistics and a feedback loop), artificial neural networks (which can derive insights from unstructured data through interconnected nodes in a layered structure similar to neurons in the human brain by self-adjusting weights and making self-corrections from examples over time), deep learning (neural nets with at least three hidden layers and potentially millions of nodes), and generative AI (systems like ChatGPT that can create hyper-realistic text, images and video).[98] Though still largely confined, for now, to single-domain problems rather than omniscient general intelligence, AI currently can learn and self-optimize without supervision; detect previously invisible correlations in massive datasets; solve complex functions with little or no human tuning; and exceed human problem-solving abilities in speed, volume and

[95] S. Trnka, & C. Trundle, (Eds.). (2017). *Competing responsibilities*. DUKE UNIVERSITY PRESS, doi:10.2307/j.ctv1220q09.

[96] *See e.g.*, McKinsey & Company, What is AI?, Apr. 24, 2023, https://www.mckinsey.com/featured-insights/mckinsey-explainers/what-is-ai (Last visited June 21, 2023).

[97] *See* J. McCarthy, M.L. Minsky, N. Rochester, and C.E. Shannon, A Proposal for the Dartmouth Summer Research Project on Artificial Intelligence (Aug. 31, 1955), http://jmc.stanford.edu/articles/dartmouth/dartmouth.pdf (Last visited June 21, 2023).

[98] *See e.g.*, IBM, What Is Machine Learning?, https://www.ibm.com/topics/machine-learning (Last visited June 21, 2023). (explaining AI terminology and history); A. Yapo and J. Weiss, Ethical Implications of Bias in Machine Learning, Proceedings of the 51st Hawaii International Conference on System Sciences (2018) at 5365 ("Machine learning is a subset of AI where algorithms directed by complex neural networks teach computers to think like a human while processing "big data" and calculations with high precision, speed, and supposed lack of bias.").

often accuracy. AI tools readily available include natural language, facial, and image recognition; recommendation engines; autonomous robots and vehicles; and AI systems capable of creating and disseminating human-quality content.

Due to AI's potential to enhance productivity, consumption, and efficiency, the business use cases for AI are numerous and growing fast, with more than half of global companies surveyed now using some form of AI such as robotic process automation, customer service, human resource management, profiling and recommendation engines, AI-enabled products, supply chain optimization, algorithmic trading, risk management, and research & development.[99]

The disruption underway cannot be overstated, as AI may add $15.7 trillion to global GDP by 2030[100] yet simultaneously put at risk up to 300 million jobs.[101] And the cost-benefit calculation is further complicated by the fact that AI may enable solutions to some of the world's most pressing problems like climate change,[102] while simultaneously causing environmental degradation (due to the vast minerals, electricity, and water needed to produce AI)[103] and potentially exacerbating the global inequality gap (as wealthier nations have almost exclusive access to AI talent, funding, and infrastructure).[104] The unknown but massive scale of potential AI harms—including human's ability to properly control them—has led some AI thought-leaders to call for a pause on its development.[105]

[99] *See* McKinsey & Company, The State of AI in 2022—And A Half Decade in Review, Dec. 2, 2022, https://www.mckinsey.com/capabilities/quantumblack/our-insights/the-state-of-ai-in-2022-and-a-half-decade-in-review. (Last visited June 21, 2023).

[100] *See* PriceWaterhouseCoopers, Sizing the Prize: What's the Real Value of AI for Your Business and How Can You Capitalise?,https://www.pwc.com/gx/en/news-room/docs/report-pwc-ai-analysis-sizing-the-prize.pdf. (Last visited June 21, 2023).

[101] *See* Joseph Briggs and Devesh Kodani, The Potentially Large Effects of Artificial Intelligence on Economic Growth, Goldman Sachs, March 26, 2023, https://www.gspublishing.com/content/research/en/reports/2023/03/27/d64e052b-0f6e-45d7-967b-d7be35fabd16.html. (Last visited June 21, 2023); Mohammed T. Hussein, Lawrence J. Trautman & Reginald Holloway Technology Employment, Information and Communications in the Digital Age, 103 J. U.S. PATENT & TRADEMARK OFF. SOC., 101 (Jan. 2023), http://ssrn.com/abstract=3762273.

[102] *See* K. Maher, Environmental Intelligence: Applications of AI to Climate Change, Sustainability, and Environmental Health, Stanford University, Human-Centered Artificial Intelligence, July 16, 2020, https://hai.stanford.edu/news/environmental-intelligence-applications-ai-climate-change-sustainability-and-environmental. (Last visited June 21, 2023); Neal Newman & Lawrence J. Trautman, *The Environmental, Social and Governance (ESG) Debate Emerges from the Soil of Climate Denial*, 53 U. MEMPHIS L. REV. 67 (2022), http://ssrn.com/abstract=3939898.

[103] *See e.g.*, Elsabet Jones & Baylee Easterday, Artificial Intelligence's Environmental Costs and Promise, Council on Foreign Relations, June 28, 2002, https://www.cfr.org/blog/artificial-intelligences-environmental-costs-and-promise. (Last visited June 21, 2023).

[104] *See e.g.*, David Rotman, How to solve AI's inequality problem, MIT Technology Review (April 19, 2022) ("The dominance of a few cities in the invention and commercialization of AI means that geographical disparities in wealth will continue to soar."); *see also, e.g.*, Cristian Alonso, Siddarth Kothari & Sidra Rehman, How Artificial Intelligence Could Widen the Gap Between Rich and Poor Nations, International Monetary Fund, IMF Blog, Dec. 2, 2020, https://www.imf.org/en/Blogs/Articles/2020/12/02/blog-how-artificial-intelligence-could-widen-the-gap-between-rich-and-poor-nations. (Last visited June 21, 2023).

[105] See e.g., Pause Giant AI Experiments: An Open Letter, The Future of Life Institute (March 22, 2023), https://futureoflife.org/open-letter/pause-giant-ai-experiments/; see also, Center for AI Safety, Statement on AI Risk: AI experts and public figures express their concern about AI Risk, https://www.safe.ai/statement-on-ai-risk#open-letter. (Last visited June 21, 2023).

Of certain, however, is that ethical decisions will be critical to harnessing the potential of AI while mitigating its harms, especially as the legal and regulatory regimes governing these technologies are undeveloped, particularly in the United States.[106] Policymakers, businesses, and astute managers must be prepared to make choices between privacy or surveillance, fairness or discrimination, transparency or opacity, sustainability or extraction, human autonomy or manipulation, shared prosperity or greater inequality, safety or insecurity, and worker augmentation or displacement. By adopting processes and seeking outcomes that are guided by time-tested ethical decision-making frameworks and core human-centered ethical principles—including reliability, safety, security, privacy, transparency, consent, fairness, explainability and accountability—individuals, governments, businesses, and society can choose to use AI responsibly.

Since data is one of the essential components of AI (along with specific algorithms and specialized microchips), data privacy, data accuracy, and data security pose core ethical and practical challenges to AI's responsible development and use. Without ensuring those, AI may render harmful, false predictions that deprive users of fundamental rights, opportunities, and freedoms; compromise sensitive components of individual identity pertaining to medical, financial, sexual, or religious practice; or lead to malicious data breaches.[107] One way in which these data-related harms can be prevented is through privacy and data protection "by design and default," according to which AI developers intentionally minimize data collection in proportion to legitimate need, anonymize and/or pseudonymize personally identifiable data, limit the duration of storage, and adopt cybersecurity measures to safeguard data integrity and confidentiality against hacks, misuse, loss, or damage.[108] Training data also must be robust and validated prior to AI deployment, and businesses must be prepared to provide rights of access, erasure, and error-rectification.[109]

Fairness is another core challenge posed by AI. Left unchecked, AI can unfairly discriminate, especially along protected classes like race and gender.[110] Since AI is only as good as its training data, historical biases like the disproportionate exclusion of women

[106] As of the date of this writing, the United States does not have comprehensive federal legislation governing AI or its underlying algorithms. Certain other jurisdictions are much farther along with the E.U. Artificial Intelligence Act, for example, progressing rapidly toward adoption. The same is true for data privacy protections. While the E.U. has adopted the General Data Protection Regulation, *see infra* note 13, federal data privacy legislation in the U.S. is piecemeal, as the Children's Online Privacy Act, 15 U.S.C. 6501 et seq., and the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 110 Stat. 1936, Pub. L. 104-191, govern only certain subjects. Certain U.S. states, however, have begun to adopt privacy legislation. See e.g., California Consumer Privacy Act of 2018 as amended by the California Privacy Rights Act of 2020, CA Civ Code § 1798.192; Colorado Privacy Act, Sen. Bill 21-190 (2021); Illinois Biometric Information Privacy Act, 740 ILCS 14/5 (2008).

[107] *See e.g.*, Scott Neuman, The U.N. Warns That AI Can Pose a Threat to Human Rights, NPR, Sept. 16, 2021 (citing UN report); Commission Proposal for a Regulation of the European Parliament and Of the Council (Artificial Intelligence Act), COM (2021) 206 Final (Apr. 21, 2021) (noting AI risks giving rise to proposed legislation).

[108] *See* E.U. General Data Protection Regulation, Council Regulation 2016/679, 2016 O.J. (L119) at Art. 25.

[109] *See e.g.*, *id*. at Arts. 15-17.

[110] *See e.g.*, S.M. West, M. Whittaker, and K. Crawford, Discriminating Systems: Gender, Race and Power in AI—Report, AI Now Institute (2019), https://ainowinstitute.org/publication/discriminating-systems-gender-race-and-power-in-ai-2. (Last visited June 21, 2023).

from the C-suite can perpetuate discrimination when AI is used in hiring to scan resumes or conduct interviews. Unfairness can also infect AI because natural language processing and facial recognition may have difficulties with minority features and accents.[111] Even when developers consciously try to avoid the use of race, AI can draw inappropriate correlations using proxy data like zip code.[112] Solutions for ameliorating these problems include pre-launch testing and periodic auditing of AI systems and the conscious choice to ensure a "human-in-the-loop" before AI recommendations are acted upon.[113] While third-party testing is arguably the most trustworthy, this too is controversial, as providing access to AI systems and data can risk compromising trade secrets that form the basis of corporate comparative advantage.[114]

Explainability, or the lack thereof, is another major ethical concern for AI systems. This "black box" problem occurs because certain AI neural networks are so complex that they can provide predictions without an underlying explanation of how those were reached.[115] If even the system's creators don't know how AI reached a decision (on whether to extend credit, hire an employee, deny bail, or attack a particular target on the battlefield, for example), it may be impossible to determine if those choices were appropriate or to correct errors.[116] While technological solutions may be forthcoming, for now, it remains incumbent upon those who would use such systems to maintain "human-in-the-loop" processes, be wary of such black boxes, and use responsible vendors if buying AI off-the-shelf.

Finally, ensuring human autonomy is one of the most challenging problems posed by AI.[117] This is because AI can manipulate human behavior not only through deep fakes and disinformation but also by the exploitation of informational asymmetries, cognitive biases, and human vulnerabilities.[118] Despite recent examples of voter manipulation, radicalization, and psychological harms occasioned by AI-enabled social media,[119] the

[111] *See e.g.*, Joy Buolamwini and Timnit Gebru, Gender Shades: Intersectional Accuracy Disparaties in Commercial Gender Classification, Proceedings of Machine Learning Research 81:1-15, Conference on Fairness, Accountability and Transparency (2018).
[112] *See e.g.*, Alexandra George, Thwarting Bias in AI Systems, Carnegie Mellon University (2018) (discussing data proxies), https://engineering.cmu.edu/news-events/news/2018/12/11-datta-proxies.html (Last visited June 21, 2023).
[113] See e.g., Artificial Intelligence Act, *supra,* note 100 at Arts. 10 (data and data governance), 14 (human oversight).
[114] *See e.g.*, Frank Pasquale, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION, Harvard University Press (2015).
[115] *See e.g.*, *id.*
[116] Will Knight, The Dark Secret at the Heart of AI, MIT Technology Review, April 11, 2017 ("No one really knows how the most advanced algorithms do what they do. That could be a problem.").
[117] *See e.g.*, Carina Prunkl, Jessica Morley, Jonathan Pugh and Peter Millican, Does AI Threaten Human Autonomy, Ethics in AI Podcast, University of Oxford, https://podcasts.ox.ac.uk/does-ai-threaten-human-autonomy. (Last visited June 21, 2023).
[118] *See e.g.*, Shoshanna Zuboff, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER, Public Affairs, 2019; Yuval Noah Harari, Why Technology Favors Tyranny, THE ATLANTIC, Oct. 2018; Dylan Walsh, Study: Social Media Use Linked to Decline in Mental Health, MIT Sloan School of Management, Sept. 14, 2022, https://mitsloan.mit.edu/ideas-made-to-matter/study-social-media-use-linked-to-decline-mental-health. (Last visited June 21, 2023).
[119] *See e.g.*, The Cambridge Analytica Files: A Year-Long Investigation into Facebook, Data, and Influencing Elections in the Digital Age, THE GUARDIAN, https://www.theguardian.com/news/series/cambridge-analytica-files. (Last visited June 21, 2023); *see also*

line between ethically permissible "nudging" and unacceptable manipulation remains elusive.[120] And standard methods for ensuring autonomy like informed consent may not be sufficient, as few of us carefully read or understand such licensing agreements.[121] Thus, it is vital for those deploying AI to remember that humans are not props to be manipulated.

Given the ethical challenges posed by AI, tomorrow's business managers must employ all the analytical tools at their disposal to resolve them. This includes not only utilitarian frameworks that ask what will promote the greatest good for the greatest number (to the extent knowable),[122] but also duty-based deontological frameworks that assess the morality of an action based on its adherence to a categorical imperative to act on universalizable principles and respect human rights.[123] Useful, too, are distributive justice and social contract frameworks that assess fairness and ask whether we would hypothetically consent to such uses from positions of equal bargaining power.[124] Finally, managers will need to rely on values-based and principles-based ethical approaches that remind to us to practice core virtues of honesty, integrity, fairness, and justice.

X. ENVIRONMENT AND SUSTAINABILITY MANAGEMENT

> "For most of history, man has had to fight nature to survive; in this century he is beginning to realize that, in order to survive, he must protect it."
>
> — Jacques-Yves Cousteau

The environment sustains life.

Without a clean and sustainable environment, our very lives are imperiled.

People care about their own backyards. They care about what affects them every day. They care about what they see. About what they eat. About where they can get the things they need at a reasonable price.

Facebook Whistleblower Frances Haugen: The 60 Minutes Interview, Oct. 3, 2021, https://www.youtube.com/watch?v=_Lx5VmAdZSI. (Last visited June 21, 2023).

[120] *See, generally*, Richard Thaler and Cass Sunstein, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS, PENGUIN BOOKS 2009; Christian Ernst, Artificial Intelligence and Autonomy: Self-Determination in the Age of Automated Systems in REGULATING ARTIFICIAL INTELLIGENCE (Thomas Wischmeyer and Timo Rademacher, Eds., Springer International Publishing, 2020); Luc Bovens, The Ethics of Nudge, in PREFERENCE CHANGE: APPROACHES FROM PHILOSOPHY, ECONOMICS AND PSYCHOLOGY, THEORY AND DECISION LIBRARY A 42, at 207 (Till Grüne-Yanoff & Sven Ove Hansson eds., 2009) (exploring whether nudges are consistent with respect for autonomy).

[121] *See e.g.*, Meg Leta Jones and Elizabeth Edenberg, Troubleshooting AI and Consent, in THE OXFORD HANDBOOK OF ETHICS OF AI (Markus D. Dubber, Frank Pasquale and Sunit Das, Eds., Oxford University Press, 2020) at pp. 358-374 (noting that "digital consent has been criticized as a meaningless, procedural act because users encounter so many different, long and complicated terms of service that do not help them effectively assess potential harms or threats.")

[122] *See e.g.,* John Stuart Mill, UTILITARIANISM (Willard Small, Boston, 1887).

[123] *See e.g.*, Michael Sandel, JUSTICE: WHAT'S THE RIGHT THING TO DO (Farrar, Straus and Giroux, 2009) at Ch. 5 (discussing Emmanuel Kant and the Categorical Imperative as originally outlined in GROUNDWORK OF THE METAPHYSICS OF MORALS).

[124] *See e.g.*, id. at Ch. 6 (discussing John Rawls' theory of Justice as Fairness).

When a business harms the environment, they are ultimately harming someone's backyard.

Here, we briefly answers the question, why does the environment matter and why should businesses care?

1 - Stakeholder Engagement

Let's be honest. Some people are going to spend more money on a product they believe to be environmentally friendly. Some folks will likely seek out such a product. Creating products for this market engages sustainability-minded consumers, but it also engages stockholders, suppliers, manufacturers, nonprofits, academics and other entities who may desire to invest in and work with companies with a sincere commitment to the environment.

2 - Risk Management

Businesses are becoming increasingly responsive to environmental risks.[125] Some are cognizant of and seek to minimize their contribution to environmental harms, such as hazardous waste disposal, use of nonrenewable resources, and greenhouse gas emissions. Others are more concerned about regulatory and litigation risks, such as environmental and securities laws. Companies also face supply chain and physical risks from climate change and other environmental risks, challenging operational viability. Finally, failure to address environmental harms results in reputational risk, leading to reduced competitive advantage. Better for companies to consider and prepare for these issues than to ignore them and pay a significantly higher cost.

3 - Innovation

Some companies view environmental risks as an opportunity to innovate. From increasing efficiency to completing rethinking the design process, companies may attempt to meet environmental challenges by reducing and shifting materials and considering the entire life cycle of a product and designing for its end.

4 - Recruitment & Loyalty

Companies that are sustainable or seek a mission in harmony with environmental causes often attract a particular type of employee, one who is likely to remain with a company that has a purpose that aligns with the individual. Companies such as Patagonia and Interface both engage in manufacturing, and they both attract workforce talent that cares about going beyond carbon neutrality through reductions in emissions and innovative design. Adherence to corporate values such as environmental stewardship also results in increased employee retention and customer loyalty.

[125] Jehan El-Jourbagy & Phil Gura, *In Space, No One Can Hear You're Green: Standardization of Environmental Reporting, the SEC's Proposed Climate Change Disclosure Rules, and Remote Sensing Technology*, 59 AM. BUS. L.J. 773 (2022).

5 - Financial Performance

Loyalty leads me to the last reason why businesses should care about the environment. Money. Some corporate leaders may view profit maximization as the purpose of a corporation, but others may view making a profit as a way to serve a greater purpose. Considering the environment can create a competitive advantage by differentiating products, improving efficiency, and reducing waste. Investment firms seek companies with greater environmental transparency, and many environmental firms outperform their peers.[126]

XI. MANAGING A DIVERSE WORKFORCE

The Reality

No longer is the existence of diversity a question. Specific to the United States, the American Community Survey indicated a 2021 white racial demographic of 68.2%, a decrease from 73.8% just 7 years earlier.[127] Similar recent diversity impacts have been felt across Canada, the United States, and several Asia-Pacific nations.[128]

To complicate matters, data can be imperfect. Increasingly, traditional identification "molds" are being broken. Individuals identifying as multiracial more than doubled from 2014 to 2021.[129] Genderqueer identities have become more visible. Struggles such as tracking sexual minorities, persons with disabilities, and those experiencing mental illness continue in the face of stigma and maltreatment.

What is clear, however, is that diversity can bring substantial benefits. Studies show persistent outperformance of diverse teams over homogenous ones, with McKinsey finding ethnically diverse teams in 2019 outperformed less diverse teams by 36% in profitability.[130] The Williams Institute similarly found LGBT-supportive policies led to greater job commitment.[131] Even touted advantages of homogenous teams, such as quicker decision-making, can be mitigated by such practices as inclusive processes – resulting in making decisions twice as quickly.[132]

[126] Cole Horton and Simon Jessop, *Positive ESG Performance Improves Returns Globally, Research Shows*, REUTERS (Jul. 28, 2022), https://www.reuters.com/business/sustainable-business/positive-esg-performance-improves-returns-globally-research-shows-2022-07-28/.
[127] ACS Demographic and Housing Estimates: ACS 5-Year Estimates Data Profiles: From United States Census Bureau (2021), https://data.census.gov/table?tid=ACSDP5Y2021.DP05.
[128] *See e.g.*, Jacob Poushter, Janell Fetteroff, & Christine Tamir, Pew Research Center, A Changing World: Global Views on Diversity, Gender Equality, Family Life and the Importance of Religion (April 22, 2019).
[129] ACS Demographic and Housing Estimates: ACS 5-Year Estimates Data Profiles: From United States Census Bureau (2021), https://data.census.gov/table?tid=ACSDP5Y2021.DP05.
[130] McKinsey & Company, Diversity Wins: How Inclusion Matters (May 19, 2020), https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters.
[131] M.V. Lee Badgett et al., The Business Impact of LGBT-Supportive Workplace Policies: From THE WILLIAMS INSTITUTE (May 2013).
[132] Erik Larson, New Research: Diversity + Inclusion = Better Decision Making at Work: From FORBES (Sept. 21, 2017), https://www.forbes.com/sites/eriklarson/2017/09/21/new-research-diversity-inclusion-better-decision-making-at-work/?sh=128ed78b4cbf.

Complexities of Diversity Management

The presence and potential of diversity does not discount its challenges. Should diversity management emphasize equality (sameness) or equity (fairness) in pursuit of goals? Should a company embrace the notion of a melting pot, wherein diverse employees blend to create a new workplace culture, or that of historian Howard Zinn's salad bowl, wherein unique flavors come together to be appreciated in a symbiotic yet not fully fused whole?

Choices will need to be made as to what populations to devote resources to for such initiatives as employee resource groups. Should more "choice-based" demographics including religion and military service be given the same weight for instance as race and gender?

No choice will be without tradeoff. Perhaps a company decides to pursue an initiative such as affirmative action by layoff, prioritizing retention of diverse demographics in the event of downsizing.[133] Be prepared to face pushback from historic labor initiatives such as seniority protections, a justifiable interest but one that has preserved white male demographic advantage.

All the while, choices are not entirely unrestricted. Civil rights laws, constituency statutes, and other considerations may limit options. President Trump in 2020 for instance issued an "Executive Order on Combating Race and Sex Stereotyping."[134] The order, no longer in effect but plausibly replicable in the future, could impose very real limitations on diversity programming for a federal contractor.

In short, diversity management is not a choice, but ethical response to it is. This arena is full of quandaries that data and theory can help managers tackle most effectively.

XII. THE SEC AND PROMOTERS, SHAMS, & FRAUDS

Lessons from our daily lives suggest that whenever there is a new "bright shinny object" or technological development, investment schemes are soon to follow. These are often the result of entrepreneurial hopes and dreams that suffer from lack of adequate funding, business knowledge, a development of a receptive market for the product, or any of many other assorted reasons.[135] However, all too often these investment schemes are the product of fraudulent promoters.

Importance of Fair, Free, and Efficient Capital Markets

SEC Chair Gary Gensler observed that "The U.S. capital markets thrive because we've had rules of the road that have helped ensure for investor protection, transparency,

[133] *See e.g.*, Clare O'Hara, Leaders Urged to Protect Tech Diversity: As Layoffs Hit the Sector, Founder of Professionals' Group Encourages Companies Not to Value Workers' Seniority Over Skill Sets: GLOBE & MAIL, Sept. 6, 2022, at B3.

[134] *See* Exec. Order No. 13950, 85 FR 60683 (2020).

