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From the Editor-in-Chief. . . .

This is the 15th 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 fifteenth 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, 2023. Congratulations to all our authors. I extend a hearty invitation to the next meeting of the SALSb in San Antonio, Texas, Feb. 28-March 2, 2024.

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

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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)

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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
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Mark Your Calendars

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MEDIATION METRICS III: DEPLOYING ESSENTIAL ZOOM STYLES IN VIRTUAL MEDIATION

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CHARLES RAMSER

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This is the third in a series that examines emerging issues and opportunities in mediation. The need for social distancing over the past three years spawned a meteoric rise in virtual mediation to the extent that it is now the dominant form of alternative dispute resolution. The previous paper dealt with a host of errant Zoom styles among participants that may plague the virtual mediation process. This paper is the antithesis, examining a host of essential Zoom styles that mediators should foster if virtual mediation is to succeed. It offers a Personality-Based Model of Essential Zoom Styles that mediators should promote and deploy in virtual mediation. The extent to which mediators employ these essential Zoom styles impacts the effectiveness of virtual 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, 2021). 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.

Before the pandemic, mediation was conducted in person in all but a few specialized cases (Scheindlin, 2022; Galton, 2021). The practice was suspended in Spring 2020 when the COVID-19 pandemic began and has not regained popularity since, even as health and safety concerns waned (Van Winkle, 2023). During this time, virtual mediation became the norm as mediators, attorneys, and parties adapted and expressed satisfaction with the process (Van Winkle, 2023). It has become the dominant form of ADR and is here to stay (Edwards, 2021). Zoom has emerged as the preferred videoconferencing platform to the extent that now Zoom mediation is synonymous with virtual mediation (Black & Keathley, 2021). Despite its many benefits, heavy reliance on Zoom mediation often spawned a variety of misguided or errant Zoom behaviors or styles among participants in virtual mediation. In a previous paper, the authors provided a comprehensive review of 12 errant or misguided Zoom styles that can plague virtual mediation (Bultena, Ramser, & Tilker, 2022). This paper is the antithesis, examining 12 essential Zoom

styles that are vital for virtual mediation success. These styles, derived from group dynamics literature and the authors' experiences in hundreds of Zoom sessions, are summarized in the Personality-Based Model of Essential Zoom Styles. A detailed description of these essential styles follows in the Typology of Essential Zoom Styles. The theoretical basis of these styles is outlined in the Progression of Expression in Virtual Mediation. A Strategy for Deploying Essential Zoom Styles is provided, as are updates on mediation settlement rates.

Recognizing the interpersonal dynamics of virtual mediation can determine the success or failure of the process. Before considering how these skills can be developed using the model, 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 the recent dramatic shift to a virtual process, business leaders must understand and know how to prepare for and conduct successful 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 5,300 cases have been referred annually to the ADR system there, with over 90,000 cases referred over the past 18 years. Also, an impressive average settlement rate of 65% has been registered (Annual Report Oklahoma, 2022). Farther north, results in Nebraska (see Table 2) are also impressive. The number of cases referred annually to that state's ADR system had more than doubled by 2019 before declining over the past three years due to COVID-19. The average settlement rate remained impressive at 79% (Annual Report Nebraska, 2022). These striking regional settlement rates are mirrored across the nation: Better Business Bureau, 78% (4 Disputes.com); U.S. Equal Employment Opportunity Commission, 75% (eeoc.gov); and Financial Industry Regulatory Authority, 75% (finra.org). Impressive settlement rates are also seen internationally as 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

<i>Date</i>	<i>Cases</i>	<i>Settlement Rate</i>
2005	6,328	68%
2006	7,968	62%
2007	5,139	64%
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	<i>No</i>	<i>Report</i>
2017	4,559	68%
2018	4,168	70%
2019	4,419	65%
2020	3,677	62%
2021	3,361	62%
2022	5,014	62%
Total	90,447	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

<i>Date</i>	<i>Cases</i>	<i>Settlement Rate</i>
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%
Total	27,852	80%

Source: *Annual Mediation Center Case Data Report*
from the Nebraska Office of Dispute Resolution

IV. PURPOSE

While virtual mediation was growing prior to the pandemic, it has exploded with the need for social distancing over the past three years. Top mediators Jeff Kichaven and Paul Van Osselaer give virtual mediation high marks and proclaim that “for the foreseeable future, online mediation is mediation” (Kichaven & Van Osselaer, 2021, p. 1.). The consensus among top mediators, as reported by Robert Creo in *Alternatives* (Creo, 2020), is that mediators universally embrace virtual mediation, finding it “not only a viable option, but in many instances the first choice” (p. 122). It is here to stay as a dominant form of mediation and a valuable tool in the mediator’s toolbox (Creo, 2020; Diliberto, 2022). One of the largest providers of mediation services is the EEOC, which has held more than 249,000 mediations, resolved 180,000 private-sector charges, and obtained monetary benefits of more than \$3.15 billion over the past 21 years (EEOC Press Release, p. 3.). The EEOC recently announced results of two large independent studies that report overwhelming satisfaction with their mediation programs, with 98% of employers and 92% of charging parties willing to participate in the program again if they were party to an EEOC charge (EEOC Press Release, p. 2.). More importantly, 70% of participants reported that they would prefer online (virtual) mediation to in-person mediation in the future, citing “flexibility, convenience, cost savings, and a ‘safe place’ as reasons for preferring online

mediation” (EEOC Press Release, p. 2). Moreover, as Zoom has emerged as the preferred videoconferencing platform (Kichaven & Van Osselaer, 2021; Creo, 2020; Black & Keathley, 2021), Zoom mediation is likely to endure long after the pandemic eases (Edwards, 2021; Galton, 2021).

Zoom mediation has advantages and disadvantages over in-person mediation. Most mediators cite as advantages convenience; scheduling flexibility; reduced cost due to elimination of travel; and greater comfort (reduced tension and stress) because of being in a familiar, more comfortable setting (Black & Keathley, 2021). Mark Metzger, a seasoned online mediator, reports that Zoom has cut the time of mediation in half (Kavanagh, 2020). Disadvantages include challenges with the technology; greater difficulty developing rapport with parties and counsel; difficulty reading non-verbal cues; Zoom fatigue; and a loss of control over session recording, unauthorized guests, distraction, and rogue comments by parties (Black & Keathley, 2021). Howard Koh, former dean of Harvard Law School, interviewed two dozen early adopters of virtual mediation, including federal and state judges, arbitrators, mediators, and trial lawyers (2021). He reports clients seemed to be more relaxed, calmer, and happier when no longer confined to a conference room, but attorneys and mediators had less control and persuasive power over parties (Koh, 2021). Zoom mediation seems to diminish some of the control that mediators and attorneys can exercise with in-person mediation. Virtual breakout rooms help, but virtual mediation can present a challenge to effective communication among participants.

Mediation by any means is a form of collaborative communication. Thus, effective communication is vital to its success. In a previous paper, the authors examined the effects of 12 detrimental or errant Zoom styles or behaviors that plague virtual mediation (Bultena, Ramser, & Tilker, 2022). These included Disengaged (Ceiling Fans, Ghosts, and Zombies); Distracted (Phantoms, Mobile Zoomers, and Casual Zoomers); Dominant (Angry Birds, Chatterboxes, and Bulldozers); and Detailed (Show-offs, Chat Masters, and Snipers), which were categorized by personality type (Bultena, Ramser, & Tilker, 2022). By contrast, this paper examines 12 essential Zoom styles that should be developed for virtual mediation success. These styles, derived from group dynamics literature and the authors’ experiences in hundreds of Zoom sessions, are summarized in the Personality-Based Model of Essential Zoom Styles. A detailed description of these essential styles follows in the Typology of Essential Zoom Styles. The theoretical basis of these styles is outlined in the Progression of Expression in Virtual Mediation. The paper closes with a Strategy for Deploying Essential Zoom Styles and updates on mediation settlement rates. Overall, the paper highlights a variety of essential Zoom styles mediators should develop and deploy as a means to enhance the effectiveness of virtual mediation.

V. ESSENTIAL ZOOM STYLES IN VIRTUAL MEDIATION

A. COMMUNICATION IN VIRTUAL MEDIATION

Despite the many benefits of Zoom mediation, such as speed, convenience, efficiency, scheduling flexibility, and lower cost without travel (Kichaven & Van Osselaer, 2021), heavy use is revealing some deficiencies, such as difficulty maintaining confidentiality, Zoom fatigue, and distraction among participants (Bailenson, 2021; Greenwald, 2021; Rizzo, 2021). Mediators have long been aware of the importance of communication in mediation. Each participant, including the mediator, has a unique personality type and communication style. Mediators are skilled at recognizing and managing communication dynamics when in person, but this process is complicated in virtual mediation by physical separation, partial visibility, and indirect access to participants. Without the physical presence of the attorney and mediator to persuade and to preclude and police potentially unproductive or misguided behavior, parties are more likely to relax and be less inhibited in expressing themselves. Moreover, participants in virtual mediation are less likely to read nonverbal cues, maintain eye contact, avoid outbursts, and maintain smooth conversational flow (Black & Keathley, 2021).

“The loss of these cues and differences in how communications are received are the reasons why, when we are online, it seems as if we are either sitting there in silence or talking over one another, creating a disjointed conversation that is hard to follow.” (Black & Keathley, 2021, p. 9)

While the relaxed atmosphere is considered to be a strength of virtual mediation by many top mediators (cf. Kichaven & Van Osselaer, 2020; Creo, 2020; Koh, 2021), it is also a likely avenue for manifestation of a participant’s natural communication style and gives rise to the potential for miscommunication and misguided behavior in virtual mediation. Mediating from their home without the physical presence of the mediator and counsel affords parties greater latitude to engage in communication styles that may hinder virtual mediation. The authors examined 12 errant Zoom styles that may plague virtual mediation in a previous paper (Bultena, Tilker, & Ramser, 2022). In this paper, the authors turn their attention away from these errant Zoom styles (Bultena, Tilker, & Ramser, 2022) to consider positive Zoom styles that enhance virtual mediation success.

B. EXPLORING ESSENTIAL ZOOM STYLES

The authors conducted a content analysis from review of key roles identified in the group dynamics literature and anecdotal evidence from hundreds of Zoom sessions to create a list of behaviors that may impact virtual mediation success. This analysis, summarized in Table 3, indicates considerable overlap or convergence in key team roles identified by pioneers in the field of group dynamics. These include Thomas Quick’s (1992) eight team building roles; Henry

Mintzberg's (1973) 10 managerial roles leaders perform; Glen Parker's (2008) four essential team player styles; Meredith Belbin's (2010) nine team roles; and additional team roles from Andrew Dubrin's (2023) summary of eight positive team member roles that contribute to effective teamwork. The authors reformulated these and other effective roles they had observed in Zoom sessions to yield 12 essential Zoom behaviors marked in bold in Table 3. It is important to note that the errant Zoom styles examined in a previous paper (Bultena, Tilker, Ramser, 2022) were expected to be manifested by participants in virtual mediation (not the mediator). By contrast, while it is possible that some of the essential Zoom styles could be manifested by participants, virtual mediation is best served when the mediator fills these roles.

Table 3: Content Analysis of Key Team Roles in Group Dynamics

Quick's Classic Team Building Roles	Mintzberg's Classic Leader Roles	Parker's Four Team Player Styles	Belbin's Classic Team Roles	Authors Role/Style Reformulations
Personal Style - Driver				
	Leader		Shaper ¹	Captain
Harmonizing		Contributor	Coordinator	Coach (Facilitator)
Mediating	Negotiator		Resource Investigator	
Personal Style - Expressive				
	Entrepreneur		Plant (Dreamer)	Innovator
Gatekeeper	Liaison	Collaborator		
	Spokesperson	Communicator	Completer/Finisher	Salesperson
Personal Style - Analytical				
Process Observing	Monitor		Specialist ²	Expert
Summarizing	Disseminator		Implementer	Organizer
Confronting		Challenger	Monitor/Evaluator	
Personal Style - Amiable				
	Disturbance Handler			Referee
Supporting			Team Worker ³	Counselor
Listening				Confidant
Less Relevant to Mediation				
	Figurehead			
	Resource Allocator			

Notes ^{1,2,3} Dubrin (2023) refers to Shaper as Take-Charge Leader, Specialist as Knowledge Contributor, and Team Worker as People Supporter.

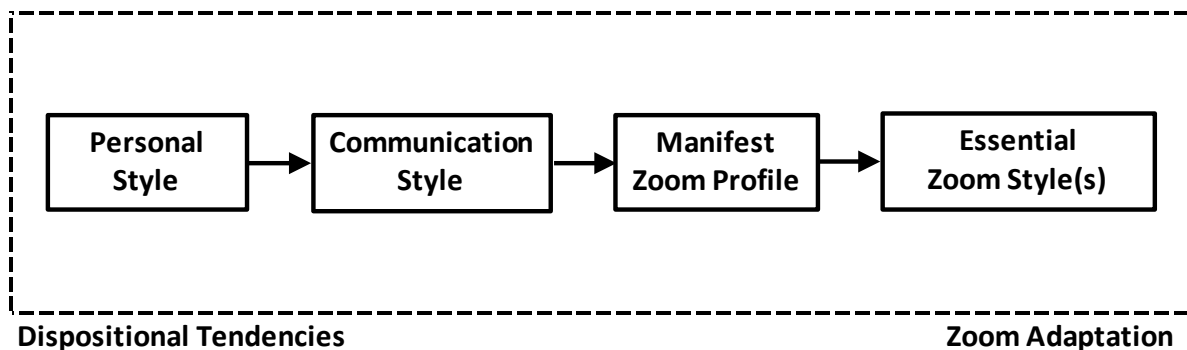
Sources: Quick (1992), Mintzberg (1973), Parker (2008), Belbin (2010), and Dubrin (2023). Personal Styles by Merrill & Reid (1991). Role/Style Reformulations by the authors.

Even though mediators are a blend of personal styles (personalities), it is unlikely that even the most seasoned, well-balanced mediator will be proficient in all 12 essential Zoom styles. When they are not, there may be a tendency for some participants to fill the gap. Belbin's Team Role Theory (2010) stresses the importance of team members understanding the roles that others play and how and when to let others take over to compensate for shortcomings. Due to the unique nature of mediation and the potential for bias, manipulation, and threat to impartiality, it may be ill-advised to entrust these roles to participants. Co-mediation, discussed later in the paper, is a better option for deploying essential styles that are not natural to the mediator.

C. PERSONALITY AND ZOOM STYLE

The 12 essential Zoom styles are mapped on four distinct Zoom profiles derived from Merrill and Reid's (1991) Four Personal Styles (personality types) in the Personality-Based Model of Essential Zoom Styles in Figure 2. The theoretical basis for the model rests in the relationship between personality and communication, outlined in the Progression of Expression in Virtual Mediation in Figure 1.

Figure 1: Progression of Expression in Virtual Mediation



Every personality trait expresses itself in a different way (deVries et al., 2011). The way in which a person communicates with others depends on the way they behave in general. For example, a person who is more friendly, cheerful, and optimistic communicates in a more expressive way according to their personality type and is known to be helping and humorous (deVries et al., 2011). Ahmed and Naqvi (2015) demonstrated a positive relationship between Costa and McCrae's (1992) Big Five personality traits and deVries et. al.'s (2011) Six Communication Styles. Communication in Zoom is likewise an expression of personality. Merrill and Reid (1991) captured the essence of mediator styles in their Four Personal Styles. Applied to mediation, **Drivers** are leaders concerned with action who strive to forge a settlement as quickly as possible. **Expressives** are communicators who build rapport, engage parties, and find creative solutions. **Analyticals** are critical thinkers who rely on knowledge, logic, and organization to reach agreement. Finally, **Amiables** are peacemakers, great team players who are supportive, friendly, and diplomatic (Merrill & Reid, 1991). Ideally, skilled mediators exhibit

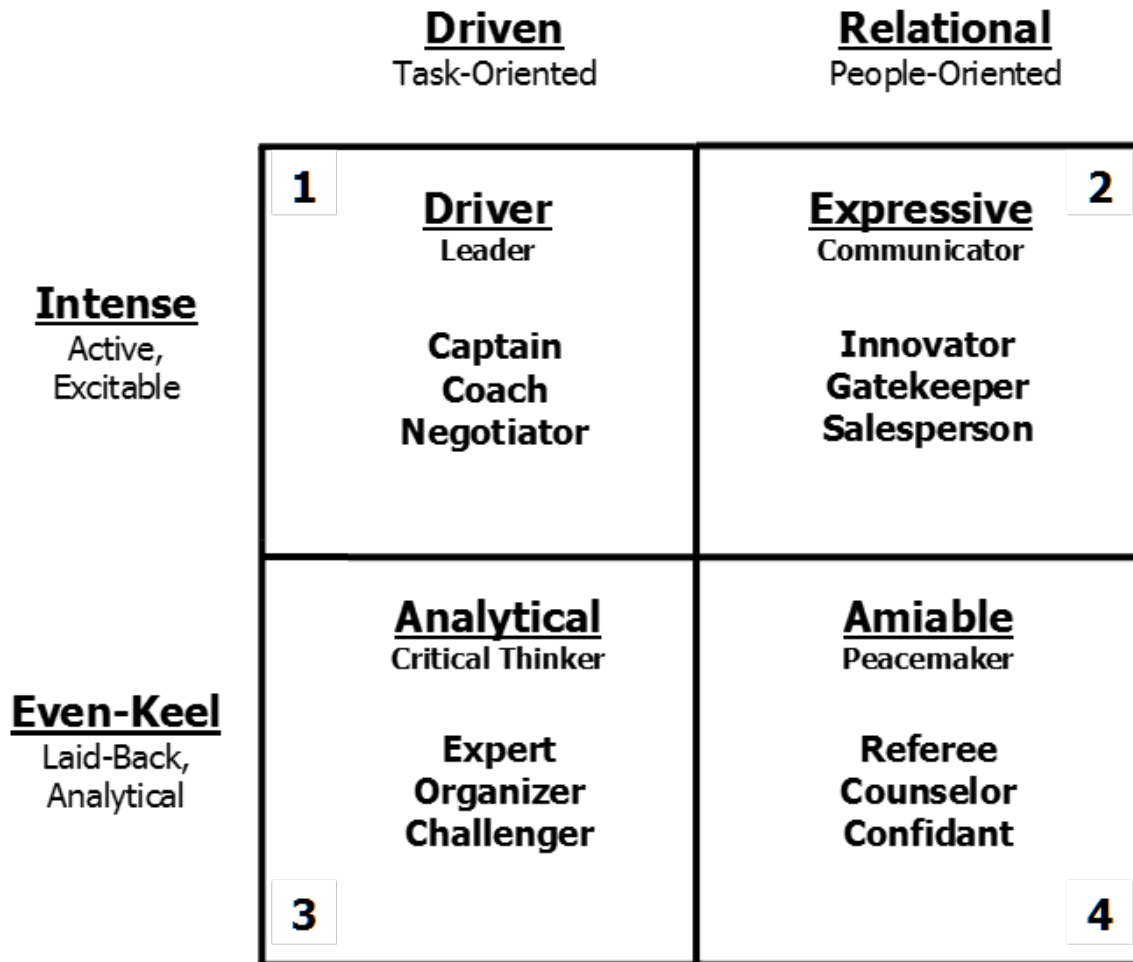
characteristics of all four styles as needed in a given mediation. In practice, mediators tend to revert to familiar patterns of behavior centered around their dominant style. Based on the work of deVries et. al (2011), mediators can be expected to manifest a unique pattern of Zoom communication or styles consistent with their dominant personal style or personality type – in this case, a unique pattern of essential Zoom styles (Zoom profile). Twelve essential Zoom styles identified by the authors are mapped on these four Zoom profiles in the next section.

D. PERSONALITY-BASED MODEL OF ESSENTIAL ZOOM STYLES

The authors describe 12 essential Zoom styles that are vital for virtual mediation success in the Typology of Essential Zoom Styles in Table 4. Essential Zoom styles are mapped on the four personality-based essential Zoom profiles outlined in the Personality-Based Model of Essential Zoom Styles in Figure 2. Essential Zoom profiles are arranged into four quadrants defined by two dimensions: **Focus** and **Intensity**. In terms of **Focus**, the profiles are classified as being Driven (Task-Oriented) or Relational (People-Oriented). **Intensity** gauges the activity level of the profiles, whether they are Intense (Active and Excitable) or Even-Keeled (Laid-Back or Analytical).

In Figure 2, **Quadrant 1**, labeled **Driver**, are action-oriented **Leaders** who strive to keep the parties moving quickly toward settlement. They are active and goal-oriented, and they set the pace and keep things rolling toward resolution (Merrill & Reid, 1991). They come in three varieties: **Captain**, **Coach**, and **Negotiator**. The **Captain** acts as a take-charge leader (cf., Dubrin, 2023), establishing control and using a directive approach to keep the session on track. This role is most important in the early stages of virtual mediation as the mediator tries to start the process. Rather than direct the process, the **Coach** facilitates interaction between participants, focusing on partnership and collaboration to reach a settlement. Finally, the **Negotiator** finds common ground, invents options, and strives to remove barriers to agreement. The **Negotiator** is well-suited to the art and science of bargaining. Natural to the **Driver**, each of these essential Zoom styles is vital to effective virtual mediation.

Quadrant 2 is the realm of **Expressives**, who are **Communicators** who use their skills to build rapport with participants, their creativity to devise novel solutions, and their persuasiveness to overcome barriers to settlement. They are verbally adept, engaging, enthusiastic, and excel at breaking down barriers between participants (Merrill & Reid, 1991). They embody three essential Zoom Styles: **Innovator**, **Gatekeeper**, and **Salesperson**. When parties are deadlocked, the **Innovator** has the ability to brainstorm and find the optimal resolution of the dispute that others may overlook (Love & Parker, 2017, p. xii). Some participants in virtual mediation are less assertive, and others may monopolize the discussion. The effects of both are amplified in virtual mediation. The **Gatekeeper** is adept at prying open the gate of communication – re-engaging, reassuring, and re-energizing silent participants – and neutralizing the dominators who monopolize the discussion (Quick, 1992, p. 41). Finally, the **Salesperson** uses persuasive powers to close the distance between party positions and to gain support for settlement offers while remaining impartial.

Figure 2: Personality-Based Model of Essential Zoom Styles

Source: C.D. Bultena, C.D. Ramser, and K.R. Tilker

The **Analytical Critical Thinkers** occupy **Quadrant 3**. They are polite but logical, fact-oriented, analytical, and highly organized. They tend to have great problem-solving skills, challenge the status quo, and rely on knowledge, perfection, and precision to settle cases (Merrill & Reid, 1991). They excel in three essential Zoom styles: *Expert*, *Organizer*, and *Challenger*. *Experts* are subject-matter experts who use knowledge constructively to inform parties and reach agreements, not as a means to intimidate and overwhelm participants. There is no substitute for knowledge of the subject matter in the brevity of virtual mediation. If the mediator is not familiar with the subject matter, a subject-matter expert may be required. *Organizers* excel at scheduling, arranging and summarizing information, managing proposals, and caucusing (the efficient use of shuttle diplomacy). Organization is vital to success in virtual mediation before, during, and after the session, and it is essential in the conduct of relatively brief, often complex, virtual mediation sessions. *Challengers* criticize decisions or thinking that is deficient or

ethically unsound. Effective interpersonal skills are required to be a Challenger because antagonistic, attack-oriented people quickly lose their credibility (Dubrin, 2023, p. 224). To confront complacency, noncritical thinking, and bad ideas, mediators may assume the role of *Challenger*.

Finally, **Quadrant 4** is home to the Amiables who are the **Peacemakers**. They are team players who are supportive, friendly, and diplomatic. They resolve conflict, reassure parties, gain trust, and remove barriers to agreement. They are supportive, respectful, dependable, and agreeable (Merrill & Reid, 1991). Three Zoom styles appear in this quadrant: *Referee*, *Counselor*, and *Confidant*. When the parties' views are so intense and polarized that they are unwilling to move toward each other's point of view, the *Referee* is needed to mediate the dispute (Quick, 1992, p. 42). They are called upon to break up virtual disputes, call virtual fouls, and break stalemates. In the role of the *Counselor* style, mediators may have to hit the pause button in virtual mediation to offer support to participants who are overwhelmed or upset. A little time invested in demonstrating empathy and compassion and helping parties navigate difficult emotions may salvage the session. Finally, mediators may serve as *Confidants*, because most disputes cannot be resolved without some degree of trust and cooperation between the parties. In this role are good listeners who gain the trust of parties by demonstrating sincere concern for their interests and positions while maintaining confidentiality.

Overall, this section presents a comprehensive, personality-based model of essential Zoom styles for virtual mediation success. Being aware of these behaviors and responding appropriately enables mediators to preclude communication problems and effectively manage virtual mediation.

Table 4: Typology of Essential Zoom Styles

Zoom Profile	Essential Zoom Styles
Quadrant 1 – Driver	
Leader – active, goal-oriented leader who sets the pace and motivates the parties to keep moving quickly toward resolution and settlement.	
Captain	Acts as a take-charge leader establishing control and using a directive approach to keep the session on track – most important in early stages.
Coach	Works as a partner with participants to facilitate progress in the session. Lays out parameters and allows more participation in the session.
Negotiator	Empathizes with parties, focuses on interests and not positions, finds common ground, invents options, and strives to remove barriers to agreement.

Table 4: Typology of Essential Zoom Styles (Continued)

Zoom Profile	Essential Zoom Styles
<i>Quadrant 2 – Expressive</i>	
Communicator – uses charm to build rapport and connect participants. Breaks the ice, relaxes participants, offers creative solutions, and gains support for solutions.	
Innovator	Has the uncanny ability to brainstorm and find the win-win solutions overlooked by others that often lead to resolution.
Gatekeeper	Pries open the gate of communication, re-engaging and reassuring silent participants and neutralizing dominators who monopolize the discussion.
Salesperson	Uses persuasive powers to close the distance between parties and gain support for settlement offers while remaining impartial.
<i>Quadrant 3 – Analytical</i>	
Critical Thinker – logical, fact-oriented problem solvers who are not afraid to challenge the status quo. They rely on superior knowledge, perfection, and organization to settle cases.	
Expert	Use subject-matter knowledge constructively to inform parties and reach agreements, not as a means to intimidate participants.
Organizer	Excels at scheduling, arranging and summarizing information, managing proposals, and the efficient use of shuttle diplomacy (caucusing).
Challenger	Questions decisions or thinking that is deficient or ethically unsound offering viable alternatives without appearing antagonistic.
<i>Quadrant 4 – Amiable</i>	
Peacemaker – great team player who is supportive, friendly, and diplomatic. Resolves conflict, reassures parties, gains trust, and removes barriers to agreement.	
Referee	Often called upon to break up virtual disputes, call virtual fouls, and break stalemates. Control anger and manage conflict between parties.
Counselor	Takes time to demonstrate empathy and compassion helping parties navigate difficult emotions that may arise in the session.
Confidant	A good listener who gains the trust of parties by demonstrating sincere concern for their interests and positions during the session.

Sources: 12 Essential Zoom Styles by the authors. Personality Types based on Merrill-Reid (1991) and Littauer (1992).

E. DEPLOYING ESSENTIAL ZOOM STYLES – THE CASE FOR CO-MEDIATION

Communication style is etched in the mind of the mediator. It is a function of personal style or personality. While certain communication styles come naturally to a particular mediator, they may not for others. Although mediators are a blend of personalities and styles, it is unlikely that even the most seasoned, well-balanced mediator will be proficient in all 12 essential Zoom styles. Due to the brevity and challenges of physical separation in virtual mediation, mediators have little time to adjust or work around styles they typically avoid during a session. If the case requires avoided styles, co-mediation may be vital for virtual mediation success. Co-mediation is a “tool in the mediator’s toolkit that uses two or more mediators working in tandem to assist parties in reaching a resolution” (Baggett-Hayes, 2022, p. 1). It is an increasingly popular approach that is used in community and non-profit mediation programs, commercial cases, and other complex disputes, including family and divorce matters (Mediation Works, Inc., 2021). Mediators marshal “the richness of two perspectives, the value of interventions different from their own” to enhance mediation outcomes (Heller, 2021, p. 3).

“In these instances, the connections between the co-mediators – their styles, listening and summarizing skills, their tempos, and rhythms coupled with their comfort with anger, conflict, and silences and knowing when and how to intervene – become even more crucial...” (Heller, 2021, p. 2).

Co-mediation has many advantages. It employs teamwork, as one co-mediator uses interpersonal styles, skills, and knowledge that the other mediator lacks (Baggett-Hayes, (2022). It saves time and improves mediation outcomes as co-mediators use a tag-team approach to work concurrently, caucusing separately in alternate rooms and deploying the unique knowledge and skill of one mediator separately to resolve specific issues (Ratliff, 2021). There are many opportunities for mediators to rescue one another and rely on effective strategies during the mediation as needed (Baggett-Hayes, 2022, p. 2.). There are, of course, obstacles to effective co-mediation, including inability to get approval of the parties; disagreement over who should sponsor the mediation and fee sharing; and inability to mesh interpersonal differences in style and tactics while sharing leadership roles (Baggett-Hayes, 2022; Ratliff, 2021).

Thus, co-mediation can be an effective tool to expand essential Zoom styles deployed in virtual mediation. It may not be appropriate in all cases, but it remains a viable option for deploying additional essential Zoom styles. The Strategy for Deploying Essential Zoom Styles in Table 5 is a 10-step roadmap for identifying, developing, and deploying the styles. It is a compilation of recommendations by the authors and mediation professionals who are skilled in co-mediation. It begins with a discovery process whereby a mediator assesses their own personal style using an assessment such as the Merrill-Reid Social Styles Questionnaire (Merrill & Reid, 1991) or Florence Littauer’s Wired That Way Survey (Littauer, 1992, see thepersonalities.com). Because most people are a blend of styles, the mediator can find their dominant and secondary personal styles in the Typology of Essential Zoom Styles in Table 4.

This demonstrates the strengths or natural tendencies of the mediator. Confirmation is then sought in post-mediation exit surveys and feedback to confirm the styles used and those that were underused or avoided. At this point, the mediator embarks on a self-development journey to develop underused or avoided styles, through mediation training, working with complementary mediators who deploy avoided styles, and practicing these styles in actual virtual mediation sessions. Follow-up mediation exit surveys and feedback will indicate progress.

Next, mediators should assess personalities of participants and anticipate styles needed in premediation meetings. This should inform case selection and whether co-mediation is warranted. Because it is unlikely that even the most seasoned, well-balanced mediator will be proficient in all 12 styles, some cases may not be a good fit for the mediator. At this point, co-mediation should be considered. However, this option must be developed over time if it is to be deployed effectively.

According to Earlene Baggett-Hayes (2022), “selecting an appropriate co-mediator is critical” (p. 3). Mediators should seek out partners with complementary subject-matter expertise as well as communication, and negotiation styles (Baggett-Hayes, 2022). Deborah Heller (2021) recommends looking for connections with potential co-mediators in terms of their “styles, listening and summarizing skills, their tempos and rhythms coupled with their comfort with anger, conflict, and silences, and knowing when and how to intervene” (p. 2). It is imperative that mediators select partners with complementary styles for virtual mediation. Once potential co-mediators have been selected, a meeting is needed to explore styles, habits, expectations, physical limitations or health concerns, potential conflicts, as well as neutrality, and they must agree on availability, fees, ground rules, and terms for a co-mediation agreement (Baggett-Hayes, 2022). The co-mediation agreement must be approved by the mediation parties, and any additional costs, which should be minimal in virtual mediation, as well as the potential for greater efficiency, effectiveness, and better resolution, should be disclosed.

Co-mediators should meet with the parties before virtual mediation in order to establish ground rules and procedures for virtual mediation and to familiarize themselves with the parties’ styles and interests, as well as with details of the case. Co-mediators should meet privately before mediation begins to discuss the parties, their styles, and interests; to arrange seating to ensure eye contact; to prepare technology for virtual co-mediation; to agree on the strategy, styles, and roles they will assume; and to discuss how they will communicate during mediation (Mediation Works Inc., 2021; Baggett-Hayes, 2022). It is essential that co-mediators communicate directly during mediation, know when to tag off to their partner, and take breaks as needed to discuss sensitive issues privately (Mediation Works, Inc., 2021). Finally, co-mediators should conduct an open, honest debriefing after co-mediation in order to discuss what both learned, what styles and tactics worked, and what each could do differently next time (Baggett-Hayes, 2022, Mediation Works Inc., 2021). Effective co-mediation is built on trust, communication, honesty, and constructive feedback.

The natural shortcomings in Zoom styles that are inherent in a mediator can be overcome by assessing the mediator's personality; identifying underused or avoided styles; developing and deploying these styles when feasible; and enlisting a co-mediator when it is not. Virtual mediation presents unique challenges to mediators and participants. The Strategy for Deploying Essential Zoom Styles offers a roadmap for identifying and addressing shortcomings in the virtual mediation process. Successfully deploying the essential Zoom styles enhances the likelihood of virtual mediation success.

VI. SUMMARY

The shuttering of the courts and offices of attorneys and mediators during the pandemic that began in Spring 2020 likely changed the face of mediation forever (Van Winkle, 2023). It ushered in the age of virtual mediation, which has become the dominant form of dispute resolution. Robert Creo of *Alternatives (Master Mediator Series)* expressed surprise at the "universal embrace" of online mediation in his canvassing of top mediators (Creo, 2020, p. 119). After 300 virtual mediations, Eric Galton, co-author of *Stories Mediators Tell* (2012), predicts that virtual mediation "will usher in a virtual renaissance in the modern mediation movement," infusing it with new energy, a new array of tools, and greater reach, making it more accessible and affording it a greater role in the public domain (Galton, 2021, p.1). Mediators will continue to adapt to what may be the most significant development in the field of ADR to date. This paper highlights some of the communication challenges they are facing and offers solutions for addressing them.

Essential Zoom styles that are vital to virtual mediation were introduced in the Personality-Based Model of Essential Zoom Styles in Figure 2. This model traced the connection between personal style (personality) and communication style, identifying four personality-based Zoom profiles. A content analysis of Classic Group Dynamics Theory yielded 12 essential Zoom styles that were classified and mapped onto those profiles. These styles were outlined in the Typology of Essential Zoom Styles in Table 4. Guidance in identifying, developing, and deploying these styles was provided in the Strategy for Deploying Essential Zoom Styles in Table 5 (see below), which provided a 10-step roadmap for mediators to deploy the styles. These steps included a detailed plan for using co-mediation as a means to expand styles deployed in virtual mediation. Growing use of co-mediation is enhancing communication and the effectiveness of the process.

Table 5: Strategy for Deploying Essential Zoom Styles

	Mediator Steps for Deploying Essential Zoom Styles
1.	<u>Assess Your Personality Type</u> – complete a personality assessment, such as the Merrill- Reid Social Styles Questionnaire or Florence Littauer’s Wired That Way survey (see thepersonalities.com) to identify your dominant personality type(s).
2.	<u>Assess Essential Zoom Styles Deployed</u> – use post-mediation exit surveys and feedback to assess essential Zoom styles deployed and those not mentioned that you tend to avoid in mediation.
3.	<u>Develop a Plan to Expand Styles Deployed</u> – through training, working with complementary mediators (those who deploy styles you avoid), and practicing new styles in mediation.
4.	<u>Anticipate Styles Needed in Premediation Meeting</u> – by assessing personalities among participants and essential Zoom styles likely to be needed. This informs case selection and when co-mediation is warranted.
5.	<u>Explore Potential Co-mediation Partners</u> – meet with potential partners to assess synergy, natural rhythm, tempo, and complementary styles. Consider joining forces in a routine mediation meeting or session.
6.	<u>Contract with a Co-Mediator</u> – determine availability, set fees, ground rules, and prepare a mediation agreement.
7.	<u>Gain Approval of Co-mediation Agreement from Parties</u> – disclose additional costs (which may be minimal in virtual mediation) and highlight potential for greater efficiency, effectiveness, and better resolution with co-mediation.
8.	<u>Meet with Co-mediator Prior to Mediation</u> – arrange seating to ensure eye contact, prepare technology for co-mediation, set ground rules, and discuss communication and mediation styles and how best to deploy them in the session.
9.	<u>Communicate Directly with Co-mediator During Mediation</u> – maintain eye contact, communicate directly during mediation, know when to tag off to your partner, and take breaks as needed to discuss sensitive issues privately.
10.	<u>Debrief with Co-mediator After Mediation</u> – discuss what both learned, what styles and tactics worked, and what both could do differently next time. Effective Co-mediation is built on trust, communication, honesty, and constructive feedback.

Source: Compilation of recommendations from: Baggett-Hayes (2022), Heller (2021), Ratliff (2021), and Mediation Works, Inc. (2021). Additional recommendations by the authors.

VII. CONCLUSION

The resilience of mediation in the wake of the dramatic shift to a virtual process has been noted, the communication challenges posed by process have been exposed, essential Zoom styles have been revealed, 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 address communication problems among mediation participants, leading to a more efficient and effective process. Virtual mediation has become a vital tool in ADR. It is most likely to succeed when participants recognize and respond appropriately to these communication challenges.

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 utilization of virtual mediation on the rise, it is more important than ever for business leaders to master skills necessary to take full advantage of the opportunities this process offers. Mediation is an effective tool when business leaders prepare for and navigate the process with a clear understanding of how to remove interpersonal barriers, thus ensuring more understanding, mutual respect, and open communication.

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CASTEISM IN CORPORATE AMERICA: LEGAL AND HUMAN RESOURCES IMPLICATIONS OF CASTE DISCRIMINATION IN TODAY'S WORKPLACE

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ABSTRACT

In 2020, the California Department of Fair Employment and Housing filed a lawsuit against Cisco alleging discrimination based on the South Asian caste system. This case has since brought significant attention to allegations of caste-based discrimination within the United States, and it is critical for organizations to recognize the potential impacts of caste discrimination in the workplace. This article provides a concise overview of the South Asian caste system and then examines the legal and Human Resources implications of caste discrimination within U.S. companies. From a legal perspective, the lack of specific statute and case law creates a vulnerable situation for organizations, and federal legal reform is a critical step toward achieving caste equality. From a Human Resources perspective, caste discrimination threatens an organization's competitive advantage—especially when the organization strategically leverages foreign human capital from South Asia. Organizations will benefit from being proactive by examining their internal discrimination policies to determine exposure to caste discrimination liability. To help organizations navigate this process, the authors adapt Cisco's formal allegations to highlight critical elements for organizations to consider when reviewing their internal discrimination policies.

INTRODUCTION

In 2020, the California Department of Fair Employment and Housing (CDFEH) brought a lawsuit against Cisco claiming that several of Cisco's employment practices amounted to discrimination based on the South Asian Caste System (Complaint, 2020a).¹ The case has brought attention to those who are discriminated against, in the United States, because of their caste. Caste is broadly defined as “a division of society based on differences of wealth, inherited rank or privilege, profession, occupation, or race” (Merriam-Webster Dictionary, n.d.). This stratification of societies commonly involves the following core traits: “(1) hereditary transmission and endogamy; (2) strong relationships with religious and social practice and interaction; (3) relationships with concepts of “purity” and “pollution”; and (4) hierarchical ordering, including through perceived superiority of dominant castes over oppressed castes, hierarchy of occupation, and discrimination and stigmatization of oppressed castes” (Krishnamurthi & Krishnaswami,

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¹ Effective July 1, 2022, after CDFEH filed the lawsuit, the state of California renamed CDFEH as the California Civil Rights Department.

2021, p. 462). Krishnamurthi and Krishnaswami use the term “caste” synonymously with the traditional caste system prevalent in South Asia and that was spread with the South Asian diaspora.

HISTORY OF THE CASTE SYSTEM

Although the caste system has its roots in India dating back thousands of years, there is dispute among scholars as to the actual origin of the caste system (Grisnell, 2001; Hanchinamani 2001). The caste system goes back at least to the Rig Veda, which is believed to be written around the fifteenth century B.C. (French, 2012). The Veda created hierarchical relationships within the Indian society. (Smith, 1994) The societal hierarchy is stratified by both varna and jati. Varna divide the society into four classes, which in order from the highest to lowest in societal hierarchy, include Brahmins, Kshatriyas, Vaishyas and Shudras. Traditionally, Brahmins were the priestly caste, Kshatriyas were the princely and warrior caste, Vaishyas were the business, merchant and farmer caste, and Shudras did menial jobs and were servants. Beneath the four recognized castes, there was a group so low in the societal hierarchy that they were excluded from having a caste altogether. This group of casteless individuals were commonly referred to as outcastes, non-caste Hindus, and untouchables. Today, members of this group are referred to as Dalits. (BBC News 2009). Some scholars refer to Dalits as a “sort of fifth caste outside the four-fold system” (Brown et al., p.120). The jati system works along with the caste system. There are thousands of jatis, which further stratify the castes by, among other things, traditional occupations (Krishnamurthi & Krishnaswami, 2021). The jati system also reinforced a traditional societal hierarchy, in which Dalits were generally relegated to occupations that were considered to be ritually impure (e.g., removing human waste, handling animal carcasses, tanning leather, washing clothes, sweeping streets, making and fixing shoes, and temple prostitution (Kudekallu, 2020).

A person is associated with the caste in which they were born into for their entire lives. Traditionally, moving between castes is nearly impossible (Grinsell 2010). It is noted that “[t]o be born into a specific caste is to inherit all the privileges or detriments, to hold all the social currency or suffer imposed poverty, to be able to access education or excluded from it, to have very limited choices (in general) in association, be it in marriage, friendship, or even occupying the same physical space with others” (Kudekallu, 2020 p. 1109-1109). Because of the caste hierarchy, Brahmins, Kshatriyas and Vaishyas are considered the upper, or dominant castes. Additionally, all castes, including the Shudras, are superior to Dalits. The dominant castes have historically subjugated the Shudras and Dalits (Krishnamurthi & Krishnaswami, 2021).

Scholars are in dispute as to whether the caste system was created as a tenet of Hinduism. Caste may predate Hinduism as a religion and may have started as a division of labor creating a specialization of occupations in pre-Hindu India (Nadkarni, 2003). Some define Hinduism, in reference to the caste system to include indigenous beliefs. Krishnamurthi and Krishnaswami note that “[t]he caste system is rooted in the indigenous traditions, practices, and religions of South Asia. We can generally refer to those traditions, practices, and religions as “Hinduism.” The term Hinduism, as we use it, is an umbrella term for a diversity of traditions, practices, and religions that may share no common thread except for geographical provenance. So defined, the term Hinduism is capacious” (Krishnamurthi & Krishnaswami, 2021 p. 460). However, what is known is that the caste system was perpetuated through Hinduism. This has led to the caste system of South Asia often being referred to as the “Hindu caste system” (see e.g. Brown et al., 2022).

Many modern Hindus believe that Hinduism does not include the caste system, and some say that it never has (Krishnamurthi & Krishnaswami, 2021). As an attempt to create an egalitarian

society, in 1947 India constitutionally prohibited discrimination by many grounds, including caste, and banned untouchability (Nagarajan, 2009). However, there are enough examples to note that often “modern Hindu practice continues to recognize and entrench caste in religious and social practice and interaction, and people suffer oppression and discrimination on the basis of caste” (Krishnamurthi & Krishnaswami, 2021 p. 462-463). While the prevalence of belief in the caste system by modern Hindus is not known, it is alive enough that it should be included when discussing legal remedies (Krishnamurthi & Krishnaswami, 2021). It should be further noted that the perpetuation of the caste system does not rely on Hinduism. As caste was seen by many as a construct of Hinduism, often Hindus outside of the dominant castes would convert to other religions, such as Islam and Christianity. Even after conversion to religions where caste was never recognized, the caste-based hierarchy would still apply to converts in societal matters (Sridharan, 1999).

INDIA DIASPORA TO THE UNITED STATES

The India diaspora is the largest in history. It occurred in separate waves of emigration over time, and currently there are approximately 17.5 million Indian-born people who live in other countries. This is in addition to other South Asian diasporas. Bangladesh and Pakistan have also had large diasporas, of 7.8 million and 6.3 million people respectively (Singh 2022). The waves of immigration led to people of South Asian descent living around the globe. The United States started receiving large numbers of South Asian immigrants beginning with the enactment of the Immigration and Nationality Act of 1965 (Hatton 2015). This Act established the modern immigration system in the United States, based on work and family ties. By doing so, it replaced the Luce Cellar Act of 1946 which was based on discriminatory national origin-based quotas on immigration. The Luce Cellar Act only allowed 100 Indians to immigrate to the United States per year (Luce-Cellar Act; Elzweig 2021). The Immigration and Nationality Act of 1965 allowed for 170,000 people per year to immigrate from the Eastern Hemisphere, which included South Asian countries (Lee & Lewis, 2003). South Asian migration steadily continued to the United States. Between 2001 and 2015, more than half of the H-1B visas granted for high skilled workers, were granted to people from India (South Asians by the Numbers, 2019). From 2010 and 2017 the South Asian population in the United States grew by forty percent. As of 2019, there were approximately 5.4 million South Asians in the United States, with the number expanding (South Asian Americans Leading Together, 2019). Because of societal factors, such as access to education, over ninety percent of Indian immigrants to the United States are from the dominant castes (Tiku, 2020). Dalits and Shudras make up only two percent of South Asian immigrants (Kapur, 2019).

CASTE-BASED DISCRIMINATION CLAIMS IN THE UNITED STATES

A survey of Dalits indicates that the caste system migrated to the United States along with the South Asian immigrants (Elzweig, 2021). In 2018, Equality Labs, a Dalit advocacy group, released a study on caste-based discrimination in the United States. As a small minority of the South Asian immigrants, Dalits were found victims of caste-based discrimination in many institutions within the United States by those in dominant castes. Large percentages of Dalits surveyed indicated they were discriminated against in primary and higher education institutions and their places of worship. The majority of Dalits reported instances of derogatory jokes and slurs, and over a quarter of Dalits reported being physically assaulted because of their caste. Most germane for this paper, sixty-seven percent of Dalits reported that they had faced caste-based discrimination from U.S. employers (Zwick-Maitreyi et al, 2018). Allegations of discrimination

are ubiquitous to all employment sectors, but they are of particular concern to the information technology (IT) industry. A 2019 study found that most of America's top ten H-1B employers were major technology firms including Amazon, Google, Tata Consultancy Services, Microsoft, Facebook, IBM, Apple, and Intel (National Foundation For American Policy, 2020). The availability of H-1B visas has led to as many as 100,000 IT and computer specialists per year to immigrate to the United States since the mid-1990s. This wave of the India diaspora is sometimes referred to as the *IT generation* (Chakravorty et al., 2016). The *Cisco* lawsuit involved accusations that upper caste South Asian supervisors harassed a Dalit employee because of the caste disparity between them. Additionally, there were allegations that the Dalit employee received lower pay and fewer opportunities within Cisco because of their caste affiliation (Complaint, 2020a). Shortly after CDFEH filed suit against Cisco, Equality Labs received approximately 260 additional complaints from IT workers claiming that they were victims of caste-based workplace discrimination (Tiku, 2020).