[135] Lawrence J. Trautman & Oliver W. Aho, *Crowdfunding, Entrepreneurship, and Start-Up Finance*, ENTREPRENEUR & INNOVATION EXCHANGE (EiX.org) (2019), http://ssrn.com/abstract=3251538; Lawrence J. Trautman, Anthony "Tony" Luppino & Malika S. Simmons, *Some Key Things U.S. Entrepreneurs Need to Know About The Law and Lawyers*, 46 TEX. J. BUS. L. 155 (2016), http://ssrn.com/abstract=2606808.

and competition for 90 years—since the signing of the Securities Act of 1933."[136] Chairman Gensler continues to note that only a year later, "President Roosevelt worked with Congress to pass the Securities Exchange Act of 1934 to regulate securities intermediaries, such as exchanges and broker-dealers. That law also created the SEC."[137] It was the economic crisis and widespread suffering:

> During the peak of the Great Depression, [when] Congress passed the Securities Act of 1933 (Securities Act) and the Securities Exchange Act of 1934 (Securities Exchange Act), which established the SEC. These laws were designed to regulate the financial markets and restore investor confidence in U.S. capital markets by providing investors and the markets with reliable information and clear rules to ensure honest dealings. The main purpose of these laws was to ensure the following:
>
> •Companies that publicly offer securities for investment dollars are forthcoming and transparent about their businesses, the securities they are selling, and the risks involved with investing; and
>
> •People who sell and trade securities—brokers, dealers, and exchanges—treat investors fairly and honestly.[138]

Fast-forward about 90 years and we see that "The United States has the largest, most sophisticated, and most innovative capital markets in the world. U.S. capital markets represent about 40 percent of the global capital market."[139]

Fraud Abounds

The Commission writes, "To protect the investing public, the SEC will continue to work toward ensuring markets are free of fraud, manipulation, and other misconduct—not only through its rulemaking, but through its enforcement and examination programs as well."[140] Enforcement of U.S. securities laws is a paramount goal, whether the offense "be deceptive conduct by registered or private funds, offering or accounting frauds, insider trading, market manipulation, failures to act in retail customers' best interests when making a recommendation, reporting violations, best execution and failure to act in accordance with the fiduciary duty, or any other form of misconduct.'[141]The following

[136] PRESS RELEASE, We've Seen This Story Before" Remarks Before the Piper Sandler Global Exchange & Fintech Conference (Remarks by Gary Gensler, Chair U.S. Securities and Exchange Commission) (Jun 8, 2023), https://www.sec.gov/news/speech/gensler-remarks-piper-sandler-060823.
[137] *Id.*
[138] Congressional Budget Justification Annual Performance Plan (FY 2024) and Annual Performance Report (FY 2022), U.S. Securities and Exchange Commission, 8, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.sec.gov/files/fy-2024-congressional-budget-justification_final-3-10.pdf.
[139] Strategic Plan: Fiscal Years 2022-2026, U.S. Securities and Exchange Commission, 6, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.sec.gov/files/sec_strategic_plan_fy22-fy26.pdf.
[140] Strategic Plan: Fiscal Years 2022-2026, U.S. Securities and Exchange Commission, 7, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.sec.gov/files/sec_strategic_plan_fy22-fy26.pdf. *See also* Lawrence J. Trautman, Brian Elzweig & Neal F. Newman, The SEC, Fraud & Cryptocurrencies, http://ssrn.com/abstract=4965035.
[141] *Id.*

SEC press release titles capture the wide variety of enforcement issues addressed by the Commission, just to name a few:

> SEC Seeks Emergency Relief to Ensure Binance.US Customers' Assets are Protected;[142] SEC Charges Coinbase for Operating as an Unregistered Securities Exchange, Broker, and Clearing Agency;[143] SEC Files 13 Charges Against Binance Entities and Founder Changpeng Zhao;[144] Former Coinbase Manager and His Brother Agree to Settle Insider Trading Charges Relating to Crypto Asset Securities;[145] SEC Shuts Down WeedGenics $60 Million Cannabis Offering Fraud;[146] SEC Charges 10 Microcap Companies with Securities Offering Registration Violations;[147] SEC Charges Red Rock Secured, Three Executives in Fraud Scheme Targeting Retirement Accounts;[148] Dutch Medical Supplier Philips to Pay More Than $62 Million to Settle FCPA Charges;[149]SEC Alleges Son and Father-in-Law Touted Faith to Target Church Members in $20 Million Offering Fraud;[150] SEC Charges Three Executives at U.S. Navy Shipbuilder Austal USA with Accounting Fraud;[151]SEC Charges Hedge Fund Trader and Broker-Dealer Partner in Multi-Million Dollar SPAC Insider Trading Scheme;[152] SEC Charges Financial Adviser for

[142] PRESS RELEASE 2023-103, SEC Seeks Emergency Relief to Ensure Binance.US Customers' Assets are Protected, U.S. Securities and Exchange Commission, (June 6, 2023), https://www.sec.gov/news/press-release/2023-103.

[143] PRESS RELEASE 2023-102, SEC Charges Coinbase for Operating as an Unregistered Securities Exchange, Broker, and Clearing Agency, U.S. Securities and Exchange Commission, (June 6, 2023), https://www.sec.gov/news/press-release/2023-102.

[144] PRESS RELEASE 2023-101, SEC Files 13 Charges Against Binance Entities and Founder Changpeng Zhao, U.S. Securities and Exchange Commission, (June 6, 2023), https://www.sec.gov/news/press-release/2023-101.

[145] PRESS RELEASE 2023-98, Former Coinbase Manager and His Brother Agree to Settle Insider Trading Charges Relating to Crypto Asset Securities, U.S. Securities and Exchange Commission, (May 30, 2023), https://www.sec.gov/news/press-release/2023-98.

[146] PRESS RELEASE 2023-97, SEC Shuts Down WeedGenics $60 Million Cannabis Offering Fraud, U.S. Securities and Exchange Commission, (May 23, 2023), https://www.sec.gov/news/press-release/2023-97.

[147] PRESS RELEASE 2023-94, SEC Charges 10 Microcap Companies with Securities Offering Registration Violations, U.S. Securities and Exchange Commission, (May 16, 2023), https://www.sec.gov/news/press-release/2023-94.

[148] PRESS RELEASE 2023-93, SEC Charges Red Rock Secured, Three Executives in Fraud Scheme Targeting Retirement Accounts, U.S. Securities and Exchange Commission, (May 15, 2023), https://www.sec.gov/news/press-release/2023-93, https://www.sec.gov/news/press-release/2023-93.

[149] PRESS RELEASE 2023-92, Dutch Medical Supplier Philips to Pay More Than $62 Million to Settle FCPA Charges, U.S. Securities and Exchange Commission, (May 11, 2023), https://www.sec.gov/news/press-release/2023-92.

[150] PRESS RELEASE 2023-84, SEC Alleges Son and Father-in-Law Touted Faith to Target Church Members in $20 Million Offering Fraud, U.S. Securities and Exchange Commission, (May 2, 2023), https://www.sec.gov/news/press-release/2023-84.

[151] PRESS RELEASE 2023-69, SEC Charges Three Executives at U.S. Navy Shipbuilder Austal USA with Accounting Fraud, U.S. Securities and Exchange Commission, (Mar. 31, 2023), https://www.sec.gov/news/press-release/2023-69.

[152] PRESS RELEASE 2023-66, SEC Charges Hedge Fund Trader and Broker-Dealer Partner in Multi-Million Dollar SPAC Insider Trading Scheme, U.S. Securities and Exchange Commission, (Mar. 31, 2023), https://www.sec.gov/news/press-release/2023-66. *See also* Neal Newman & Lawrence J. Trautman, *Special*

Misappropriating More Than $1 Million From Current, Former NBA Players;[153] SEC Charges Cannabis Company American Patriot Brands, CEO, and Others with Fraud;[154] SEC Charges Nishad Singh with Defrauding Investors in Crypto Asset Trading Platform FTX.[155]

The Challenges of Rapid Technological Change

Innovation and new technologies continue to play a major role in shaping global capital markets. The SEC observes that "increased use of, and reliance on, technology has introduced new risks and, in some cases, amplified better-known market risks. For example, cybersecurity threats to the complex system that helps the markets function are constant and growing in scale and sophistication."[156]

XIII. WHAT ABOUT TAX EVASION?

One of the classic questions in both public finance and political philosophy is, "When is tax evasion ethical?" There is no agreed-upon answer to this question. The most recent study by the World Values Survey[157] interviewed more than 150,000 people in more than 90 countries. Only 63.0% of those interviewed believed that tax evasion is never justifiable; 2.2% believed tax evasion is always justifiable and 34.8% believed tax evasion is justifiable in certain circumstances.[158] Polls conducted in various countries[159] found there is widespread support for tax evasion in some cases. One poll conducted in the USA[160] found that the strongest reasons to justify tax evasion were:

Purpose Acquisition Companies (SPACs) and the SEC, 24 U. PA. J. BUS. L. 639 (2022), http://ssrn.com/abstract=3905372.

[153] PRESS RELEASE 2023-60, SEC Charges Financial Adviser for Misappropriating More Than $1 Million From Current, Former NBA Players, U.S. Securities and Exchange Commission, (Mar. 23, 2023), https://www.sec.gov/news/press-release/2023-60.

[154] PRESS RELEASE 2023-55, SEC Charges Cannabis Company American Patriot Brands, CEO, and Others with Fraud, U.S. Securities and Exchange Commission, (Mar. 16, 2023), https://www.sec.gov/news/press-release/2023-55. *See also* Lawrence J. Trautman, Donald Mayer, Paul Seaborn, Adam Sulkowski & Robert T. Luttrell, *Cannabis At the Crossroads: Regulation, A Transdisciplinary Analysis and Policy Prescription*, 46 OK. CITY U. L. REV. 125 (2021), http://ssrn.com/abstract=3541229.

[155] PRESS RELEASE 2023-40, SEC Charges Nishad Singh with Defrauding Investors in Crypto Asset Trading Platform FTX, U.S. Securities and Exchange Commission, (Feb. 28, 2023), https://www.sec.gov/news/press-release/2023-40. *See also* Trautman, FTX Crypto Debacle, *supra* note 52.

[156] Strategic Plan: Fiscal Years 2022-2026, U.S. Securities and Exchange Commission, 10, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.sec.gov/files/sec_strategic_plan_fy22-fy26.pdf; Lawrence J. Trautman, Kenneth J. Sanney, Eric D. Yordy, Tammy W. Cowart & Destynie Sewell, *Teaching Ethics and Values in an Age of Rapid Technological Change*, 17 RUTGERS BUS. L. REV. 17 (2021), http://ssrn.com/abstract=3102552.

[157] www.worldvaluessurvey.org (2022).

[158] Ashiqullah Pardisi & Robert W. McGee, *Which Countries Are the Most/Least Opposed to Tax Evasion? A Ranking*, in THE ETHICS OF TAX EVASION, VOLUME 2, NEW PERSPECTIVES IN THEORY AND PRACTICE (Robert W. McGee & Jovan Shopovski, eds., 2024).

[159] Robert W. McGee, *Why Do People Evade Taxes? Summaries of 80+ Surveys*. Working Paper (2023), http://dx.doi.org/10.2139/ssrn.4381069.

[160] Robert W. McGee & Sheldon R. Smith. *Ethics and Tax Evasion: A Comparative Study of Accounting and Business Student Opinion in Utah*. American Society of Business and Behavioral Sciences 14th Annual Meeting, Las Vegas, February 22-25, 2007. Published in the Proceedings of the American Society of Business and Behavioral Sciences 14(1): 1175-1185. http://dx.doi.org/10.2139/ssrn.941510

1. If I were a Jew living in Nazi Germany.
2. If the government imprisons people for their political opinions.
3. If a significant portion of the money collected winds up in the pockets of corrupt politicians or their families and friends.
4. If the government discriminates against me because of my religion, race or ethnic background.
5. If the tax system is unfair.
6. If a large portion of the money collected is wasted.
7. If a large portion of the money collected is spent on projects that I morally disapprove of.
8. If I can't afford to pay.
9. If tax rates are too high.

That same study found that the least popular reasons to justify tax evasion were:

1. If I pay less, others must pay more.
2. If the probability of getting caught is low.
3. If everyone is doing it.
4. Even if most of the money is spent wisely.
5. Even if a large portion of the money collected is spent on projects that benefit me.
6. If a large percentage of the money collected is spent on worthy projects.
7. If a large portion of the money collected is spent on projects that do not benefit me.
8. If some of the proceeds go to support a war I consider unjust.
9. Even if tax rates are not too high because the government is not entitled to take as much as it is taking from me.

In the 1950s, some people had to pay more than 90% of their marginal income in federal taxes. If you add state and local income taxes, sales taxes, property taxes and other taxes to the total, it is possible that some individuals might have been forced to pay more than 100% of their marginal income in taxes. Do you think that is fair, or did those individuals have a moral right to evade taxes at some point? What is the cut-off point where the obligation to pay ends and evasion becomes acceptable?

In 2020 in the United States,[161] the top 1% paid 42.3% of the total tax bill; the top 5% paid 62.7%; the lowest 50% paid 2.3%. Do you think this distribution of the tax burden is fair? If not, what distribution do you think would be fair? If you are one of the people who is being treated unfairly, do you think that evading some taxes would be ethical? Why or why not?

QUESTIONS TO PONDER

1. Is it ever ethical to evade taxes? Why or why not?
2. If your taxes are funding abortion, critical race theory, an unjust war, religious schools, foreign aid to our enemies or something else you find morally reprehensible, would tax evasion be morally acceptable? Why or why not?
3. How would you determine what a person's "fair share" of the tax burden is?

[161] Erica York. *Summary of the Latest Federal Income Tax Data, 2023 Update.* Tax Foundation. https://taxfoundation.org/

4. Should rich people pay a higher percentage of their income in taxes, or should everyone pay the same flat percentage? Why?
5. Should some upper limit be set, either as a percentage of income or as a dollar amount, beyond which no one is forced to pay? Why or why not?
6. Is taxation theft or is it voluntary even if you do not personally consent?

XIV. CONCLUSION

Our goal in this paper has not been to provide an exhaustive account of theoretical foundations or a comprehensive treatise on the subject of ethics. Rather we have sought to show how ethical decisions are relevant to our daily personal and business lives and how navigating ethical decisions can be complicated undertakings. We believe our efforts here contribute to a contemporary understanding of this subject.

IN A DIFFERENT LIGHT: EXAMINING THE SUPREME COURT'S REJECTION OF THE CDC'S EVICTION MORATORIUM AS A BLOW TO THE ADMINISTRATIVE STATE

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Abstract:

The circumstances of the Covid-19 pandemic led Congress to pass the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) in hopes of forestalling the economic effects caused by the pandemic (Pub. L. 116-136, 134 Stat. 281). Congress included a 120-day moratorium in the CARES Act, protecting those residing in properties participating in any federal rent assistance program or financed via loans backed by federal loans from eviction (Id.). The CDC Eviction Moratorium was extended several times through the end of 2020 and into the summer months of 2021, all while causing tremendous debate over the legality of its order.

Many critics of the CDC Eviction Moratorium argued that the CDC did not possess the authority to issue an order that banned evictions across the entire United States (Berman et. al., 2021). The CDC claimed that it received the required authority from the Public Health Service Act of 1944 (Alabama Assn. of Realtors, et al., 2021).

Key Words: eviction moratorium, Covid-19, administrative law, constitutional law

BACKGROUND AND HISTORY:

The Supreme Court's rejection of the Center for Disease Control's (CDC) arguments in support of its eviction moratorium can be viewed in several different lights (*Alabama Assn. of Realtors, et. al*., 2021). This paper construes the decision as a rejection and limit on the ever-growing power of administrative agencies.

In response to the Covid-19 Pandemic, Congress included a 120-day moratorium on eviction actions in its *Coronavirus Aid, Relief, and Economic Security Act.* The moratorium applies to tenants living in properties whose owners were participating in federal assistance programs or involved federally backed loans (Pub. L. 116-136, 134 Stat. 281). President Trump then extended the moratorium by executive order. When the moratorium expired, the CDC, on its own initiative, implemented another moratorium that went further than its predecessor by blanketing every single residential property in the country and subjected violators to criminal prosecution (85 Fed. Reg. 55292, 2020). Eventually, after one Congressional extension and several by the CDC, it was administratively challenged by the Alabama Association of Realtors, who pursued the matter all the way to the United States Supreme Court (*Alabama Assn. of Realtors, et. al*., 2021).

The issues raised before the Supreme Court harken back to the nativity of the United States when the competing visions of the Federalist and Democratic Republicans wrestled for primacy (*The Federalist and the Republican Party)*.

A. Birth of Administrative Agencies

Federal administrative agencies in and of themselves are not a recent development, with the first batch being created in 1789 (Pierce, 2002). However, today's alphabet soup of agencies has little in common with those original agencies, which were the State Department, the Department of Treasury, and the Department of War. In contrast to the three original agencies, there are currently so many administrative agencies that a comprehensive list doesn't exist (Crews, 2017). Depending on the source consulted, the number of existing administrative agencies runs from the Department of Justice's count of 119 (DOJ) to the Federal Register's tally of 457 (Federal Register). Regardless of the number, the place of power that many of these agencies have been allotted in our government is undeniable.

B. Administrative State

Critics of the administrative state have pointed to its rise as an abandonment of the principles of limited government in which the United States is rooted (Hamburger, 2014). Philip Hamburger warns that the executive branch's heavy reliance on administrative law harkens back to the absolutist monarchies supposedly left behind in Europe:

> Administrative law thus raises profound questions. Like the old absolute prerogative, it stands outside the law and even above it, and it consolidates the powers of government. The Constitution, however, was framed to bar any such extralegal, supralegal, and consolidated power. It therefore must be asked whether administrative power is unlawful—indeed, whether it is a return to absolute power (Id.).

The CDC's eviction moratorium clearly falls into the category of administrative agency decision made by an executive agency at the behest of the President (Millhiser, 2021). Hamburger warned of a legal constraint on the rights and privileges of Americans that was not enacted through the legislative process required by the Constitution, but rather via executive prerogative, a prerogative that does not exist under the Constitution (Id.).

CHEVRON DOCTRINE:

A. CARES ACT AND THE CDC'S MORATORIUM

In March 2020, the circumstances of the Covid-19 pandemic led Congress to pass the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) in hopes of forestalling the economic effects caused by the pandemic (Pub. L. 116-136, 134 Stat. 281). Congress included a 120-day moratorium in the CARES Act, protecting those residing in properties participating in any federal rent assistance program or financed via loans backed by federal loans from eviction (Id.).

The Cares Act moratorium expired in July 2020 amid a legislative impasse during which Congress did not act to extend it further. In August 2020, President Trump ordered the CDC to investigate whether extending the moratorium would be effective in reducing the impact of the ongoing pandemic (Executive Order 13945, 2020). Evidently, the CDC made the determination that an extension would in fact be helpful in the fight against Covid-19 because it imposed a new

moratorium which expanded far beyond the margins of its legislatively created predecessor. In fact, this new administratively created moratorium blanketed every residential property in the country, forbidding any eviction due to non-payment of rent or housing payment (Federal Register). Further, it threatened criminal consequences for its violation (Id.).

B. CDC's Eviction Moratorium

The CDC Eviction Moratorium was extended several times through the end of 2020 and into the summer months of 2021, all while causing tremendous debate over the legality of its order.

Many critics of the CDC Eviction Moratorium argued that the CDC did not possess the authority to issue an order that banned evictions across the entire United States (Berman et. al., 2021). The CDC claimed that it received the required authority from the Public Health Service Act of 1944 (*Alabama Assn. of Realtors, et al.*, 2021). The pertinent part of the act states:

> The Surgeon General, with the approval of the [Secretary of Health and Human Services], is authorized to make and enforce such regulations as in his judgment are necessary to prevent introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from on State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to sources of dangerous infection to human being, and other measures, as in his judgment may be necessary (42 U.S.C § 264).

This act originally gave the President of the United States the power to respond to a national pandemic and in this context was interpreted by the CDC as carte blanche to essentially take any action it deemed necessary so long as its aim was controlling the spread of some contagion or disease (*Alabama Assn. of Realtors, et al.*, 2021).

MORATORIUM CHALLENGED:

A. Alabama Association of Realtors

A group of plaintiffs consisting of Danny Fordham, Robert Gilstrap, several business entities controlled by Fordham and Gilstrap, along with the Alabama and Georgia Associations of Realtors (collectively, "Plaintiffs") filed suit in the United States District Court for the District of Columbia challenging the CDC's moratorium (Id.). The Plaintiffs challenged the moratorium on a multitude of grounds rooted in the Administrative Procedure Act (APA). including allegations that it exceeded the CDC's statutory authority, violated the notice and comment period requirement, and was arbitrary and capricious. Several constitutional claims were also made (Id.). The constitutional claims alleged that the CDC's moratorium violated the Takings Clause, the Due Process Clause, deprived the Plaintiffs of their right to access the courts, and violated the non-delegation doctrine (Id.).

B. Round 1: U.S. District Court

The Plaintiffs filed a motion seeking expedited summary judgment and the CDC responded by filing its cross-motion for summary judgment and its partial motion for dismissal (Id.).

The CDC relied on the trusty old Chevron Doctrine in the obvious hope that the court would afford it the same great deference that other administrative agencies have enjoyed under the doctrine when the propriety of their decisions and policies have been litigated (Id.). The court agreed on the applicability of the doctrine to the issues at bar; however, the result was probably not the one that the CDC expected (Id.).

The court decided as a threshold matter that the Chevron Doctrine applied to this case because the CDC's eviction moratorium "was clearly intended to have the force of law" (Id.). The first step under the doctrine is determining whether Congress has "directly spoken to the precise question at issue" (*Chevron U.S.A, Inc.*, 1984). If the answer to this question is "yes," then the inquiry is over and the second prong of the test is of no consequence (*Confederated Tribes Of Grand Ronde Cmty*., 2016). This first step really boils down to a question of statutory construction utilizing the traditional rules (*Alabama Assn. of Realtors, et al.*, 2021). In this instance, the court recognized that Congress had granted the Secretary a broad swath of rulemaking authority with Section 264(a) (Id.). However, the court held that this broad grant of authority was narrowed or limited by the sentence, "or purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to sources of dangerous infection to human being, and other measures, as in his judgment may be necessary" (Id.). Under the traditional *ejusdem generis* canon, the court held that the term "other measures" were limited by the list in the preceding sentence (Id.).

The court reasoned that any "other measures" adopted by the CDC had to be directed towards "animals or articles" that are either contaminated or infected to the degree they pose a risk of infection to people (Id.). The court succinctly explained that any rules or regulations enacted under § 264(a) must be directed towards specific threats discovered to be infection sources (Id.).

C. *Round 2:* Battle over the Stay

It was therefore a strange turn of events when the trial court stayed its own decision, pending its appeal (Id.). The Court acknowledged the extraordinary nature of such a stay as wandering into and impeding the normal administrative and procedural processes of appellate review (Id.). Further, the Court clearly described the wholly discretionary and subjective nature of a court's decision to stay a judgment, pending appeal (Id.).

A four-pronged test is used by courts in deciding whether to grant a stay, pending appeals. The four factors are 1) whether the applicant makes a strong showing of probable success on the merits; 2) whether the applicant will suffer irreparable damage without a stay; 3) whether a stay will substantially injure the non-applicant; and 4) the public's interest in the matter. In applying these factors, the Court noted that in the D.C. Circuit, the weight each of those factors should receive is "an open question" (Id., see also Nora v. Wolf, 2020).

The Court took the approach that the four prongs of the test were not absolute requirements and that a strong showing on one or more of them could outweigh a total dearth of evidence on one of more of the others (Alabama Assn. of Realtors, 2021). Accordingly, the Court discounted the CDC's inability to demonstrate a substantial probability that it would successfully appeal the judgment against it (Id.). Instead, it interpreted that prong as merely requiring the CDC to "raise a serious legal question on the merits," so long as the other prongs favor granting a stay (Id.). The Court granted the stay while candidly stating that while "there is not a substantial likelihood the Department will succeed on appeal, the CDC's nationwide eviction moratorium raises serious legal questions," which along with public health considerations justified the financial hardships landlords would suffer during the stay (Id.).

The plaintiffs filed a motion to vacate the stay in the District Court for Washington D.C. where the Court performed a relatively perfunctory abuse of discretion review. However, along the way it felt compelled to inject its own opinion that the trial court was wrong because the CDC *WAS likely to prevail on appeal before it* (Id.).