CISCO FEDERAL CLAIMS

The *Cisco* case was originally filed in federal court claiming that the John Doe plaintiff's "ancestry, national origin/ethnicity, and race/color is Dalit Indian. Doe has a darker complexion relative to other persons of non-Dalit Indian descent. Doe's religion is Hindu. As a Dalit, he also is known as being from the untouchable or scheduled caste" (Complaint., 2020a p. 8). CDFEH claimed that, therefore, Cisco was in violation of Title VII of the Civil Rights Act of 1964 (Title VII) (42 U.S.C. § 2000e, *et seq.*), and the California Fair Employment and Housing Act (Cal. Gov't Code § 12900, *et seq.*), because "Cisco engaged in unlawful employment practices on the bases of religion, ancestry, national origin/ethnicity, and race/color against plaintiff John Doe" (Complaint, 2020a p. 1). Without stating a reason, CDFEH voluntarily dismissed the federal case (Plaintiff's Notice, 2020) and refiled in state court, deleting the federal claims (Complaint, 2020b). It is likely that the dismissal was based on CDFEH's assessment that they were more likely to be successful under a California law claim. Title VII states that

It shall be an unlawful employment practice for an employer---

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin (42 U.S.C. § 2000e-2(a)).

This part of Title VII defines "protected classes" that are relevant to a Title VII claim: race, color, religion, sex, or national origin. CDEFH did not make a claim under 42 USC § 1981 (§1981), a commonly used federal statute brought in conjunction with Title VII claims in employment discrimination actions. Section 1981 states that "[a]ll persons ... shall have the same right ... to make and enforce contracts ... as is enjoyed by white citizens" (42 U.S.C. § 1981). Section 1981 was originally enacted right after the civil war to allow freed slaves equality in contracts and was later interpreted to include employment contracts and other employment relationships including

those for employment at will. Section 1981 creates a remedy for discrimination based on race and color (and only race and color) in employment claims (Jones, 2000). No federal statute identifies caste as a protected class. To claim that caste discrimination is federally protected, caste would have to be a proxy for one of the identified protected classes. No court has yet held this, but it will likely be litigated in the future. Although it is controversial, Brown and Sitapati note that “Progressive Dalit groups believe that they were the original inhabitants of the Indian subcontinent. They point to the fact that the Aryans (whom they hold to be the upper castes Hindus of today) had distinct features such as fair skin and sharp facial features, while Dalits have darker skin.” (Brown & Sitapati, 2008). Regardless of whether this is true, caste discrimination is based on social stratification, not on the tone of a person’s skin. Caste discrimination is not constrained by sex, and all sexes may be discriminated because of caste. Although caste may have been perpetuated by Hinduism, caste discrimination is not based on the religion, but on the social status of the individual. This is true, whether a person is Hindu, has left Hinduism for another religion, or was never Hindu, but was otherwise part of the South Asian caste system. The Hindu American Foundation (HAF) filed suit against the California Civil Rights Department (which CDFEH became after the filing of the *Cisco* lawsuit) for violations of Hindus’ civil rights and for defamation because CDFEH filed “enforcement actions based on the inaccurate assertion that caste, a caste system and caste-based discrimination are an inherent part of Hindu religious belief and practice” (Compliant, 2022 p. 8). The complaint stated that this was based on inaccurate colonial beliefs that a caste system is a tenet of Hindu. The HAF asserts that these allegations were a discriminatory attempt to define Hinduism, which is not done with other religions, and claim that Hinduism itself was biased because of its supposed relationship to the caste system. Caste based discrimination is also, by itself, not the same as national origin discrimination. Most people who claim that they are victims of caste discrimination have roots in India and other parts of South Asia. However, the discrimination is based not on the country of origin or national origin group, but on social class regardless of national origin.

Following the case of *Bostock v. Clayton County*, which determined that discrimination based on sexual orientation is a form of sex discrimination, many scholars theorize that a comparable approach might be adopted regarding caste discrimination (Krishnamurthi & Krishnaswami, 2021; Brown et al., 2022). *Bostock* ruled that a “but for analysis” can be used to determine Title VII discrimination. *Bostock* noted that “[w]hen it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to the challenged employment decision. So long as the plaintiff’s sex was one but-for cause of that decision, that is enough to trigger [a Title VII claim]” (*Bostock v. Clayton County*, 2020 p. 1738-1739). These scholars note that even if caste discrimination cannot be reduced to a specific protected class, one’s caste could still be a relevant factor in employment decisions when analyzed using a “but for analysis”. An example of this analysis given by Krishnamurthi and Krishnaswami states:

“the but-for test can be used to argue that caste discrimination is a form of national-origin discrimination, because it would not occur “but for” one’s national origin. Specifically, but for the employee having an ancestor who had a particular caste identity defined and dictated by South Asian culture and practice, the employee would not have been discriminated against. More simply, but for the employee having a particular South Asian heritage (that is, their involuntary membership in a South Asian caste hierarchy), the employee would not have been discriminated

against. So that is national-origin discrimination” (Krishnamurthi & Krishnaswami, 2021 p. 472).

A similar analysis may be made for other protected traits including race, color, and religion. However, no court has undertaken this analysis in relation to a caste discrimination claim.

CISCO CALIFORNIA STATE CLAIMS

The likely reason that CDFEH dismissed the federal lawsuit, and refiled the suit in a California state court, is that California has more protected classes, including discrimination based on ancestry. Cases involving ancestry discrimination are often closely associated with race. The EEOC defines race discrimination as “include[ing] discrimination on the basis of *ancestry* or physical or cultural characteristics associated with a certain race, such as skin color, hair texture or styles, or certain facial features.” (Questions and Answers About Race and Color Discrimination in Employment, 2006). Again, it is theorized that “[i]f ‘race’ means something like a group distinguished by ancestry, then caste will select a particular ‘race,’ because caste is a hereditary system that relates to ancestry” (Krishnamurthi & Krishnaswami, 2021 p. 473). This rationale could lead a California state court to interpret caste discrimination as a form ancestry (or race discrimination). However, no court has made this determination either.

The lack of specific statute and case law leaves organizations in a state of limbo. It is unknown if legal claims brought under federal or state caste discrimination theories are actionable or not. Therefore, organizations need to be proactive. Brandeis University was the first university to specifically ban caste-based discrimination. This was followed by other universities and some companies. In 2023, the city of Seattle became the first municipality to ban caste discrimination. Unless there is a specific organizational policy or municipal ordinance that specifically addresses caste discrimination, there is no consensus of whether an organization can be held liable for damages in a caste discrimination claim. Therefore, organizations need to protect themselves not only legally and ethically but also systematically and strategically.

IMPACTS OF GLOBALIZATION

Most U.S. labor laws were developed prior to the globalization of America’s workforce, which has contributed to significant gaps that often marginalize the basic human rights of foreign workers including those from South Asia. Thus, achieving caste equality in the U.S. will require a multifaceted approach including both comprehensive legal reform and substantive institutional support. Thus far, this article has considered caste discrimination from a legal perspective—concluding that federal legal reform is a critical step toward achieving caste equality. Now, the focus shifts to consider the strategic implications of caste discrimination for U.S. organizations, focusing on, but not solely limited to, the technology industry. Caste discrimination is clearly a strategic threat to companies within the technology industry. Such discrimination persists due to systemic issues that make it difficult for organizations to identify and address prejudicial stigmas and behaviors and ultimately influence substantive change. Seattle’s recent update to its discrimination laws made it the first U.S. jurisdiction to make caste discrimination illegal. While Seattle’s reform may create some initial challenges for companies operating in multiple municipal legal jurisdictions, it has the potential to catalyze systemic change, which makes it a significant milestone toward creating more inclusive labor laws for American workers.

CASTE DISCRIMINATION AS A STRATEGIC THREAT

From a strategic perspective, caste discrimination threatens an organization's competitive advantage—especially when the organization strategically leverages foreign human capital from South Asia. Part of Cisco's defense against allegations of caste discrimination relied on the rationale that caste discrimination is not unlawful (Complaint., 2020a). While Cisco's legal interpretation of the issue may have been accurate, such an oversimplified justification undermines the foundation of contemporary Human Resources (HR) practices. In an era when human capital is a coveted source of competitive advantage, HR plays a critical role in an organization's ability to execute its overall strategy by managing employees in a way that maximizes their productivity, engagement, and contributions (Holbeche, 2009). Thus, companies that invest significant resources to recruit, sponsor, and train foreign workers, must equally prioritize the management of this group.

Big tech companies like Cisco strategically employ high numbers of South Asians to leverage specialized knowledge, skills, and experience. For instance, 42% of Cisco's management and professional-level jobs were held by Asian workers in 2020 (Haase, 2021). Specifically, these organizations rely on H-1B visas to fill shortages in highly skilled occupations with talented foreign workers (Ruiz, 2017). Despite the highly competitive selection process for H-1B visas, caste discrimination still takes place among this community within American organizations. In particular, India's reservation system, which mandates universities to allocate 15% of seats for students from oppressed castes (Indian Institute of Technology Kharagpur, 2016), continues to be used to perpetuate negative stereotypes regarding the educational inferiority and intellectual capabilities of individuals from caste oppressed communities (Venkatraman, 2022). Yet, all students admitted to Indian universities are required to meet the same academic requirements to graduate, regardless of their caste or reservation. Simply put, stereotypes that attribute merit to caste are baseless. While caste discrimination clearly poses a strategic threat to U.S. tech companies, it is perpetuated by systemic issues that inhibit substantive change.

SYSTEMIC ISSUES

The issue of caste discrimination is compounded by the fact that it is grossly underreported to employers within U.S. companies. Although the *Cisco* case is the first instance of caste discrimination being tried in the U.S. (Soundararaj, 2020), the allegations made in the case are not unique to Cisco or new for American companies. According to an anonymous survey collected in 2018, approximately 67% of Dalits working in America reported being treated unfairly at their workplace because of their caste (Zwick-Maitreyi et al., 2018). Unfortunately, many Dalits feel powerless and are hesitant to report caste discrimination within the workplace because such allegations are not explicitly prohibited under federal labor laws or even by most corporate discrimination policies. While reporting workplace discrimination can be stressful for employees under any circumstance, the stakes are significantly higher for H-1B visa holders. H-1B visas are temporary work visas that require employer sponsorships (Ruiz, 2017), which means H-1B visa holders can lose their status to live and work in the United States if terminated.

Moreover, the systemic underreporting of caste discrimination cultivates a culture of impunity, which makes it difficult for companies to identify and address such discrimination. Despite growing pressure from employees and activists, Apple is the only tech company that has updated its internal discrimination policies to include caste as a protected class (Sengupta, 2022). Although the rest of the industry has been hesitant to take such a firm stance on the matter through

policy reform, several leading companies have publicly condemned casteism, implemented [limited] caste-proficiency training, and even started moderating internal message boards for caste-based hate speech (Venkatraman, 2022). While such initiatives are useful for spreading awareness and discouraging prejudicial stigmas and behaviors, these actions alone are not sufficient to safeguard the rights of caste-oppressed employees. In the absence of inclusive labor laws and corporate discrimination policies, companies will struggle to bring about substantive change as caste-oppressed employees will continue to be vulnerable and powerless, which perpetuates the cycle of discrimination and underreporting.

A CATALYST FOR SUBSTANTIVE CHANGE

Seattle's more inclusive discrimination laws represent a significant milestone towards creating more inclusive labor laws for America's workforce. While Seattle's legal reform may present some initial challenges, it also has the potential to serve as a catalyst for substantive change—starting with the tech industry's leading companies.

Incremental legal reform like Seattle's will create specific challenges for organizations that operate in multiple cities and/or states throughout the U.S. Since organizations must comply with labor laws at all levels of government (USA Gov., 2023), employee disputes that cross city and/or state boundaries become increasingly complex when labor laws conflict between different jurisdictions. Further, legal jurisdiction is generally determined by each employee's physical location at the time work is performed (Ogletree Deakins, 2021), so contemporary business practices such as remote work, virtual teams, and onsite consulting will only compound the potential for legal conflicts.

Seattle is a major tech hub in the U.S. and home to many industry-leading companies that operate across numerous legal jurisdictions in the country. These companies leverage foreign human capital from South Asia and are among the top H-1B sponsors (Ruiz, 2017). As caste oppressed employees in Seattle come forward under the city's progressive anti-discrimination laws, it is inevitable that some defendants will work outside of Seattle's municipal jurisdiction. In such cases, organizations will find themselves navigating conflicting anti-discrimination laws across different locations. Situations like this will continue to increase in complexity as other jurisdictions are likely to follow Seattle's lead. As evidence of this, there is already a bill in the California state senate seeking to explicitly ban caste discrimination by adding caste discrimination to the definition of ancestry discrimination under the state's anti-discrimination laws. This bill is opposed by several advocacy groups and individuals, including the HAF which asserts that "Should SB403 pass, trainings that explicitly declare Hinduism as a fundamentally evil and oppressive religion will be taught to millions of Californians, instilling biases about Hindus that impact their safety and wellbeing in the workplace, education and other sectors." (Hindu American Foundation Advocacy Center, n.d.). Despite the opposition from these groups, the bill has been moving forward in the California General Assembly, indicating a likelihood that it will be enacted.

Although many companies have been reluctant to address caste discrimination through corporate policy reform, it may be time to reconsider this approach. Until the *Cisco* case is resolved, organizations cannot be sure whether such claims are actionable. Even though caste is not currently recognized as a protected class at the federal or state level, some legal experts have theorized that *Cisco* could still be held liable if the California state court interprets caste as a cultural characteristic of ancestry or establishes that the alleged discrimination would not have occurred "but-for" the plaintiff's South Asian national origin.

The bottom line is that with such challenges and uncertainty looming, now is the time for organizations to proactively address casteism, instead of waiting for courts to intervene. Organizations need to thoroughly review their HR policies to identify deficiencies and opportunities for improvement. Organizations may find it helpful to use Cisco's formal allegations as a checklist for identifying critical areas to focus on. In the list below, Cisco's formal allegations have been adapted to highlight critical elements for companies to consider when reviewing their internal policies.

1. Corporate policies should explicitly recognize casteism as a form of unacceptable (and possibly unlawful) discrimination or harassment.
2. Corporate policies should include a thorough procedure for investigating discrimination claims and taking corrective action. These procedures should clearly specify the organization's expectations and measures for accountability, quality, and timeliness.
3. Workplace discrimination training needs to explicitly address casteism.
4. Managers need to develop and document initiatives to prevent, deter, remedy, and monitor casteism in the workplace. These initiatives should also indicate the organization's expectations and measures for accountability, quality, and timeliness.

LIMITATIONS AND AREAS FOR FUTURE RESEARCH

Although the scope of this article has focused on caste discrimination against existing employees in U.S. tech companies, discriminatory hiring practices also create significant barriers for foreign applicants from caste-oppressed communities who are seeking employment in the U.S. While labor laws at each level of government aim to protect both current employees and job applicants, such laws may not regulate the recruitment and selection of H-1B visa holders, which is the primary way U.S. companies hire foreign workers in highly skilled occupations (Ruiz, 2017). Therefore, in the movement to advance caste equity, it is crucial to simultaneously address two fronts. In addition to advocating for the inclusion of caste as a protected class at all levels of government, caste discrimination must also be addressed in the selection and hiring of H-1B visa holders. Without this second initiative, progressive actions such as Seattle's anti-discrimination reform will not be enough to prevent prejudice from influencing H-1B visas recruitment and hiring practices.

CONCLUSION

The *Cisco* case brought attention to claims of caste-based discrimination in the United States. These claims have been focused on the IT industry but can affect all types of industries and organizations. Organizations, therefore, need to recognize the potential impacts of casteism. Currently there are no federal or state law decisions on the legality of these claims. There is a growing number of different types of organizations that have taken action to combat legal, systemic and strategic challenges brought forth by casteism. These organizations, and action taken by the city of Seattle to include caste-based discrimination as a protected class, will likely become a catalyst of the creation of future remedies for casteism.

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ETHICS BEFORE LAW: A LEGAL GENESIS FOR CRYPTOCURRENCY REGULATION

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Abstract

Cryptocurrency is defined as a decentralized digital peer-to-peer currency and is based on blockchain technology, a type of electronic ledger that records transactions quickly, securely, and anonymously. Since cryptocurrency began existence as a digitalized currency, its reach from the moment of inception has been global. There are many cryptocurrencies, yet few, if any, legal regulations in the U. S. or abroad. This dearth of regulation has led not only to myriad practical issues, but also issues as to who is to regulate a market that is truly global and in what way is it to be regulated. Practical issues include anonymity among users, its use to the un- and underbanked, whether it is secure, whether the average consumer feels comfortable trusting it, etc. Since there are indeed few regulations in this globally important matter, we offer that basic principles of ethics, including the notion of rights and social contract theory, can provide a solid foundation for the formation of a legal structure suitable to regulate cryptocurrency regardless of country or legal tradition.

Introduction

“Cryptocurrencies’ market is among the largest unregulated (market) in the world (Coiro, 2021, p. 92).” It has been postulated that cryptocurrency was an outgrowth of the 2008 financial crisis (Fauzi et al., 2020). Cryptocurrencies have been in existence since 2008, with the advent of Bitcoin, the brain-child of Satoshi Nakamoto, a pseudonym for the creator of blockchain and Bitcoin (Nakamoto, 2008) and interest in it has waned and waxed. The first transaction in bitcoin currency was on the first day that Nakamoto bitcoin software was issued (Sharma, N. & Vyas, 2017). The first commercial transaction was in 2010 and by 2019, there were more than 2,000 cryptocurrencies on the market (Arias-Oliva et al., 2019). According to Arias-Oliva et al., 10% of GDP will be stored in blockchain (wherein cryptocurrencies are stored and transactions recorded) by 2027, with an average annual growth rate of 62.1% until 2025. Much of the original interest stemmed from cryptocurrency attributes, like the ease of exchange, the removal of intermediaries in payments between two parties, the anonymity of transactions, and the decentralized nature of the currency. More recently, however, interest has peaked in cryptocurrency, not because of any of its attributes, but because Sam Bankman-Fried used FTX, of which he was CEO, and FTX cryptocurrency to defraud large numbers of investors of hundreds of millions of dollars (Chang, 2023; Stewart, 2023).

Bitcoin is a generic term for any cryptocurrency; on February 20, 2023, it was trading at almost \$25,000/coin, but in 2019, its value was less than \$5,000/coin. After the news of FTX's collapse, the market fell from approximately \$21,000 to about \$15,000 (*Google Finance*, 2023). These fluctuations highlight two notable disadvantages to cryptocurrency: it is a volatile currency and it is unregulated (Das et al., 2018; Edwards et al., 2019; Fauzi et al., 2020; Sharma, N. & Vyas, 2017).

Myriad questions surround cryptocurrency as a medium of exchange, though there has been little research into the area (Fauzi et al., 2020). These include whether they should be considered as simply another type of currency or as a security. Another is that of regulation of the market: should it be regulated and, if so, how should it be regulated and by whom should it be regulated. Given that cryptocurrency is a truly global phenomenon, its regulation is problematic for a number of reasons. Our position is that regulation is needed and, further, that the regulations be based in universal theories of ethics. We say universal because, though we know ethical relativism exists among different cultures and in different times, there are certain universal principles that can be used by any group at any time. We suggest that a legal framework upon which to base regulations of cryptocurrency can be based on ethical frameworks and, in particular, the notion of rights, social contractual and moral rights. This need for regulation is critical: "the existence of cryptocurrency poses a challenge to regulatory bodies, but it is one that need(s) to be handled swiftly because cryptocurrency is here to stay (Das et al., 2018, p. 3)."

Definitions: What's in a Name?

Fiat money is what societies have used for millennia as a means of payment, a store of value, a method of accounting, etc. It has physical existence and is issued by a central governmental authority. Whether one calls cryptocurrency virtual money, digital currency, bitcoin, or electronic currency (Sharma, N. & Vyas, 2017), cryptocurrency can be compared to fiat money in a variety of ways. Some characteristics are the same, and some are vastly different. The following section provides a description of the different characteristics of fiat money and cryptocurrency. As a point of information, bitcoin and blockchain are generic names for any cryptocurrency or blockchain activity (Sausser, 2017); for example, bitcoin can be used interchangeably with cryptocurrency.

Fiat Money

Money is deemed to have four functions: it is a unit of account for the prices of things, it is a means of payment, it is a medium of exchange, and it is a store of value (representing an asset) (Coiro, 2021; Edwards et al., 2019). Fiat money, one type of money, is a government-issued and backed currency not backed by gold, silver, or another physical commodity (Chen, 2023). Edwards et al. (2019) further describe fiat money, in contrast to cryptocurrency, as sovereign fiat money, controlled by a central authority (a country's central bank) and transferred through regulated financial institutions like banks. This money has value as it is supported by the government which issued it. Fiat money can be contrasted with other things that reflect value, for example, cigarettes in World War II and cooking salt in the Roman era (Fauzi et al., 2020).

Cryptocurrency

Going directly to the source of the original idea of cryptocurrency, Nakamoto defines cryptocurrency, an electronic coin, “as a chain of digital signatures. Each owner transfers the coin to the next by digitally signing a hash of the previous transaction and the public key of the next owner and adding these to the end of the coin. A payee can verify the signatures to verify the chain of ownership (Nakamoto, 2008, p. 2).” Dabrowski et al (2021) describe both cryptocurrency and blockchain. Cryptocurrencies organize funds ownership with public and private key cryptography; it is the nature of the use of the public key that allows the anonymity of parties to cryptocurrency transactions.

According to Coiro (2021), cryptocurrency is a digital currency without physical form, which represents value. The precursor to cryptocurrency is found in electronic money, which itself came about as a result of increased Internet usage wherein bank money (typically fiat money) is transferred by check or other electronic means (i.e., ACH payments, PayPal, Venmo). Electronic money can be contrasted with cryptocurrency in that “it is an electronic storage of monetary value on a technical device that may be widely used to make payments without necessarily including bank accounts in the transactions...it uses computer networks and digital stored value systems (Coiro, 2021, p. 11).” The evolution of cryptocurrency is based on fiat and electronic money systems. It is a digital currency which is virtual in form that is not tied to a real currency. Further, it is a digital, virtual currency that is convertible to fiat money. In addition to its digital, virtual, and convertible characteristics, it is marked by a lack of regulation by any central authority. Finally, it is a digital, virtual, convertible, decentralized currency that uses blockchain technology to be validated. Coiro (2023, P.12) describes three types of virtual money: “fruit ninja money,” used in online gaming, unidirectional money, and bidirectional money. Unidirectional money is characterized by the ability one has to convert real money into virtual currency, while bidirectional money allows for virtual currency to be converted into real money to purchase real goods/services.

Amsyar et al. (2020) describe cryptocurrency as a virtual currency without physical form, but the function of which is the same as the use of fiat currency, also having an exchange rate. They ascribe the following characteristics to cryptocurrency: it is digital, decentralized, peer-to-peer, without a username, with freedom from any control exercised by a third party, that is encrypted for security purposes, and is global in nature.

Fauzi et al. (2020) define cryptocurrency as the first digital currency, designed to facilitate day-to-day transactions directly between individuals, without the utilization of an intermediary such as a bank. The transaction is anonymous wherein the identities of the trading partners is not known outside the transaction. Cryptocurrency has allowed for “the trading and transaction of cryptocurrency (to be) much easier and more independent, without compromising personal information and details...(it allows parties) to transact freely and anonymously (p. 695).” They also note that bitcoin’s value is based on its scarcity. They compare the natures of fiat money and bitcoin: with fiat currency, the monetary authority or central bank of a country hold and reserve currency, limiting the amount of paper money that is distributed. Thus, the central financial authority of a country can adjust as deemed necessary the quantity of money in circulation at any given time, creating scarcity, which reflects the value of the currency.

Cryptocurrency is based on algorithms, sets of protocols, or rules as to how to solve a problem, in this case, the creation of a blockchain that will itself sequentially record transactions in the digital ledger of transactions. This set of procedures or steps allows a task to be completed: for cryptocurrency, this means that a set of steps needs to be established, the creation of an algorithm that will identify a bitcoin, the end result being the creation of value in the coin

and the subsequent use of the blockchain. According to Britannica (N.D.), “(t)he (computational) complexity of an algorithm is a measure of the amount of computing resources (time and space) that a particular algorithm consumes when it runs.” The value of the bitcoin comes from the creation of the algorithm that serves as the source of the blockchain’s iterations in every ledger entry. Sharma and Vyas (2017) explain that the value of bitcoin is actually in the mining of the solution of complex algorithms by miners who are paid bitcoin in return for the solution. “(A) network of miners who confirm the owner of the virtual currency unit, validating the transaction (between a buyer and seller) and the transfer to the new owner (p. 324).”

Arias-Oliva et al. (2019, p. 2) site the World Bank’s characterization of cryptocurrency: it is “a non-fiat digital currency that is not backed by any underlying asset, has zero intrinsic value, and does not represent a liability on any institution.” Denominations of bitcoin are millibitco, microbitco, and Satoshi, each representing a progressively higher stake in a single unit of bitcoin (Sharma, N. & Vyas, 2017).

As cigarettes and salt are comparable to fiat money, Fauzi et al. (2020) also compare cryptocurrency to fiat money. It is comparable in that it has a store of value, is a medium of exchange, and is a unit of account. One difference, however between cryptocurrency and fiat money is that it is available only to those with Internet access. “(I)t can be regarded as money to people who are technology and Internet-enabled. The problem lies on the fact that only a small fraction of the people worldwide have access to the Internet (Fauzi et al., 2020, p. 696).” This is noted to be a particularly present issue in emerging and developing nations do to the lack of secure Internet services.

Blockchain Technology in Cryptocurrency

Schatsky and Muraskin (2015, p. 2) define blockchain technology as “a digital, distributed transaction ledger, with identical copies maintained on multiple computer systems controlled by different entities.” Fauzi, et al. (2020) describe Bitcoin as the first digital coin to have used blockchain technology: computers participate across a network of nodes. The blockchain nature of cryptocurrency “has one of the highest security systems by not allowing fraudsters to use the currency more than once (p. 695).”

While fiat money is issued by a central bank, cryptocurrency “is created by mining via the blockchain using cryptography technology (Fauzi et al., 2020, p. 696).” The parties involved include users, developers, miners, and node maintainers who all participate in the interactions that “endure the functionality of the distributed ledgers (Fauzi et al., 2020, p. 696).” They note that miners and creators of cryptocurrency must have the necessary capital to purchase the hardware and software needed to solve complicated equations, the solutions of which create a coin, as well as the money to support the massive use of computer systems’ energy use while mining for bitcoin. “When a miner is able to solve the puzzle in the blockchain system, the digital coins will be rewarded and transferred to the wallet that has been predetermined earlier (Fauzi et al., 2020, p. 697)” The verification of each transaction from an earlier blockchain is the validation that yields value and also prevents fraud: it is virtually impossible to go back to modify prior entries in the blockchain ledger in order to commit some sort of fraud. According to Bankrate.com (Royal, 2022), when a computer on the blockchain network verifies and processes a transaction, new bitcoin is created or mined. The verification and processing of the transaction is paid for with bitcoin.

Bitcoin digital transactions are entered into a ledger called the blockchain, which systematizes data into batches known as blocks, which use cryptographic validation to line the

batches together, simultaneously making it difficult to go back to prior blocks to alter data to serve fraudulent ends (Sharma, N. & Vyas, 2017). “(T)here are only records of transactions between different addresses, with balances that increase and decrease. Every transaction that ever took place is stored in a vast public ledger called the blockchain (Sharma, N. & Vyas, 2017, p. 325).” Edwards et al. (2019, p. 15) note that the blockchain ledger is a historical record of all verified financial transactions using cryptocurrency and “controls the creation of additional units.”

Advantages to Using Bitcoin

A chief advantage of using cryptocurrency is that it can help the un- and underbanked, those with limited or no access to traditional banking services. It is possible to use one’s smart phone for virtual currency transactions (Sharma, N. & Vyas, 2017). These authors also note that the cost of this peer-to-peer transaction system is much less expensive than the system of credit cards.

Arias-Oliva et al. (2019) also provide advantages to using bitcoin. They report that the use of cryptocurrency is fast, efficient, traceable (to previous transactions rather than those transacting), and secure. Fauzi, et al. (2020) also tout the advantages of cryptocurrency as being secure, with low transaction costs, potentially high rates of return, suitable for wage payment, and “as an alternative for a country’s bailout mechanism (p. 696).” Amsyar et al. (2020) describe the data preserved in blockchain technology as secure: it is anonymous and it cannot be retroactively tampered with or altered. These authors also note that the use of blockchain technology allows for transparency of transactions with the exception of who the transacting parties are. Supply and demand set the value for bitcoin: this is a good thing when the value is up, but Amsyar et al. caution that this could also be a bad thing in the event of wild value fluctuations.

Fauzi et al. (2020) suggest that use of blockchain technology will prevent fraud from occurring since going back retroactively to tamper with the ledger is virtually impossible. They laud it as being one of the best platforms and most sophisticated technologies since the invention of the Internet itself. It is known for its efficiency and security. The protection from fraud lies in the requirement for both parties to a transaction to authenticate transactions: the criminal cannot just attack one of the parties to alter the blockchain and so steal. Further, in describing confidentiality as an attribute of cryptocurrency, Fauzi et al. (2020) note that the elimination of third-party institutions, i.e., banks, merchants, credit card companies, etc., protects confidentiality to a high degree. Simply the reduction of the number of persons who “handle” a transaction reduces the possibility of fraud. Another attribute of cryptocurrency is that it is not attended by the possibility of interest in the way credit cards are. Finally, those authors note that brick-and-mortar financial institutions are limited to the times/dates they are open, not a consideration for an Internet framework.

“Fraudsters will not be able to commit such crime because one cannot change nor validate several ledgers at the same time (Fauzi et al., 2020, p. 697).” They also note that the whole area of cryptocurrency and blockchain technology is “understudied,” but suggest that cryptocurrency still has much lower processing fees than fees associated with credit cards. Aside from a reduction of possible fraud, cryptocurrency transactions provide the benefit of being less expensive than trading normal currencies because of the decentralized and deregulated nature of the currency (Fauzi et al., 2020). They are also capable of bringing savvy investors a high rate of return. Fauzi et al. also suggest that the more bitcoin is issued, the more popular it

will become and the less risky it will be perceived: once the rate of bitcoin creation has dropped, it will become a scarcer commodity, and that will help stabilize the market for it.

Sharma and Vyas (2017, p. 329) list the benefits of crypto: it is “cheaper, faster, more secure and more transparent” than fiat money. It provides anonymity for users; it obviates the need for third party intermediaries. Cryptocurrency allows for non-payment of any pertinent tax obligation because of its anonymity. Further, it has very low transaction fees. Additionally, cryptocurrency is easily accessible to the un- and underbanked.

Edwards et al. (2019) recite the benefits of cryptocurrency and blockchain technology: first, it reduces transaction costs by removing intermediaries like banks. They also note that digital currency defies possible expropriation by governments. Cryptocurrency is also helpful for the un- and underbanked. Additionally, cryptocurrencies may not be as fully anonymous as criminals might have hoped. Generally, the anonymity of cryptocurrency has been praised as an advantage, but, the authorities could identify wrongdoers’ illegal transactions in a way that “may not have been possible had those attacks been carried out with cash (Edwards et al., 2019, p.15).” Exhibit 1 presents a laundry list of advantages deemed to exist for cryptocurrency.

Exhibit 1: Advantages to Cryptocurrency (Amsyar et al., 2020; Coiro, 2021; Edwards et al., 2019; Sharma, N. & Vyas, 2017).

- Crypto represents a payment process with heightened security, efficiency, and speed
- Crypto is separate from centralized currency systems, potentially allowing for financial inclusion of those traditionally under- or un-banked
- It is a peer-to-peer system with no intermediaries between two parties: this allows for less expensive and time-consuming transactions
- Geographical boundaries are removed
- It “provides a high level of flexibility regarding the business model and business strategy for the virtual community”
- It competes with traditional currency in the sense that it has no corporeal existence and thus no physical storage issues
- It is a transaction currency that cannot be seen and is thereby safer than fiat currency
- Crypto transactions are anonymous
- Blockchain technology makes all transactions clear and easy to follow, as well as preventing retroactive alteration of transactions
- “Data stored in (blockchain) blocks is permanent, which means the data cannot be falsified, altered, or hijacked”
- Without a private key to the blockchain, while the data of a transaction can be seen by others, the anonymity of the owners/parties is preserved
- The computer code is the “law”

Disadvantages to Using Bitcoin

Arias-Oliva et al. (2019) report a number of disadvantages to cryptocurrency. First, it is inherently risky because of non-regulated and volatile markets. Further, the difficulty many people have in understanding what cryptocurrency really is or how it works makes it a less useful tool for any financial activity. The authors list, then, the lack of financial literacy as a problem in cryptocurrency. An associated problem with using cryptocurrency is a lack of technological competence: using a virtual currency using, by definition, only electronic technology with which too many people are unfamiliar seems to be a game stopper. The “uncertain social perception of

owning (cryptos) (p. 2)” is also a disadvantage. With regard to criminal pursuits, they list tax evasion, money laundering, extortion, and the theft of the bitcoins themselves as being associated with cryptocurrency.

Edwards et al. (2019, p. 14), in their call for better regulation of cryptocurrencies, note the “wide range of illicit activities, even espionage against the United States. In some incidents of fraud, legitimate participants in crypto asset markets have incurred substantial losses...” They list fraud, money laundering, illicit drug activity, and price manipulation as criminal activities that are facilitated by the unregulated cryptocurrency markets. Referencing a report by the U. S. Department of Justice Drug Enforcement Administration, they report that virtual currencies enable transnational criminal organizations to transfer illegally gained proceeds on an international scale. Sharma and Vyas (2017, p. 324) recognize that cryptocurrencies have opened the door wide to “illicit and illegal activities in the dark net.” They also note that crypto is not accepted in many places compared to legally recognized fiat money. Both INTERPOL and government agencies like the U. S. IRS have evinced interest in regulating cryptocurrency markets to prevent crime such as fraud and tax evasion (Sharma, N. & Vyas, 2017). This also highlights the nature of the global scale of the issues surrounding cryptocurrency regulation.

Edwards et al. (2019) also express concern for price manipulation and cyberattacks that would diminish the efficacy of cryptocurrency. Further, hackers have cost millions of dollars of losses in cryptocurrency markets. Of note, however, is that these authors do not necessarily put the blame of such losses onto the currency itself, but rather onto the criminals and/or exchanges who engage in theft: “many of these thefts appear to have occurred through exchanges or custodians, rather than the cryptocurrencies themselves (Edwards et al., 2019, p.15).” Their laundry list of criminal activities facilitated by cryptocurrency includes crimes related to money laundering and tax evasion.

Fauzi, et al. (2020) report on the disadvantages of cryptocurrency: they site a lack of regulation, high costs of hardware and software and the electricity used to run them, a lack of security, anonymity, and switching costs. While admitting that fraud is highly unlikely to occur, they also note, however, that it could be done if it were carried out on a large scale: if someone is able to control 51% of the computing power, they might be able to subvert that power to altering prior transactions in the blockchain.

Das, et al. (2018) report that the biggest risk associated with bitcoins is the risk of theft. They liken it to the theft of fiat currency in that user wallets stored in purportedly secure systems are subject to hacking. They report that malware designed specifically to steal cryptocurrency has been created, allowing cyber-thieves to remove the cryptocurrency from the owners’ accounts and place it in their own servers. Notably, this is not fraud in the blockchain transaction itself, but simple fraud in the theft of funds existing digitally. Also notable, there is no version of the FDIC for a legitimate account owner to turn to make good those losses.

A number of authors report that bitcoin is considered quite a volatile currency (Amsyar et al., 2020; Dabrowski et al., 2021; Das et al., 2018; Fauzi et al., 2020). While this volatility can be bad, it also can be good, depending on the time frames during which the investment is made. The volatility of the market is just as unregulated as the currency itself, in contrast to fiat money which, though it fluctuates, is controlled by the central bank of the issuing currency: for hard currencies, that means that one can predict the rise and fall of the currency such that wild swings in the value of the currency are rare and rarely harmful. Since the value of cryptocurrency fluctuates significantly and is not guaranteed by any bank or government, as the FDIC would

guarantee U. S. dollars held in a failed bank (Sharma, N. & Vyas, 2017), there is a greater degree of inherent risk in using cryptocurrency.

On a more prosaic note, Fauzi et al. (2020) note that a major expense of mining cryptocurrency is that of electricity. The need for extensive computer systems to find and solve the puzzles that create Bitcoin the bigger, more capable the computer is needed, and the more computer time is needed. They suggest that the consumption of such a great deal of electricity is harmful to the environment in that the generation of the electricity is expensive in terms of inputs of coal or other forms of energy and outputs of that process, such as carbon dioxide. They posit that “(i)t is not worth sacrificing the earth for a short-term profit (Fauzi et al., 2020, p. 700),” such as that to be made on cryptocurrency. For Bitcoin specifically, the algorithm dynamically controls the complexity of the proof of work (the puzzle to be solved) so that on average, one block is written per hour. So as machines with higher computing power are introduced, the complexity also increases. As a result, there are no electrical savings.

The U. S. National Institute of Standards and Technology (NIST) defines immutable as “Data that can only be written, not modified or deleted (Yaga et al., 2019).” Perform a web search on the terms “are cryptocurrencies immutable” and over two million results will be returned. Some say that cryptocurrencies are absolutely immutable, others say they are not. NIST details that there are scenarios where blocks can be overwritten either with the death of a blockchain or with bad software. This is what happened to Bitcoin in March of 2013 when the upgrade from 0.7 to 0.8 caused a hard fork in the blockchain. This created two different versions of Bitcoin, as some miners were processing on version 0.7 and some on 0.8. To correct the issue, version 0.8 was shut down, and as a result, six blocks were lost (Narayanan, 2015).

Exhibit 2: Disadvantages to Cryptocurrency (Coiro, 2021; Das et al., 2018; Edwards et al., 2019; Fauzi et al., 2020; Sharma, N. & Vyas, 2017).

- Crypto does not possess legal tender status
- Crypto is accepted only within a specific online community
- It is an invented currency
- The supply and demand is set by volatile exchange rates
- “The price of (cryptocurrency) is still very unstable and unpredictable”
 - The lack of market oversight has allowed cryptocurrency to be dominated historically by speculators
- Uncertain exchange rates can “endanger monetary, payment and financial stability”
- Many people really don’t understand it
- Financial literacy is an associated issue
- Crimes are associated with crypto: tax evasion, money laundering, extortion, and theft of the bitcoins themselves
- The U. S. Department of Justice Drug Enforcement Administration report that virtual currencies enable transnational criminal organizations to transfer illegally gained proceeds on an international scale
- Crypto does not prevent regular fraud
 - Hackers can get into purportedly secure systems and simply transfer the cryptocurrency funds from the owners’ accounts to their own
- There are no service quality guarantees
- There is no way to assure that firms offering crypto services are properly capitalized
- There is no requirement relating to internal controls or risk management

- Cryptocurrency technologies are tamper resistant and tamper evident, but are not immutable ledgers.

Table 1 presents a broad comparison of the advantages and disadvantages of fiat currency or more traditional monetary substitutes like credit cards and cryptocurrency. It highlights the most obvious, but also the strongest characteristics of each type of currency that would help in a choice of whether to use fiat money or cryptocurrency.

Table 1: Comparative Examples of Advantages and Disadvantages of Fiat Currency and Cryptocurrency

Fiat Currency/Credit Card		Cryptocurrency	
Advantages	Disadvantages	Advantages	Disadvantages
Highly regulated	Available only during regular business hours	Not regulated	Available 24/7/365
Liquid	One can incur debt	One cannot incur debt	Must be liquid to afford the “tools of the trade”
Can be stored with some level of security	Can easily be stolen from one’s person or even from one’s financial institution	Transactional fraud between the parties is highly unlikely	Crimes like money laundering and terrorism financing are more easily committed
Parties involved are known and can build relationships of trust	Potentially high number of parties involved in a transaction, increasing the possibility of fraud	Only two parties are involved in each transactions, so there is a reduced chance of fraud	The anonymity of the parties could create a vacuum of trust between them

Global Scope of Cryptocurrency Use and Regulation

Cryptocurrency is indeed global in scope, by its very nature and by its ubiquity. The nature of cryptocurrency is that its venue of operation is the Internet, a globally integrated system of hardware and software. Thus, anyone who has access to the Internet is capable of dealing in cryptocurrency (Arias-Oliva et al., 2019; Edwards et al., 2019; Sharma, N. & Vyas, 2017). The European Central Bank has gone so far in the acceptance of cryptocurrency as to define it specifically: virtual currency is an unregulated type of digital money (Coiro, 2021, p. 11). Sharma and Vyas (2017) provide a partial list of countries that have accepted the use of cryptocurrency, as well as those that haven’t. Examples of countries where the trade in bitcoin is accepted include Australia, Austria, Brazil, Congo, Cuba, Japan, Kenya, the Philippines, South Korea, and Zimbabwe. Of particular note are the countries like Congo, Kenya, and Zimbabwe, which have a greater need for a cashless system of exchange as a result of poor financial industry infrastructure. Examples of countries that have outlawed virtual currencies include Afghanistan, Bolivia, China, and Russia. On balance, a far greater number of countries accept the existence

and use of virtual currency. This makes the issue of regulation a truly global one, from the moment of inception, very unlike any kind of fiat money.

Edwards et al. (2019, p. 16) note that “few (countries) have settled on a coherent regulatory response to either cryptocurrency or cryptocurrency asset markets,” though all major countries are studying these markets with an eye to regulating them. They report that China has banned the ownership of cryptocurrency, but accepts the use of blockchain technology for transaction recordation. Japan has made cryptocurrency a legal means of payment and granted regulated licenses to cryptocurrency exchanges. South Korea, as of 2019, allowed cryptocurrency to be traded but required that the traders’ real names be used and that capital gains taxes be assessed on sales of cryptocurrency.

The U. S. Department of the Treasury (2022) reports that an Executive Order outlines “an interagency approach to address the risks and harness the potential benefits of digital assets and their underlying technology, including through international engagement to adapt, update, and enhance adoption of global principles and standards for how digital assets are used and transacted.” Their report also provides a comprehensive summary of international engagement in sorting out how to proceed to achieve a safe and effective cryptocurrency market. The G7, the G20, and the OECD are engaged in the designation of roles of public and private sector players in the creation and movement of digital currency and the technology that allows that to happen in a stable environment. One aim is to develop “a faster, cheaper, more transparent international payment system.” The Financial Stability Board (FSB) is an international body that monitors the global financial system and makes recommendations about how to make cryptocurrency safe and more efficient (Boring & Carbone, 2022; Financial Stability Board, 2018). The IMF and the World Bank are also engaged with furthering the better understanding and regulation of cryptocurrency markets worldwide.

Call for Regulation

Coiro (2021), Edwards et al. (2019), Fauzi et al. (2020), and Sharma and Vyas (2017), are just a few of the authors that have attacked the question of the legal nature of cryptocurrency. It has been posited that it could be defined as a security, a derivative, a negotiable instrument, an asset suitable for use under the U. S. UCC Art. 9 law on secured transactions, etc. The simplest definition of cryptocurrency is that it is just that, a currency used to pay for things, as an accounting system, and as a store of value. In 2019, the SEC took some of the uncertainty out of the equation by stating fairly unequivocally that “cryptocurrencies are replacements for sovereign currencies (Sharma, R., 2019).

At the Financial Economist Roundtable event in 2018, a number of members of the group signed a statement calling for better regulation of cryptocurrency. Edwards et al. (2019, p. 14) raise “the issue of whether more effective regulatory oversight of cryptocurrency markets is needed, and if so, what kind of regulation and by whom.” Further, they call for a “coordinated international regulatory response to abuses in cryptocurrency asset markets (p. 14).” This highlights the nature of the markets as both unregulated, but also unregulated on a global scale. This scale is going to make crafting regulations more difficult since different countries have different approaches to what is legal or not, how much regulation is needed, how strong enforcement of such regulation will be, and, indeed, cultural differences in attitudes about whether regulation is really needed. Edwards et al. (2019, p. 16) also call for regulation of cryptocurrency regardless of its venue of transaction “should be subject to regulation wherever they reside, whether in ...U. S. states or other countries.”

Another issue for debate is that of taxation. Should it be considered income if received as payment for an exchange of goods or the provision of labor? Should it be considered appropriate to treat gains made from investments in cryptocurrency to be treated as capital gains or merely as income? Should cryptocurrency miners be taxed for the cryptocurrency they mine? These are all questions that need to be addressed when contemplating a legal regulatory scheme. On a practical level, “it is suggested that effort should be expended in trying to overcome those limitations (of regulatory uncertainty) instead of inhibiting the growth of bitcoins (Das et al., 2018, p. 2).

Legal Maneuvers

Sharma and Vyas (2017) report that the Financial Crimes Enforcement Network (FinCEN) has classified bitcoin as a convertible digital currency and that several states in the U. S. have adopted laws relevant to cryptocurrency regulation. Various other nations have also attempted some regulatory schemes, but no regulatory scheme has been devised by any country or group of countries that would effectively define what cryptocurrency is and how it should be regulated. In early 2020, the Crypto-Currency Act of 2020 was proposed. While it did not pass, it did provide a foundation for future legal efforts in the regulation of cryptocurrency (Brett, 2019; Coiro, 2021). It was envisioned to clarify which federal agencies would be responsible for regulating which digital assets.