Next, the plaintiffs requested Supreme Court intervention to lift the stay (Id.). However, although the decision was close, a majority of the Court declined to intervene. A majority of the Court gave a pretty fair indication of their feelings, with Justices Thomas, Alito, Gorsuch, and Barret voting in favor of granting the motion to vacate. Justice Kavanaugh concurred with the majority's denial, but with a major caveat. Justice Kavanaugh took the time to write a brief concurring opinion that is noteworthy. He admitted that he believed the moratorium was unconstitutional, but its imminent expiration would, if allowed to die of its own terms, allow Congress and tenants time to take appropriate actions. Between those lines, one can clearly see his challenge to both Congress and the Whitehouse to "use this time to pass a bill giving the CDC the authority to make such a regulation or else." Justice Kavanaugh would learn his reward for such constitutional flexibility in very short order.

D. Supreme Court

And what did Congress do with this gift of time? Absolutely nothing. Members of the House of Representatives who supported the moratorium talked about it a lot but did not even take up the issue until the very last day of its summer session before adjourning for its lengthy summer vacation (Khan, 2021). Many amongst the current majority blamed their colleagues across the aisle, while others blamed President Biden for not calling for action until the day prior to the sessions' end (Id.). In particular, Speaker Pelosi said, "[r]eally we learned about this yesterday. Not really enough time to socialize it within our caucus to build… the consensus necessary" (Id.). This position was assailed by members of Pelosi's own party, including Representative Ocasio Cortez of New York, who pointed out that the Supreme Court's ruling came a full month before President Biden's call for action (Id.). However, Ocasio Cortez went on to blame the Executive Branch for not calling for action sooner (Id.). Apparently, a prerequisite to legislative discussion and action is presidential permission to engage in the business of legislation.

Rather than allow its moratorium to expire quietly, the CDC doubled down and reimposed it within days of its expiration on July 31, 2021 (86 Fed. Reg. 43244). It did this in the face of the

Supreme Court's ruling and knowing full well it would be very likely be struck down (Jones, 2021). Faced with this obstinance, the plaintiffs were compelled to once again, take on the procedural gauntlet of the Federal Courts.

The Plaintiffs returned to the trial court and requested that it vacate its stay (*Alabama Assn. of Realtors, et al.*, 2021). The Court expressed its belief that its original reasons for granting the stay were no longer valid (Id.). However, it declined to vacate its stay, believing itself bound by the D.C. Circuit's previous ruling upholding it (Id.).

After a perfunctory whistle stop in the D.C. Circuit (Id.) where it again refused to vacate the stay, the plaintiffs again found themselves before the Supreme Court seeking redress (Id.).

This time around, the Supreme Court sent a fireboat directly through the CDC's arguments.

In response to the CDC's assertion that § 361(a) authorizes it to take practically any action it self-deems necessary to combat Covid-19, the Court pointed out that the section's second sentence limits its authority to take actions and measures *directly* related to preventing interstate spread of disease. The Court also identified the wholly indirect and "downstream" nature of the moratorium as "markedly different from the direct targeting of disease" authorized by § 361 (Id.).

Next, and perhaps of more long-term value than the direct issue before it, the Court took a formal swing at the Administration State while noting up to "80% of the country" were covered by the CDC's Moratorium (Id.). The Court identified the CDC's actions as exactly the type of extreme exercise of power over economic and political issues that should not be lackadaisically delegated to administrative agencies absent clear statutory delegation of that power (Id.). It reiterated that such a delegation of so much power may only occur when Congress has clearly expressed its intention to do so (Id.). The Court also identified the moratorium for what it truly was at its core: a trespass into the purview of the States' authority to regulate the landlord-tenant relationship within its borders (Id.). Such a trespass by an administrative agency is untenable in the absence of "exceedingly clear language" expressing Congress' "intent to significantly alter the balance between federal and state power and the power of the Government over private property (Id.)."

Finally, the Court took pains to express a truth that should be self-evident and utterly without controversy in the legal world but has become perpetually endangered: the ends do not justify the means (Id.). While acknowledging the strong public interest in halting the spread of Covid-19, the Court noted "our system does not permit agencies to act unlawfully even in the pursuit of desirable ends…….[i]t is up to Congress, not the CDC, to decide whether the public interest merits further action here" (Id.). To be ultra-clear the Court's opinion closed with "[i]t is up to Congress, not the CDC, to decide whether the public interest merits further action here" (Id.).

AFTERMATH:

The parties reacted to the Supreme Court's ruling in wholly predictable ways.

First, faced squarely with the Supreme Court's writing on the wall, the CDC voluntarily dismissed its appeal, effectively conceding its loss (Id.). An overreaching administrative agency that is reeling from a Supreme Court slap-down really has not option other than concession. What is inexplicable is the vitriol directed at the Court for reaching the decision it had already telegraphed as unavoidable (Garger, 2021).

In contrast, and as would be expected, the plaintiffs celebrated their victory as a triumph of "mom-and-pops" over the overreaching hands of big government (*Alabama Assn. of Realtors, et al.*, 2021).

The rest of the administrative state failed to get the Supreme Court's very clear message and continued about its business. Several months after the Court's ruling, OSHA took it upon itself to mandate widespread vaccination against Covid-19, despite any clear Congressional delegation of such power (Federal Register).

CONCLUSION

The particular genius of the United States Constitution is that its proper application dispenses with emotion. This is not Machiavelli's United States where the ends justify the means, where good intentions justify the exercise of power never granted to an administrative agency comprised of unelected individuals. Only by continually striking down regulations made with the best of intentions can the citizenry be protected from regulations made with the *worst of intentions*. This is what makes the Supreme Court's decision in this case so important. By holding the eviction moratorium, a regulation made with the best of intentions, unconstitutional, the Court sent a very clear message to the other branches of government and the administrative state-the decades of deference that they have enjoyed are over.

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COMPLIANCE PEDAGOGY AND THE FUTURE OF THE INTRODUCTORY LEGAL ENVIRONMENT OF BUSINESS COURSE

LEE USNICK*

RUSSELL USNICK**

Several decades ago, legal compliance was equated with the idea that everyone was expected to obey existing laws. In a relatively short time, compliance has become much more. In response to new kinds of laws, legal enforcement systems, and technologies, the term has expanded sufficiently to generate dedicated departments in major enterprises, C-level and board level positions, and an expansive and rapidly growing support industry. This paper examines the present and near future implications of the quickly changing range of compliance functions as they apply to an introductory legal environment of business course.

I. INTRODUCTION

Legal compliance continues a rapid and expansive growth in every corner of the business world. This paper focuses on the implications of that reality on Bachelor of Business Administration (BBA) students' introduction to the legal environment of business. In particular, as legal compliance issues grow, what future pedagogical issues need to be addressed? The conclusions contained here are non-prescriptive and open ended, arguing for careful review rather than specific outcomes. While the discussion inherently raises some broad and ponderous issues, the purpose and focus of this paper is slanted toward relatively short term tactical issues regarding the pedagogy of a particular course in a particular setting.

The authors of this paper acknowledge a predisposition in favor of an active compliance focus in business law courses. This predisposition grows from the fact that both authors entered law school already credentialed, professionally certified, holding non-law graduate professional degrees, and considerable professional experience. Within four years of completing law school, both were full time graduate faculty teaching law courses in non-law and non-business management professional degree programs, one in health care law and the other in land use and environmental law. In both cases, these degree programs were, in the 1980's and 1990's, already deeply focused on all aspects of compliance as a crucial, central part of professional education with students moving directly from the classroom to formidable real world complex compliance decision-making employment.

II. THE NATURE OF COMPLIANCE

Compliance is the compulsory part of the law. When there is a legal rule, everyone is compelled to comply with the law. Failure to comply is a non-compliance and subjects a non-

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complier to penalties. Compliance and business are inherently closely entwined. This relationship between social boundaries and pursuit of business objectives dates to the earliest records of business transactions. A lot of compliance requirements have evolved from efforts to protect people, including customers, clients, workers, associates and the like. Additionally, the history of compliance requirements has a long record of attempting to guide and protect the entire business process, sometimes in a justified and successful manner, and sometimes in less than honorable ways. Stated another way, wrongdoers are a target of government regulators such as the Department of Justice.[1]

A. *Compliance Ideally*

Ideally, the parameters of any mandated compliance are crystal clear with distinct boundaries. Unfortunately, compliance efforts can be less than succinct and fail to readily indicate whether a particular course of action would comply. This can be the case particularly for companies operating globally.[2] Ideally, everyone would willingly and timely meet the compliance requirements in place, but the reality of day to day operations is not so accommodating. "Compliance…means different things to different people within a company based on factors such as the industry sector and the particular level of actors within a firm."[3] It is important to note that the existence of compliance requirements can often create considerable advantage to those choosing not to comply, but instead risking the penalties.

B. *Effects of Non-Compliance*

The level of non-compliance, or the perceived level of non-compliance, can result in an intensified focus on the compliance aspect of law and society. That is, if it is believed that there is sufficient non-compliance, then the focus on compliance issues heightens. In a simple setting, a sense that basic criminal laws are not sufficiently being followed might result in additional policing or higher penalties for non-compliance. As laws become more detailed and sophisticated, compliance measures tend to follow suit, becoming themselves more detailed, sophisticated, and complex.

C. *Increasing Compliance Complexity*

As the complexity of compliance rises, the attention given to that added complexity must inherently expand. A larger investment is made trying to understand the more complex boundaries of the mandated compliance. Since compliance can be both affirmative and negative, compliance can be in the form of mandating a particular act, or of prohibiting a particular act. In other words, at any given time, every person and entity need to be scanning to determine all of

[1] Kenneth A. Polite, Assistant Attorney General, U.S. Department of Justice, Remarks on the Criminal Division's Corporate Enforcement Policy, (Jan. 17, 2023), justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-georgetown-university-law.
[2] Robert L. Cassin, *Compliance Alert: Sometimes Companies Must Break the Law*, THE FCPA BLOG (April 1, 2021), https://fcpablog.com/2021/04/01/compliance-alert-sometimes-companies-must-break-the-law/.
[3] D. Daniel Sokol, *Teaching Compliance*, 84 U. Cin. L. Rev. 401, 399-419, (2018), https://scholarship.law.uc.edu/uclr/vol84/iss2/3 (discussing compliance risk as a driver of corporate behavior, how compliance means different things to different actors).

those possible actions that are affirmatively mandated, while also scanning to determine all of those possible actions that are specifically prohibited.

D. *Are We In Compliance?*

Eventually, there is an inflection point where the consideration of "what is the law" expands to "are we sure that we are in compliance." In recent United States history, the recognition of an expanded compliance awareness tends to occur topically. Major shifts in health care law and in environmental law quickly evolved in the 1960's and 1970's. Almost overnight, huge shifts in the scope of the laws quickly led to large-scale, complex compliance responses in the industries affected by the enhanced regulation.

E. *The Fast Growing Compliance Industry*

The most recent iteration of increased compliance complexity has created what can now be thought of as a compliance industry. On the C-level of many large enterprises, the title of CCO, or Chief Compliance Officer, or something similar, is now commonplace. Job descriptions, even at the lowest levels of organizations, include both specific and general descriptions of the expected compliance activities of the job holder. Compliance certifications covering a long list of business activities hang on office walls throughout most businesses, and increasingly include university based formal degrees.[4] Even non-profit organizations face a serious list of compliance requirements, some of which even apply to free, volunteer labor.

F. *Potentially Quasi-Legal Compliance Requirements*

The complexity of the current compliance framework expands beyond the simplistic "what is the law" in a number of ways. Along with all of the specific "laws" that are government created and enforced, there is an additional, tangential non-legal compliance world growing rapidly. Non-legal, or probably more correctly, potentially quasi-legal compliance requirements, grow out of an expanding world of certification which lies mostly outside the law.[5] Not a perfect example, but sufficient here would be a hypothetical private, and hence not *per se* legal certification stating that this company has met the specific requirements for that particular certification. Assuming that an organization achieves this certification falsely, and then proceeds to use it in a contract, in advertising, or in a myriad of other ways, the less than legal certification can take on now the status of failing to comply with a legal compliance standard.

G. *All Kinds of Compliance*

Initially students might think of compliance as a limited binary choice between compliance and non-compliance. Over time, characterizing any compliance regime might come in many forms, starting from intentional non-compliance and moving through numerous levels

[4] For university programs accredited by the Compliance Certification Board, see https://www.corporatecompliance.org/university-program.

[5] Michael Julian, *Measuring Compliance Performance Is the Future of Profession*, THE FCPA BLOG (Nov. 9, 2021), https://fcpablog.com/2021/11/09/measuring-compiance-performance-is-the-future-of-profession/ (discussing ISO 37001).

including casual non-compliance, passive non-compliance, unintentional non-compliance, unwitting non-compliance, accidentally but unwittingly complying, intentionally technically complying, complying in practice but not in spirit, full reasonable compliance, compliance above and beyond the standards, and compliance as a badge of honor. Over time, possible gradations grow as compliance regimes expand and mature.

H. *Recent and Current Compliance Trends*

In today's environment, it is clear that compliance approaches and standards are no longer static and in fact can be highly fluid. One set of compliance laws might have built-in conflicts with another compliance set of rules. Getting solutions or answers about such conflicts or apparent conflicts can be difficult. It is becoming common to add an aspirational framing consideration to aid the enterprise in understanding the regulatory intent, and also to give the regulators tools to explain the ultimate character of the compliance expected from the regulated.

I. *A Changing Set of Compliance Framework Terminology*

Often the characterization of the regulators' desired underlying framework of a mandated compliance results in more questions than answers. Just what is an attitude of compliance? How do corporate culture, ethics and legal environment integrate into the compliance formula? How do we differentiate a culture of compliance from compliance consciousness, especially in the context of expecting that compliance demands unrelenting constant vigilance? How do we explain full organization engagement in the pursuit of getting critical right-sizing of all aspects of compliance? How do we derive what the law wants as compared to what it does not want with regard to the particular compliance issue?

These questions on an array of similar considerations try to demonstrate the changing nature of the compliance framework. It is also important, however, to keep in mind that the compliance systems, expectations, and responses that an enterprise undertakes in the current compliance system face more than an evolving external compliance environment. The enterprise itself is changing and evolving internally as their responses to each compliance wave create reactions within the enterprise which further alter the compliance systems and attitudes of the enterprise, especially in a global business environment.[6]

J. *The Search for the Best Description of Current Compliance Approaches*

The past several decades have given rise to a stream of terms and concepts thought to encapsulate the thrust of compliance in a meaningful and thoughtful way. One current attempt embraces the all-encapsulating phrase of Environment, Society and Governance, or ESG. This over-arching umbrella concept is intended to convey the idea that an enterprise must be acting as a good corporate citizen on this very broad plain. The current framework tries to place an enterprise in concert with all of the complex compliance rules, and additionally directly impact the large local, national and global social issues of the day.

K. *Compliance and the Future*

[6] D. Daniel Sokol, *supra* note 3, at 406.

Looking forward is no longer only about basically complying, but it is about complying in a way that does the least damage or cost possible. This seems likely to place a heavy focus on broad issues like transparency, disinformation, and anticipatory mitigation. It will call for more efforts to attack avoidable future non-compliance, and will probably come to mean that compliance on the large scale actually means compliance on all scales. Compliance will need to become more future looking, searching for potential weaknesses that can be prevented or mitigated.[7] The same rationale will require anticipating the rollout of the next iteration of compliance regulations. The Department of Justice's 2020 Guidance calls for more proactive, forward-looking strategies, and less backward looking at past failures, resulting in a more future oriented compliance regime.[8]

L. *Artificial Intelligence Next*

It is clearly reasonable to expect that there will continue to be a growing number of compliance expectations from an increasing number of entities with broad rule-making authority. It is also reasonable to expect that into the future not only will there be more rules, but the rapid growth of artificial intelligence (AI) in all things compliance will continue expanding at an accelerating pace. Expect AI involvement to continue to alter the entire compliance spectrum in massive ways for the foreseeable near future.[9]

M. *Eventually, Holistic Future Oriented Responses*

Another aspect of the near future of compliance will be rapid response. The faster pace will affect both the creation of rules, and also the expected response from those being regulated. Tied to this will be a closer relationship between compliance and foresight as both regulators and entities strive to be more agile in all aspects of compliance.[10] Anticipatory compliance planning is likely to enjoy considerable growth as a necessary part of compliance.[11] This will likely be accompanied by the need for rolling forecasts as the anticipation and mitigation movements expand. Sooner or later, the idea of holistic compliance will replace the established view of compliance as a set of separate responses to separate issues controlled by separate regulations.

N. *Statutory Standards and the Future*

Along with the convergence of the various single regulation approaches to compliance, there will become a growing view that the statutory minimum requirements merely define

[7] Tom Fox, *An Underutilized Tool in Compliance – Forecasting*, THE COMPLIANCE & ETHICS BLOG (Feb. 9, 2017), http://www.complianceandethics.org/underutilized-tool-compliance-forecasting/.

[8] Lisa Monaco, Deputy Attorney General, U.S. Dep't of Justice, Remarks at American Bar Assn. National Institute on White Collar Crime (Mar. 2, 2023), justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement.

[9] Fortune + Deloitte, *Does Your Company Need a Chief A.I. Ethics Officer, an A.I. Ethicist, and A.I. Ethics Council, or All Three?*, https://brand-studio.fortune.com/deloitte/does-you-company-need-a-chief-a.i.-ethics-officer-an-a.i.-ethicist-an-a.i../?prx_t=5YcGAErBKAoPEQA.

[10] Tom Fox, *supra* note 7.

[11] Tom Garruba, *Making Anticipatory Compliance Your New Best Practice*, CORPORATE COMPLIANCE INSIGHTS (Oct. 4, 2019), https://www.corporatecomplianceinsights.com/anticipatory-compliance-best-practice/.

absolute minimum effort. It appears that eventually the necessary level for establishing adequate compliance will need to be far beyond a mere technical statutory minimum in each single category. Integration of effort across business compliance is the logical endgame.

II. PEDAGOGY AND COMPLIANCE

Assessing the match between compliance and pedagogy mostly raises questions. What do we expect our students to take away from the BBA experience? How does the whole spectrum of business law through compliance and ethics help us answer the first question? What part does the introductory legal environment of business course play in relation to the rest of a student's total curriculum? To what extent should we expect commonality in the teaching of an introductory legal environment of business courses among individual BBA students, BBA students in the same majors, BBA students in the same departments, universities, states, and so on? How do we deal with the impact of the rapidly evolving diverse external and internal compliance environments?

Questions such as these are at the core of any pedagogy discussion. In the end, the pedagogy of compliance, like any topic, is one that must give careful thought to the standards set based on consideration of the classic range asking who, what, where, when, why and how.

A. *A Very Brief American Business Law Pedagogy History*

In the 1800's, as business expanded as a university area of study, the need for knowledge of at least the basics of contract law and related transactions emerged. The need for some knowledge about legal transactions consistently grew through the first half of the 1900's.[12] By mid-century, legal concerns evolved into a fairly standard formula where business students took one three hour course in general business law often followed by another three hour course heavily focused by commercial law and related transactions. In some places this six hour, two course model still holds.

Since that time, business law was expanded into the legal environment of business.[13] It was often reduced to a single three-hour course in the process. Along the way, a minimum introduction to business ethics was added to the legal environment of business course. While this was underway the laws that affected business and demanded compliance were exploding. The clear trend is less of the students' course time to prepare for an ever more complex and demanding compliance environment.

Throughout this history, the role of compliance has mostly been an unspoken component. Perhaps the best way to describe the university general framework that still survived was that the student was taught the law with a tacit, but seldom openly acknowledged caveat that the student was expected to comply with the laws they were taught, and they implicitly, but mostly silently agreed to the *quid pro quo*. As ethical lapses occurred, the added business ethics elements in the curriculum served as the reminder of the broad agreement that the university does not teach and student does not learn about the law for purposes of non-compliance.

[12] Robert Bird, Janine Hiller, *Rediscovering the Power of Law in Business Education* (Feb. 23. 2016), https://www.aacsb.edu/insights/articles/2016/02/rediscovering-the-power-of-law-in-business-education.
[13] *See* Carol J. Miller, Susan J. Crain, *Legal Environment v. Business Law Courses: A Distinction Without a Difference?* J. of Legal Studies Ed., vol. 28, 149-206 (2011).

B. *Is It Time To Consider An Updated Compliance Pedagogy?*

There is a plausible argument that the student, the teacher, the university, and the community do not have common, identifiable boundaries between business law, legal environment of business, business ethics, and compliance. As more and more of the business community deals with the growing need for substantial compliance efforts, the need for a more comprehensive and integrative approach will force a more formidable framework for compliance generally designed to serve all of the stakeholders. The entire broad community of stakeholders has serious interests to be served by appropriate, comprehensive compliance.

There does seem to be a need for examining the stresses on this system in light of the fact that the implied student duty to comply with the law is somewhat offset by business ethics and economics discussions that discuss avenues and situations where the implied compliance mandate could be side-stepped. This issue has serious implications to the underlying design of the course. It carries in it threads of a classic business school dilemma, educate BBA students for the boardroom where we hope they will spend some of their career, or for the warehouse dock which may more likely be the actual first managerial experience for the young BBA graduate. The current and expected future state of compliance make this trade-off a complex issue. In the end, the ethical implications of the on-going expansion of compliance is, by itself, a basis for arguing that compliance pedagogy as applied to an introductory legal environment of business course is warranted.

C. *Newest AACSB Guidelines*

The 2020 AACSB Standards and Interpretive Guidelines add some interesting dimensions to this issue.[14] The core document suggests that matters like those discussed in this paper should be a part of an analysis that asks what is appropriate for these particular students, in these particular programs, in this particular university, and in this particular community. Within this framework, it would appear to be legitimately possible and reasonable that one university could elect to totally ignore this paper and continue their *status quo*, while another university on the other side of the same city could conclude that their students, their programs, their university and their community calls for major revisions with how compliance is addressed. The underlying suggestion is that issues like the ones covered in this paper are beyond a "one size fits all" formulation.

D. *What Students Need to Know*

Students need to understand that compliance is or soon will be a part of everyone's work world. They need to know that compliance is everywhere and that it is not going away. They need to know that compliance is a discrete industry. They need to know that compliance is important for staying out of jail. They need to know that compliance is important in avoiding criminal or civil fines. They need to know that compliance is about not being a danger to themselves, their enterprise or to their employer. And they certainly need to know that the

[14] AACSB 2020 Guiding Principles and Standards for Business Accreditation, https://www.aacsb.edu/educators/accreditation/business-accreditation/aacsb-business-accreditation-standards (effective July 28, 2020, updated July 1, 2022).

chances of getting caught for non-compliance are going up rapidly every day. They need to know that more and more AI is focused on catching non-compliance, using both internal risk assessment and external risk assessment tools.[15]

E. *What Students Might Like to Know*

They might like to know that there are numerous of compliance jobs. They might like to know that many of these jobs pay well. They might like to know that many of the jobs do not require advanced degrees. They might like to know that there are many, many general and specialized certifications available. They might like to know that understanding compliance can result in better sleep and a generally calmer trajectory to their professional lives.

F. *Core Pedagogy*

There will always be an interplay between law, ethics, and compliance. Students will have to understand and work in the new compliance environment, and they will have to have that introduction somewhere. On many levels, the legal environment of business faculty are the ideal source for the messages that students need to take with them post-graduation. One way of viewing the pedagogy of the compliance world today is that the university has failed if the student ends up in jail or fined for non-compliance.

G. *The Compliance Pedagogical Balance*

The complexity of the evolving compliance environment coupled with the large demands already on the typical introductory legal environment of business course require a careful evaluation and balancing process. Likewise, balancing compliance theories with tactical compliance tools is essential. As with other areas of the introductory legal environment of business course, deciding between fewer topics in more depth verses more topics covered in less depth is central in the compliance pedagogy discussion. Compliance-specific training will have to address directly the balancing between concepts that will be of immediate value to the student verses concepts and tools for later in their management careers. Much of the critical balancing will likely evolve by gradual, progressive inclusion of the compliance realities into many parts of the numerous current courses in a BBA curriculum.