So, for example, FinCEN was deemed to be responsible for the regulation of cryptocurrencies (for the purposes of this article, we are not concerned with crypto-commodities or crypto-securities regulations). The Act defined cryptocurrency as a representation of U. S. currency or synthetic derivatives utilizing blockchain, decentralized ledger technology. FinCEN, a division of the Treasury Department, was to establish rules on transaction tracing, allowing for the tracing of people engaging in cryptocurrency transactions, much like the Bank Secrecy Act requires certain notifications by financial institutions of cash deposits of more than a specified amount. Cryptocurrency transactions are in fact regulated by the Bank Secrecy Act and anti-money laundering regulations: anything that substitutes value for money is regulated by these laws (Bloomberg Law, 2022).

The Investment and Jobs Act, also known as the Infrastructure Bill, is primarily concerned with the allocation of resources on basic infrastructures long in need of repair, replacement, additions, etc. However, the method of funding these projects is found in the additional taxation revenue envisioned as a result of increased reporting requirements of cryptocurrency brokers and brokers dealing with digital assets. The increase in the reporting requirements includes the report of such assets as assets and would allow for the taxation of such asset transfer, in the same manner as any other physical asset might be taxed. As Coiro (2021, p. 34) describes “businesses could be required to collect and report every detail of cryptocurrency’s transactions to the IRS and if failing to do so, face criminal and civil penalties.” Two interesting notes: first, if this proceeds as planned, the anonymity of transactions is gravely impacted and, second, the whole point of this law is not the regulation of cryptocurrency, but rather the intention to increase tax revenue. Thus, there is still a dearth of regulation on the cryptocurrency market itself.

A mark of how chaotic the law purportedly to regulate cryptocurrencies is is the number of failed and in-process pieces of legislation and rules there are, as well as the array of agencies, both federal and state, within the U. S. and globally, which could have a hand in such regulation. The two acts listed above, the Token Taxonomy Act, the Bank Secrecy Act, CFR provisions, the

SEC, the CFTC, the IRS, the Department of the Treasury, myriad state agencies, INTERPOL etc. are an amalgamation of agencies, rules, and regulations that could have a hand in how cryptocurrency is managed (Bloomberg Law, 2022; Brett, 2019; Coiro, 2021; Sharma, N. & Vyas, 2017).

Our Ethical Framework as a Basis for Legal Regulatory Schemes

We base our framework on the ideal of rights. Rights are important, normative, justifiable entitlements to something: things are designated as rights to give them special status, a status that is more important than mere claims (DeGeorge, 1999; DeGeorge, 2010; Velasquez, 2017). They impose duties on us to abide by people's rights, making this a deontological approach to ethics. Typically, where someone is entitled to the enforcement of a right, others have associated responsibilities to allow that person the right or to act responsibly towards the right-holder. Further, rights can only be pre-empted by other more basic rights. According to the Stanford Encyclopedia of Philosophy (2020), "(R)ights dominate modern understandings of what actions are permissible and which institutions are just. Rights structure the form of governments, the content of laws, and the shape of morality as it is currently perceived. To accept a set of rights is to approve a distribution of freedom and authority, and so to endorse a certain view of what may, must, and must not be done (Stanford Encyclopedia of Philosophy, 2020)." Generally speaking, when one has a right, someone else has a corresponding obligation to respect that right.

Further, rights allow us to act in certain ways that may be seemingly contrary to achieve some otherwise valid end. There are several questions that must be asked when considering the nature of rights. See Exhibit 3 for a list of questions.

Exhibit 3: Questions of Rights

- Who has the right in question, i.e., the person who sells and/or purchases crypto
- What actions do the rights pertain to, i.e., the sale or purchase of cryptocurrency, the use of cryptocurrency to fund what ends, i.e., criminal pursuits or merely payment of debts
- Why is a right granted to the right holder, i.e., those transacting in cryptocurrency have rights to honest and fair dealing in their exchanges to serve the legitimate purpose of ease of exchange, as a unit of measure and/or as a store of value
- Whether a rightsholder's actions can be withdrawn on the basis of a violation of a superior right, i.e., someone can be barred from using cryptocurrency gained illegally

There are two major categories of rights: moral and legal. Velasquez (2017) defines moral rights as an absence of a prohibition to do something; in the case of using cryptocurrency as currency, we are allowed to do so, just as we would use fiat money. There is also a right that allows us to secure the interests of others; in the case of cryptocurrency, we have the right to protect the cryptocurrency market from manipulation of the technology to commit some kind of fraud, either from the perspective of speculative trading or the use of the currency to commit crimes like drug trafficking or money laundering. The right to do something to secure the interests of others also exists and also includes the idea that we can make sure that people know about their right to have secured transactions in cryptocurrency, a more passive right related to others' rights than our own. Finally, Velasquez notes that we have the right to protect the rights of others from being violated, i.e., we can prohibit the manipulation of cryptocurrency markets

however they are used or categorized (as currency or as a security, or as negotiable instruments, etc.).

Moral rights can be the foundation of a morally justifiable decision; in the case of cryptocurrency, it is my right to have a market free from fraud and rules can be made to protect that right. While moral rights do not always transfer into legal rights (i.e., freedom of speech in the U. S. is very different from freedom of speech in China, Iran, or Russia), we can base legal rights in the precepts provided by moral rights. Given the global scale of the cryptocurrency industry, it is important to note that moral rights are universal rights: all humans have moral rights, regardless of geographical, legal, or political venue. Thus, our use of the concept of rights has value as the basis of translating our recommendations for safer, more secure, and more efficient cryptocurrency markets into legal recommendations.

A review of the objectives of the Executive Order on developing digital assets responsibly (U. S. Department of the Treasury, 2022) provides a bridge between the more philosophical moral rights as they pertain to cryptocurrency and the legal parameters that should be instituted. The objectives of designing a legal framework for digital currency worldwide include a number of protections that line up very well with our proposed framework for the ethical utilization of cryptocurrency. Recommendations of legal means to achieve a safe and efficient market in cryptocurrency are numerous. Edwards et al. (2019) suggest that legitimate and innovative uses of cryptocurrency and blockchain are protected and that a choice should be made as to whether cryptocurrency is akin to a fiat currency or more akin to a security. Further, exchanges between cryptocurrency and fiat currencies should be maximally secured to protect against hacking and theft. Traders of cryptocurrency should be required to be properly capitalized and be able to meet margin requirements if values decline significantly. Finally, traders of cryptocurrency should be required to submit appropriate tax reports to the proper authorities.

Arias-Oliva et al. (2019) had four suggestions for a crypto regulatory scheme to put forward. First, more efforts should be made to ensure that less risky means of trading cryptocurrency are always being developed; we would go further to require trading companies to employ “think-tanks” to generate ever better ways to secure the markets. The public should be educated as to the advantages and disadvantages of cryptocurrencies (through public service announcements and perhaps the public should be required to be certified in some way to deal with cryptocurrency: these are the authors’ suggestions), and marketing efforts should be made to alert possible consumers of cryptocurrency value. Third, they suggest that financial literacy should be improved and that technological knowledge must be set at a minimum, both of which are in line with the authors’ suggestions of some sort of certification. Finally, before people can be allowed to operate with cryptocurrency, consumers should be required to stay up-to-date on the latest developments in the cryptocurrency markets/technology. All of these suggestions are to benefit the consumer and, thereby, to make cryptocurrency markets stronger and potentially more available to those that could really use the technology, such as the un- and underbanked.

Fauzi et al.(2020, p. 702) chose to rely more heavily on technology as the means to ensure safe and effective cryptocurrency markets. They urge that considerable blockchain technology knowledge is the key to safer, more efficient cryptocurrency markets. “Hence, expertise in this field should collaborate with policy makers and the government agencies in making regulations and policies pertaining to a country’s stand in using cryptocurrency.” A number of other recommendations were generally discussed. See Exhibit 4 for examples. Table 2 provides an integrated presentation of the use of rights as a basis for legal regulation of crypto,

policy statements relating to its regulation and specific elements of a possible legal framework for cryptocurrency regulation.

Exhibit 4: General Recommendations for Legal Frameworks to Achieve a Safer, More Effective Cryptocurrency Market

- The formation of Central Bank Digital Currency (CBCD) technology across international boundaries
- Users of cryptocurrency should be held to minimum standards of security checks
- The anonymity of cryptocurrency users should be preserved subject to minimum safety protocols
- Knowledge management among industry stakeholders and researchers should be regulated so that people understand the potential risks and rewards of using cryptocurrency
- Stakeholders in higher education should be employed to educate prospective users of cryptocurrency
- The nature of public and private keys must be strengthened to include the randomness of key assignment for transaction parties to allow for mutual verification of each other to prevent manipulation attempts

Table 2: Examples of the Intersection of Rights, Policy Objectives, and Legal Recommendations

Concepts of Rights	Executive Order 14067 Policy Statements	Legal Framework
Why do we grant protective rights to cryptocurrency consumers?	Protect consumers	The anonymity of cryptocurrency users should be preserved subject to minimum safety protocols
Who has the rights to protection and the obligations to protect in the cryptocurrency market?	Protect U. S and global financial stability Reinforce U. S. leadership in the global finance system	Central Bank Digital Currency (CBCD) technology should be used across international boundaries
Should rights to access to use of cryptocurrency be revoked?	Mitigate illicit finance and national security risks	Users of cryptocurrency should be held to minimum standards of security checks
What rights should be granted to whom?	Promote access to safe and affordable financial services	Stakeholders in higher education should be employed to educate prospective users of cryptocurrency
Who has the obligation to help maintain the rights of consumers?	Support technological advances that promote responsible development and use of digital assets	The nature of public and private keys must be strengthened to include the randomness of key assignment for transaction parties to allow for mutual verification of each other to prevent manipulation attempts

Conclusion

Given that there is a dearth of research in the areas of cryptocurrency regulation (Coiro, 2021; Fauzi et al., 2020), it is incumbent on relevant members of society to provide model regulation codes for the industry. And given that criminals will find ways to commit crimes, “Being anonymous on the web is the perfect ground for criminals and fraudsters in committing their (crimes) (Fauzi et al., 2020, p. 699),” we must craft regulatory schemes to inhibit criminal activity. We have not succeeded in crafting such regulation even within the U. S., much less on a global scale. “Therefore, to acknowledge cryptocurrency as the replacement for the fiat money in today’s economi(es) is still premature and requires further understanding in application, theoretically and practically (Fauzi et al., 2020, p. 696).” This is partly why this work contributes to the literature: we must establish reasonable ethical and legal frameworks upon which to base regulations globally that will serve the interests of society as a whole, regulatory authorities, the emerging industry and individual users of and investors in cryptocurrency. The conundrum is well put: “cryptocurrencies’ capacity to weaken the institutional monetary system’s control constitute(s) a major risk for the U. S. market. On the other hand, distributed decentralized ledger technology could be implemented in different areas bringing trust, speed, visibility, and traceability, improving security and privacy while at the same time reducing costs (Coiro, 2021, p. 32).”

Sharma and Vyas (2017, p. 330) assert that “the government has the sovereign right to bring virtual currencies like Bitcoins into the classification of ...currency...by just modifying the regulations...” The government then must assert its power to the benefit of society in regulating the markets, uses, and taxation of cryptocurrencies. Our framework provides an ethical foundation for such a regulatory scheme: this is our contribution to the literature. Further, as academics, we have an obligation to educate our students as to what cryptocurrency is, what its advantages and disadvantages are, and whether it is a good investment or simply a mechanism to be used by criminals to further their criminal activities. This is the contribution of this paper: we provide a framework based on theories of ethics upon which possible regulation can be based.

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UNBUNDLING TEXAS MINERAL ESTATES: THE DUTY OF AN EXECUTIVE RIGHT HOLDER

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ABSTRACT

This paper addresses the issue of property rights of various types of interest holders. Specifically, the legal concept created by Justice Benjamin Cardozo, that property rights are like a “bundle of sticks.” One of the “sticks” is the executive right. The executive right is the right to authorize exploration and development of the mineral estate, or in layman’s terms, the right to lease. The executive right comes with duties or obligations to the other interest holders. The court has been inconsistent in ruling on these duties and therefore it has been difficult to determine what are the exact duties that are owed. This paper examines the relevant court cases in this area of the law to determine what the current court decisions mean for executive right owners.

The “bundle of sticks” metaphor is the dominant legal paradigm used by courts and the chief theory of property taught to American law students.⁵ Justice Benjamin Cardozo is generally credited with having first likened ownership entitlements to a bundle of firewood.⁶ The metaphor is used to demonstrate that ownership is not a unitary thing. Rather, ownership is an assemblage of different rights and interests that can be separated and re-assembled in various combinations. In the most general interpretation of this doctrine, these “sticks” include the right to control or use, the right of profit, the right of transference, the right of destruction, and the right of exclusion. Other rights exist as well, such as the rights to consume, to transfigure, to pledge as collateral, to create a covenant that runs with the land, and to subdivide into smaller interests. Each of these rights, then, is represented by an imaginary “stick” in the metaphorical bundle.

Another fundamental tenet of real property law is the ability to sever a tract of land (and therefore re-bundle the metaphorical sticks) both vertically and horizontally. Vertical severances are common and are exemplified by a neighborhood subdivision or a plat map – here, the interests in a larger piece of property have been split (*i.e.*, vertically divided) amongst various owners. In

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⁵ See *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (referring to “the bundle of rights that are commonly characterized as property”); see also *United States v. Craft*, 122 S. Ct. 1414, 1418 (2002) (“A common idiom describes property as a ‘bundle of sticks’—a collection of individual rights which, in certain combinations, constitute property.”); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1044 (1992); *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 831 (1987). See also, Bruce A. Ackerman, *Private Property And The Constitution* 26-29 (1977) (discussing the “scientific” analysis of property as a “bundle” of rights); Stephen R. Munzer, *A Theory Of Property* 16-17 (1990) (discussing the “sophisticated conception” of property as a “bundle of ‘sticks’” or a set of “legal relations . . . among persons or other entities with respect to things”). Denise R. Johnson, *Reflections on the Bundle of Rights*, Vt. L. Rev., Feb. 2012, at 248.

⁶ Benjamin N. Cardozo, *The Paradoxes Of Legal Science*, 129 (1928) (“The bundle of power and privileges to which we give the name of ownership is not constant through the ages. The faggots [a bundle of twigs used for firewood] must be put together and rebound from time to time.”)

contrast, a horizontal severance splits or divides ownership of the surface from the underlying resources; it is common in some states for one person to own the surface of a particular tract of land, while another person owns the subterranean resources under that same tract of land.⁷ These underground resources (commonly known as the mineral estate), include oil, natural gas, gold, silver, copper, iron, coal, uranium, and other minerals.⁸ However, sand, gravel, limestone, and subsurface water are not considered mineral rights and typically belong to the surface rights holder as part of the surface estate.⁹

With regard to oil and gas law, and in particular when examining the mineral estate, the “bundle of sticks” includes five rights or “sticks”: (1) the right to self-development; (2) the executive right; (3) the right to receive bonus payments; (4) the right to receive delay rentals; and (5) the right to receive royalty payments.¹⁰

Of particular interest—and, some would argue, utmost importance—is the executive right. The executive right is the right to authorize the exploration and development of the mineral estate, or in layman’s terms—it is the right to lease.¹¹ This right includes the power to make decisions regarding whether or not to lease the mineral rights, how much compensation to demand for such leases, and what form that compensation should take. The executive right is a wholly alienable property right and may be transferred, bought and sold even standing alone.¹² Once this “stick” has been broken off from the “bundle,” the other mineral interest owners (who are in possession of other “sticks” but not in possession of the “stick” representing the executive right) are considered “non-executive interest owners.”¹³ The non-executive interest owners still own some type of interest in the minerals, but they do not have the power to execute a lease covering those minerals.

With the power of being an executive interest owner comes a corresponding duty to the other non-executive mineral right holders. Normally, one would presume that all mineral interest owners in a tract would be united by a desire to see the estate leased such that income is maximized. While this presumption appears rational it often proves faulty. It is not unusual for the executive right to be held by the surface estate owner who owns little or no interest in the rest of the mineral estate. In this situation, the executive interest owner’s duty, however that duty is defined, conflicts with the surface estate interest. Maximizing profits for the non-executive mineral estate holders is often at odds with the quiet use and enjoyment of the surface estate.

The exact scope of the executive interest owner’s duty has historically been a moving target.¹⁴ Over the last century, Texas courts have rendered several opinions delineating the extent of the duty owed by the executive interest owner to other interest owners. This duty is oftentimes mistakenly identified as a generic fiduciary duty.¹⁵ However, the actual nature of the duty an executive right holder owes other interest holders is a duty of “utmost faith and fair dealing” which

⁷ States where minerals (the mineral estate) are often severed from the surface estate include: Texas, Oklahoma, Pennsylvania, Louisiana, Colorado, New Mexico and others where oil and gas has been produced for decades. *Surface Rights vs Mineral Rights in Oil & Gas Leasing*, Mineral Web, <https://www.mineralweb.com/surface-rights-vs-mineral-rights-in-oil-gas-leasing/>

⁸ Annika Hipple, What You Need to Know About Mineral & Surface Rights on Your Land, August 29, 2018, <https://www.land.com/owning/minerals/guide-to-mineral-and-surface-rights/>

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Day v. Texland, Inc.*, 786 S.W.2d 667 (Tex., 1990); Shade at 14.

¹³ Another term in common use for non-executive interest owners is “non-participating royalty owners.”

¹⁴ See *Texas Outfitters Limited LLC v. Nicholson*, 572 S.W.3d 647, 652 (Tex., 2019) (citing *Lesley v. Veteran’s Land Board*, 352 S.W.3d 479).

¹⁵ E.g. *Andretta v. West* 415 S.W.2d 638,641 (Tex., 1998); *Friddle v. Fisher*, 378 S.W.3d 475 (Tex.App.—Texarkana, 2012).

is not coterminous with a fiduciary duty.¹⁶ It has also been called the “ordinary prudent landowner test.”¹⁷

Defining the exact boundaries of the duty owed by the executive interest holder is important largely due to the fact that the nature of ownership of oil and gas rights is quite different from owning other types of property. In the oil and gas realm divided or “fractionalized” ownership is the rule and not the exception.¹⁸ This is not to say that other types of real property are never owned by multiple parties, but those ownership interests are generally clearly defined and finite. In contrast, the types of interests that can be held in any given mineral estate are so numerous that they are practically unlimited. Most cases implicating the executive interest holder’s duty involve self-dealing and are easily resolved by courts without the necessity of delineating the parameters of the duty. Accordingly, courts often do not bother to draw those lines. However, this lack of specificity by the courts has led to lingering questions for executive rights holders who are attempting to faithfully carry out their duty and attorneys advising executive and non-executive rights holders. The exact boundaries of the duty owed by the executive interest owners to other interest owners have been debated by scholars since the 1980’s and, nearly forty years later, the true nature of the executive’s duty remains cloudy and inconsistent.

Ownership of these highly fractionalized interests often results in business entities acquiring executive rights and the duty of utmost good faith and fair dealing that goes with them. Recently, the Supreme Court of Texas decided just such a case, *Texas Outfitters v. Nicholson*, wherein a limited liability company held the executive rights and was accused by the owners of fractional interests in the tract of breaching the duty owed to them in making leasing decisions.

DUTY OWED BY EXECUTIVE RIGHT HOLDER

The Supreme Court of Texas bears the responsibility for casting doubt on the exact nature of the duty executive right holders owe non-participating royalty owners. In the early days of the oil and gas industry, up until the 1980’s, the duty was unequivocally one of utmost good faith and fair dealing.¹⁹ However, in its 1984 opinion in *Manges v. Guerra*, the Court described the duty as being fiduciary in nature and, since then, has vacillated between the two descriptors, often using them interchangeably.²⁰ The Court, after muddying the waters by using the terms interchangeably for decades, seems to now take a “I know it when I see it approach,” much like U.S. Supreme Court Justice Potter Stewart’s much more famous theory on pornography.²¹

MANGES v. GUERRA: THINGS GET MURKY

Prior to this decision, Texas law was clear that the duty owed by an executive interest owner to the non-executive interest owners was one of utmost good faith and fair dealing.²² The Court caused great confusion, which continues to this day, by conflating the duty of utmost good faith and fair dealing with a fiduciary duty.²³ However, in this case, the actions of the infamous

¹⁶ Ernest E. Smith, *Implications of a Fiduciary Standard of Conduct for the Holder of the Executive Right*, 64 TEXAS L.REV. 371, 373 (1985)(detailing the differences between “utmost good faith” and a “fiduciary duty”).

¹⁷ *Id.* at 372 (1985).

¹⁸ Shade, Joseph, *Primer on the Texas Law of Oil and Gas*, page 9, Lexis Nexis, 2004.

¹⁹ See *Schlittler v. Smith*, 101 S.W.2d 543, 545 (1937).

²⁰ *Manges v. Guerra*, 673 S.W.2d 180, 183-85 (Tex., 1984).

²¹ *Jacobellis v. State of Ohio*, 378 U.S.184, 197, 84 S. Ct. 1676, 1683 (1964).

²² Shade, Joseph, *Primer on the Texas Law of Oil and Gas*, page 14, Lexis Nexis, 2004.

²³ Shade, Joseph, *Primer on the Texas Law of Oil and Gas*, page 14, Lexis Nexis, 2004; *Manges v. Guerra*, 673 S.W.2d 180, 183-85 (Tex., 1984).

defendant, Clinton Manges were so egregious that the exact nature of the duty violated was largely immaterial.²⁴

Clinton Manges managed to acquire a significant portion of the massive (even by South Texas standards) Guerra Ranch—approximately 400,000 acres.²⁵ He purchased the entire surface estate, the executive rights to the entire tract, and an undivided 50% interest in the mineral estate.²⁶ In time, he went on to enter a series of finance agreements, pledging his executive rights in the Guerra Ranch as collateral.²⁷ Additionally, one of the loan agreements granted the lender the right to purchase oil and gas from any Manges-controlled tract.²⁸ By encumbering his executive interests, Manges, and by extension the mineral interests retained by the Guerras as non-executive interest holders, “were effectively withdr[awn] from the lease market.”²⁹ The Guerras proceeded to file suit, as their mineral interests sat undeveloped while other interest holders in the area enjoyed the wealth accompanying an oil boom.³⁰ However, never one to be deterred by such details, Manges went on to lease the mineral interest to *himself* for the sum of five dollars, total.³¹ This lease agreement provided for a 1/8th royalty to be paid to the mineral interest holders. Manges went on to drill three producing wells, which by the time the Texas Supreme Court took up the matter in 1984, had produced \$2,000,000 worth of oil.³² So of course, Manges asserted that he was entitled to his proportionate share of the 1/8th royalty (53.4 % of 1/8th of \$2,000,000) AND the remaining 7/8^{ths} of the production value (7/8th of \$2,000,000).³³

Regardless of the exact standard applied to Manges’ actions, it is clear that Manges’ self-dealing strayed well past the line of acceptable and legal conduct. Perhaps that explains the Court’s opinion in and of itself: his actions were so far beyond the pale that the precise boundaries need not even be drawn. In any event, in a single paragraph, the Court’s opinion gave birth to an enduring controversy:

The *duty of utmost good faith owed by an executive* [interest holder] has been settled since *Schlittler v. Smith*, 128 Tex. 628, 101 S.W.2d 543, 545 (1937). That standard has been repeated in *First National Bank of Snyder v. Evans*, 169 S.W.2d 754, 757 (Tex.Civ.App.—Eastland 1943, writ ref’d); *Kimsey v. Fore*, 593 S.W.2d 107, 111 (Tex.Civ.App.—Beaumont 1980, writ ref’d n.r.e.); *Portwood v. Buckalew*, 521 S.W.2d 904, 911 (Tex.Civ.App.—Tyler 1975, writ ref’d n.r.e.); and *Morriss v. First National Bank of Mission*, 249 S.W.2d 269, 276 (Tex.Civ.App.—San Antonio 1952, writ ref’d n.r.e.). *The fiduciary duty arises* from the relationship of the parties and not from the contract. See *English v. Fischer*, 660 S.W.2d 521, 524–25 (Tex.1983) (Spears, J., concurring). While a contract or deed may create the relationship, the duty of the executive arises from the relationship and not from express or implied terms of the contract or deed. That duty requires the holder of the executive right, Manges in this case, to acquire for the non-executive every

²⁴ See generally, Burka, Paul, *The Man in the Black Hat*, Texas Monthly, June, 1984.

²⁵ Shade, Joseph, *Primer on the Texas Law of Oil and Gas*, page 15, Lexis Nexis, 2004.

²⁶ *Id.*

²⁷ *Manges v. Guerra*, 673 S.W.2d 180, 182 (Tex., 1984).

²⁸ *Id.*

²⁹ *Manges v. Guerra*, 673 S.W.2d 180, 182 (Tex., 1984) (citing the argument made by the Guerras which was accepted by the Court).

³⁰ *Id.* at 181.

³¹ *Id.* at 182.

³² *Id.*

³³ *Id.*

benefit that he exacts for himself. R. Hemingway, *The Law of Oil & Gas*, § 2.2(D) (2d ed. 1983).³⁴

And with this paragraph, what had been settled law in Texas for nearly fifty years, instantly became uncertain. From the day these words were written to the present, the exact boundaries of the duty at issue have been, and remain, amorphous and subject to debate.

BREACH BY INACTION

A question left unanswered by *Manges v. Guerra* was whether an executive interest holder could breach his or her duty by *not leasing* the mineral estate. It would be nearly two decades before the Texas Supreme Court weighed in on this issue. In order to properly understand the Court's opinion in *Texas Outfitters*, it is necessary to first answer to this question.

In 2003, the Texas Supreme Court was again faced with a case involving non-executive interest holders at odds with the executive interest holder in the matter of *In Re Bass*.³⁵ In this case, the non-executives filed suit against the executive Bass for failing to lease the mineral estate.³⁶ The Court held that, since Bass had not exercised his executive right by leasing the tracts minerals to anyone (himself included), he could not have breached his duty.³⁷ Stated differently, the Court held that it was impossible for Bass to have breached his duty to the non-executives because he had not obtained any benefit for himself.³⁸ Once *In re Bass* was decided, the law in Texas seemed to be that, as long as an executive interest owner neither engaged in *Manges*-style self-dealing, nor leased the minerals at all, then she could not breach her duty. However, the lay of the land would change again in eight short years.

In 2011, the Supreme Court took up *Lesley v. Veterans Land Board*, a case where the executive had entered into restrictive covenants preventing the mineral estate from ever being developed.³⁹ The restrictive covenants were designed to prevent oil and gas extraction activities from disturbing the surface estate, which included a housing development.⁴⁰ Thus, the Court was faced with a defense of its own making—the executive interest holder's argument that, under *Bass*, he was immune from liability because he had not leased the minerals to anyone. The Court backtracked and clarified its position on the issue:

...[W]e do not agree ... that Bass can be read to shield the executive from liability for all inaction. It may be that an executive cannot be liable to the non-executive for failing to lease minerals when never requested to do so, but an executive's refusal to lease must be examined more carefully. If the refusal is arbitrary or motivated by self-interest to the non-executive's detriment, the executive may have breached his duty.⁴¹

This reexamination of the bright-line rule first established in *Bass* (or deviation from it) made it clear for the first time that executive inaction is not a universal defense to claims of breach brought by non-executives. This set the table for a new wave of litigation by non-executive interest holders.

³⁴ *Id.* at 183-84.

³⁵ *In Re Bass*, 113 S.W.3d 735 (Tex., 2003).

³⁶ *Id.* at 738.

³⁷ *Id.* at 745.

³⁸ *Id.*

³⁹ *Lesley v. Veterans Land Board*, 352 S.W.3d 479 (Tex., 2011).

⁴⁰ *Id.* at 481-82.

⁴¹ *Id.* at 491.

TEXAS OUTFITTERS

In 2019, the Supreme Court of Texas took another stab at clarifying the exact nature of the executive duty in *Texas Outfitters, LLC v. Nicholson*.⁴²

In 2002, Dora Jo Carter and her two children (collectively, the Carters) sold a 1,082 acre tract in Frio County, Texas to Texas Outfitters, LLC.⁴³ The Carters sold the entire surface estate to Texas Outfitters along with a small portion of their fifty percent interest in the mineral estate, as well as the executive rights to their entire fifty percent interest.⁴⁴ Thus, Texas Outfitters owned the surface rights to the entire tract, an undivided 4.16% of the mineral estate, and executive rights to the entire fifty percent interest previously owned by the Carters, while the Carters retained 45.84% of the tract's mineral estate but no executive rights.⁴⁵ Texas Outfitter's sole owner was Frank Fackovec, who intended to use the ranch property as his residence and to operate a hunting business.⁴⁶

In 2010, Texas Outfitters rejected an offer to lease its mineral interest along with the Carter family's interest.⁴⁷ El Paso Oil Exploration and Production Company (El Paso) offered \$1,750 per acre and a 25% royalty, and had already successfully leased the other 50% mineral interest in the 1,082 acre tract.⁴⁸ After some negotiation between the Carters and Texas Outfitters, the Carters came to believe that Texas Outfitters had no intention of ever leasing the mineral interests due to Fackovec's concerns about how oil and gas exploration and production might affect his hunting operation, which by this time included a deer breeding operation.⁴⁹ The Carters then filed suit against Texas Outfitters alleging it breached its duties as the holder of the tract's executive rights.⁵⁰

As litigation progressed, oil and gas exploration in the area continued.⁵¹ Ultimately, the tract's mineral estate became less valuable as nearby exploration and production proved the tract to be less productive than El Paso believed when it made its original offer.⁵² In 2012, Texas Outfitter's sold the surface tract and a portion of its mineral interests for \$3.5 million, making a profit of \$2.5 million over the purchase price paid a decade before.⁵³

After a bench trial, the trial court found Texas Outfitters breached its executive duty and entered a judgment in the Carter's favor.⁵⁴ The court awarded the Carters \$867,654.32, which included the amount the Carters would have received if the El Paso lease offer had been accepted, plus interest, costs and fees.⁵⁵

Texas Outfitters appealed the trial court's judgment to the San Antonio Court of Appeals, which affirmed the lower court's judgment.⁵⁶ Texas Outfitters filed a petition for review and the Supreme Court of Texas granted the petition.⁵⁷ The case's ultimate outcome was impacted by the

⁴² *Texas Outfitters Limited LLC v. Nicholson*, 572 S.W.3d 647 (Tex., 2019).

⁴³ *Id.* at 649.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 649-50.

⁴⁸ *Id.*

⁴⁹ *Id.* at 650.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 650-51.

⁵⁵ *Id.* at 651.

⁵⁶ *Texas Outfitters v. Nicholson*, 534 S.W.3d 65, 80 (Tex.App.—San Antonio, 2017).

⁵⁷ *Texas Outfitters v. Nicholson*, 572 S.W.3d 647 (Tex., 2019).

nature of Texas Outfitter's challenge to the trial court's verdict. Texas Outfitter's sole appellate issue was the legal sufficiency of the evidence supporting the trial court's conclusion that it had breached its duty to the Carters.⁵⁸ Accordingly, the challenge would fail if the Supreme Court found more than a scintilla of evidence supported the trial court's finding that Texas Outfitters breached its executive duty by failing to lease the mineral estate.⁵⁹

The Texas Supreme Court acknowledged the equivocation in its prior decisions, quoting several of its notable previous cases describing the executive duty as "imprecise", "difficult to determine", and unfit for a "bright-line rule."⁶⁰ However, the Court went on to reiterate, and thereby reaffirm, a handful of principles from its previous cases.

First, the Court distanced itself from the fiduciary duty language from *Manges*. The Court opined that the executive duty does not require an executive right holder subjugate their own interests to those of any holders of non-executive rights.⁶¹ Instead, an executive rights holder must procure the same benefit for non-executives that the executive herself receives under any exercise of the executive's power to lease the mineral rights.⁶²

A fiduciary duty is defined as follows: "a duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person. It is the highest standard of duty implied by law (e.g., trustee, guardian)."⁶³ Thus, a fiduciary standard, if applied literally, would require the executive interest holder to put the interests of the nonexecutive interest holders above his own.⁶⁴ This is incompatible with the Court's determination that the executive need only procure the same benefit for non-executives that the executive herself receives.

The application of fiduciary duty is not improper in all situations, however. For instance, if an express trust is created, if close family members turn over the management of their affairs to the member having special business expertise, or if a partnership is formed, it would be appropriate to prevent the person entrusted with managerial responsibilities for oil and gas properties from acting in his own selfish interests and ignoring the interests of the other parties.⁶⁵

Second, an executive right holder can breach its duty through inaction, *i.e.* by failing to lease the mineral estate.⁶⁶ Specifically, the Court pointed out that liability depends on whether the executive's decision was based on their own interests, was wholly arbitrary, and whether the non-executive was harmed.⁶⁷

Finally, the Court clearly delineated the standard test for determining "whether the executive engaged in acts of self-dealing that unfairly diminished the value of the non-executive interest."⁶⁸ From there, it was a simple matter for the Court to examine the evidence adduced at trial and determine there existed more than a scintilla of evidence supporting the trial court's verdict.

Among the trial court's finding of facts were several supporting its judgment. For instance, Dora Jo Carter testified Fackovec told her that he planned not to lease the tract's mineral estate because he did not want to disturb Texas Outfitter's hunting operation.⁶⁹ The trial court also

⁵⁸ *Id.* at 653.

⁵⁹ *See Id.*

⁶⁰ *Texas Outfitters Limited LLC v. Nicholson*, 572 S.W.3d 647, 652 (Tex., 2019) (quoting *Lesley v. Veteran's Land Board*, 352 S.W.3d 479, 488; *KCM Financial v. Bradshaw*, 457 S.W.3d 70, 74 (Tex., 2015)).

⁶¹ *Id.*

⁶² *Id.*

⁶³ Black's Law Dictionary, Sixth Edition (1990), p. 625.

⁶⁴ Ernest Smith, *Implications of a Fiduciary Standard of Conduct for the Holder of the Executive Right*, 64 TEXAS L.REV. 371 (1985).

⁶⁵ *Id.*

⁶⁶ *Texas Outfitters v. Nicholson*, 572 S.W.3d 647, 652 (Tex., 2019).

⁶⁷ *Id.* at 652 (quoting *Lesley v. Veterans Land Board*, 352 S.W.3d 479, 491 (Tex., 2011)).

⁶⁸ *Id.* at 652 (quoting *KCM Financial, LLC v. Bradshaw*, 457 S.W.3d 70).

⁶⁹ *Id.* at 651.

found that Texas Outfitters was able to sell the ranch for a \$2.5 million dollar profit free and clear of any oil and gas lease burdening the mineral estate.⁷⁰ Further, the trial court found that Texas Outfitter's decision to decline El Paso's offer was made with the knowledge that El Paso had already leased the other 50% interest in the same tract and the knowledge that the Carters wanted Fackovec to accept the lease offer.⁷¹ Finally, the Court found that Texas Outfitters chose to gamble on whether some other offer would be made which was superior to that offered by El Paso.⁷² Thus, the Texas Supreme Court concluded there was sufficient evidence to support the lower court's finding that Texas Outfitters breached its duty to the Carters by refusing El Paso's lease offer.⁷³

The Court pointed out that the issue was not simply one of an executive rights holder declining a lease offer in the honest hope of a better offer coming along later, because El Paso had already leased the other 50% interest in the same tract.⁷⁴ Very few, if any, reasonable oil companies would offer to lease the other half of the minerals in such a tract.⁷⁵ In fact, while the case was pending, two oil companies made offers to lease the interests at issue for amounts very comparable to El Paso's initial offer, but both were withdrawn when the offerors discovered that El Paso already had the other 50% leased.⁷⁶ Texas Outfitter's decision to gamble less than \$12,000 on the remote possibility that an oil company would make an ill-advised offer higher than El Paso's, while risking almost \$900,000 on the Carter family's behalf, clearly was not something a reasonable person would do.⁷⁷

Further, the Court found the evidence clearly supported the trial court's determination that Texas Outfitters declined El Paso's offer out of concerns for its own self-interest.⁷⁸ Texas Outfitters clearly valued the ability to operate its hunting business free from any potential interference exploration and production activities might cause.⁷⁹ Additionally, the trial court's implicit finding that Texas Outfitters was able to maximize its profits when re-selling the ranch free of any existing lease was also supported by the evidence.⁸⁰

NOW THAT THERE ARE ANSWERS, DOES IT MATTER?

It does. Perhaps not when Clinton-Manges type behavior is at issue, where the conduct is so far beyond the bounds of reason that there is never a doubt whether they have violated their duties. However, for landowners who are attempting to stay between the lines, it does.

If an executive is held to a true fiduciary duty, then they have an affirmative duty to diligently pursue potential leases and any failure to do so exposes them to liability to the non-executive.⁸¹ That is quite different from merely avoiding self-dealing and acquiring the same benefits for all interest holders that the executive negotiates for itself.

Further, as the Court made clear in *Texas Outfitters*, an executive can breach its duty by refusing to lease minerals in pursuit of its own interest in the surface estate. This undermines the

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 654-66.

⁷⁵ *Id.* at 657.

⁷⁶ *Id.* at 650.

⁷⁷ *Id.* at 657.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 657-58.

⁸¹ Earnest E. Smith, *Implications of a Fiduciary Standard of Conduct for the Holder of the Executive Right*, 64 Tex. L. Rev. 371, 1985; see also Shade at page 14 footnote 24 (for a brief discussion of whether Smith's interpretation of "fiduciary" based in trust law is what the court actually meant in *Manges*).

value of the executive right for the owner of the surface estate and makes such an arrangement one best avoided.

DETERMINANTS OF CODES (RULES) OF PROFESSIONAL CONDUCT FOR THE ACCOUNTING PROFESSION: AN ANALYSIS ACROSS LICENSING JURISDICTIONS

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Abstract

This study examines the variation in codes or rules of professional conduct for Certified Public Accountants (CPAs) across licensing jurisdictions. While previous research has studied the design, purpose, and effectiveness of codes of conduct, no study has focused on jurisdiction-level codes or rules of professional conduct or sought to explain why those codes or rules vary across the jurisdictions. Results of this study show that a larger business community results in a larger professional community, or number of CPAs. A larger professional community is positively related to more sophisticated jurisdiction-level codes or rules of professional conduct.

KEYWORDS: codes (rules) of professional conduct, Certified Public Accountants (CPAs)

Introduction

The American Institute of Certified Public Accountants (AICPA) adopted the AICPA Code of Professional Conduct in 1962 with the intent to provide a principles-based ethics code to guide the behavior of its members (Fatemi, *et al.* 2018). The AICPA Code of Professional Conduct is a living document that adapts as the accounting profession and the business environment in which the profession serves change (Jenkins 2020). The revisions in 1973, 1988, and most recently 2014 provide evidence to the evolving nature of the AICPA Code of Professional Conduct. The AICPA Code of Professional Conduct has been criticized for being poorly designed (Neill, *et al.* 2005), self-serving to legitimize the profession (Dillard and Yuthas 2002), and counterproductive as a means of protecting the public interest (Collins and Shultz 1995).

As professionals endowed with the public trust, the public expects Certified Public Accountants (CPAs) and other accounting professionals to apply their technical knowledge and expertise in an ethical way (Lawson, *et al.* 2016). Jamal and Bowie (1995) show that disagreement can exist between the profession and the public over provisions within codes of professional conduct, especially those provisions designed to protect the public interest. Nevertheless, having a principles-based guide for professional behavior such as the AICPA Code of Professional Conduct helps build public trust (Moriarty 2000). Digabriele (2020) shows that having a code of conduct also adds credibility to accountants' statements.

Research is less clear as to the value of codes of conduct for actually impacting professional behavior. Pflugrath, *et al.* (2007), for example, conclude that the presence of a code of conduct positively influences the quality of accountants' professional judgement. In contrast,

Baker (2014) asserts that ethical behavior in the accounting profession is driven more by the desire to conform to professional ideals than by compliance with a code of conduct.

Regardless of their actual impact on professional behavior, codes of conduct are prevalent across the accounting profession. In addition to the AICPA Code of Professional Conduct, all other professional organizations create and maintain their own codes of conduct. The Association of Certified Fraud Examiners, the Institute of Internal Auditors, the Institute of Management Accounts, and the Association of Government Accountants are just a few examples. Furthermore, each state or other jurisdiction that licenses Certified Public Accountants (CPAs) promulgates codes or rules of professional conduct that are binding to the licensees within those respective jurisdictions.

Codes of conduct created and enforced by licensing boards, regulators, and professional organizations vary in scope across different regions of the country (Prakash 2000). In the United States, CPAs are licensed through the various state and territorial jurisdictions, typically through the respective state or territorial boards of accountancy. These state or territorial boards of accountancy are charged by the state or territorial governments with regulating the accounting profession within those states or territories. Many of the boards of accountancy promulgate stand-alone codes or rules of professional conduct for licensees under their jurisdiction. Others, however, simply adopt the AICPA Code of Professional Conduct as the jurisdictional rules. Some boards of accountancy adopt the AICPA Code of Professional Conduct in whole or in part but make modifications or additions applicable to their specific jurisdiction.

While the AICPA Code of Professional Conduct has been studied extensively, little attention has been given to the state-level codes or rules of professional conduct to which CPAs are bound. This study examines the determinants of the variation in the codes or rules of professional conduct among states. The next section reviews the literature and develops the hypotheses for this study. The following section describes the methodology used in this study and presents the statistical models and results. The final section provides concluding remarks.

Hypotheses Development

Unethical behavior by an individual CPA or other accountant reflects negatively on and damages the reputation of the entire profession (Mintz 2020). In carrying out their professional obligations, accountants must be aware of potential adverse interests having the potential to diminish the public trust, such as client familiarity and advocacy, management participation, self-review, or other undue influences (Tribunella & Tribunella 2014). Codes of conduct can be effective in helping accounting professionals resolve these ethical dilemmas and honor the public trust (Schmutte & Duncan 2014).

Several studies have shown the effectiveness of codes of conduct in guiding behavior. Green and Weber (1997) conclude that senior level accounting students function at a higher level of ethical reasoning when facing an ethical dilemma after being introduced to the AICPA Code of Professional Conduct. Students' ethical reasoning can improve even though their core ethical orientation is not changed as a result of exposure to codes of conduct (McCarthy 1997). In a study by Fatemi, *et al.* (2018), CPAs were able to reach a more ethically reasoned conclusion to a dilemma when provided with excerpts from the AICPA Code of Professional Conduct. Pflugrath, *et al.* (2007) conclude that the presence of a code of conduct positively impacts the quality of accountants' professional judgement.

In practice, codes of conduct in the accounting profession exist to not only guide but to also evaluate the behavior of CPAs (Jamnik 2011). Violations of the codes or rules of conduct promulgated by the state boards of accountancy can lead to censure or, in extreme cases, loss of licensure for CPAs. Generally, the state boards' codes or rules of conduct will subsume the AICPA Code of Professional Conduct as well as the codes of conduct of other professional organizations. CPAs are motivated, therefore, to be familiar with and adhere to AICPA Code of Professional Conduct even if they are not members of the AICPA (Rigos 2015). As living documents, the codes of conduct applicable to the accounting profession continue to evolve as the profession seeks to address inappropriate behavior and provide additional guidance (Armitage & Moriarity 2016). The state boards of accountancy serve an important role in gathering information to guide and evaluate the behavior of CPAs and revise the codes or rules of conduct (Jenkins, *et al.* 2020).

The accounting profession, and CPAs in particular, exist in large part to serve the business community. As the business community within a licensing jurisdiction grows, more CPAs should be necessary to support the various business endeavors and facilitate that growth. This leads to the first hypothesis, stated in the alternative form.

H1: The number of CPAs in a state is positively related to the size of the business community in that state.

To effectively serve the business community, the accounting profession must seek to maintain and expand their trust. Interestingly, sophisticated financial groups, such as those in the business community, have less trust in accounting professionals than others who have less knowledge about the profession (Brown, *et al.* 2006). Developing and revising the codes or rules of professional conduct can build confidence and show a commitment to the public trust (Digabriele 2020, Moriarity 2000). The second hypothesis stated in alternative form is as follows.

H2: The sophistication of the code or rules of professional conduct is positively related to the number of CPAs in the state.

A larger professional community as evidenced by the number of CPAs that exists to serve a larger business community (from H1) would be expected to develop a more sophisticated code of professional conduct to guide and monitor the behavior of CPAs (from H2) and thus preserve and expand the public trust.

Methodology and Results

To examine the research questions, this study collected data for the fifty states and five territories that are members of the National Association of the State Boards of Accountancy (NASBA). Data was not available for the territories, so the scope of the study was restricted to the states. The number of active CPAs in each state was provided by the Texas State Board of Public Accountancy. The gross domestic product (GDP) for each state was collected from the Bureau of Economic Analysis and used as a proxy for the size of the business community in the respective states. Each state's code or rules of professional conduct was collected from either the state board web sites or the Public Accountancy Act from each state and copied into Microsoft

Word where the review function measured Flesch Kincaid Grade level, Flesch Reading Ease, and word count metrics as proxies for the sophistication of those codes or rules of professional conduct.

Table 1 provides summary statistics for the variables included. The Flesch Kincaid Grade level, Flesch Reading Ease, and word counts ranged from 9.10 to 20.30, 11.30 to 42.70, and 3,860 to 63,151, respectively. The average state GDP was \$432.22 billion. The number of active CPAs was not available for four states, so the final sample was limited to 46 observations.

Table 1
Summary Statistics

Variable	<i>n</i>	Mean	SD	Min	Max
Number of CPAs	46	13,907.65	16,148.18	778.00	74,619.00
State GDP (in \$Billion)	50	423.22	550.62	34.78	3,137.47
Flesch Kincaid Grade Level	50	14.85	2.35	9.10	20.30
Flesch Reading Ease	50	25.55	7.83	11.30	42.70
Word Count	50	18,447.82	11,058.71	3,860.00	63,151.00

To test H1, a linear regression was conducted to assess if a state's GDP predicts the number of active CPAs. Results are presented in Table 2. State GDP is positive and significant at the $p = 0.05$ level. Additionally, $R^2 = 0.93$, indicating the 93% of the variation in the number of CPAs across states can be explained by the states' GDP. These results support H1 and suggest that the size of a licensing jurisdiction's professional community (number of CPAs) increases with the size of the business community (GDP).