H. *Closing Thoughts*

It will probably be necessary, sooner or later, to acknowledge that the compliance world is changing a lot faster than the typical introductory legal environment of business course is changing. Compliance is a topic that both academically and in practice calls for an ability for reflective thinking. Compliance will evolve in many less than apparent ways, one of which will be some serious changes in the role of trust throughout the entire compliance spectrum. In the end, what works for everyone is searching out synergies, consolidation, integration, and harmonization. And finally, of course, more high quality compliance everywhere.

[15] Yogi Arumainayagam, *How AI Can Benefit Compliance*, THE COMPLIANCE & ETHICS BLOG (Mar. 13, 2023), https://www.complianceandethics.org/how-ai-can-benefit-compliance/.

ETHICAL IMPLICATION OF SUBSIDIES FOR PRE-K THROUGH 12TH GRADE PRIVATE SCHOOLS IN TEXAS: AN ANALYSIS OF TEXAS S.B. 1, 88(3) Leg. (2023)

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ABSTRACT

This paper investigates the ethical implications of the 2023 Texas Senate Bill 1, that would allow up to an $8,000 subsidy for the families of eligible students enrolled in a pre-K through 12th grade private school and up to a $1,000 subsidy for the families of eligible pre-K through 12th grade homeschooled students. The paper studies the Texas' history and goals with regards to funding schooling from pre-K through 12th grade; discusses the proposed bill for school vouchers in Texas; evaluates the results from past voucher programs; and, finally discusses the ethical implications of providing state subsidies for private school education, from both utilitarian and deontological perspectives. The paper finds the current voucher system fails both rule utilitarianism and deontology, but may under specific circumstances be acceptable under both act utilitarianism and deontology.

KEYWORDS: School Vouchers, Ethics, Private Schools, Texas Senate Bill

INTRODUCTION

This paper investigates the ethical implications of the 2023 Texas Senate Bill 1 that would allow up to an $8,000 subsidy for the families of eligible students enrolled in a pre-K through 12th grade private school and up to a $1,000 subsidy for the families of eligible pre-K through 12th grade homeschooled students. The paper studies the Texas' history and goals with regards to funding schooling from pre-K through 12th grade; reviews the proposed bill for school vouchers in Texas; examines the implications of voucher programs on quality of schools and student education; looks at the failure rate of private schools accepting vouchers; considers the impact of vouchers on consumer sovereignty and financing; looks into the impact of school vouchers on segregation and racism; and, finally, discusses the ethical implications of providing state subsidies for private school education, from both utilitarian and deontological perspectives.

HISTORY AND GOALS OF K-12 SCHOOL FUNDING IN TEXAS

The beginning of vouchers for K-12 education can be traced to 1957, when the Texas House approved a bill that would have given any family that withdrew their child from an integrated school a "tuition grant" to attend a private school. (Texas H.B. 235, Leg. [1957]). Decades later, voucher supporters argue that, instead of helping white students leave an

integrated public school, modern private school choices should give students of color access to private schools that can better meet their needs. (Phillips, 2023).

In 1993, the Texas legislature added Chapter 41, Wealth Equalization Options and Procedures, to the Texas Education Code, with the goal of creating equity of funding among Texas school districts regardless of the property taxes collected in that district (TEA, n.d.; Villanueva, 2018).

In 1994, a Texas Supreme Court decision recognized home schools as one form of private school. Thus, vouchers could be used to subsidize home schooling with absolutely no accountability for the use of public funds, and parents could have considerable funding from the state to keep their children at home (Frels and Thomson, 2015).

Between 2015 and 2017, the Texas House rejected voucher proposals that sought to subsidize a voucher equal to 60 percent of the average cost of providing schooling to a student in public school (Schwartz, 2024; Frels and Thomson, 2015). As observed by some critics, the state of Texas currently contributes an average of 45 percent of the total cost of a student's education, with the remainder paid by local property taxes. In some school districts, the state contributes significantly less than the voucher amount proposed to be distributed from state funds (Frels and Thomson, 2015).

For the state property taxes collected that are subject to recapture, Texas uses a formula to calculate the amount of funding to be allocated to each school from the taxes received based on the number of students. It then allows adjustments for area cost of living, which may require higher teacher pay, and student demographics that have been identified as requiring more resources, such as disabled students and low-income students (Swaby, 2019; Villanueva, 2018). Under the recapture laws, school districts that collect more money than the state calculation allows based on student enrollment with allowed adjustments, must give the excess money to the state (Swaby, 2019; Villanueva, 2018). The state allocates this money among charter schools and poorer school districts (Swaby, 2019; Villanueva, 2018).

VOUCHER PROPOSAL FOR K-12 PUBLIC SCHOOL FUNDING IN TEXAS

The 2023 Texas Senate Bill 1 proposed allowing up to an $8,000 subsidy for the families of eligible students enrolled in a pre-K through 12th grade private school and up to an $1,000 subsidy for the families of eligible pre-K through 12th grade homeschooled students (Texas S.B. 1, 88[3] Leg. [2023]). The stipend can be spent on a variety of items including, but not limited to, tuition, textbooks and other instructional material, uniforms, costs for academic assessment, private tutor service, transportation from a fee-for-service transportation provider, and for an outside educational provider (Texas S.B. 1, 88[3] Leg. [2023]). All school age students who are Texas residents, except for the children or wards of current Texas state representatives, Texas state senators, or Texas statewide elected officials, would be eligible, with a lottery being used if there is not enough funding in the program to meet demand (Texas S.B. 1, 88[3] Leg. [2023]). If the lottery is required, then 40 percent of slots will be reserved for eligible children or wards in households at or below 185 percent of the federal poverty level, 30 percent of slots will be

reserved for eligible children or wards in households above 185 percent and below 500 percent of the federal poverty level, 20 percent of the slots will be reserved for eligible children or wards with disabilities, and any remaining slots would be open to eligible children or wards not in the other categories (Texas S.B. 1, 88[3] Leg. [2023]). School districts with under 5,000 students who experience a net decline in enrollment due to students participating in the voucher program, will receive $10,000 per child for the first three years the child is in the voucher program, provided the child remains in their district (Texas S.B. 1, 88[3] Leg. [2023]).

In November 2023, despite the pressure exerted by Texas Governor Greg Abbott, the Texas House of Representatives voted against vouchers for private education in Texas (Despart and Lopez, 2023). Opponents of the bill stated concerns about diverting money from the public school districts and a lack of private school infrastructure in rural areas (Despart and Lopez, 2023). Representatives of rural Texas communities expressed concerns that as funding was transferred from public schools to private schools every Texas school district would be harmed, with the smaller schools, like the ones in their districts with minimal budget margins, being impacted the most (Findell, 2023).

Even with this recent vote, the topic of vouchers continues to be important in Texas as voucher supporters plan to continue advocating for this legislation (Pandey, 2023), and as other states have passed voucher bills similar to those currently being advocated in Texas (Findell, 2023).

RESULTS FROM PAST VOUCHER PROGRAMS

Historically, voucher programs have varied from targeting select demographics, such as low-income or special education, to being open to all students within a geographic location. This section examines what researchers have learned from these various programs. It must be noted that voucher programs are also called scholarship programs, and, to work around potential court issues with funding private schools, some states issue tax credits (Povich, 2013). Voucher programs, scholarships programs, and tax credits all work in a similar manner; parents receive funds to put their child in a private school of their choice. This paper refers to all of these programs collectively as voucher programs.

Increased Competition

In 1955, Milton Friedman posited that the federal government, by allowing parents vouchers that enable them to send their children to a private school of their choice, ensures competitive pressures on the school system that will make the public school system better (Friedman, 1955). In practice, studies have shown mixed results with regards to increased competition between schools increasing the overall quality of education for students (Carnoy et al., 2007). As an example, Carnoy et al. (2007) found mixed results related to Milwaukee's voucher program. There were positive increases in public schools two years after the program launched, but there was no clear correlation between the number of students at risk of using vouchers and improvements in public schools (Carnoy et al., 2007). The authors also did not see

improvements past the first two years, but it is possible this could be explained by better students leaving the public schools to use the voucher program, and thus possibly the fact that the public school is maintaining the same level of education is demonstrating improvement (Carnoy et al., 2007). Studies have found improvements in public schools that face more competition, but these improvements could also be explained by alternate factors for which the studies were unable to control (Epple et al., 2017; Rouse and Barrow, 2009). For example, Florida's voucher program allows students who go to a school that scored a failing score, based primarily on student performance, to have the option to use a voucher to attend another school (Rouse and Barrow, 2009). Schools with failing scores are given additional resources and more administrative oversight (Rouse and Barrow, 2009). Rouse and Barrow (2009) posit that an alternative motivator could be a stigma effect that motivates teachers. Additionally, the extra funding and increased administrative oversight may also be factors that increase school performance.

Impact on Students

Students in Indiana and Louisiana who attended private school using vouchers subsequently later demonstrated reduced scores on reading and math tests compared to their direct peers that stayed in public schools (Dynarski, 2016). Over the past few decades, there has been extreme pressure on schools to improve student test scores (Dynarski, 2016). This pressure has resulted in public schools closing the test score gap that used to be present with private schools (Dynarski, 2016), thus demonstrating that there are alternative ways to increase the overall quality of public school education. Reviewing the prior literature on school vouchers, Epple et al. (2017) found no evidence that vouchers are a dependable way to ensure increased educational results, with most studies finding no significant difference when vouchers were awarded and more recent studies finding a mix of positive and negative test score results for students who utilized vouchers. The positive effects indicate that specific subgroups may benefit from vouchers, but the majority of students see no significant impact or are negatively impacted (Dynarski, 2016).

Examples of where specific subgroups were impacted is in New York City. Cheng and Peretson (2021) posit that students from backgrounds with lower opportunities for social mobility, less money, and fewer social networks may be harmed by the use of vouchers. They found minority black and hispanic students using vouchers in New York City were more likely to go to college and graduate if their mothers had some college education or if they came from a higher-income household; however, if their mothers had no education or they came from a lower-income household, there was no significant difference in college education outcome (Cheng and Peterson, 2021). The impact of demographics on student success with vouchers may account for the lack of significant difference in college attendance for low-income students who took advantage of the voucher program in Washington, DC (Chingos and Kisida, 2023). Another example is with children with disabilities who, with vouchers, are able to attend highly specialized schools that can provide access to accommodations that public schools do not have

the ability to provide; the Supreme Court has upheld the use of vouchers in these situations (Tang, 2019).

A lack of common values and knowledge base among students has been mentioned as a possible disadvantage to the voucher system. Specifically, because of a lack of regulation of private schools, topics and values taught may vary widely, resulting in more bias than that would be received with a public education, creating dissimilar common experiences among our society and resulting in a less effective democracy (Tang, 2019).

Private School Failure Rate

Exploring the failure rate of private voucher schools participating in the Milwaukee school voucher program that existed between 1991 and 2015 and went out of business, Ford and Andersson (2019) found evidence that 41% of the schools failed. Start-ups, schools in existence less than ten years, and schools not affiliated with a larger organization, such as a religious organization, showed higher rates of going out of business (Ford and Andersson, 2019). Additionally, Ford (2016) found that voucher schools that were lower-performing closed at a higher rate relative to voucher schools who were higher-performing.

Consumer Sovereignty

The arguments for consumer sovereignty, also introduced as liberty, revolve around allowing parents the right to direct their child's education regardless of their geographic location and income (Tang, 2019). It eliminated the state's ability to unilaterally determine what should be taught and how students should be trained to think (Tang, 2019) and, instead, empowers parents to make this decision.

Financing

The use of vouchers limits the government involvement to a financial one that is capped at the voucher amount granted per student. The federal government and states may even save money. In most U.S. voucher programs, the voucher amount is equal to or less than the state's formula for calculating the cost per student (Aud, 2007); this would indicate states may actually save money per student. Proponents argue the reason for this is that private schools are more efficient (Tang, 2019). However, other financial considerations include federal funds that would be lost for each voucher, which otherwise would be used to help educate low-income children, students with disabilities, and provide breakfast and lunch programs and technical/vocational education, as well the concerns around the lack of accountability for how vouchers would be used, including whether parents could pocket the funds allocated through vouchers (Frels and Thomson, 2015).

It has been noted that public schools do lose the per student allocated funding resulting in a decrease in funds to the public school (Tang, 2019). Proponents of vouchers say this is mitigated by the loss of cost to teach the student, and, overall, the public school may still have positive funding because it maintains the fixed amount of funding it receives from the local tax

base (Aud, 2007). This latter argument only works if the cost of educating the student is more than the funding provided by the state. Actions by states and local governments indicate the tax savings may not be present. When it started its voucher program, Alabama set aside 40 million dollars to absorb anticipated losses (Povich, 2013), and, in Wisconsin, some districts have raised taxes to offset the funding loss from voucher programs (Johnson, 2015). Part of the cost difference may be that many of the costs, such as teachers, may be a step variable cost and cannot be decreased in direct proportion to students using vouchers. Johnson (2015) cites a Wisconsin State Schools Superintendent who stated five teachers cannot be laid off with the transfer of a few students, enforcing the idea that this is more of a step variable cost. In addition, some costs, such as building maintenance and janitorial services are fixed costs and do not change with enrollment.

Additionally, in many rural communities, vouchers have the potential to be detrimental to the local communities. Often the school district is one of the largest employers and provides entertainment in the form of athletic events and scholastic competitions (Findell, 2023). The schools also provide training in trades, such as welding and meat processing and as part of their training, students help with home repairs for families in need (Findell, 2023). While, because of the lack of private schools available, it is less likely that rural schools will lose students to private schools, the schools will still be impacted by less funding available to their schools because of the tax dollars being redirected to private schools (Findell, 2023). Therefore, rural communities will potentially receive less funding, causing the quality of the education offered to decrease without the added benefit of having the option to send their students to high quality private schools.

Finally, individual households may be negatively impacted by their choice of schools. Many private schools lack a bus service and require extra fees to participate in many of the extracurricular activities, making access to the school and participation in school activities more challenging for poorer students whose parents may lack the funds for the extracurricular activities and may not have compatible work schedules or the means to drop off and pick up the students from school. Moreover, lower income families often rely on the free lunches provided by the National School Lunch Program and breakfast provided by the School Breakfast Program. These programs only serve public and non-profit private schools (Texas Department of Agriculture, 2024a and Texas Department of Agriculture, 2024b); students attending a for-profit private school, homeschool, or online school may be ineligible or have difficulty obtaining these meals that help to ensure their nutritional needs are met.

Segregation and Racism

Many voucher programs focus on low-income families and have capped amounts for the vouchers (Tang, 2019). This makes it difficult for low-income families to attend elite private schools that either cost more than the voucher, which the low-income families cannot afford, or do not accept vouchers (Tang, 2019). This may still give an advantage to wealthy families who can afford the tuition requirements of elite private schools (Tang, 2019). Even if low-income

students are able to attend private schools, they will be treated differently because of their lack of ability to participate in some activities that cost extra and their potential lack of ability to have the resources that other students do.

Proponents of vouchers have indicated that the use of them can give low-income families, many of whom are families of color in poorer school districts, access to private schools (Gooden et al., 2016). This may be effective, but would need to be broadly implemented (Gooden et al., 2016). However, the effectiveness of a voucher program will be dependent on the level of disadvantage with which the student starts. Those with the highest level of disadvantage, defined as lower opportunities for social mobility, less money, and fewer social networks, may see no difference in college completion (Cheng and Peterson, 2021).

Additionally, there may be an issue with admissions, since private schools are able to set their own criteria for enrollment, and it may be difficult to ensure equal access to private schools that may limit their admissions based on criteria such as race, gender, and/or sexual orientation (National Education Association, 2024).

ETHICAL IMPLICATIONS OF VOUCHER SYSTEM

This paper looks at the ethical implications of implementing a voucher system in Texas from a deontological and utilitarian point of view. Deontological ethics evaluate actions independently of their consequences; it is a rights and duties based approach, focusing on moral principles or duties and their consistency with fundamental rights that individuals are seen to possess, including life, liberty, and personal safety. Utilitarian ethics focuses on the outcomes or consequences of actions, evaluating actions based on the ultimate balance of happiness and suffering they produce.

The impact of overall school quality caused by public schools competing with private schools and the impact on student improvement, if a voucher system was implemented, has mixed results (Carnoy et al., 2007; Rouse and Barrow, 2009; Dynarski, 2016; Epple et al. 2017; Tang, 2019; Chen and Peretson, 2021), with an indication that specific subgroups, such as the disabled, may benefit from vouchers (Tang, 2019). Finally, the effectiveness of the voucher program on low-income students will vary. Many elite private schools either do not accept vouchers or cost more than the vouchers provide, resulting in limited access to these schools by poorer demographics resulting in a lack of uniform access to this level of quality education using voucher programs (Tang, 2019). Additionally, even if the tuition is covered in full, many private schools lack a bus service and require extra fees to participate in many of the extracurricular activities making access to the schools and the activities that would make the school beneficial to the student limited. Moreover, lower income families often rely on the free lunches and breakfasts provided by the National School Lunch Program and the School Breakfast Program.

These programs only serve public and non-profit private schools (Texas Department of Agriculture, 2024a and Texas Department of Agriculture, 2024b); students attending a for-profit private school, homeschool, or online school may be ineligible or have difficulty obtaining these meals that help to ensure their nutritional needs are met. It is not surprising that Cheng and

Peterson, 2021 found that the effectiveness of a voucher program will be dependent on the level of disadvantage with which the student starts. While minority students with mild disadvantages may be significantly helped, minority students with the highest level of disadvantage, defined as lower opportunities for social mobility, less money, and less social networks, may not be helped by a voucher program (Chen and Peterson, 2021).

Additionally, when a student transfers, the school funding decreases to public schools (Tang, 2019), and this impacts a public school's ability to cover the costs of programs, teachers, and fixed costs that do not change with enrollment size, which may ultimately lower the quality of education received in public schools or increase the taxes levied on the community (Johnson, 2015). While there are proponents that posit the lower cost per student that needs to be paid for by a voucher program is beneficial to the state, this is assuming there is no potential need to further supplement state school funding. The private school failure rate is 41% in schools participating in Milwaukee's school voucher program (Ford and Andersson, 2019), which indicates the amount paid per student may not be enough. Additionally, the failure of a private school may negatively impact the progress of students as there is also the inability to ensure a uniform set of common values and knowledge, because private schools do not have the standardized education criteria that is implemented in public schools (Tang, 2019). This means that as a private school fails, its students who may have been exposed to unique learning criteria must be integrated into other schools, possibly setting the students back in their education as they may end up relearning things they have already learned and/or miss items that have already been covered by their new school, but were not yet covered or would never have been covered by their private school.

A voucher system may also impact Texas communities. Often in rural communities, the school district is an integral part of the community providing one of the largest employers and entertainment for the community (Findell, 2023). A voucher system will lower the funding available to these schools because of the tax dollars redirected to private schools (Findell, 2023). Therefore, this will potentially reduce the quality of the education and benefits offered to rural communities who often lack a private school option because private schools are just not located in these communities. Moreover, common values needed for a democracy are taught in public schools. These may not be found in private schools, which lack a regulated curriculum, resulting in a diminished democratic process.

As indicated above, segregation and racism, either through process of acceptance, natural dollar limitations of the voucher programs, and/or design of the system, are potentially problematic under a voucher system. However, one must consider that a voucher system can also result in low-income families in poorer school districts having access to private schools.

Also, the arguments for consumer sovereignty are strong with the voucher system, allowing parents the right to direct their child's education regardless of their geographic location and income (Tang, 2019).

Overall, these items indicate that for the majority of students and taxpayers, the voucher system may not result in the best consequences, resulting in the system not meeting the criteria

for rule utilitarianism. However, for select demographics that have been shown to strongly benefit from a voucher system, act utilitarianism would support the system. From a deontological perspective, the only item discussed here that might impede a person's right to life, liberty, and personal safety, would be access to the free school breakfasts and/or lunches that a student may not be eligible for at all voucher schools. Because of this threat to life, rule deontology would not support a school voucher system. However, barring this, voucher systems do allow for more liberty of choice for parents, and, as long as a voucher program is implemented using the proper legal process, act deontology would allow it provided the students who required subsidized meals were still able to receive them.

CONCLUSION

In conclusion, based on the current bill proposed, rule utilitarianism and deontology would not support the passage of the bill. However, for specific purposes, both act utilitarianism and deontology would support the use of school vouchers.

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LONG-TERM CARE FOR THE ELDERLY: EXAMINING A MODEL TO ADDRESS CERTAIN ISSUES INVOLVING THIS GROUP

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Abstract

The authors address the basic issues and challenges of long-term care as it exists currently and present a model to note the various aspects of long-term care for the elderly. Although both federal and state laws may address this area, this article focuses only on federal law. Accordingly, the article includes a discussion about the history of long-term care, provides a basic understanding of long-term care, and includes information pertaining to issue prevention. Thereafter, the article concludes will some overall thoughts about long-term care for the elderly.

I. Introduction

"*The true Measure of any society can be found in how it treats its most vulnerable members.*"

- Mahatma Ghandi

An elderly World War II veteran was required to be admitted into a nursing facility after suffering a stroke. Later, the family learned that he passed away. However, it was later disclosed that he endured issues concerning bed sores while at the facility. Further, he also sustained a hip fracture and a number of ulcers towards the end of his stay at the nursing facility (Freking, June 18, 2008).

In today's complex and demanding environment, situations like the elderly World War II veteran requiring long-term care, may occur. It is important that care is provided and properly monitored to facilitate a quality and healthy environment for the elderly. However, while trying to provide for the elderly requiring quality and varied long-term care, it can be an extremely challenging endeavor for families ("Nursing, History, and Health Care," n.d.). In many instances, much effort is expended to ensure that proper and necessary care which is needed by the resident may be obtained. Further, most often, this type of long-term care is administered at home. However, providing long-term care at home may also result in its own unique difficulties and disruptions to the family's daily activities and environment. As a result, certain components of family life that may be affected involve finances, caregiving, resourcefulness, and may put much strain on the family in numerous ways ("Nursing, History, and Health Care," n.d.). In essence, these elderly residents may require a variety of needs which may prove quite difficult to provide for the family.

Understandably, medical situations and various circumstances may necessitate the need for an individual to move into a nursing long-term care facility for an extended stay. Unfortunately, these types of facilities may have their own unique challenges to the person in need of these services as well as that person's family. The facility may not provide adequate, or quality care and the resident may endure many other physical or mental concerns ("Nursing, History, and Health Care," n.d.). Accordingly, it is the needs of the chronically ill resident that do not get better and stay in this condition for an extended period of time that may produce the most challenges ("Nursing, History, and Health Care," n.d.).

Accordingly, to provide an understanding of long-term care in today's environment, the authors address the basic issues and challenges of long-term care as it exists currently and present a model to note the various aspects of long-term care. Although both federal and state laws may address this area, this article will focus only on federal law. The article discusses in part II the history of long-term care, provides a basic understanding of long-term care in part III, provides information pertaining to issue prevention using a long-term care model in part IV, and concludes will some overall thoughts about long-term care for the elderly in part V.

II. History of Long-Term Care

During the nineteenth century and early part of the twentieth century, the responsibility of providing long-term care to the elderly was considered primarily a responsibility of the family (Nursing, History, and Health Care, n.d.; Talley & Crews, 2007). In some instances, close friends provided this care. However, not surprisingly, families or people who assisted others during these difficult times that had financial means were able to hire and obtain the necessary medical persons and care.

Of note, institutions such as hospitals were only considered for those without families or friends who would provide assistance ("Nursing, History, and Health Care," n.d.; Talley & Crews, 2007). Additionally, providing care to those with long-term needs was rarely perceived as matter of public health but it was normally a responsibility of the family. As a result, providing long-term care for those in need was not considered a matter for the public. Efforts were aimed at providing insight into the psychological and social aspects of the strain and pressure of providing caregiving (Talley & Crews, 2007). Notably, it is not hard to determine that there were a number of difficult challenges for those providing necessary long-term care to the elderly.