Table 2
Linear Regression Results for H1

State GDP (in \$Billion) predicting Number of CPAs

Variable	Estimate	SE	<i>t</i>	<i>p</i>
Intercept	1,797.40	789.87	2.28	.028
State GDP (in \$Billion)	27.66	1.11	24.83	<.001
$F(1,44) = 616.71, p = <.001, R^2 = 0.93$				

Results for H2, whether the size of the professional community impacts the sophistication of the code or rules of professional conduct for the licensing jurisdiction, are less conclusive. The results for a linear regression with Flesch Kincaid Grade Level as the dependent variable and number of active CPAs as the independent variable are shown in Table 3. Though the number of CPAs is significant at the 0.05 level ($p = 0.36$), the model explains only 10% of the variability in Flesch Kincaid Grade Level ($R^2 = 0.10$). Results were similar using Flesch Reading Ease and word count as proxies for the sophistication of the codes or rules of professional conduct, yet neither variable was significant at the 0.05 level.

Table 3
Linear Regression Results for H2

Number of CPAs predicting Flesch Kincaid Grade Level

Variable	Estimate	SE	<i>t</i>	<i>p</i>
Intercept	14.26	0.45	31.52	<.001
Number of CPAs ¹	0.00	0.00	2.16	.036

$F(1,44) = 4.67, p = .036, R^2 = 0.10$

¹ The parameter estimate is not a true zero value. For consistency, the estimate reported here is rounded to two decimal places. The sign on the estimate is positive and significant at the .05 level.

Discussion and Conclusion

CPAs are endowed with the public trust, and the public rightly expects accounting professionals to act in the public interest. Regulators, professional organizations, and licensing boards promulgate and enforce codes or rules of professional conduct to guide decision making and establish an enforceable degree of compliance with accepted professional norms. These codes or rules of professional conduct vary in sophistication across the many regulatory agencies, professional organizations, and licensing jurisdictions.

This study examines why the variation in codes or rules of professional conduct exists across the multiple licensing jurisdictions for CPAs. The hypotheses posit that as the business community within the licensing jurisdiction grows, the professional community will grow because more CPAs will be needed to support the larger business community. Further, as the professional community, or number of CPAs, increases, the result will be a more sophisticated code or rules of professional conduct put in place to guide the professional community.

The results of the study generally support the hypotheses. The number of CPAs within a licensing jurisdiction is significantly and positively related to the size of the business community, as measured by GDP for the jurisdiction or state. The relation between the sophistication of the codes or rules of professional conduct, as measured by Flesch Kincaid Grade Level, and number of CPAs within the licensing jurisdiction is also positive and statistically significant, yet the results are less convincing.

Results of this study are somewhat limited by data availability and measurement. First, there are some differences in how the various licensing jurisdictions measure and report the number of CPAs within the jurisdiction. Also, data was not available for four of the states or for any of the territories that are members of NASBA. Furthermore, Flesch Kincaid Grade Level, Flesch Reading Ease, and word count are, arguably, crude measures of and proxies for the sophistication of the codes or rules of professional conduct. A more detailed linguistic analysis of the texts could potentially yield greater insights and stronger results.

While the intended purposes and the efficacy of codes or rules of professional conduct has received extensive focus in the literature, the reasons for the variation in scope across different organizations and regions has received little to no attention. As a licensed CPA practicing across different licensing jurisdiction and industries or clients, an accounting professional would be subject to multiple codes or rules of professional conduct. Assuming that the intended purpose of these codes is to guide professional decision making in the public

interest, further examination into the cause of the variation in, and perhaps the optimal degree of complexity or sophistication of, the codes or rules of professional conduct seems merited.

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OPPORTUNITIES AND ETHICAL IMPERATIVES FOR EXPANDING LEGAL ENVIRONMENT OF BUSINESS STUDIES

LEE USNICK*

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Accreditation standards of the Association of Advance Collegiate Schools of Business (AACSB) have recently evolved their standards regarding undergraduate business degree accreditation and re-accreditation. Changes grant to individual programs added flexibility to refocus topical and course requirements. This paper advocates that nearly all undergraduate business degree programs should require six credit hours, covering a wide scope of legal topics. This paper argues that recent AACSB documents provide numerous aspirations that are directly addressed in typical legal environment of business courses. Further, this paper also contends that the local, regional, national, and globally massive growth of business compliance considerations add an ethical imperative to this objective.

I. Newest AACSB (Association to Advance Collegiate Schools of Business International) Accreditation System Invites New Approaches

This paper is optimistic that recent changes in AACSB re-accreditation open the possibility of greatly expanding the role of Legal Environment of Business studies for business students, including full inclusion and acknowledgment of the explosive growth of business compliance concerns in every marketplace around the world.

This paper suggests an approach that can be stretched and reconfigured to evaluate the Legal Environment of Business courses across multiple issues ranging from design of simple assignments through much broader curriculum design and assurance of learning decision-making about the entire course.

This discussion seeks solely to integrate helpful perspectives on the new AACSB principles-based system as it relates to the evolution of Legal Environment of Business studies. There is no intention that the authors of this paper either applaud or denigrate the shift in the AACSB re-accreditation process.

II. Expanding Legal Environment of Business Training is an Inherently Positive Proposition

This paper presupposes that a broader, deeper understanding of the Legal Environment of Business for business students is an inherently positive proposition.

A. Argument I

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Law has been a core topic of required business training from the earliest days of formal business curricula. Seriously embracing this new opportunity could serve as a reminder that when Mr. Wharton pledged funds for the very early Wharton School of Business, he stipulated that five topics must be included. One of the five was law. Interestingly, the first hire for the new school was an attorney.¹

B. Argument 2

Legal teaching has served as a cornerstone for an ethical framework for business transactions.

C. Argument 3

Legal environment pedagogy is continuously losing ground to a global explosion of legal rules and compliance mechanisms, leaving each generation of business graduates a weaker framework of working knowledge with which to address an ever more complex legal environment of business.

D. Argument 4

If the purpose of the study of legal environment of business and the related compliance is not to induce everyone to participate on a level legal level playing field, then the only other reasonable conclusion is that rules and compliance are intentionally created to give undeserved advantage to some.

F. Argument 5

Simply, it is both a practical and ethical problem that one cannot be expected to adhere to society's rules and compliance requirements that they do not know exist.

III. Possible Legal Environment Studies Changes to Consider

There are many possibilities that could be considered within the framework of the expanded opportunities for change envisioned by the latest AACSB standards. The purpose of this paper is not to lobby for specific changes but rather to stress the apparent opportunity to explore a wide range of opportunities such as:

Expand the Legal Environment core requirement for all business students to six credit hours.

Introduce all business students to 40 to 50 key legal environment topics.

¹ 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>

Emphasize major linkages to the rapidly expanding compliance environment of business.

IV. Some Things Are Largely Unchanged

AACSB has provided such an over-arching framework for some time. Important parts of that framework remain in some form in the new system.

A. Older AACSB Standards for Continuous Improvement Remain

The historic expectations by AACSB for continuous improvement are clearly embedded into the blanket set of overriding principles retained by AACSB. AACSB Guiding Principles and Expectations for Accredited Schools includes Guiding Principle Five, Continuous Improvement.² It states, “The school demonstrates a commitment to a culture of continuous improvement that yields high-quality outcomes.”³

A failure to find continuous improvement seems to retain the same negative implications that it has held for many years, and could result in a failure to gain re-accreditation.

B. Scattered Inferences of a "Comparable" Standard

There are scattered references and inferences in the 2020 and 2022 documents suggesting that in some circumstances, "comparable" examples could provide guidance. The implication is that as the principles-based model grows, there is still guidance to be found in the practices of the majority of those currently accredited, thereby upholding the older specifications.⁴ The ponderable part of this standard is judging, in each individual setting and particular issue, how far afield a new framework can stray.

From a purely planning and program revision standpoint, the mention of comparables suggests a starting point that held sway prior to the new principles approach. The intermediate issue becomes how much innovation, how soon, and driven by what general and particular energizers.⁵

In supplemental materials, AACSB specifies “...curricula should address competencies that would normally be included in the type of degree under consideration.”⁶

² 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), at 16.

³ *Id.*

⁴ AACSB 2020 Interpretative Guidance For AACSB Business Accreditation, <https://www.aacsb.edu/-/media/documents/accreditation/2020-interpretive-guidance-redlined-july-1-2022.pdf> (effective July 28, 2020, updated July 1, 2022), at 27.

⁵ *Id.*

⁶ *Id.*

A key factor in the new context will be the access to comparables. Finding truly useful information about other programs at a granular level could well be a major transparency challenge as the new system evolves over time.

C. Competencies Matter, But Now A Lot More

Competencies will be an ever more important driver of curriculum and related learning outcome processes. The knowledge, skills, ability, competency overlay coupled with the need for demonstrating competency achievement will require careful attention in the new principles driven system.⁷

Any tools need to include recognition of the shifts in this area. Assurance of learning measures will need revising to reflect the stated desired "outputs" to be demonstrated by students.⁸

AACSB standards lie in their historic practice of clearly specifying expectations for discrete topics, including the legal environment of business.

V. New AACSB Mission Current Framework

A. AACSB Mission

The Preamble to the 2020 Guiding Principles for Business Accreditation states their Mission "...is to foster engagement, accelerate innovation and amplify impact in business education."⁹

B. AACSB Guiding Principles: Expectations for Accredited Schools

Guiding principles are established to guide the expected "...behaviors, values, attitudes, and choices as they relate to strategy and operations of the business school of accredited schools."¹⁰ The principles are:

Ethics and Integrity
Societal Impact
Mission-Driven Focus
Peer Review
Continuous Improvement
Collegiality
Agility
Global Mindset
Diversity and Inclusion

⁷ AACSB, *supra* note 2, at 38.

⁸ AACSB, *supra* note 4, at 30.

⁹ AACSB, *supra* note 2, at 7.

¹⁰ *Id.*, at 15.

Continued Adherence to AACSB Guiding Principles and Business Standards¹¹

C. Individual College Mission Now Very Important

The new principles-based model replaces the past detailed mandate, and directs major attention to the mission of the specific college. In addition, there will need to be consistency not only in the Mission and plans of the Business College, but consideration will need to be given to all of the mission statements that control it. That will include the university, the system that the university is a part of, and any oversight that may be above that such as a state coordinating board, or perhaps another parent organization. Attention must be given to the missions statements and other guiding commitments for consistency with and furtherance of a university coordinating board or parent organization, a university system, the university itself, the business college, the department, and possibly sub-department discipline, major, or certificate offerings.

VI. AACSB Accreditation Standards Categories

Determining the effects of the new AACSB principles-based re-accreditation on a Legal Environment of Business course starts clearly with all four standards under the General Accreditation Standard Two, Learner Success.¹² Curriculum, Assurance of Learning, Learner Progression, and Teaching Effectiveness and Impact are the drivers of course design, delivery, competencies, and learning outcomes in this critically important standard.

Additionally, General Accreditation Standard Three, Thought Leadership, Engagement, and Societal Impact¹³ interfaces significantly with a Legal Environment of Business course.

VII. AACSB Overriding Standards Likely to Affect Legal Environment of Business Studies

The Legal Environment of Business course also falls under the AACSB Mission, which "...is to foster engagement, accelerate innovation and amplify impact in business education."¹⁴ It will also fall under the AACSB Guiding Principles and Expectations for Accredited Schools within the framework of innovation, engagement and social impact.¹⁵

A. Innovation

For this analysis approach to work, there needs to be an extensive collection of unique alternative tools. The ability to move significant amounts of information and cultivate creative thinking in the legal environment topics is a huge challenge. As the regulatory environment

¹¹ *Id.*

¹² *Id.*, at 37.

¹³ *Id.*, at 50.

¹⁴ *Id.*, at 7.

¹⁵ *Id.*, at 19.

around the world continues to expand concomitant compliance efforts, the selection of course parameters, including focus, topics, competencies, and even assignments will need to all be evaluated for innovative approaches.¹⁶

Significant in this process will be continuous efforts to find the balance between the depths of coverage of a particular topic verses the breadth of covering a wider number of topics.¹⁷ This element is a significant aspect of the overall AACSB drive to see that missions align with their holistic principles-based standards.¹⁸

B. Engagement

For the Legal Environment of Business, engagement remains less changed. For many of the students, some legal topics themselves can generate student engagement. At the same time, engagement enhancement also affects directly the ability to cover a wider array of topics and competencies in greater depth.¹⁹

Engagement essentially starts beyond the basics, which is to say beyond “...readings, course participation, knowledge development, projects, and assignments,” then engagement begins.²⁰

The battle between available time against the impact of an ever growing list of critical information regarding the Legal Environment demands a continuous re-assessment of often competing demands. But, careful attention to potential efficiencies generated by appropriate engagement strategies can often reduce the dilemma. Again, this element is a significant aspect of the overall AACSB drive to see that missions align with their holistic principles based standards.²¹

C. Social Impact

The scope of social impact potential for the Legal Environment of Business course is huge. Again, the social impact of the class battles with massive amounts of legal environment topical material that has potential social impacts for those who enter the modern and rapidly changing

¹⁶ *Id.*, at 38.

¹⁷ AACSB, *supra* note 4, at 30.

¹⁸ AACSB, *How AACSB Is Transforming Business School Accreditation*, <https://www.aacsb.edu/-/media/documents/accreditation/aacsb-accreditation-white-paper-2021.pdf?rev=39ce05c698ce46ca8d868c7ea80de2ec&hash=48D9EBDE4A3514B2D4052896B63390F5#:~:text=They%20call%20business%20schools%20to,and%20between%20disciplines%20and%20institutions>

¹⁹ AACSB, *supra* note 4, at 29.

²⁰ *Id.*

²¹ AACSB, *supra* note 18, at 6.

business environment unaware of legal constraints. Legal compliance efforts across all industries are exploding as are expanding compliance expectations from regulators.²²

VIII. Implications, and Why A Spreadsheet?

A quick count of the possible range of standards, frameworks, aspirations, audiences, sources for decision-making, guidelines, constituencies and other pertinent inputs number in the hundreds.

Proposing, defending, or opposing possible changes to a Legal Environment of Business Course should be a nearly continually recurring activity. Delineating the rationale for or against any change, large or small, can be frustrating. Providing arguments for or against a proposed change often needs to demonstrate the strengths and weaknesses within the total program context, including policies, plans, goals, missions, accreditations, and other inputs.

Any course or program modification deserves to be carefully analyzed within a number of external guiding standards. Doing so necessitates maintaining a working list of internal and external accepted desired objectives, learning outcomes, and competencies.

One approach to this problem is creation of an extensive checklist that attempts to comprehensively acknowledge the possible range of influences affecting the decision issues and processes.

A spreadsheet analysis seems daunting at that level, though on the other hand, demonstrating the significant range of influences that a Legal Environment of Business course could show would be a powerful tool in all phases of decision-making. In the end, AACSB wants the business school to be viewed as a positive contributor to society.²³

The Appendix below gives a starting place for creating a tool for documenting the current state of any part of a course in relation to the new approach and the effects of any change in the course. The terms collected there are all direct or indirect derivatives from AACSB guidance documents.

The number of items in a single spreadsheet for this purpose can certainly be viewed as excessive. It can also be viewed as hundreds of ways of finding and selecting the best solutions. Once this process identifies those solutions, the same tool can be used to explain and describe the numerous ways that a desired outcome can be supportive of both missions and internal needs while also enhancing the institution's on-going accreditation status.

IX. Conclusions

²² 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](https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement).

²³ AACSB, *supra* note 2, at 7.

A. Good Prospects for Legal Environment, But It Will Take Persistent Effort

First, the mission of the college now becomes an important factor in curriculum and teaching approaches as this expanded approach to accreditation settles in.

Making and proving a record of both continuous improvement and being comparable with peers becomes vastly more important. Beyond meeting assurance of learning standards, demonstrating interfaces with the full range of principles and multiple missions will be critical.

The overriding AACSB commitment to innovation, engagement and social impact can be a strong place to protect and expand legal environment studies, but failure to understand that the implications will be a central focus for some time to come necessitates active demonstration of the role the legal environment can play.

In the end, documentation will be a key factor. A simple product, the spreadsheet, can show the numerous ties to the new standards that even a simple legal environment assignment can support the numerous broad mission-level objectives.

B. And the Ethical Imperative?

Simply, what do these current students need to know so that they have the ability to function in the existing and near term legal and compliance environment?

How will they use and expand their knowledge and skills to keep pace in these rapidly changing environments?

Finally, what legal and compliance skills and training do their community and their future business enterprises or their future employers deserve from them throughout their careers?

A participant (aka a graduating business student) in a transactional social order needs to know the rules if they are to be expected to follow the rules.

How to secure and continue these outcomes will take place in every legal environment of business studies program in some form. It will, sooner or later, require evidence of both the practical and ethical advantages gained by keeping and expanding student legal environment knowledge and capabilities as new systems evolve.

Appendix

Legal Environment Course Decision Process Spreadsheet Tool Elements in an AACSB Setting

State University Coordinating Board

State University Coordinating Board Mission
State University Coordinating Board Vision
State University Coordinating Board Philosophy

University System

University System Level Mission
University System Level Values
University System Level Goals
University System Level Principles/Values/Etc.

University

University Mission
University Vision
University Principles/Values/Etc.

Business College

Business College Mission
Business College Vision
Business College Principles/Values/Etc.

Potential Stakeholders

Potential Stakeholders and various Mission related inputs

AACSB Current Accreditation Touchstones for the Future

AACSB Current Principles Based Framework
Principles based standards over dictated rules standards
College Mission is the key driver
Positive social impact is a key goal
Social impact is human, economic, environmental, social well-being
Collegiality is a key component in every regard
Diversity and inclusiveness of people

Diversity and inclusiveness of ideas
More peer review
A global mindset
Adherence to AACSB guiding principles
Adherence to AACSB business standards
Mission describes mission, vision, and values
Mission defines core identity, values, stakeholders, and aspirations
Mission seeks alignment with all of its elements
Need to seek out ways to use mission to inject innovation
Need to keep everything focused around social impacts
Strategic Plan as tool for near and far planning
Plan checks for plans aligning with the mission
Risks to the plans must be addressed
Sustainability is an implicit aspect of the plan process
Need competencies of knowledge, skill, and ability
Students need to demonstrate competency
Curriculum needs to include innovation, experiential learning, life long learning oriented, and have social impact
There must be cutting edge content
Curriculum issues
Experimental pedagogues
Variation of delivery modes
New degree programs
New curricular and co-curricular initiatives
New teaching approaches
Teach innovative business theories and practices
Curriculum which identifies theories, ideas, concepts, skills, and knowledge gained
How curriculum helps in the first job
Stimulates intellectual curiosity and critical thinking
Facilitate and encourage active student engagement in learning
Show everything that is innovative
Need to include technology
Show that it is current and relevant
Some of it should be innovative
Show that there are competencies standards
Show that competencies are addressed and met

AACSB Lingerin Continuous Improvement Framework

Continuous improvement is still an implied part of re-accreditation

AACSB recent standards based Accreditation Framework

New principles-based standards still reference comparables, suggesting earlier specific standards can still give guidance. Gaining support evidence is currently formidable.

Current Catalog degree requirements

Current Catalog degree requirements of everything

Current degree parameters beyond catalog

Current degree parameters beyond catalog

Current specific course components

Current checklist for components of a particular course

SAVING SOCIAL SECURITY

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ABSTRACT: There has been much recent speculation about the future financial viability and liquidity of the Social Security Trust Fund (SSTF), and its ability to make future Social Security payments to beneficiaries. The Congressional Budget Office (CBO) and the Social Security Trustees have both suggested that the SSTF may run out in the early 2030s. This paper 1) assesses the future financial viability and liquidity of the SSTF, 2) discusses alternatives to address any prospective shortfalls and proposes an approach with minimal impact, and 3) presents additional alternatives, including covering unemployment compensation and adding a Privatized Component, to achieve additional objectives.

KEY WORDS: Congressional Budget Office (CBO), Privatized Component, Social Security, Social Security Trust Fund (SSTF), Social Security Trustees, Supplemental Security Income (SSI), Unemployment Compensation

*“The national debate on Social Security has been cheapened by demagoguery on all sides.”
– Former U.S. Representative Bill Delahunt (D-MA)*

INTRODUCTION

During recent speculation about the future financial viability and liquidity of Social Security (SS) and the Social Security Trust Fund (SSTF), there has been much misinformation and demagoguery on all sides. This paper attempts to cut through some of the misinformation and propose a solution with minimal negative impact on both wage earners and retirees.