As another component of caregiving, during the early part of the nineth and twentieth century, providing care to the elderly was basically not considered an issue that was noted as long-term. Prior to the use of modern-day medical standards such as antibiotics, for example in 1900, it was not expected for people to die prior to attaining the age of 45 years due to issues relating to infections (Talley & Crews, 2007). As a result, people did not live as long and life expectancy was shortened and decreased.

In order to address certain health care concerns for the elderly, the federal government in 1935 stepped in and began to provide assistance. They provided a program, the Old Age Assistance program, which was a component of the Social Security Act. The program gave monetary

payments to the aged poor irrespective of their employment record ("Aid for the Aged (OAA) 1935," n.d.; Galofré-Vilà, et al., 2022; Social Security Administration, n.d.).

In an effort to provide additional assistance, in the 1965 Social Security Act, the Medicaid and Medicare benefits programs were established (Nursing Home Basics, Costs, Laws, and Resources, 2022). These two programs greatly assisted the elderly. However, there was a concern that long-term facilities were not providing quality care either in service or facility. Accordingly, there was pursuant, to a request from Congress, a report on assisted living providers in the United States was provided by the *Institute of Medicine* in 1986. The report noted several concerns pertaining to: (1) substandard conditions for living facilities; (2) very low quality of care from facility personnel; (3) numerous occupants did not view the quality of the care well (Findlaw Staff, 2022).

In 1987, in order to address a several concerns, the Nursing Home Reform Law was passed by Congress (Klauber & Wright, 2014). Standards were required for nursing homes (including long term care facilities) for their residents. Achieving a certain level of care was required to be met in order for the facility to receive Medicaid or Medicare payments. Additional information was noted at the federal level pertaining to nursing facilities which can be used for long-term care. Congress provided a ranking system in 2021 with the Nursing Home Reform Modernization Act for long-term facilities (Findlaw, 2022). Further, according to a report by Kaiser Family Foundation (July 2022), 62% of nursing home residents were on Medicaid and 13% of nursing home residents were on Medicare (Chidambaram & Burns, 2024). Lastly, another federal law, the Elder Justice Act, requires workers at long-term care nursing facilities to convey information pertaining to crimes, such as elder abuse, to the proper persons if noted within a certain period (Findlaw Staff, 2022). As a practical note, laws such as this assist in promoting a safe environment for the elderly in long-term care facilities.

III. Understanding Aspects of Long-Term Care

In order to provide a basic perspective of long-term care, it is important to initially provide a definition of the concept. Long-Term Care is a concept which "involves a variety of services designed to meet a person's health or personal care needs when they can no longer perform everyday activities on their own" (National Institute on Aging, n.d.) In essence, it provides various types of basic and unique care that a person may need while requiring the basics of long-term care. Although the need for long-term care may appear instantly and without warning, it is most typically derived in a measured and steady manner. As a result, the need for long-term care is noted when a person becomes old, feeble, and fragile as an illness gets gradually worse ("National Institute on Aging," n.d.).

There are various types of long-term care facilities which are necessary to provide quality services to an individual in need. It can be provided in the home or at a facility. In most situations, certain care is needed for the individual in need. Although it is necessary to be provided in a number of places, in particular in the home, long-term care involves personal care which assists with everyday activities. These activities are called *Activities of Daily Living* (hereafter, ADLs). ADLs are "essential and routine tasks that most young, healthy individuals can perform without

assistance" (Activities of Daily Living, 2023). The ADL functions typically fall in certain categories These areas are:

- "Ambulating: The extent of an individual's ability to move from one position to another and walk independently."
- "Feeding: The ability of a person to feed oneself."
- "Dressing: The ability to select appropriate clothes and to put the clothes on."
- "Personal hygiene: the ability to bathe and groom oneself and maintain dental hygiene, nail, and hair care,"
- "Continence: The ability to control bladder and bowel function."
- "Toileting: The ability to get to and from the toilet, use it appropriately, and clean oneself."

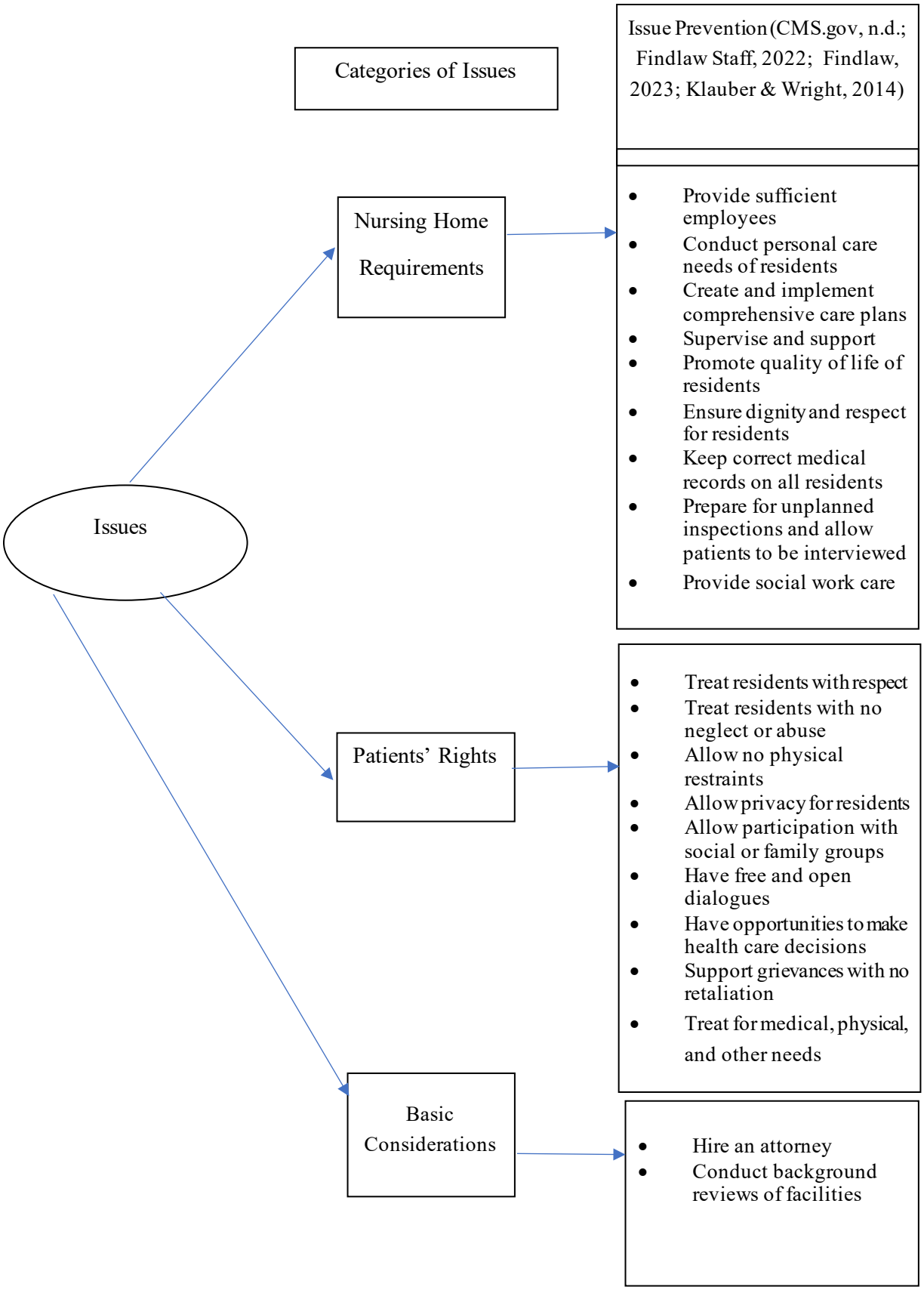
(Activities of Daily Living, 2023)

When delivering these services in the home, it is important that the caregiver is able to provide each of the unique functions needed. Providing certain unique services may be challenging (Activities of Daily Living and the Need for Long-Term Care, 2024; National Institute on Aging, 2023). There are a number of considerations when noting resident needs. Will the services be performed in the appropriate manner and will the facility have the necessary and unique physical components needed ("Activities of Daily Living and the Need for Long-Term Care," 2024; National Institute on Aging, 2023).

IV. Long-Term Care Issue Prevention Model

In order to provide insight and to promote a better understanding into the issues of long-term care, the authors developed a model to share a better understanding into the specifics of long-term care. The issue categories include the Nursing Homes Requirements, the Patient's Rights, and the Basic Consideration. Thereafter, more information is included to note details related to each category. Each category involves consideration of the patient, nursing home leadership, and the nursing home staff.

Long-term Care Issue Prevention Model:



A. Requirements for Nursing Homes that Reside Long-Term Care Residents

In order to assist and promote the quality of long-term care nursing facilities, Nursing Home Reform laws (NHRL) were established by the federal government ("CMS.gov," n.d.). These laws were necessary because state oversight of these facilities did not prove effective at this time ("Nursing, History, and Health Care," n.d.). Each of these rules was designed to promote a quality and good environment for the residents. For the first rule, in accordance with the NHRL, nursing home facilities were *required to provide and maintain a proper staff number* in order to maintain a quality operation and assist residents (Klauber & Wright, 2014). Proper staffing helps ensure resident needs will be addressed. In addition, NHRL required facilities to *identify and provide for the specific needs of each patient* (Findlaw Staff, 2022). This type of assistance allows the residents' specific needs to be known in a timely manner so that the individual needs of the resident may be met. Further, another rule notes that *facilities are required to provide for the activities of daily living (ADL) for each patient* (Klauber & Wright, 2014). As noted earlier, this type of care, which is necessary for each resident, refers to, but is not limited to, ambulating, feeding, dressing, and other types of activities necessary for the resident sustenance.

Another ADL for a facility is noted to *ensure residents are properly supervised* and *foster a solid level of living for the patient*. It is also important that each (a) *resident is afforded a quality level of dignity and respect*, (b) c*omplete medical records should be properly maintained for each resident*, and (c) facilities should be subject to *random inspections and residents should be allowed to interview residents* (CMS.gov, n.d.; Findlaw Staff, 2022; Klauber & Wright, 2014). Lastly, a *full-time social worker should be provided for those facilities* with more than one hundred and twenty (120) beds (Findlaw Staff, 2022).

Leadership plays a key role in assisting with the daily activities that are essential for proper care in nursing homes (Myhre et al., 2020). Specifically, leadership includes individuals that are trained to assist groups of people to achieve a goal by implementing strong leadership practices that include training and resources, as needed (Myhre et al., 2020: Pilbeam et al., 2016). These leadership practices tend to focus on an environment of safety and a culture of respect and dignity for the residents. As a practical point for the nursing facility, nursing facilities which do not meet these standards may be subject to penalties such as monetary fines and staff training. In addition, penalties may also include the removal of certifications for Medicare and Medicaid (Findlaw, 2022).

B. Patients' Rights Under the Nursing Home Reform Law

In addition to other requirements noted by the Nursing Home Reform Law (NHRL), residents are afforded certain rights recognized by this law. First and foremost, *residents are required to be treated with a quality level of respect as well as dignity* ("CMS.gov," n.d.). For individuals having to experience living in situations of this type, it is necessary and important. The residents should also live in an environment that does not subject them to endure neglect, *mistreatment, or abuse* (Findlaw 2023; Klauber & Wright, 2014). Accordingly, how a resident is treated is quite important. Another rule notes that patients should not have *to endure any types of restraints to their physical person, afforded proper privacy* and *should be allowed to participate in social settings or family groups* (Findlaw, 2023; Klauber & Wright, 2014).

On a more personal note, residents *should be allowed to communicate with others freely* and *speak with others openly pertaining to the decisions concerning their personal care*. (Findlaw, 2023). When residents participate in their decision-making process, this increases information flow and decision outcomes are usually better (Anderson et al., 2003). Further, *residents should be allowed to voice their grievances without fear of retaliation* ("CMS.gov," n.d.). This involves creating a culture of safety that involves leadership and leadership practices that focus on an all-inclusive nursing home of safety participants (Myhre et al., 2020). Lastly, residents should be *provided with a quality set-up for special needs which include medical, physical, social, and legal accommodations* ("CMS.gov," n.d.; Findlaw, 2023; Klauber & Wright, 2014). The people that provide these special needs may include individuals within the medical community, individuals from the health department, and a long-Term Care Ombudsman ("CMS.gov," n.d.). Providing an environment which promotes these types of rules should positively contribute to the overall mental and physical health of the residents.

In order to provide additional protection to the resident, it would be important for the resident to complete certain directives such as establishing a living will or making a power of attorney. Performing these early tasks will "ensure that the healthcare providers know" the resident's preference should the "resident become incapacitated" and avoid a conservatorship situation (Spears et al., 1993).

C. Basic Considerations

There are additional areas that may improve the condition of or provide assistance to those that must to endure a period of time in a long-term care facility. First, potential residents should hire qualified and experienced legal representatives. An experienced attorney may review the contract and note areas of concern to address ("The Last Contract Review Checklist You'll Ever Need!," n.d.). Areas of concern may include private pay requirements, arbitration provisions, eviction procedures, and waiver of rights. A private pay requirement seeks to require a party to provide payment for a Medicare or Medicaid recipient ("Should You Sign a Nursing Home Admission Agreement?," n.d.). This type of situation is illegal. Although arbitration agreements are not illegal, a resident that signs this agreement gives up the right to have their case heard in court. There are eviction provisions which may provide concerns. Although, there are several eviction provisions which are legal. Lastly, certain waivers of rights may be considered illegal. Good legal counsel may provide this information ("Should You Sign a Nursing Home Admission Agreement?," n.d.).

As noted earlier, the residents may also draft advanced directives such as a durable power of attorney or a living will (Findlaw Staff, 2022). Accordingly, the resident's desires would be addressed if the resident becomes incapacitated. However, there may be a cost to using an attorney that could be high. The resident will have to take the cost into consideration ("The Last Contract Review Checklist You'll Ever Need!," n.d.). Next, potential residents should perform an extensive background review of different long-term facilities to determine the quality of the facility. Accordingly, residents should review areas such as quality of the facility, the quality of the staff,

and note the reviews of past and current residents (Findlaw Staff, 2022). Lastly, potential residents should review a wide variety of long-term care facilities (Findlaw Staff, 2023).

V. Conclusion

As noted earlier, having to admit a loved family member can be extremely stressful and quite difficult. In addition, the administrative requirements due to this necessary effort may have exacting consequences if not handled appropriately. It is important that individuals or families with an individual that is required to live in a long-term care facility perform the necessary background work to ensure the quality of the facility as well as the necessary requirements to ensure that person will receive proper care for their daily living ("Activities of Daily Living and the Need for Long-Term Care," 2024).

The background work of the family, related to nursing home facilities and support services, is focused on making sure the loved family member receives good quality care ("CMS.gov.," n.d.). The quality care includes family and friends visiting and obtaining knowledge about the care services and nursing home rules. The quality care also includes considerations related to the leadership involved in influencing the behaviors of nursing home staff and the participation of groups of people in the decision-making process including the patients, family members, leaders, and nursing home staff (Anderson, et al., 2003).

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NOW IS THE TIME TO EXTEND FREE SPEECH RIGHTS TO PRIVATE EMPLOYEES . . . AND REIGN IN CORPORATE POWER

NICHOLAS MISENTI*

I. INTRODUCTION

First amendment free speech rights generally apply only against the government and thus protect only public employees.[1] Retaliation against public employees is generally prohibited when they speak as private citizens on issues of public concern.[2] In contrast, free speech protection for private employees, including employees at big for-profit corporations, is extremely limited to nonexistent.[3] Employment at will is still the norm in the United States, and free speech is not recognized as an exception to the doctrine. Thus, as a general rule, private employees can be disciplined or even terminated if their employer doesn't like their speech, even if their speech was as private citizens on issues of public concern. The fact that the livelihood of private employees is at risk when they speak publicly creates a chilling effect on public debate. The Supreme Court has acknowledged this fact with respect to public employees, stating that the "the threat of dismissal from public employment is . . . a potent means of inhibiting speech."[4] There is no reason to believe this threat wouldn't apply equally to private employees.

Two questions are pertinent: Do we want big private corporations controlling public debate, and why isn't there parity between private and public employees? The answer to the first question should be a responding no. As to the second question, clearly the founders of this country feared the government (and in particular the federal government)[5] because of its size and power. They wouldn't have feared private employers because the corporations of today with immense size and power didn't exist at the time the country was founded.[6] Today's corporations have outsized control over the government and work hand in hand with the government to

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[1] See, e.g., *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019)
[2] *Pickering v. Board of Education,* 391 U.S. 563 (1968)
[3] For a discussion of these limitations, see, e.g., Cynthia L. Estlund, Free Speech and Due Process in the Workplace, Indiana Law Journal, Volume 71 Issue 1 Article No. 4 Winter 1995
[4] *Pickering v. Board of Education,* 391 U.S. 563, 572-3 (1968)
391 U.S. at 572-73.
[5] First amendment free speech originally applied only against the federal government. *Barron v. Baltimore*. 32 US 243 (1833). It wasn't until 1925 that the Supreme Court applied 1st amendment free speech to the states through the 14th amendment. *Gitlow v. New York*, 268 U.S. 652 (1925).
[6] The first industrial corporation is generally regarded to be Boston Manufacturing Co., which was created in in 1813, well after the Bill of Rights was adopted in 1791. Library of Congress. https://www.loc.gov/pictures/item/ma0972/. Retrieved November 3, 2023.

manage and implement social and economic policies.[7] What has happened is typical. The law has simply not caught up the current state of the country.

Given the chilling effect private employers can have on public debate and the quasi-public nature of many corporations, private employers should be held to the same free speech standards as public employers. Some might argue achieving parity between private and public employees would interfere with the rights and functioning of private corporations. However, the courts have been careful to strike a balance between the rights of public employers and employees and as a result significant exceptions exist to protection of speech by public employees, and those exceptions would also apply to private companies.[8]

A small number of states offer some type of protection for speech by private employees.[9] However, only one of these states, Connecticut, achieves true parity between public and private employees by expressly extending first amendment free speech rights to private employees, subject to the same exceptions that the courts apply to public employees.[10] Connecticut's statute dates to 1983 but has gone largely unnoticed, which reinforces the conclusion that extending free speech rights to private employees doesn't impair the rights or functioning of private employers.

First amendment free speech protection should apply on a nationwide basis to private employees in the same way it applies to public employees. This can be accomplished in several ways:

- A statute passed by Congress that simply states that private corporations are subject to first amendment free speech protections: i.e., the Connecticut Model
- A recognition by the US Supreme Court that private corporations of a certain minimum size are quasi-public entities and thus subject to first amendment free speech protections
- A statute passed by Congress that amends Title 7 of the Civil Rights act of 1964[11] to include free speech as a protected class

Clearly, the easiest and best approach would be for Congress to adopt the Connecticut model. However, unless action is taken, the problem will only get worse. For example, it was just disclosed that Walmart, Delta Air Lines, T-Mobile, Chevron, Starbucks, Nestle, and AstraZeneca are using Artificial Intelligence to monitor employee speech on Slack, Microsoft Teams, Zoom and other apps.[12] With the country polarized on so many issues today, and the input of all people critical to public policy, now is the time to protect free speech by private

[7] For a discussion of this issue, see "The Myth of U.S. Democracy and the Reality of U.S. Corporatocracy." https://www.huffpost.com/entry/the-myth-of-us-democracy-corporatocracy_b_836573. Retrieved November 3, 2023. See also

[8] Statements made pursuant to a position as a public employee, rather than as a private citizen, do not enjoy First Amendment protection. *Garcetti v. Ceballos*, 547 U.S. 410 (2006). Further, public employee speech that causes a workplace disruption doesn't garner protection. *Pickering v. Board of Education*, 391 U.S. 563, 572-3 (1968).

[9] These states include California, Colorado, Louisiana, Minnesota, Missouri, Nebraska, Nevada, South Carolina, West Virginia, and Connecticut.

[10] CGS Sec. 31-51q

[11] 42 U.S.C. §§ 2000e - 2000e17 (as amended)

[12] Haydon Field, How Walmart, Delta, Chevron and Starbucks are using AI to monitor employee messages. February 9, 2024. Retrieved at: https://www.cnbc.com/2024/02/09/ai-might-be-reading-your-slack-teams-messages-using-tech-from-aware.html

employees and reign in the power of big corporations have over private employee speech and thus over this debate.

II. PROTECTION OF PUBLIC EMPLOYEE SPEECH

A. The General Rules

Several important rules govern public employee speech:

- Speech by public employees (governmental employees) may be protected under a test that balances the rights of public employers (government agencies) and public employees, *if* an employee is speaking as a private citizen on matters of public concern. Under this balancing test, if the rights of the public employee outweigh the rights of the public employer, the speech is protected. Thus, a public employee cannot be disciplined or terminated for such speech.

- Public employee speech where a public employee is not speaking as a private citizen on matters of public concern is not protected. Thus, a public employee generally may be disciplined or terminated for such speech.

- Where a public employee is specking as an employee concerning the employee's official job duties, the speech is not protected. Thus, a public employee generally may be disciplined or terminated for such speech.

B. The Pickering Connick Balancing Test

In *Pickering v. Board of Education*[13], the plaintiff was a town High School teacher who was fired for criticizing how the Board of Education and superintendent handled proposals to raise new revenue for the schools.

The US Supreme court held that "statements by public officials on matters of public concern must be accorded First Amendment protection. . . ."[14] Matters of public concern involve speech where "free and open debate is vital to informed decision-making by the electorate."[15]. The Court concluded that the plaintiff's statements were "a matter of legitimate public concern".[16]

However, public employers have an interest in maintaining discipline in the workplace. Thus, "(t)he problem in any case is to arrive at a balance between the interests of the (public employee), as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[17] That balancing test has been construed to mean "a court must assess the extent of the disruption caused by the employee's speech on workplace discipline, harmony among co-

[13] *Pickering* v. *Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 (1968)
[14] *Id,* at 774
[15] *Id,* at 571-72
[16] Id, *at* 571
[17] *Id,* at 568

workers, working relationships, and the employee's job performance, and determine whether the disruption justifies the employer's attempt to stifle the employee's expressive activity."[18]

Here, the Court found that:

> The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning. Accordingly, to the extent that the Board's position here can be taken to suggest that even comments on matters of public concern that are substantially correct may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it.[19]

Accordingly, the Court ruled the termination was illegal: "In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[20]

Pickering was followed by *Connick v. Myers*[21] *in 1983. Connick* reinforced the *Pickering* holdings. According to the *Connick* Court:

> When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.[22]

In *Connick*, the plaintiff was a prosecutor who was informed that she was being transferred to a different part of the criminal court. She informed her superiors that she opposed the transfer. The plaintiff then prepared and distributed a questionnaire to fifteen Assistant District Attorneys that solicited "the views of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns."[23] Early the following morning, the plaintiff typed and copied the questionnaire. She also met with Connick who urged her to accept the transfer. She said she would "consider" it. Connick then left the office. Myers then distributed the questionnaire to 15 Assistant District Attorneys. The plaintiff was then terminated from her position.[24]

[18] *McEvoy v. Spencer*, 124 F.3d 92, 98 (2d Cir. 1997)
[19] *Pickering,* at 569-70
[20] *Pickering* at 574
[21] 461 U.S. 138 (1983)
[22] *Id*, at 138
[23] *Id*, at 154
[24] *Id*, at 141

The Court upheld the termination, concluding that:

> (The plaintiff's) questionnaire touched upon matters of public concern in only a most limited sense; her survey, in our view, is most accurately characterized as an employee grievance concerning internal office policy. The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. (The plaintiff's) discharge therefore did not offend the First Amendment.[25]

However, the Court added that:

> We reiterate, however, the caveat we expressed in *Pickering*, 391 U.S., at 569: "Because of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged."[26]

C. The Garcetti Exception

In 2006, in *Garcetti v. Ceballos*[27], the Court forgot what it had said in *Connick* and did exactly what it said was "inappropriate" to do. The plaintiff in *Garcetti* was a district attorney who claimed that he had been passed up for a promotion for criticizing the legitimacy of a warrant. The Garcetti Court concluded that "(p)roper application of the Court's precedents leads to the conclusion that the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities. Because Ceballos' memo falls into this category, his allegation of unconstitutional retaliation must fail."[28] Accordingly, the Court upheld that plaintiff's employment termination.

Garcetti is significantly flawed. The decision creates a hard and fast rule that "the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities."[29] *Pickering* and *Connick* had already established that public employee speech is protected only if the employee was speaking as a private citizen on issues of public concern. Even in that situation, an employer's rights could outweigh an employee's rights. It appears that *Garcetti* could have been decided on those grounds, but pursuant to *Garcetti,* those questions no longer even have to be considered. The intent of the Court appears to have been granting greater power to discipline employees: "Without a significant degree of control over its employees' words and actions, a government employer would have little chance to provide public services efficiently. . . . Thus, a government entity has broader discretion to restrict speech when it acts in its employer role."[30] Further: "Restricting speech that owes its

[25] *Id*, at 154
[26] *Id*, at 154
[27] *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951 (2006)
[28] *Id*, at 411
[29] *Id*, at 411
[30] *Id*, at 410

existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created."[31] Significantly flawed or not, Garcetti nevertheless, provides another significant, and fairly cut and dry, exception to protection of public employee speech.

III. PROTECTION OF PRIVATE EMPLOYEE SPEECH

A. The General Rule: No Protection Exists

While significant exceptions existing to protecting public employee speech, the fundamental rule remains that public employee speech will *generally* be protected under the first amendment if a public employee is speaking as a private citizen on matters of public concern. In contrast, private employees enjoy no protection under the 1st amendment: "The Free Speech Clause of the First Amendment constrains governmental actors and protects private actors."[32] Thus, there is a glaring disparity between employees who work for government agencies and employees who work for private corporations. At the federal level and nearly every state, employees of private corporations can be disciplined or terminated for speech an employer doesn't like, even if it is speech made as a private citizen on matters of public concern and there is no provable disruption to the workplace.

B. The Need to Rein in Corporate Power

That disparity is alarming. There is much debate today on issues of public concern, including:

- Climate change
- Diversity, Equity, and Inclusion
- Gender Identity
- Immigration

If someone works for the "wrong" private company, as a general rule they can be disciplined and even fired for speaking publicly on any of these issues. Moreover, private employer monitoring is only getting worse. Big private companies, including Walmart, Delta Air Lines, T-Mobile, Chevron and Starbucks, Nestle and AstraZeneca, are using acritical intelligence to monitor analyzing employee messages on Slack, Microsoft Teams, Zoom and other popular apps.[33] Is there really a right to free speech if employees of private corporations know they can be disciplined or fired for speaking out as a private citizen on matters of public concern? As the

[31] *Id*, at 411

[32] *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019)

[33] Haydon Field, How Walmart, Delta, Chevron and Starbucks are using AI to monitor employee messages. February 9, 2024. Retrieved at: https://www.cnbc.com/2024/02/09/ai-might-be-reading-your-slack-teams-messages-using-tech-from-aware.html

Pickering Court said: "The threat of dismissal from public employment is . . . a potent means of inhibiting speech."[34]

A recent case illustrates the problem[35]. In 2017, a Google software engineer wrote and published a memo suggesting that Google should hire software engineers strictly based on "objective criteria" that indicated who was the best candidate for the position, and abandon hiring based on diversity, equity, and inclusion. If that wasn't enough, he focused on female candidates for software engineering positions at Google, suggesting that there were genetic and evolutionary conditions that might make males better software engineers, and females were being hired when males were the better candidates.

In his memo, he described what he described as Google's intolerance for anything inconsistent with its left-leaning ideologies. He also admitted that there would be instances where a woman would be the best candidate and said he had hoped to have an "honest discussion" about the questions he raised. None of that helped. Some employees at Google expressed outrage at the memo, the CEO stated the workplace was disrupted, and Google fired the software engineer. Two years after filing suit to get his job back, he dropped the matter.[36] There seems little doubt that the legal advice he would have been received was that he had no case under the first amendment because he was a private employee.

While many would find the software engineer's memo objectionable, several things must be considered. Speech that is popular doesn't need protection because no one objects to it. It is objectionable speech that gets people punished and needs protection. Further, the software engineer's speech would not necessarily been protected had he been a public employee. The memo may or may not have been construed as a private citizen speaking on issues of public concern. But, if it was, then the *Pickering* and *Connick* balancing test would have come into play. The difference is that then Google would have had to prove significant disruption to the workplace that was sufficient to outweigh the software engineer's first amendment rights, instead of having to prove absolutely nothing connected to the firing. Lastly, the same kind of thing could happen at a company with conservative management that fails to adopt or implement policies that fit in on the left side of the political spectrum. For example, in 2023, big tech companies, including Google, slashed diversity, equity, and inclusion spending.[37] It would not be difficult to envision a scenario where a Google employee publicly objected to that and was accordingly fired. It may be that there were no reported objections at Google because employees there were aware of what happened to the software engineer and were afraid speak out.

There are two important questions to ask: Do we want big for-profit corporations controlling public policy debates? Most of the public would likely answer that first question with a resounding no. The other question to ask is: Why isn't there parity between private employees and public employees?

[34] *Pickering v. Board of Education,* 391 U.S. 563, 572-3 (1968)

[35] Daisuke Wakabayashi. *Google Fires Engineer Who Wrote Memo Questioning Women in Tech*. Aug. 7, 2017. Retrieved at: https://www.nytimes.com/2017/08/07/business/google-women-engineer-fired-memo.html. 07.29.24

[36] Dalvin Brown. Ex-Google engineer who alleged discrimination against conservative white men asks judge to dismiss lawsuit. May 10, 2020. Retrieved at: https://www.usatoday.com/story/tech/2020/05/10/google-james-damore-diversity-discrimination-lawsuit/3105662001/. 07.29.24

[37] Jennifer Elias. Tech companies like Google and Meta made cuts to DEI programs in 2023 after big promises in prior years. December 22, 2023. Retrieved at: https://www.cnbc.com/2023/12/22/google-meta-other-tech-giants-cut-dei-programs-in-2023.html. 07.29.24

C. Why Protection Doesn't Extend to Private Employees

1. The Purpose of the Bill of Rights

The answer to that second question is based on a history of the US Constitution and Bill of Rights, and who the framers of the Constitution were concerned might deprive the public of rights such as free speech. That concern was focused entirely on the federal government. The wording in the first amendment reveals that concern: "*Congress* shall make no law . . . abridging the freedom of speech . . . (emphasis added). In 1833, in *Barron v. Baltimore*[38], the US Supreme Court held that the first amendment right to free speech applied only against the federal government. This focus on the federal government is not surprising, given that the founders of the country had just escaped a federal dictatorship. But it meant that free speech protection only extended to federal government employees.

In 1865, the fourteenth amendment was added to protect citizens against the states. However, as enacted, the 14th amendment does not include a free speech clause and instead only expressly affords protection based due process and equal protection. Thus, after the 14 amendment was enacted, free speech protection continued to extend only federal government employees. However, in 1925, the US Supreme Court applied first amendment free speech to the states through the 14th amendment in a process called incorporation.[39] Thus, since 1925, free speech protection has applied to all public (governmental) employees.

This raises an additional question as to why the next logical step, extension of free speech to private employees, hasn't happened. The concern after the Revolutionary War in limiting the power of the federal government is evident in the language of the Bill of Rights and understandable given the war. The fourteenth amendment was added after another war, the Civil War. The focus there was on protecting African Americans from discrimination by the states and that focus also is understandable.

2. The Rise in Corporate Power

The founders wouldn't have been concerned with corporate power when the country was founded: What is generally recognized as the first industrial corporation, Boston Manufacturing Co., wasn't created until 1813, well after the Bill of Rights was adopted in 1791.[40] Even in1865 when the fourteenth amendment was added, the corporations of today didn't exist. Corporations of the size and power that exist today are a recent phenomenon. The power big corporations wield over the government today is undeniable. In 2016, Wall Street spent a then record $2 billion trying to influence U.S. elections.[41] In 2020, this figure was another new record, $2.9 billion.[42] Former President Jimmy Carter has termed the government "an oligarchy with

[38] 32 US 243 (1833)

[39] *Gitlow v. New York*, 268 U.S. 652 (1925)

[40] Library of Congress. Retrieved at: https://www.loc.gov/pictures/item/ma0972/. 07.31.24

[41] Stephen Gandel. Fortune. Wall Street Spent $2 Billion Trying to Influence the 2016 Election. March 8, 2017. Retrieved at: https://finance.yahoo.com/news/wall-street-spent-2-billion-175957291.html

[42] Brian Schwartz. CNBC. Wall Street execs, employees spent $2.9 billion on campaigns, lobbying during 2020 election, study shows. April 15, 2021. Retrieved at: https://www.cnbc.com/2021/04/15/wall-street-spent-2point9-billion-to-influence-washington-during-2020-election.html. 07.31.24.

unlimited political bribery." That power has led some to say we no longer have a democracy, but instead a "Corporatocracy".[43]

This power also may explain why Congress hasn't extended free speech protection to private employees today. One of the great ironies is that private corporations have a right to free speech[44], even though they are not actually persons, while their employees can be disciplined or even fired if they engage in any kind of speech their corporate employer doesn't like. Thus, in a real sense, private corporations enjoy a greater right to free speech than their employees.

A further irony involves what's been happening around "captive audiences", which describes the corporate practice where employees are assembled in an auditorium and bombarded with anti-union rhetoric for hours at a time. Attendance is a condition of employment and thus mandatory. States have begun outlawing the practice.[45] Private corporations, which seem quite content to be able to control and dominate the speech of their employees, have filed suits to block the bans on the grounds that they violate the corporation's right to free speech.[46]

IV. FEDERAL PROTECTIONS FOR PRIVATE EMPLOYEE SPEECH ARE VERY NARROW AND INADEQUATE

The general rule is that there is no protection for private employee speech. The exceptions exist on the federal level are very limited in scope and apply only in special circumstances. For example, the National Labor Relations Act[47] protects private employee speech when it pertains to wages, hours, and working condition. This is hardly a panacea, given its limited scope. It wouldn't apply to the Google software engineer[48] or any similar circumstance.

Speech in the form whistleblowing is protected by many different federal (and state) statutes.[49] Again, the protection is limited in scope given that private corporations enjoy an unlimited right to punish employees for speech outside of these narrow exceptions. E.g., this exception wouldn't have applied to the Google software engineer or any similar circumstance.

Federal anti-discrimination laws would protect speech that is connected to a good faith and reasonable discrimination claim.[50]

[43] Bruce Levine. The Huffington Post. The Myth of U.S. Democracy and the Reality of U.S. Corporatocracy. May 25, 2011. Retrieved at: https://www.huffpost.com/entry/the-myth-of-us-democracy-corporatocracy_b_836573. 07.31.24.

[44] *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S. Ct. 1407 (1978); *Citizens United v. Fed. Election Comm'n,*, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753, 78 U.S.L.W. 4078 (2010)

[45] E.g., in 2022, Connecticut amended CGS § 31-51q to ban captive audiences

[46] Mark Pazniokas. CT's 'captive audience' law challenged in federal lawsuit. November 1, 2022. Retrieved at: https://ctmirror.org/2022/11/01/ct-captive-audience-law-lawsuit-chamber-tong-union-organizing/. 07.30.04.

[47] 29 U.S.C. § 151.

[48] In fact, the Google software engineer made such an NLRA claim, then dropped the complaint. Dalvin Brown. Ex-Google engineer who alleged discrimination against conservative white men asks judge to dismiss lawsuit. May 10, 2020. Retrieved at: https://www.usatoday.com/story/tech/2020/05/10/google-james-damore-diversity-discrimination-lawsuit/3105662001/. 07.29.24

[49] See, e.g., *See* Charlotte Garden, May 5, 2022. Was it something I said? Legal protections for employee speech. Economic Policy Institute, https://www.epi.org/unequalpower/publications/free-speech-in-the-workplace/#_note108, retrieved July 27, 2024.

[50] *See*, e.g., Title VII of the Civil Rights Act of 1964: 42 U.S.C. § 12203(a);

Each of these narrow exceptions has specific, and complicated, requirements employees must meet to qualify for protection, and in many employees won't meet all of these requirements for one reason or another.[51] More importantly, most or at least many cases of retaliation by private corporations against employees based on their speech don't involve any of these narrow exceptions.

The "state action" exception provides that a private corporation may be considered a state actor, and therefore subject to the Bill of Rights, when it exercises a function "traditionally exclusively reserved to the State."[52] The doctrine only applies where a private corporation is acting in place of the government in providing traditional government services, which is to say it almost never applies. A highly regulated utility company with a government granted exclusive service area[53], and a public television station operating public access channels, have each been held not to be state actors under the doctrine.[54]

V. THE CONNECTICUT MODEL CREATES PARITY BETWEEN PUBLIC EMPLOYEES AND PRIVATE EMPLOYEES

A. CGS § 31-51q (b)

CGS § 31-51q (b) applies to "any employer" and in section (1) protects "the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4 or 14 of article first of the Constitution of the state, provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer." The statute clearly envisions application of some type of Pickering and Connick balancing test, and the Connecticut Supreme court has in fact held that the Pickering and Connick balancing test does apply, along with the limitation that only speech on matters of public concern is protected.[55] The court has also expressly held that § 31-51q applies to private employees: "The use of the word "any" employer at the outset of the statutory language reenforces its natural reading to encompass rights at a private workplace."[56] The statute is clear on its face that protection is afforded to employees based on both the first amendment and the Connecticut constitution.

B. General Rules Applicable to CGS § 31-51q (b)

The Connecticut Supreme Court has made two important decisions on the reach of Garcetti with respect to claims based on CGS § 31–51q:

[51] For a discussion of these issues, see Charlotte Garden, May 5, 2022.Was it something I said? Legal protections for employee speech. Economic Policy Institute, https://www.epi.org/unequalpower/publications/free-speech-in-the-workplace/#_note108, retrieved July 27, 2024.

[52] *Jackson v. Metropolitan Edison Co.* , 419 U.S. 345, 352, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974).

[53] *Jackson v. Metropolitan Edison Co.* , 419 U.S. 345, 352, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974).

[54] *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019)

[55] *Cotto v. United Technologies Corp.*, 251 Conn. 1, 738 A.2d 623 (Conn. 1999)

[56] *Cotto v. United Technologies Corp.*, 251 Conn. 1, 7, 738 A.2d 623 (Conn. 1999)

- *Garcetti* applies to claims brought pursuant to § 31–51q against a private employer that are based on the first amendment.[57]
- *Garcetti* does not apply to claims brought pursuant to § 31–51q against a private employer that are based on the Connecticut Constitution, and, instead, modified *Pickering*[58] and *Connick*[59] balancing test applies that is based on Justice Souter's dissent in *Garcetti.*[60]

C. The First Amendment and CGS § 31-51q (b)

In *Schumann v. Dianon Systems, Inc.*[61], the Connecticut Supreme Court held that the *Garcetti* holding, that speech pursuant to a public employee's official job duties was not protected by the first amendment[62], applies to claims brought pursuant to CGS § 31–51q against a private employer that are based on the first amendment.

The plaintiff in *Schumann* was a pathologist who had developed a diagnostic product for the defendant. When the defendant decided to market a modified version of the product, the plaintiff objected on the grounds that data didn't exist to support the new product, and ultimately refused to perform his job duties related to the new product.

The court concluded that "*Garcetti* adds a threshold layer of analysis, requiring courts to first determine whether an employee is speaking pursuant to his official duties before turning to the remainder of the first amendment analysis set forth in *Pickering* and *Connick.*"[63] Here, the plaintiff's speech was related to his job duties and clearly insubordinate and therefore did not clear the threshold Garcetti test. Therefore, there was no need to apply the Pickering and *Connick* balancing tests.

The court in *Schumann* skirted the issue as to whether *Garcetti* applied to claim of private employees based on the Connecticut Constitution: "Because application of the *Pickering* test, even without the *Garcetti* threshold analysis applicable under the first amendment to the United States constitution . . . reveals that the plaintiff's speech was not constitutionally protected and, therefore, not covered by CGS § 31–51q, we simply need not, and do not, decide the issue of whether *Garcetti* applies under the state constitution."[64]

D. The Connecticut Constitution and CGS § 31-51q (b)

1. The Connecticut Constitution's Free Speech Provisions

Three years later, in *Trusz v. Ubs Realty Investors, LLC*[65], the Connecticut Supreme Court took up the relationship between CGS § 31–51q and the state constitution.

[57] *Schumann v. Dianon Sys., Inc.*, 304 Conn. 585, 604 (Conn. 2012)
[58] *Pickering* v. *Board of Education*, 391 U.S. 563, 568-75, 88 S.Ct. 1731 (1968)
[59] *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684 (1983)
[60] *Trusz v. Ubs Realty Investors, LLC*, 319 Conn. 175, 205 (Conn. 2015)
[61] 304 Conn. 585, 598, 43 A.3d 111 (2012)
[62] *Garcetti v. Ceballos,* 547 U.S. at 421, 126 S.Ct. 1951 (2006)
[63] *Schumann v. Dianon Sys., Inc.*, 304 Conn. 585, 604 (Conn. 2012)
[64] *Schumann v. Dianon Sys., Inc.*, 304 Conn. 585, 627 (Conn. 2012)
[65] 319 Conn. 175, 123 A.3d 1212 (Conn. 2015)

Trusz occurred during the 2028 financial crisis when the real estate market, and accordingly banks, collapsed in part due to mortgages that were based on grossly overvalued appraisals. The plaintiff, who was the the head of UBS Realty's valuation unit and a managing director of UBS Realty, expressed to both his employer UBS Realty and its parent company UBS AG his opinion "that by not disclosing property valuation errors to investors and not adjusting management fees in light of these valuation errors, UBS Realty was violating its fiduciary, legal, and ethical obligations to its investors."[66] Ultimately, he was fired for expressing those views."[67] The court[68] began its examination of the state constitution by citing *State v. Linares,*[69] which held that textual differences in Connecticut' Constitution's free speech provisions "warrant an interpretation separate and distinct from that of the first amendment." To support that conclusion, the court reviewed the very detailed free speech provisions in the Connecticut Constitution:

> Article first, § 4, of the Connecticut constitution provides: "Every citizen may freely speak, write and publish his sentiments *on all subjects*, being responsible for the abuse of that liberty." Article first, § 5, of the Connecticut constitution provides: "No law *shall ever* be passed to curtail or restrain the liberty of speech or of the press." Finally, article first, § 14, of the Connecticut constitution provides: "The citizens have a right, in a peaceable manner, to assemble for their common good, and to apply to those invested with the powers of government, for redress of grievances, or other proper purposes, by petition, *address or remonstrance."* (emphasis added)

The Court noted[70] that in *Linares*[71] it found that the phrases "on all subjects" "shall ever", and *"*remonstrance*"* justified a different interpretation that the first amendment, and "This broad and encompassing language supports the conclusion that the state constitution protects employee speech in the public workplace on the widest possible range of topics, as long as the speech does not undermine the employer's legitimate interest in maintaining discipline, harmony and efficiency in the workplace."

This analysis opened the door for the court to consider whether *Garcetti* applied to claims under the state constitution. The court noted the defendant had cited three state courts that had ruled that *Garcetti* applied to free speech claims under their state constitutions. After differentiating these cases, the court concluded that "We do not find these cases persuasive."[72]

In *Kaye v. Board of Trustees*[73], the court concluded the relevant state constitutional provision was not broader than the first amendment in this context. In *Newell v. Runnels,*[74] the court stated that the speech protections provided by the Maryland constitution are "generally coextensive" with first amendment protections.

[66] *Trusz v. Ubs Realty Investors, LLC*, 319 Conn. 175, 181 (Conn. 2015)
[67] *Trusz v. Ubs Realty Investors, LLC*, 319 Conn. 175, 181 (Conn. 2015)
[68] 319 Conn. 175, 192-93 (Conn. 2015)
[69] 232 Conn. 345, 381, 655 A.2d 737 (1995)
[70] *Trusz v. Ubs Realty Investors, LLC*, 319 Conn. 175, 192-93 (Conn. 2015)
[71] 232 Conn. 345, 381, 655 A.2d 737 (1995)
[72] *Trusz v. Ubs Realty Investors, LLC*, 319 Conn. 175, 205-6 (Conn. 2015)
[73] 179 Cal.App.4th at 57–58, 101 Cal.Rptr.3d 456
[74] 407 Md. at 608, 967 A.2d 729

Similarly, the court in *Gilbert v. Flandreau Santee Sioux Tribe*[75] stated that the majority of states with constitutional free speech provisions like South Dakota's "have interpreted their state constitutional free speech provisions as coextensive with their federal counterparts." Because the Connecticut Supreme Court had previously found the Connecticut Constitution provided broader free speech rights than the first amendment, it was easy for the court to conclude that "These cases, therefore, provide little, if any, support to the defendants' position in the present case."[76]

2. Rejection of *Garcetti and Adoption of the Justice Souter Modified Pickering and Connick Balancing Test for State Constitutional Free Speech Claims*

After the court completed the necessary groundwork, the court held that *Garcetti* does not apply to cases under the state constitution:

> We conclude, therefore, that Justice Souter modified *Pickering and Connick* balancing test, which recognizes both the state constitutional principle that speech on *all* subjects should be protected to the maximum extent possible and the important interests of an employer in controlling its own message and preserving workplace discipline, harmony and efficiency, provides the proper test for determining the scope of a public employee's rights under the free speech provisions of the state constitution when the employee is speaking pursuant to his or her official duties.[77]

Under a cursory analysis, the *Garcetti* and Justice Souter modified *Pickering and Connick* balancing test are not that dissimilar. According to Souter's dissent in *Garcetti,* "only comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in an employee's favor" when employee is speaking pursuant to official duties".[78]

According to the *Garcetti* court:

> Exposing governmental inefficiency and misconduct is a matter of considerable significance, and various measures have been adopted to protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions. These include federal and state whistleblower protection laws and labor codes and, for government attorneys, rules of conduct and constitutional obligations apart from the First Amendment. However, the Court's precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job.[79]

[75] 725 N.W.2d at 258
[76] *Trusz v. Ubs Realty Investors, LLC*, 319 Conn. 175, 205-6 (Conn. 2015)
[77] *Trusz v. Ubs Realty Investors, LLC*, 319 Conn. 175, 210-11 (Conn. 2015)
[78] *Garcetti v. Ceballos*, 547 U.S. 410, 435 (2006) (Souter, J., dissenting)
[79] *Garcetti v. Ceballos*, 547 U.S. 410, 412 (2006)

However, in practice the two approaches are different. The plaintiff in *Trusz* was successful in his case based on the modified Justice Souter modified *Pickering and Connick* balancing test. In theory, he also would have been successful under the Garcetti exception and the *Pickering and Connick* balancing test. On the surface, then, *Garcetti* and the Justice Souter modified *Pickering and Connick* balancing test would appear to produce similar results, given that each recognizes only narrow exceptions where speech made pursuant to an employee's job duties would be protected. However, Garcetti can be seen as being harsher to employees than the Justice Souter modified *Pickering and Connick* balancing test. *Garcetti* essentially creates a presumption that speech pursuant to an employee's job duties is not protected. As the court in said in *Schumann*, *Garcetti* represents a "threshold test."[80] If an employee can't overcome the *Garcetti* test, then no balancing between employer and employee rights is necessary. A lack of such balancing of rights is likely objectionable to many people.

Ultimately, whether the Garcetti test or the Pickering and Connick balancing test is applied in the case of the 1st amendment employee speech cases, or the Justice Souter modified *Pickering and Connick* balancing test alone is applied in employee speech cases based on the Connecticut constitution, employers have considerable power to control employee speech in the workplace. Therefore, there are no legitimate grounds for employers or any other parties to object to CGS by § 31–51q.

VI. PROTECTIONS IN OTHER STATES ARE INADEQUATE

Other states offer inadequate protection for private employee speech under state law. For example, rather than taking the direct approach of Connecticut that private employees enjoy free speech pursuant to the 1st amendment and state constitution, California limits protection for private employee speech to participating in politics, becoming candidates for public office, and other political activities and affiliations.[81] Nevada[82] and New York,[83] have a similar law limiting protection to political activities.

Some states purport to protect "off duty activities of employees[84], but these provisions have generally has been narrowly construed by courts.[85]

Why these states, including California, which is one of the most progressive and pro employee states in the country, wouldn't adopt the Connecticut approach is an open question. It could be that lobbying by private employers, based on the fallacy that they would lose their ability to control and discipline their employees if the Connecticut approach was adopted, is what rules, and legislatures need to be disabused of this false notion.

The default "at will' employment doctrine in the United States is a major factor in why employers can discipline and even terminate employees for any type of speech. Thus,

[80] *Schumann v. Dianon Sys., Inc.*, 304 Conn. 585, 604 (Conn. 2012)
[81] California Code, Labor Code - LAB § 1101
[82] NRS 613.040
[83] NY Labor § 201-d(2).
[84] *See*, e.g., California Labor Code section 96(k); Colo. Rev. Stat. Ann. § 24-34-402-5; N.D.C.C. § 14-02.4-03
[85] *See* Charlotte Garden, May 5, 2022.Was it something I said? Legal protections for employee speech. Economic Policy Institute, https://www.epi.org/unequalpower/publications/free-speech-in-the-workplace/#_note108, retrieved July 27, 2024. Erin A. Owen, Dalia Z. Khatib, Mark S. Spring, The Challenges and Risks When Private Employers Regulate Employees' Off-Duty Conduct in California. California Labor & Employment Law Blog. https://www.callaborlaw.com/entry/the-challenges-and-risks-when-private-employers-regulate-employees-off-duty-conduct-in-california retrieved July 27, 2024;

elimination of the at will doctrine could be expected to indirectly provide free speech protection to private employees. However, only one state, Montana, has repealed the at will employment doctrine for all employees.[86] The Montana's statute requires that private employers have "good cause" to terminate employees. Mt. St. 39-2-903 (5) provides that:

> "Good cause" means any reasonable job-related grounds for an employee's dismissal based on:
> (a) the employee's failure to satisfactorily perform job duties;
> (b) the employee's disruption of the employer's operation;
> (c) the employee's material or repeated violation of an express provision of the employer's written policies; or
> (d) other legitimate business reasons determined by the employer while exercising the employer's reasonable business judgment.

On the surface, the Montana exception to the at will employment doctrine should operate to protect private employee speech in a manner similar to the Pickering and Connick balancing test. However, the Montana statute has a reputation of being difficult to enforce in public.[87] In contrast, Connecticut's approach to the issue is clear cut and unequivocal, and only Connecticut achieves direct parity between private and public employees.

VII. CORPORATE OBJECTIONS TO EXTENDING FREE SPEECH PROTECTIONS TO PRIVATE EMPLOYEES ARE WITHOUT MERIT

There is absolutely no reason why public employees should be able to speak out as private citizens on issue of public concern, free of retaliation, but private employees are able to do that only if they are willing to risk being punished by the employer and losing their jobs. It's clear that the easiest and best approach to protect private employee speech would be Congress to adopt the Connecticut model and extend first amendment free speech protection to private employees. Private employers might object to this, claiming they wouldn't be able to regulate their workplace, but that protection would be subject to the same exceptions that apply to public employees under *Pickering, Connick*, and *Garcetti*, providing ample (some would say too much) protection to private employers.

VIII. OTHER OPTIONS TO PROTECT PRIVATE EMPLOYEE SPEECH ARE NOT DESIRABLE

Other options to achieve parity exist but are less desirable. The US Supreme Court could extend the "private action" doctrine to private corporations over a certain size by revenues, assets, or number of employees, based on the immense power these corporations and the people who run them have over the government. That option is extremely unlikely. Moreover, Title 7 of the Civil Rights Act of 1964[88] could be amended to include free speech as a protected class.

[86] Mt. St. 39-2-903

[87] *See* Charlotte Garden, May 5, 2022. Was it something I said? Legal protections for employee speech. Economic Policy Institute, https://www.epi.org/unequalpower/publications/free-speech-in-the-workplace/#_note108, retrieved July 27, 2024.

[88] 42 U.S.C. §§ 2000e - 2000e17 (as amended)

However, other options wouldn't achieve direct parity and entirely different body of law would govern.

IX. CONCLUSION: CONGRESS NEEDS TO ADOPT THE CONNECTICUT MODEL

Only the Connecticut model would achieve parity between public and private employees and reign in corporate power, and do that in a very clear cut and efficient manner. There is no legitimate reason why public employees should be able to speak out on issues of public concern, free of retaliation, while private employees can do that only if they are willing to risk their livelihoods. The status quo deprives most of the country of their ability to speak out on important policy issues, and instead gives control over the debate to big corporations and the people who run the corporations. That is untenable. Congress needs to adopt the Connecticut model now.

TEACHING THE COGNIZANT CASE: WHEN CORPORATE COMPLIANCE WORKS

MATTHEW D. MANGUM

Abstract

The following paper will set out the basic facts of an alleged bribe paid by Cognizant Technology Solutions in 2014 and the legal consequences that resulted. Guidance will be provided on how to frame the case for use in the classroom. Further, a list of potential discussion questions that could be used in an in-person or online class will be provided.

Introduction

In 2019 I attended a conference with many corporate compliance officers. They were abuzz about a recent announcement by the Department of Justice that Cognizant Technology Solutions had settled a case of alleged bribery in violation of the Foreign Corrupt Practices Act after self-reporting the incident. Form the compliance officer perspective, it was an example of the system working correctly and a validation of their work. I was excited to use the example in my business ethics courses. To my surprise, early attempts to do so were a complete failure. Many students expressed the idea that Cognizant was getting away with something even after they paid a $25 million civil fine. So, I had to rethink how to present the case. Below, I will outline an approach to teaching this case to preempt these student objections.

What Happened

Cognizant Technology Solutions is a multinational technology consulting company. Although they are not a household name, as of 2024, they claim 344,400 employees globally and a revenue of $19.4 billion. They provide services to a wide range of industries including banking, healthcare, oil and gas, media, and many others. They are listed on the Nasdaq and are headquartered in New Jersey.

In 2014 Cognizant was building a new campus in India. During the building process, it is alleged that an approximately $2 million bribe was paid to an Indian official. To conceal the payment, the funds were paid through a local construction contractor who paid the bribe and obtained the needed permit. The construction company was reimbursed through phony invoices which disguised the bribe as cost overruns.

It appears that the plan to pay the bribe originated at the highest levels of the company. The President, Gordon Coburn, and the Chief Legal Officer, Steven Schwartz, are alleged to be the parties responsible. They are accused of agreeing to and covering up the illegal payment. In an unusual turn of events, the two C-suit executives were indicted on federal criminal charges.

The interesting twist in this case is how the Department of Justice was alerted to the potential wrongdoing. After an internal investigation, Cognizant self-reported the infraction. As part of their settlement with the DOJ, Cognizant paid $25 million in fines while not admitting

wrongdoing. The findings of their internal investigation were used by the DOJ to bring charges against the president and CLO.

Criminal Charges and the Lack Thereof

The upside of self-reporting for Cognizant is that they did not face criminal charges. The DOJ cited many reasons why the company would not be charged. These include their prompt and voluntary self-disclosure, their ongoing cooperation, and their agreement to repay their ill-gotten gains.

In contrast, the President and CLO were charged in a 12-count indictment for violations of the FCPA, falsifying books and records, and circumventing internal accounting controls. These charges have a complex procedure history all their own as the defendants have mounted an aggressive defense. As of early 2024 the trial is still pending.

Did They Get Aways with Something?

Using this case in class has taught me that students—even business majors—are often mistrusting of businesses. Students often point out that $25 million is not a large sum of money for a company with so much revenue. It is common for students to think that because of that, Cognizant may have benefited from the bribe even after paying the fine. Two facts help limit those concerns. First, part of the settlement was expressly a disgorgement of the benefit from illegal act. To be precise, $16,394,351 was to remediate the value of the bribe. Second, Cognizant's investigation cost about $60 million.[1] So, in the end, $16.34 millions worth of benefit cost Cognizant at least $87 million dollars.[2] Even without factoring in any other possible negative consequences, Cognizant did not come out ahead by paying the original bribe. The outcome might be the best possible for the company in this situation, but it was not better than simply not paying the bribe in the first place.

Teaching the Case

This case can serve many roles in a business law or business ethics classroom. First, it can be used to introduce the anti-bribery and record keeping provisions of the FCPA. Students are often surprised that such actions in foreign nations can result in criminal charges in the United States. Second, it can be used as a contemporary example when discussing potential criminal liability for corporations and corporate officers. It is particularly valuable example for this purpose as high-level officers were charged. Third, it can illustrate the federal criminal justice process including the roles of the DOJ and SEC in policing corporate misbehavior.

Finally, the most important lesson from the case is about compliance efforts. It is an exemplar of the benefits of a robust compliance program. Further, it is an example of when a compliance program worked even when the highest-ranking officers were involved.

[1] Cognizant also faced a shareholder suit alleging inadequate compliance effort. However, they won the suit.
[2] That includes the cost of the fine, the investigation, and the original bribe.

Reflection Questions

When engaging in classroom or online discussions with students, these questions may be helpful.

1. Why would a company be tempted to pay bribes when doing business abroad?
2. Did Cognizant benefit from the alleged bribe in the long term?
3. What other consequences might Cognizant have faced because of the alleged bribe?
4. Did Cognizant do the right thing by self-reporting?
5. Considering professional ethics, is it especially concerning that the Chief Legal Officer was allegedly involved in the bad act?
6. What did you learn about the potential criminal liability of corporate officers?
7. How important are compliance procedures within a corporation?
8. Should the US federal government make paying bribes in foreign countries a crime?
9. What business lessons can you take from this case?

Conclusion

With careful presentation of the Cognizant case, students can learn valuable business law and business ethics insights about the importance of corporate compliance. Further, careful presentation of the facts can limit the impact of possible student suspicions about the motivations of corporations.

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HUMAN RIGHTS, SUSTAINABILITY, AND ADVANCING THE BUSINESS CURRICULUM

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Growing pressures from students, employers, and accrediting are pushing business schools to support interdisciplinary learning and research, responding to growing nexuses across diverse fields of professional and academic study. The growing movement to embrace the United Nations Sustainable Development Goals (SDGs) reveals a new paradigm for business education: to provide interdisciplinary curricula focused on the challenges that accompany the pursuit of organizational sustainability practices. Positioning interdisciplinary, practice-oriented courses in global sustainability and international human rights among required undergraduate and graduate business curriculum requirements will provide students with the necessary skills and knowledge to recognize, understand, and respond to these global challenges. Interdisciplinary approaches cultivate students' abilities to understand and address complex problems such as climate change, poverty, and human rights. This paper aims to illustrate the importance of international human rights as a curricular focus by demonstrating the course's significance and role as a critical interdisciplinary topic in business education.

The practice of higher education continues to advance with the evolving needs of today's students. Business schools continue to confront growing pressures from students, employers, and accrediting bodies to cultivate connections and relationships between the academic disciplines.[1] Institutions of higher learning are devoting increased resources geared toward "teaching across the curriculum" to support interdisciplinary learning and research, responding to growing nexuses across diverse fields of professional and academic study.[2] Therefore, business faculty now face new challenges connected to the need for expanded models to support interdisciplinary research and facilitate interdisciplinary learning.[3] Therefore, the increased need for interdisciplinary approaches will call on business faculty to collaborate on creating suitable course materials.[4] These and other challenges highlight the importance of integrating interdisciplinary, hands-on exercises into the contemporary study of business law and the legal environment to prepare students for real-world business practice.

With these considerations in mind, globalization has opened the world and created immense opportunities for knowledge transfer and commerce, creating unique challenges that must be addressed. Social systems depend on a quality-of-life standard, allowing health, freedom, and relative equality in a community. Through technology, people and cultures grow together, creating significant obstacles to achieving equity and sustainability. Adaptation is

[1] Caryn L. Beck-Dudley, *The Future of Work, Business Education, and the Role of AACSB*, 35 J. LEGAL STUD. EDUC. 165, 170 (2018).
[2] Matt Roessing & Jehan El-Jourbagy, *Toward a More Perfect Pedagogy: Developing Constitution Week Activities to Support a Business Law and Ethics Curriculum*, 35 J. LEGAL STUD. EDUC. 255, 261 (2018).
[3] Beck-Dudley, *supra* note 1.
[4] Constance E. Bagley et al., *A Path to Developing More Insightful Business School Graduates: A Systems-based, Experimental Approach to Integrating Law, Strategy, and Sustainability*, 19 ACAD. MGMT. LEARNING & EDUC., 541, 552 (2020).

needed. The growing movement to embrace the United Nations Sustainable Development Goals (SDGs) reveals a new paradigm for business education. There is a critical need for higher learning institutions to provide interdisciplinary curricula focused on the challenges that accompany the pursuit of organizational sustainability practices. Positioning interdisciplinary, practice-oriented courses in global sustainability and international human rights among required undergraduate and graduate business curriculum requirements will provide students with the necessary skills and knowledge to recognize, understand, and respond to these global challenges. An interdisciplinary approach promotes the ability to understand and address complex problems such as climate change, poverty, and human rights. The interconnectedness of the SDGs requires the expertise of professionals from different disciplines and sectors working together to achieve common goals.[5]

This paper proceeds in several parts. Part I introduces global sustainable development and the relationship between business and human rights, focusing on the United Nations Global Compact and the United Nations 2030 Agenda for Sustainable Development. Part II outlines the role of human rights in business education, discussing (a) the importance of including global sustainable development in the business curriculum and (b) the role played by business law faculty in driving interdisciplinary business education. Part III highlights the critical role played by the business law discipline within the business curriculum through the expansion of interdisciplinary human rights law courses. Part IV provides an example for institutions seeking to develop international human rights law course options by describing the development and innovations to an international human rights law course at our home institution, including integrating interdisciplinary collaborations between faculty members across business disciplines. Part V concludes with a summary of the implications addressed by this paper.

I. THE BUSINESS CASE FOR HUMAN RIGHTS

The impact of globalization on efforts to promote international human rights is becoming increasingly relevant to modern business practices. Globalization has created immense knowledge transfer and commerce opportunities, acting as a powerful driver for advancing growth and development. Despite the immense opportunities presented by globalization, concerns abound regarding social inequalities, job stability, and environmental degradation.[6] Multinational corporations (MNCs) have accrued economic power in parts of the world historically dominated by local industries and overseen by national governments.[7] These levels of wealth and power imbue MNCS with responsibilities to safeguard and support human rights.[8]

The business case for safeguarding and supporting human rights continues to gain momentum. We adopt the definition of the business case described by Carroll and Shabana, which referenced the financial bottom line and other considerations behind the corporate pursuit

[5] Fatima Annan-Diab & Carolina Molinari, *Interdisciplinarity: Practical Approach to Advancing Education for Sustainability and the Sustainable Development Goals*, INT'L J. MGMT & EDUC. 73, 73 (2017).
[6] Nima Norouzi & Elham Ataei, *Globalization and Sustainable Development*, 1. INT. J. INNOV. RES. HUMANIT. 66, 68 (2021).
[7] *See, e.g.*, Shaomin Li & Ajai Gaur, *Financial Giants and Moral Pygmies? Multinational Corporations and Human Rights in Emerging Markets*, 9 INT'L. J. EMERGING MARKETS, 11, 11-12 (2014).
[8] *See, e.g.*, William Bradford, *Beyond Good and Evil: The Commensurability of Corporate Profits and Human Rights*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y, 141, 149 (2012).

of corporate social responsibility (CSR) strategies and policies).[9] In his groundbreaking TED Talk, Michael Porter challenged the conventional wisdom that corporations derive profit only from causing social problems, arguing instead that corporations can also profit from solving social problems.[10] Existing research supports Porter's challenge. The link between corporate social performance (CSP) and corporate financial performance (CFP) suggests a positive relationship between CSP and CFP.[11] Firms that engage in CSR and human rights activities benefit from synergistic value creation, competitive advantage, and risk reduction.[12] As noted by Wynhoven, the benefits of corporate respect for human rights may include (a) integrating vulnerable groups into the supply chain, (b) helping improve living standards and motivate suppliers, (c) fostering educational opportunities for girls to help grow diversity and skill of labor pool; (d) conflict-sensitive business practices lead to stable business environment; and (e) embracing fair trade leads to social marketing benefits.[13] Echoing Wynhoven's work, Bradford noted that corporate protection of human rights may decrease price sensitivity, increase consumer demand, attract additional investor contributions, enhance employee satisfaction, and decrease the likelihood of litigation and regulatory risk.[14]

Despite evidence that safeguarding and supporting human rights can provide long-term profits and other benefits, incidents of MNC involvement in human rights abuses continue worldwide today. Questions and challenges remain regarding the mechanisms and strategies best suited for encouraging global respect for human rights in the face of established business practices.[15] Many guidelines, codes, and initiatives exist that provide global corporations with guide corporations in the prevention of human rights abuses.[16] In the next section, we will discuss two related efforts by the United Nations to implement universal sustainability principles promoting human rights: the Global Compact and the 2030 Plan for Sustainable Development.

II. HUMAN RIGHTS AND GLOBAL SUSTAINABLE DEVELOPMENT

A principled approach to business represents the foundation of corporate sustainability. Sustainability requires organizations to meet fundamental human rights and environmental responsibilities.[17] In a 1999 World Economic Forum speech, Kofi Annan urged the United Nations and global business leaders to "initiate a global compact of shared values and principles,

[9] Archie B. Carroll & Kareem M. Shabana, *The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice*, 12(1) Int'l J. Mgmt. Rev. 85, 101-02 (2010).
[10] *Michael Porter: Why business can be good at solving social problems*, TED, http://www.ted.com/talks/michael_porter_why_business_can_be_good_at_solving_social_ problems.html (last visited Apr. 9, 2016.
[11] Carroll & Shabana, *supra* note 9 at 93.
[12] *Id.*
[13] Ursula Wynhoven, *The Protect-Respect-Remedy Framework and the United Nations Global Compact,* 9 Santa Clara J. Int'l L. 81, 97 (2011).
[14] William Bradford, *Beyond Good and Evil: The Commensurability of Corporate Profits and Human Rights*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y, 141, 149 (2012).
[15] Stephen J. Emedi, *Utilizing Existing Mechanisms of International Law to Implement Human Rights Standards: States and Multinational Corporations*, 28 ARIZ. J. INT'L & COMP. L., 629, 630 (2011).
[16] Adefolake Adeyeye, *The Role of Global Governance in CSR*, 9 SANTA CLARA J. INT'L L., 147, 160 (2011).
[17] *The Ten Principles of the UN Global Compact*, UNITED NATIONS GLOBAL COMPACT, https://www.unglobal compact.org/what-is-gc/mission/principles (last visited Feb. 12, 2024).

which will give a human face to the global market."[18] The United Nations Global Compact (Global Compact) works toward mobilizing a global push for organizations and stakeholders to realize a better world through communal responsibility.[19] The creation of the Global Compact signified a dramatic shift in United Nations thinking, which had previously centered on the perspective that transnational corporations did not bring any positive benefits to the global community.[20] This shift reflected a realization of the critical roles of globalization and transnational corporations in the United Nations' efforts to pull billions of people from poverty.[21] The Global Compact, which now has over 25,000 participants spanning more than 160 countries, aims to encourage organizations to embrace core values such as anti-corruption, human rights, labor standards, and the environment.[22] Members must integrate the Global Compact's principles into daily operations, decision-making processes, and organizational cultures.[23]

The United Nations adopted the 2030 Plan for Sustainable Development (2030 Agenda) in 2015, building on the groundwork laid by the Compact. The Preamble for the 2030 Agenda reflects the United Nations' recognition that eliminating poverty represents a global challenge and an "indispensable requirement for sustainable development."[24] The 2030 Agenda seeks to realize the human rights of all people and represents an integrated, indivisible balance between the three dimensions of sustainable development: the economic, social, and environmental.[25] The 2030 Agenda's commitment to preserving the five Ps—people, planet, prosperity, peace, and partnerships—represents a shared blueprint for peace and prosperity for everyone, including the planet.[26] The 2030 Agenda core embodies seventeen sustainable development goals (SDGs) focused on confronting climate change, lessening inequality, promoting economic growth, improving health and education, and eradicating poverty.[27] The 2023 Agenda asks nation-states to safeguard health and environmental standards while encouraging business organizations to use creativity and innovation to address the challenges that hinder sustainable development.[28] The

[18] *Kofi Annan's Address to World Economic Forum in Davos*, UNITED NATIONS SECRETARY-GENERAL, https://www.un.org/sg/en/ content/sg/speeches/1999-02-01/kofi-annans-address-world-economic-forum-davos (last visited Feb. 12, 2024).
[19] *Our Mission*, UNITED NATIONS GLOBAL COMPACT, https://www.unglobalcompact.org/what-is-gc/mission (last visited Feb. 12, 2024).
[20] Jena M. Amerson, *The End of the Beginning-A Comprehensive Look at the UN's Business and Human Rights Agenda from a Bystander Perspective*, 17 FORDHAM J. CORP. & FIN. L. 871, 891 (2012).
[21] *Id.*
[22] *Our Participants*, UNITED NATIONS GLOBAL COMPACT, https://unglobalcompact.org/what-is-gc/participants (last visited Sept. 6, 2024); Governance, UNITED NATIONS GLOBAL COMPACT, https://unglobalcompact.org/what-is-gc/our-work/governance (last visited Sept. 6, 2024).
[23] Wynhoven, *supra* note 13.
[24] *Transforming Our World: The 2030 Agenda for Sustainable Development*, UNITED NATIONS, https://sdgs.un.org/publications/transforming-our-world-2030-agenda-sustainable-development-17981 (last visited Sept. 6, 2024).
[25] *Id.*
[26] *The Sustainable Development Goals in 2019: People, Planet, Prosperity in Focus*, UNITED NATIONS FOUNDATION, https://unfoundation.org/blog/post/the-sustainable-development-goals-in-2019-people-planet-prosperity-in-focus/ (last visited Feb. 12, 2024); *The 17 Goals*, UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, https://sdgs.un.org/goals (last visited Feb. 12, 2024).
[27] *The 17 Goals*, UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, https://sdgs.un.org/goals (last visited Feb. 12, 2024).
[28] *Transforming Our World: The 2030 Agenda for Sustainable Development*, *supra* note 24.

SDG Business Forum noted that the SDGs "provide all businesses with a new lens through which to translate the world's needs and ambitions into business solutions."[29]

The opportunities presented by the 2030 Agenda for improving the lives of billions of people reveal a new paradigm for business education. Business schools are confronting increased pressures from accrediting bodies to encourage further and promote connections between academic disciplines.[30] Such pressures are steering institutions to "teach across the curriculum" to help students recognize the different nexuses across diverse fields of academic and professional study.[31] As noted by Bird & Kirschner,[32] Business law faculty possess multidimensional expertise, one that uniquely positions them to work with faculty across disciplines to develop new (or modify existing) courses in international human rights law that can advance broader cross-disciplinary and practical perspectives. In the next section, we will further describe the growing position of sustainable development within the business curriculum and the unique role played by business law faculty in helping to drive interdisciplinary business education.

III. HUMAN RIGHTS COURSES IN BUSINESS EDUCATION

A. Sustainable Development and the Business Curriculum

The need to integrate the United Nations Sustainable Development Goals (SDGs) more fully into the higher education curriculum continues to gain momentum. Standard 4 of the AACSB guiding principles and standards for business accreditation, in pertinent part, reflects the expectation that institutions provide current, globally oriented, and forward-looking curricular content."[33] Integrating social issues into the curriculum improves students' tolerance, critical thinking, political interest, and social integration, among other benefits.[34] Efforts to embrace this heightened level of integration are especially prominent in business schools. For example, the Inspirational Paradigm for Jesuit Business Education (Inspirational Paradigm) focuses on the shift in how organizations conduct business worldwide due to the sustainable development movement.[35] New curricula are needed to address diverse topics in ethics, anthropology, social responsibility, governance, and sustainability.[36] Sustainable development education must also

[29] *SDG Business Forum 2017*, Int'l Chamber of Commerce, https://iccwbo.org/media-wall/news-speeches/business-stepping-transformational-partnerships/ (last visited July 28, 2020).
[30] Caryn L. Beck-Dudley, *The Future of Work, Business Education, and the Role of AACSB*, 35 J. LEGAL STUD. EDUC. 165, 170 (2018).
[31] Matt Roessing & Jehan El-Jourbagy, *Toward a More Perfect Pedagogy: Developing Constitution Week Activities to Support a Business Law and Ethics Curriculum*, 35 J. LEGAL STUD. EDUC. 255, 261 (2018).
[32] Robert C. Bird & Cheryl Kirschner, *Special Report: The Summit on the Academic Profession of Business Law*, 37 J. LEGAL STUD. EDUC. 87, 91 (2020).
[33] *2020 Guiding Principles and Standards for Business Accreditation*, ASSOCIATION TO ADVANCE COLLEGIATE SCHOOLS OF BUSINESS, https://www.aacsb.edu/-/media/documents/accreditation/2020-aacsb-business-accreditation-standards-jul-1-2022.pdf?rev=b40ee40b26a14d4185c504d00bade58f&hash=9B649E9B8413DFD660C6C2AFAAD10429
[34] Nicole Fournier-Sylvester, *Daring to Debate: Strategies for Teaching Controversial Issues in the Classroom*, 16 C.Q. (2013), http://collegequarterly.ca/2013-vol16-num03-summer/fourniersylvester.html.
[35] *An Inspirational Paradigm for Jesuit Business Education*, INTERNATIONAL ASSOCIATION OF JESUIT UNIVERSITIES, https://iaju.org/working-groups/newparadigm-jesuit-business-education (last visited Jan. 30, 2024).
[36] *Id.*

promote the ability to work with stakeholders with conflicting interests to find a common goal.[37] If business schools are to prepare the succeeding generation of leaders in light of this shift, they need new tools and curricula that help students understand and internalize the nexus between embracing the market economy and ensuring economic activities originate from environmentally sustainable practices.[38] For instance, the SDG Dashboard (Dashboard) is a visualization, data analytics, and reporting platform that provides institutions worldwide with a means to communicate and collaborate on best practice impacts focused on supporting the SDGs to transform business education into a global force for good.[39] The Dashboard aims to provide business schools with a robust resource for enhancing their impacts on SDG fulfillment.[40]

The need to promote the SDGs in higher education is now greater than ever. United Nations Reports showcase how the COVID-19 pandemic (COVID-19) and the impacts of climate change continue to threaten the goals established by the 2030 Agenda for Sustainable Development.[41] One recent estimate suggests that COVID-19 eradicated over four years of improvements connected to eradicating poverty and led to significant disruptions in providing essential health services.[42] The wildfires, droughts, floods, and heat waves wrought by climate change continue to harm the Earth's ecosystems.[43] Educational institutions, governments, corporations, and NGOs will play a growing role in addressing the critical need for collaborative, interdisciplinary efforts to respond to the effects of these global problems. The SDGs display a vital nexus between the development agenda and international human rights law advancement.[44] According to a study by Sidiropoulos (2013),[45] educational interventions such as integrating sustainability topics in classroom discussions, introductory sustainability seminars, and integration of sustainability topics in course assessments impact student views, attitudes, and behavior toward sustainability.

B. Business Law as a Driver of Interdisciplinary Business Education

The interdisciplinary nature of the business law discipline will continue to play a critical role in helping to integrate the SDGs more fully into the business curriculum. As noted by Bagley et al.,[46] business disciplines have conventionally operated within isolated silos from both research and teaching perspectives. Any business discipline, whether finance, accounting, or law, provides a valuable (but limited) puzzle piece. Such isolated slivers alone cannot expose the

[37] Ann Dale & Lenore Newman. *Sustainable Development, Education and Literacy*, INT'L. J. SUSTAINABILITY IN HIGHER EDUC., 351, 351 (2005).
[38] *Id.*
[39] *Reporting the SDG Impacts of Global Business Schools*, SAINT JOSEPH'S UNIVERSITY HAUB SCHOOL OF BUSINESS, https://sdgdashboard.sju.edu/?page_id=22 (last visited Jan. 18, 2023).
[40] *Id.*
[41] *The Sustainable Development Goals Report 2022*, UNITED NATIONS, https://unstats.un.org/sdgs/report/2022/The-Sustainable-Development-Goals-Report-2022.pdf (last visited Jan. 18, 2023).
[42] *Id. (*pushing nearly 100 million more people into extreme poverty in 2020.)
[43] *Id.*
[44] U.N. Hum. Rights Office of the High Commissioner, Hum. Rights and the 2030 Agenda for Sustainable Dev., https://www.ohchr.org/EN/Issues/SDGS/Pages/The2030Agenda.aspx (last visited July 24, 2020).
[45] Elizabeth Sidiropoulos, *Education for Sustainability in Business Education Programs: A Question of Value*, J. CLEANER PRODUCTION, 472, 472 (2013).
[46] Constance E. Bagley et al., *A Path to Developing More Insightful Business School Graduates: A Systems-based, Experimental Approach to Integrating Law, Strategy, and Sustainability*, 19 ACAD. MGMT. LEARNING & EDUC., 541, 552 (2020).

intricacies of the entire system.[47] A critical need exists to recognize further, encourage, and foster connections between the academic disciplines to provide students with a more complete picture of the shifting roles of business in society and the evolving expectations of business education.[48] Bagley et al. highlighted the importance of an interdisciplinary, active, and experiential approach to business school education."[49] By combining law, strategy, and sustainability in students' coursework, business schools will empower their graduates to approach climate change, racial justice, economic inequality, and other grand challenges facing society with integrity and transparency.[50] Students will also cultivate a deeper understanding of the consequences of their decisions on diverse stakeholders and ecosystems.[51] The open systems stakeholder approach situates an organization within a network of human stakeholders."[52] Robert Bird articulated the connection between international human rights and the business law discipline, noting that there exists a dedicated obligation to respect fundamental human rights regardless of economic costs to the firm, which falls alongside corporate social responsibility, business ethics, and sustainability as one of four mutually reinforcing legal and ethical principles.[53] This connection is reflected in courses and programs in international human rights law offered at institutions across the United States and the world. In the next section, we will review the overall landscape and provide specific examples of these offerings.

IV. THE BUSINESS LAW CURRICULUM AND INTERNATIONAL HUMAN RIGHTS LAW COURSES

The primary composition of courses on international human rights law appears at the law school level. Boston College Law School offers introductory and advanced human rights courses and an international human rights practicum, where students can gain "practical experiences in advocacy for the promotion of international protection of human rights."[54] The international human rights course at Creighton University Law School examines the development of the international human rights movement and its application to civil, political, economic, and social rights.[55] Santa Clara University offers a course on international human rights that helps students gain exposure to the field through the "social, cultural, religious, political and economic factors that shape the global implementation of human rights."[56] The International Human Rights Clinic (IHRC) at Santa Clara enables its students to gain practice-oriented experience with international human rights litigation, advocacy, and policy projects while serving the community and

[47] *Id.*
[48] Beck-Dudley, *supra* note 1 at 168.
[49] Constance E. Bagley et al., *supra* note 4.
[50] Constance E. Bagley, *Winning with Integrity: An Open Systems Stakeholder Approach to Teaching Law and Management in the Anthropocene*, 38 J. LEGAL STUD. EDUC. 101, 115 (2021).
[51] *Id.*
[52] *Id.*
[53] Robert C. Bird, *On the Future of Business Law*, 35 J. LEGAL STUD. EDUC., 301, 303 (2018).
[54] *Preparation for Practice*, BOSTON COLLEGE LAW, https://www.bc.edu/content/bc-web/schools/law/academics-faculty/curriculum (last visited Jan. 18, 2024).
[55] *Juris Doctor Curriculum*, CREIGHTON UNIVERSITY, https://catalog.creighton.edu/law/juris-doctor-curriculum/#courseinventory (last visited Jan. 18, 2024).
[56] *International Human Rights*, SANTA CLARA UNIVERSITY SCHOOL OF LAW, https://law.scu.edu/scheduled_classes/international-human-rights/ (last visited Jan. 18, 2024).

promoting social justice.[57] With the Human Rights Advocacy Project at Loyola University New Orleans, students earn experiential learning credit through working on ongoing cases and projects directly with human rights non-governmental organizations.[58] The course on the international law of human rights sponsored by the Center for Environmental Justice & Sustainability (CEJS) at Seattle University encompasses a "comprehensive overview of the development of modern international human rights law, including the theory, institutions, practice, and procedures of the current human rights regime."[59] Loyola University Chicago School of Law, students in international human rights law course understand the theory and practice of international human rights law.[60] The course is offered through the University's Center for the Human Rights of Children (CHRC), an interdisciplinary center focused on promoting children's human rights through research, scholarship, advocacy, and outreach programs.[61]

International human rights and international human rights law courses also appear at the undergraduate level. Internet searches by the authors, however, led to the general observation that courses addressing the topic outside the law school curriculum tend to fall into two categories: (1) certificate programs in human rights, social justice, and international affairs and (2) undergraduate majors in history, international studies, human development, or social work, among others. For example, the course offerings at Regis University in global justice, social justice/civil society, and international law and human rights appear geared toward (though not exclusively reserved for) history and politics majors.[62] The legal studies minor at Le Moyne College offers a course in international human rights that explores the blue (social and political rights), red (economic rights), and green (rights to development, clean environment, and peace) of the international human rights regime.[63] The history department at John Carroll University offers an introduction to human rights course focused on a diverse range of topics, including the death penalty, slavery, torture, humanitarian intervention, refugees and displaced persons, and human trafficking.[64] Course offerings at the University of Michigan reflect the breadth of topics addressed by human rights. Undergraduate courses addressing human rights appear in offerings by anthropology, communications and media departments, comparative literature, history, political science, and public policy, among others.[65]

[57] *International Human Rights Clinic*, SANTA CLARA UNIVERSITY, https://law.scu.edu/ihrc/ (last visited Jan. 18, 2024).
[58] *Course Descriptions*, LOYOLA UNIVERSITY NEW ORLEANS, https://lawcourses.loyno.edu/ (last visited Jan. 18, 2024).
[59] *Center for Environmental Justice and Sustainability*, SEATTLE UNIVERSITY, https://www.seattleu.edu/cejs/academics/sustainability-courses/repository/courses/international-law-of-human-rights.html (last visited Jan. 18, 2024).
[60] *Center for the Human Rights of Children*, LOYOLA UNIVERSITY CHICAGO SCHOOL OF LAW, https://www.luc.edu/law/academics/centersinstitutesandprograms/centerforthehumanrightsofchildren/ (last visited Jan. 18, 2024).
[61] *Id*.
[62] *Academic Catalog*, REGIS UNIVERSITY, https://www.regis.edu/_documents/academics/catalogs/2022-2023-regis-university-catalog.pdf (last visited Jan. 18, 2024).
[63] *Legal Studies*, LE MOYNE COLLEGE, https://www.lemoyne.edu/Academics/Colleges-Schools-Centers/Carroll-College-of-Arts-Sciences/Majors-Minors/Legal-Studies (last visited Jan. 18, 2024).
[64] *Peace, Justice, & Human Rights*, JOHN CARROLL UNIVERSITY, https://www.jcu.edu/academics/pjhr/programs/minor (last visited Jan. 18, 2024).
[65] *U-M Courses Addressing Human Rights*, DONIA HUMAN RIGHTS CENTER, https://ii.umich.edu/humanrights/resources/u-m-courses-addressing-human-rights.html (last visited Jan. 18, 2024).

International human rights law courses are far less frequent among business school undergraduate course offerings. Given the vast array of topics such a course would entail, the sensitive nature of some of the course subject matter, and potential challenges connecting such a course to the more extensive business school curriculum, the lack of courses is not necessarily surprising. One of the few examples uncovered by the authors is Fairfield University's course on International Human Rights, which has attributes for humanitarian action, international studies, and international business.[66] The course "introduces students to the origins and development of international human rights, the need to apply and enforce legal obligations, the establishment of accountability for human rights violators, and the procedures enforced by the international community for human rights violations."[67]

Considering the limited business-school course offerings at the undergraduate level in international human rights law, this paper aims to describe recent course innovations at the University of Detroit Mercy. The authors hope this paper will serve as an example of elevating the importance of international human rights as a curricular focus by demonstrating the course's significance and role as a critical interdisciplinary topic in business education. law

V. INTERNATIONAL HUMAN RIGHTS LAW AT DETROIT MERCY

A. Course Overview

The international human rights law course at the University of Detroit Mercy was developed to help students examine and comprehend the different dimensions of law beyond the coverage in our introductory business law course. The course is designed to acquaint students with the origins, mechanisms, and ongoing developments in protecting international human rights. Students gain exposure to the diverse factors contributing to human rights issues as they scrutinize the relationship between international human rights regulation and global commerce. Global business issues discussed in the course include corporate involvement with property destruction, forced exile, and crimes against humanity; corporate relationships with repressive governments; compensation and unsafe working conditions (mistreatment, sweatshops, child labor); freedom of information; and the disposal of hazardous waste.

The international human rights law course satisfies two areas of the university's core curriculum while serving as an upper-level elective in the concentration of business law. The course facilitates an understanding of cultural diversity by helping students to (a) express a basic knowledge of a variety of cultures and the issues and challenges experienced; (b) recognize the interdependence of cultures in both domestic and global terms; (c) recognize the intellectual and spiritual limitations of their cultural norms and biases by achieving new perspectives and establish an understanding of various ways of knowing; and (d) cultivate intercultural competence. The course also promotes an understanding of human differences by helping students to (a) express greater interpersonal understanding, recognizing that human differences, such as gender, race, ethnicity, class, sexuality, ableness, and other identity categories, are complex and varied; (b) interpret ways that group identities are shaped in the heterogeneous society; and (c) evaluate the issues arising from inequity, prejudice, and exclusion in contemporary societies. Integrating these university-wide educational goals with course materials

[66] *International Studies*, FAIRFIELD UNIVERSITY, https://www.fairfield.edu/undergraduate/academics/schools-and-colleges/college-of-arts-and-sciences/programs/international-studies/index.html (last visited Jan. 18, 2024).
[67] *Id.*

reflects the concept noted by Powers and Wesner that business law courses present a central connection to the skills and benefits afforded by a liberal arts education.[68]

The course pedagogy employs various instructional methods to appeal to diverse learning styles, including class lectures, reflection assignments, web-based exercises, and group work. For example, the identifying cultural assumptions and biases assignment asks students to explore the potential effects of cultural assumptions and biases on the ability to examine human rights issues from an open-minded perspective. The cultural diversity and human rights assignment helps students develop an awareness of human differences and cultural diversity by exploring the diverse aspects of culture across countries. Community-engaged service (service-learning) is also a significant component of the course. Students complete 10 hours of community-engaged service, write a reflection paper, and give a short presentation on their experience as part of their final course project. Appendix A includes a copy of the requirements for the final reflection paper. Incorporating a community-engaged service component into the course helps students connect with the real-world aspects of course materials while also providing needed assistance to support community endeavors.

B. Recent Course Modifications

Teaching an undergraduate-level course on international human rights law is challenging. Given the breadth and depth of materials on the topic, international human rights law can be daunting to present to students within the time constraints of an academic semester. Business students may bring diverse opinions and prior levels of topic exposure to the course, along with possible underlying questions regarding the relevancy of the course to their future careers. With these challenges in mind, the international human rights law course was redesigned in 2022 to emphasize the SDGs more heavily. The redesign was stimulated by a 2021 curriculum change wherein the College of Business Administration adopted a new learning goal on sustainability in response to the Inspirational Paradigm.[69] Sustainability provides a modern lens for introducing international human rights law topics and illustrating the nexus between international human rights law and the larger field of global business practice. International human rights law includes a massive span range of issues with local, regional, national, and national implications, including forced exile, working conditions, the disposal of hazardous waste, corporate involvement in property destruction, crimes against humanity, relationships with repressive governments, and the freedom of information. When examining these diverse issues, an equally wide range of political, economic, sociological, military, psychological, and sociocultural driving factors also come to bear.

C. Interdisciplinary Collaboration

The daunting nature of any course opens the door for interdisciplinary collaboration. Integrating business law courses with other concentrations, including marketing, finance,

[68] Christine N. O'Brien, Richard E. Powers, & Thomas L. Wesner, *Benchmarking and Accreditation Goals Support the Value of an Undergraduate Business Law Core Course*, 35 J. LEGAL STUD. EDUC. 171, 174 (2018).
[69] The learning goal focuses on preparing students to address the dimensions of sustainability (social, economic, and environmental) within business, community, and government organizations. The two objectives adopted to achieve this goal focus on asking students to (1) incorporate sustainability principles into developing personal and professional values and (2) evaluate solutions for addressing sustainability issues.

information systems, and accounting, is common at many business schools.[70] The redesign of international human rights law in partnership with the course on global sustainable development provided an opportunity for collaboration between the business law discipline and the decision sciences discipline. The global sustainable development courses examined the three facets of sustainable development: economic, social, and environmental. Covered course topics included risk management, change management, marketing, supply chain management, legal frameworks for sustainability, leadership, metrics tools and reporting, and corporate governance.

While both instructors approached their courses according to their disciplines, both courses included several shared components. Both encompassed a range of discussion board activities to support students' understanding and management of outside research. Instructors in both courses stressed the importance of the SMART model, an approach to project management goal setting that requires any robust goal statement to meet certain criteria: specific (explicitly identified area for improvement), measurable (suggested indicator of progress), assignable (clear indication of who is responsible for the goal), realistic (results are possible with available resources), and time-related (identification of timeline for expected completion).[71] Both instructors provided students with mutually selected online sustainability assessment tools, measurement resources, and discipline-specific course materials.

Most significantly, instructors in both courses required students to participate in the college-wide business ethics and sustainability case challenge (case challenge) sponsored by the College's Center for Practice & Research in Management & Ethics (PRIME Center).[72] The Case Challenge allows students to explore the moral imperatives of sustainable development. Student teams put themselves in the role of a fictional outside consulting group hired by the senior leadership of a real-life organization to help it address a problem related to one of the United Nations SDGs. Teams prepare a written report intended for the organization's senior leadership that analyzes the problem and proposes a viable solution. Teams select any problem, company, and SDG of their choice. The "audience" for the written report is the chosen organization's senior leadership, such as the CEO, board of directors, etc. Written reports undergo a blind evaluation by a faculty review panel according to the following dimensions: (1) ethical issues, (2) business/financial issues, (3) legal issues, and (4) persuasiveness. See Appendix B for more detailed information on each of the evaluation criteria. The review panel selects three finalist teams to give short, ten-minute presentations based on their written reports. Faculty, alums, and business community members evaluate the presentations and select the winners. The first-place team is sponsored to participate in the *International Business Ethics and Sustainability Case Competition* hosted by Loyola Marymount University each spring.[73]

Instructor observations from student submissions in the case challenge support the collaborative efforts between the international human rights law course and the global sustainable development course. The initial concern that international human rights law groups

[70] O'Brien et al., *supra* note 68.
[71] George T. Doran, *There's a S.M.A.R.T. Way to Write Management's Goals and Objectives*, 70 MGMT. REV. 35–36 (1981).
[72] The Center for Practice & Research in Management & Ethics (PRIME Center) develops opportunities for business students to network with leading business executives and thinkers, gain real-world practical experience in management, and conduct meaningful research into managerial and ethical problems. Experiential learning and leadership opportunities sponsored by the PRIME Center include hands-on coursework, internships, and teamwork projects.
[73] *International Business Ethics and Sustainability Case Competition*, LOYOLA MARYMOUNT UNIVERSITY, https://cba.lmu.edu/centers/ibes/eventsprograms/ibescc/ (last visited Jan. 30, 2024).

would focus extensively on the legal dimension proved unwarranted, as groups from that course allocated suitable coverage to each dimension. By a similar token, we expressed some concerns that groups in global sustainable development would face a disadvantage when assessing legal ramifications on an international scale. While groups from the international human rights law course referenced human rights documents and instruments more frequently than groups from the global sustainable development course, the case challenge did not require the citation of materials at the international level. Groups from the sustainable development course successfully reinforced their positions relative to the legal dimension using domestic law perspectives instead. Based on these observations, the instructors will continue to use the case challenge as a joint collaborative teaching tool in future semesters.

V. Conclusion

Globalization has opened the world and created immense opportunities for knowledge transfer and commerce, creating unique challenges that must be addressed. Social systems depend on a quality-of-life standard, allowing health, freedom, and relative equality in a community. Through technology, people and cultures grow together, creating significant obstacles to achieving equity and sustainability. Adaptation is needed. The growing movement to embrace the United Nations Sustainable Development Goals (SDGs) reveals a new paradigm for business education. There is a critical need for higher learning institutions to provide interdisciplinary curricula focused on the challenges that accompany the pursuit of organizational sustainability practices. Situating practice-oriented, interdisciplinary courses in global sustainability and international human rights among required undergraduate and graduate business curriculum requirements will be pivotal in providing students with the necessary skills and knowledge to recognize, understand, and respond to these global challenges.

APPENDIX A

1. Reflect on the human differences, such as gender, race, ethnicity, class, sexuality, ableness, or other identity categories of the clients served by the agency/organization. What did you learn about the diversity of clients served by the agency? How might your experience change your perceptions or interactions with diverse groups of people in the future?
2. How is the business environment impacted by the human rights issues noted above on a local, regional, national, and international scale? Discuss relevant economic, social, political, cultural, and environmental factors. **Include references to support your arguments.**
3. Have U.S. corporations helped or hindered efforts to combat these issue(s)? Give two examples and discuss them in detail. **Include references to support your examples.**
4. Describe 2 international human rights laws, treaties, or conventions discussed in this course relevant to the issue(s) you encountered during your service learning. **Include references to support your arguments. Do not cite the textbook.**
5. What efforts have been taken to combat these issue(s) on a local, regional, national, and international scale? Have they been successful? Give two examples. **Include references to support your examples.**
6. Propose one initiative at the corporate level and one at the federal level that could lessen the underlying human rights problem(s) this agency seeks to address. Which initiative stands a greater chance of success? Why?
7. Show that you have completed 10 hours of service learning (verification of service form).

APPENDIX B

Ethical Dimension

- From a social justice perspective, precisely why is the problem an ethical issue? Please refrain from citing philosophers and from using technical, philosophical terminology. Instead, you may refer to your chosen organization's mission statement, code of values/conduct, etc.
- What is the amount and type of tangible good and harm involved in the problem and the solution?
- Are the actions themselves, in this case (in the problem and solution), ethically defensible?
- Is there a difference in rights? Does the answer resolve this?
- Is the result ethically acceptable?
- What goals does the solution ultimately advance?
- How well does the team straightforwardly present the ethical issues, relating them directly to central issues associated with running the organization? Discussing the ethical issues should help the team "sell" the team's solution.

Business/Financial Dimension

- Are the costs to society of the underlying problem pointed out?
- Are the benefits to society of the proposed solution to the problem pointed out?
- Does the solution make sense from a business/financial perspective?
- Is the company in a position to afford the solution? Answers to this question should include (1) the costs of the proposed solution and (2) how (and to what extent) the problem raises or lowers the company's costs or profits.

Legal Dimension

- Has the problem brought about by any laws or regulations been broken? Remember that local, regional, national, and/or international laws, regulations, and court cases may be relevant to your chosen topic.
- Do any laws or regulations determine or limit what the organization/industry may or may not do to resolve the problem?
- Do any major court cases determine or limit what the organization may do to resolve the problem?
- Is there any likelihood of lawsuits?
- Is the solution legal?
- If no laws or cases apply, did the team make this clear?

Persuasiveness Dimension

- Were the problem and the solution clearly explained?
- Were the analyses thorough and well-informed?
- Is the solution realistic and practical?
- Is the solution legal, financially responsible, and ethical?
- Was the team's analysis of the problem and suggested solution convincing?