PROBLEM

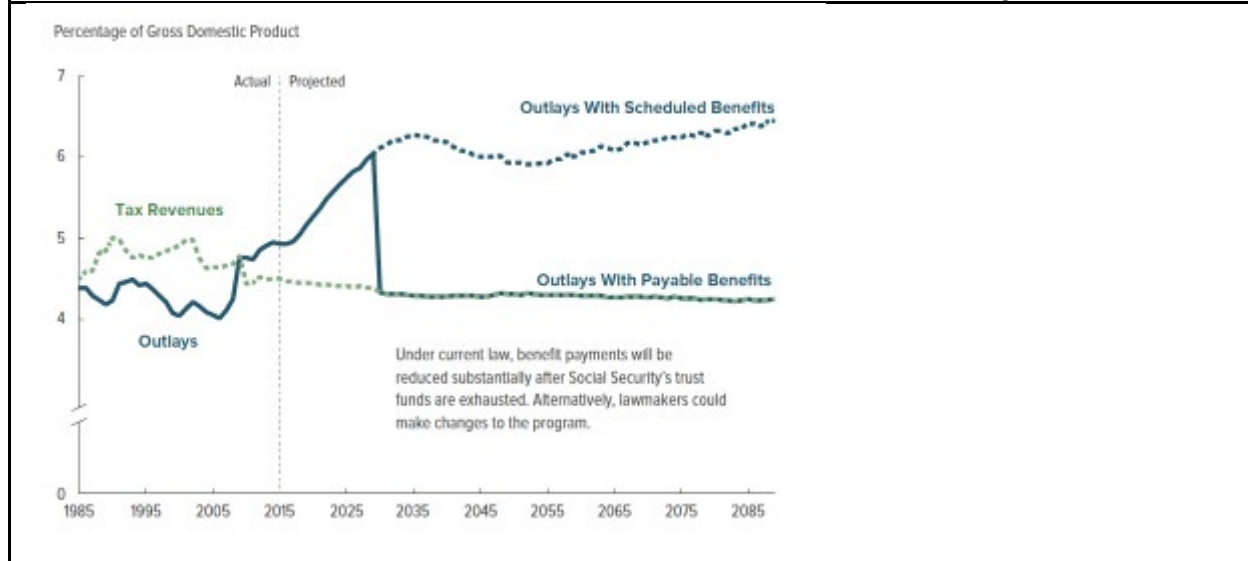
SS is not in any immediate danger of going bankrupt. The balance in the SSTF is sufficient to pay out all current SS benefits and is expected to remain so for about a decade. Table 1 compares income, payouts, and fund balances, for the combined Old Age and Survivors Insurance (OASI), Disability Income (DI), and Health Insurance (HI) trust funds, in billions, per the Congressional Budget Office, and shows that significant problems may be expected in the next decade:

TABLE 1 – CURRENT AND FUTURE STATUS OF SSTF (OASI, DI, and HI combined, \$ Billions)

Year	Taxes Received	Benefits Paid Out	Other, net	Net Change, Increase (Decrease)	Ending Trust Fund Balance (Deficit)
2021, Ending					2,990
2022, Actual	1,568	1,614	72	26	3,016
2023	1,615	1,751	65	(71)	2,945
2024	1,702	1,872	62	(108)	2,837
2025	1,789	2,008	60	(159)	2,678
2026	1,881	2,125	56	(188)	2,490
2027	1,966	2,242	52	(224)	2,266
2028	2,047	2,391	48	(296)	1,970
2029	2,129	2,470	43	(298)	1,672
2030	2,215	2,632	36	(381)	1,291
2031	2,303	2,776	28	(445)	846
2032	2,393	2,924	16	(515)	331
2033	2,482	3,120	12	(626)	(295)

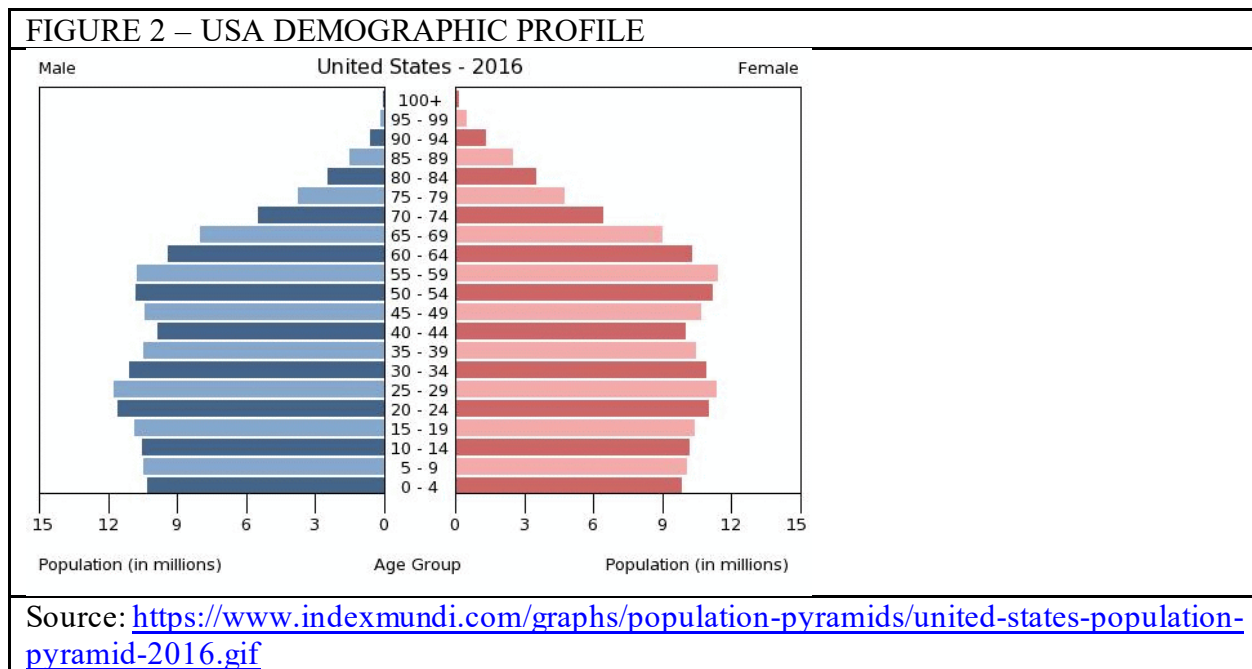
Source: CBO (2023), <https://www.cbo.gov/system/files/2023-02/51136-2023-02-Trust-Fund.xlsx>

While the immediate situation is not dire, the current trend cannot continue much longer. Looking at individual trust funds, the HI trust fund is projected to run out of money in 2030, and the total of all funds to run out in 2033. Because federal law prohibits running a deficit in the SSTF, at the point that it would go negative, either benefits will have to be cut or other taxes will have to be used. The SS Trustees' 2018 report indicates that the SSTF will run out of money in 2034, and beneficiaries will see a 21 percent cut in benefits, while CBO projects that the SSTF will run out of money in 2033. Figure 1 shows CBO's projections graphically (CBO, 2015):

FIGURE 1 - CBO PROJECTIONS OF FUTURE SOCIAL SECURITY LIQUIDITY

Three factors drive the problem:

1. **People Are Living Longer.** When SS was created, the retirement age of 65 approximated the average life expectancy. Therefore, it was originally expected that benefits would be paid out over a very short time. However, with life expectancies today approaching 80 years, the fundamental benefits calculus has changed dramatically.
2. **The Ratio of Younger SSTF Contributors to Older SSTF Withdrawers is Declining.** To understand this, it is helpful to look at a population pyramid for the United States. Figure 2 shows population by age, male to the left, female to the right. The group from about 20-35 are newcomers into the workforce, not making a great deal of money, and thus not paying a large amount into SS. The group from about 40-55 are the larger earners, and thus pay the most into SS. The group from about 65 and up tend not to be working and to be taking out SS benefits payments.



Over the next 20 years, the population groups currently in the 45-49, 50-54, 55-59, and 60-64 age ranges will be leaving the work force and drawing out SS benefits. The groups in the 0-4, 5-9, 10-14, and 15-19 age ranges will be entering the work force and paying into SS. The smallest of the age ranges that will be entering the SS benefits-drawing groups is larger than the largest age range that will be entering the workforce and paying into SS. Interestingly, the US situation in this regard is much better than most other countries, and therefore social programs in other countries will be in far more dire straits than in the US. This aging trend of the US population has been occurring for years, and as a result, the amounts being paid into the SSTF have been steady or declining (in inflation-adjusted dollars) as the amounts being paid out have increased. Until 2015, the amounts paid in exceeded the amounts paid out, so

the SSTF grew. The excess was even used to offset part of the federal budget deficit. Now the SSTF is shrinking, and that shrinking trend is expected to continue.

3. **The SSTF Earns a Very Low Return on Investment (ROI).** For a two-income household with children, the rate of return on investment (ROI) for social security contributions was calculated to be approximately 1.23% in 1998, and that rate is negative for an African-American single male (Beach, 1998). Take someone who joined the work force and began paying SS in 1966, and with total employer and employee contributions of approximately \$290,000 over the years. That person became eligible for full SS withdrawal in 2013 and has received monthly payments of approximately \$2,200 since then. Had the money that went to SS over the years been instead invested in a conservative Dow Jones index fund (DJIF), the authors calculate that this person would have been able to purchase an annuity yielding \$5,500 per month. To look at a worst case, suppose the person had taken early retirement at 62, in 2009 when the Dow was at a low point following the 2008-09 recession. At that point, the annuity payment funded by a DJIF would have been approximately \$3,100 per month. Despite paying these relatively low ROIs to recipients, the SSTF is still experiencing potential financial disaster. This would imply that the Fund's own assets are doing even worse. Considering the time value of money, even minor improvements in ROI would significantly ease the problem.

The SSTF problem has two components, a short-term problem and a long-term problem.

- The short-term problem is that at current levels of contributions are decreasing relative to withdrawals, and at currently forecasted levels of contributions and withdrawals, the SSTF will be exhausted roughly around 2033, and from that point forward continued benefits will exceed contributions, thus requiring either substantial benefit reductions or contributions from general revenues, further exacerbating the overall debt and deficit projections.
- The long-term problem is that because of the demographic trends noted above, the SSTF is expected to remain "under water" for the longer term, and the currently projected 75-year shortfall in the SSTF is expected (in terms of percent of GDP to account for inflation) to reach 0.99% of GDP per the SS Trustees' projections, or 1.54% of GDP per CBO (CBO, 2019).

A bill introduced by Rep. John Larson (D-CT) seeks to address the problem (O'Brien, 2019) by imposing SS taxes on incomes over \$400,000 per year, gradually increasing the SS tax rate from 12.4 percent (6.2 percent employer and 6.2 percent employee) to 14.8 percent (7.4 percent each) by 2043, adding a one-time increase of about 2 percent in benefits, and adding a new minimum benefit set at 125 percent of the poverty line.

The SS tax is currently applied only to income up to a ceiling amount, which is \$132,900 in 2019. Larson would reimpose the tax on incomes above \$400,000. Keeping the current wage cap and re-imposing the tax at the \$400,000 level is unlikely to produce a significant amount of additional revenue, because the number of people making more than \$400,000 is quite small, and those people generally could restructure their income away from salaries and wages, making the amount of tax revenue even smaller. This clearly appears to be more an exercise in "punishing

the rich” than in generating significant tax revenues. The increase in the tax rate will probably produce a significant revenue increase, but per CBO projections, phasing it in will not produce significant additional revenues to avoid the short-term problem. The one-time increase and the minimum benefit provision will both cost some money, but it would not be expected that the expenditure is great in either case.

PROPOSED SOLUTIONS

CBO has published extensive analyses of the situation, and in 2015 developed a study of proposed alternatives to deal with the problem (CBO, 2015). CBO believes that the 75-year actuarial deficit in the SSTF will be about 1.54 percent of GDP (CBO, 2019), whereas the SS Trustees estimate a balance of minus 0.99 percent of GDP, under current laws. CBO analyzed 36 different options and calculated the impact of each on the 75-year actuarial balance of the SSTF. These options fell into five categories:

- Changing the taxation of earnings
- Changing the benefit formula
- Raising the retirement age
- Changing the cost-of-living adjustments (COLA)
- Changing benefits for specific groups

We have reviewed these options with two objectives – to find ways that will 1) solve the problem and 2) have minimum negative impact on taxpayers and recipients. We believe that the following approach best serves those two objectives (savings estimates per CBO, 2015):

Recognize that citizens have a property right to their SS benefits, effectively overturning *Flemming v. Nestor* (U.S. Supreme Court, 1960), which held that alien Nestor did not have any property right to his old-age benefits, and therefore that termination of such rights when he was deported did not amount to an unconstitutional taking of property in violation of the Fourth Amendment. This case was decided on statutory rather than on constitutional grounds, and therefore it would appear that the holding could be reversed with merely a statute. This is important because SS clearly needs to be revised in some way to reflect economic reality, and the standard when such attempts are initiated is to bash them as, “destroying social security.” Enshrining this right, while providing that certain actuarial adjustments are appropriate as necessary to keep the SSTF solvent, should help blunt future demagoguery on this issue. The other purpose of recognizing a property right is to support restoring SS benefits to non-taxable status. If the biggest benefit cuts come at the top of the benefits scale, and those people who made more money are the ones most likely to have outside retirement income plus higher SS payments, this will offset the reduction in benefits on the top end.

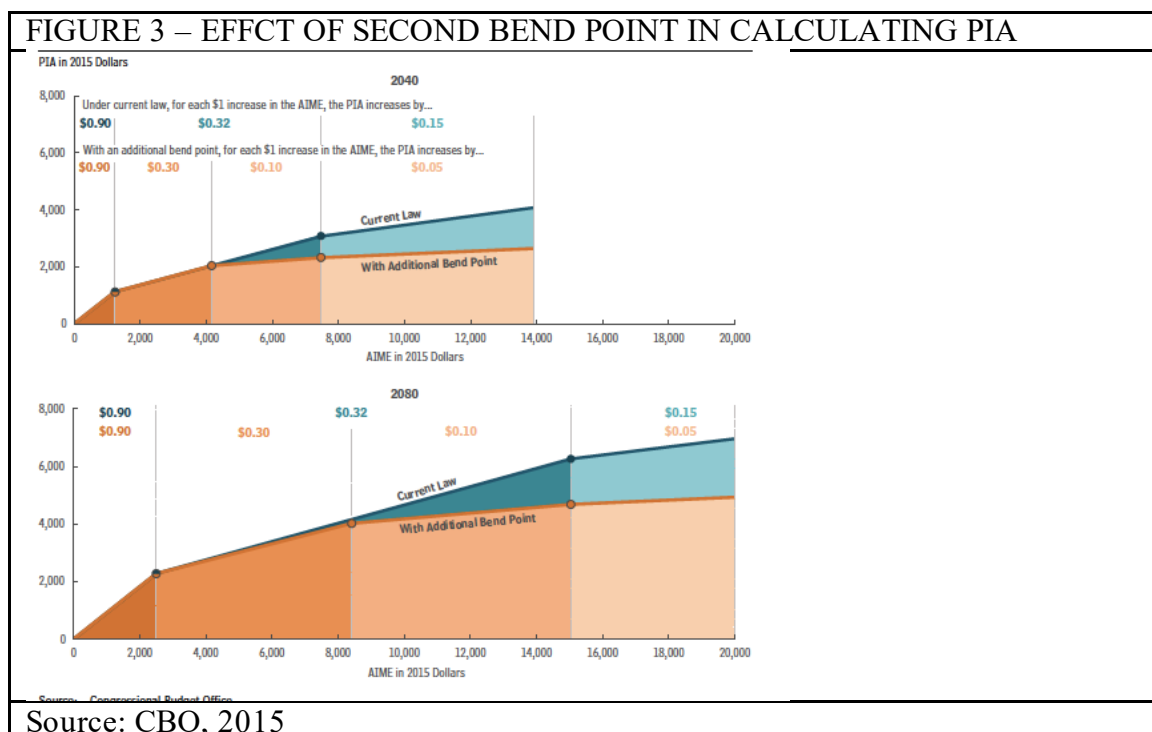
Phase out the maximum cap on wages and salaries subject to the SS tax and raise the overall rate to 15% (7.5% employer/7.5% employee). As it stands now, SS is probably the most “regressive” tax we have. CBO estimates that the current cap means that the SS tax applies to only about 83 percent of total wages and salaries (O’Brien, 2019), so there is a potential 17 percent increase in tax revenues from this step alone. Doing this immediately, rather than phasing it in per the Larson and CBO proposals, would help address the short-term problem, and

phasing in the removal of the income cap, without the rate increase, would reduce the 75-year deficit by about 0.59% of GDP.

Address the increased life expectancy by slowly raising the minimum age to draw full benefits – 1 month per year for 48 years until the minimum age hits 70. Note that depending upon demographic and actuarial considerations, it might or might not be necessary at that point to continue raising the age. Under this proposal, we would keep the early retirement age the same, with benefits adjusted actuarially. With the slow phase-in, CBO estimates that this would not materially address the SSTF short-term expiration problem but would reduce the 75-year deficit by about 0.4% of GDP.

Base cost of living adjustments (COLAs) on the chained CPU, to reduce the growth rate. This step would not significantly extend the SSTF short-term expiration problem but would reduce the 75-year deficit by about 0.18% of GDP.

Add an additional bend point in the calculation of the primary insurance amount (PIA) calculation and reduce the PIA factors. As described by CBO, this option would reduce the calculated PIA, starting at the 50th percentile of earners. What happens now is that the PIA is calculated by including \$0.90 for every dollar of annual SS income up to about \$2,000, \$0.32 up to about \$7,500, and \$0.15 above that. The proposed change would keep the \$0.90 rate, split the \$0.32 rate band into two band, \$0.30 for the lower half and \$0.10 for the upper half, and \$0.05 for any SS taxable income. This would not affect current recipients but would negatively impact future recipients with higher SS payments. This would not materially affect the SSTF short-term expiration but would reduce the 75-year deficit in the SSTF by about 0.6% of GDP. Figure 3 presents this option graphically, for the years 2040 (top) and 2080 (bottom):



The above steps should generate enough savings to be able to introduce Rep. Larson's proposed floor under benefits, without causing the SSTF to be underfunded at the 75-year point. Based upon the scoring by CBO (2015), Table 2 shows the impacts of these steps on the 75-year shortfall (expressed as a percent of GDP):

	Per Trustees	Per CBO
Projected shortfall under current law (CBO, 2019)	(0.99)	(1.54)
Eliminate taxable maximum wage and salary cap	0.59	0.59
Increase full retirement age (FRA) by one month per birth year until FRA reaches 70	0.40	0.40
Base COLAs on the chained CPU	0.18	0.18
Add an additional bend point in calculating the primary insurance amount (PIA)	0.60	0.60
Implement the poverty-standard minimum benefit proposed by Rep. Larson	(0.20)	(0.20)
NET EXCESS (SHORTFALL) WITH CHANGES	0.58	0.03

While this calculation would seem to provide only a small buffer against differences from forecasts over a 75-year period, it should be noted that in calculating the impact of eliminating the wage and salary cap for contributions, the CBO calculation assumed a phase-in over several years, whereas we propose to do it all at once, and therefore the positive impact of such a move would be substantially greater than CBO calculated. CBO also did not calculate the impact of increasing the tax rate.

The additional revenues from the rate increase would permit including unemployment compensation in Social Security, like many countries in Europe. We would also include Supplemental Security Income (SSI). The increase in tax rates is sufficient to cover this, at least in the short run, and the other changes should be sufficient in the long run. We would also propose to consider a couple of alternatives for unemployment compensation.

- Set unemployment up as a work-fare jobs program. Identify needs such as infrastructure maintenance and assign unemployed persons to perform such jobs—work 32 hours a week at such job and have 8 hours per week of documented job search or skills-development and be paid for 40 hours at the minimum wage.
- Consider the German *kurzarbeit* (“short work”) system, where to reduce the need for employers to lay off workers for economic reasons, the government pays up to half the wages to keep the workers employed.

These proposals would have to be costed out separately, and that is beyond the scope of this paper, but we do propose such steps for consideration.

The combined impact of the Larson minimum income proposal, the reduction in inflation rates for calculating benefits, and adding the additional “kink point” for calculating benefits, will narrow the gap between highest and lowest SS benefit payments over time. This will be at least partly, if not totally, offset by the impacts of making all SS benefits non-taxable and creating a privatized portion.

PRIVATIZED PORTION

Adding a privatized portion of SS has generally been proposed from the conservative end of the political spectrum and has been generally opposed by the more leftward end. But it should be noted that even social democrat (called by some “socialist”) nations like Sweden have done this with good effect. The approach recommended here is in four steps, as follows:

Step 1 would be to transfer various federal activities with potential to become profitable enterprises to the SSTF in return for reduction of about \$1.5 billion in intra-government debt owed to the SSTF. Such activities could include the Interstate highway system (set up national toll road system, like much of Europe); Air traffic control, like Canada (consider including airports and TSA); Postal service, like New Zealand (including possible postal bank, also like New Zealand); TVA and the western power authorities (Bonneville, WAPA, SWPA, SEPA); Amtrak (like much of Europe); and Bureau of Reclamation and the non-military portion of the Army Corps of Engineers.

Step 2 would be to set the transferred activities up as federal enterprise funds, with user fees set to generate annual return on investment (ROI) of 5%, well above the ROI on current SSTF assets/investments.

Step 3 would be to create a privatized trust fund (PTF) funded with annual contributions of 5% (2.5% employer, 2.5% employee) of wages and salaries. As these contributions fund the PTF, have it purchase 75% interests in those enterprises from the regular SSTF for cash (SSTF keeps 25%), and make future investments to maintain and grow those enterprises.

Step 4 would be to establish individual PTF accounts with investment restrictions such as the following to insulate the funds from market risk:

- First \$100,000 per individual account is invested in the privatized federal enterprises, with target ROIs of 5% per year;
- Second \$100,000 per individual account can be invested in very secure mutual funds, such as a Dow Jones Index (DJI) fund;
- Amounts over \$200,000 per individual account can be moved to self-directed investments.

Privatization of these functions would also mean a reduction in general expenditures, as the functions would become self-supporting and profitable. Table 3 presents the proposed privatized activities, the proposed amount of debt to be offset when they are transferred to the SSTF, the projected annual earnings at 5% ROI, the reduction in cost to the general funds, and a list of other countries that have privatized these functions (dollar amounts in billions):

TABLE 3 - FUNCTIONS TO BE PRIVATIZED (dollar amounts in billions)				
Function	Amount of Debt Offset	Projected ROI at 5%	Federal Budget Savings	Other Countries Who Have Privatized
Interstate Highway System	\$1,117.1	\$55.86	\$45.0	Much of Europe (national toll roads)
Postal Service	71.1	3.56	8.8	New Zealand, Sweden, Netherlands, Germany, United Kingdom
TVA	81.8	4.09	0.4	Much of Europe
Bureau of Reclamation	63.7	3.20	1.1	Much of Europe
Army Corps of Engineers (non-military functions)	52.9	2.64	6.9	Much of Europe
Western Power Authorities	15.9	0.80	0.5	Much of Europe
AMTRAK	26.9	1.35	4.5	United Kingdom, Japan
Air Traffic Control	7.8	0.39	2.2	Canada
Transportation Security Administration	7.4	0.37	6.3	Most of Europe
General Services Administration	77.1	3.85	9.8	
St. Lawrence Seaway	1.0	0.05	0.0	Canada
TOTALS	\$ 1,522.7	\$ 76.16	\$ 85.5	
Sources: Expected budget savings from Edwards, 2017; Other countries who have privatized from Cato, 2017; Interstate Highway System, see below; other agencies, from annual financial reports or budgets				

Amounts for the Interstate Highway System have been calculated by projecting revenues at \$121.9 billion, based on an average toll of \$0.151 per mile (\$0.12 rural, \$0.36 urban), expenditures at the current \$45 billion federal and \$21 billion state expenditures, and capitalizing the resulting \$55.9 billion net at a 5% capitalization rate. Amount of debt offset for the other activities are based upon the larger of their assets or annual revenues, per annual reports or federal budgets, with ROI calculated as 5% of those amounts. The \$85 billion projected budget savings would reduce the annual deficit, and the amount of debt exchanged would reduce the total federal debt and interest on debt.

This would create a “super 401k” for each individual. In the current situation where most citizens’ wealth consists primarily of equity in their home, or bank accounts for renters, adding this fund would reduce wealth inequality substantially over time. Like current 401k funds, there could be provisions for borrowing from the fund prior to retirement for major life events, such as medical emergencies or education. Additionally, balances in this fund could be transferred to heirs upon death. After retirement of individuals, their PTF balances could be converted to annuity funds, and undistributed balances could be transferred by inheritance upon the death of any individual.

Since most of these privatized functions are engaged in infrastructure, privatization would have the added benefit of providing funding to address needed infrastructure improvements. In addition to the profits resulting from the 5% ROI, there would also be a steady stream of capital contributions from future tax collections. These could be used for purposes including:

- Interstate Highways: Expanding Interstate as network of national toll roads (freeing current Highway Trust Fund entirely for non-Interstate highways and public transportation); purchasing non-Interstate toll roads.
- TVA and other Power Authorities: Expanding non-fossil-fuel generation (wind, solar, geothermal, hydroelectric, nuclear); expanding and upgrading transmission and distribution grids.
- Amtrak: Expanding passenger rail, particularly high-speed passenger rail; possibly doing a sale-and-leaseback arrangement with existing rail carriers for their tracks, then converting railroads from fossil fuel to electric power by providing electric power to the tracks, with railroad companies using cash to buy electrically-powered locomotives; once ownership of tracks is gained, designating certain tracks a passenger-only and certain tracks as freight-only, to avoid existing conflicts between the two, to increase efficiency of both, and converting passenger tracks and rights-of-way to high-speed operation; potentially acquiring urban mass transit systems and integrating them into passenger rail systems, as in Europe.
- Postal Services: Implementing changes to increase efficiency of operations; potentially opening a postal bank, as in New Zealand.
- Air Traffic Control: Upgrading hardware and software, as Canada has done.

CONCLUSION

The SSTF is secure for the very short term, but if steps are not taken to address pending issues, there will be major problems in a decade or slightly more. We have presented one set of solutions which we believe will address the problem with minimum negative or disruptive impact, with short-term results shown in Table 4 (calculation by authors, based upon total salaries and wages per CBO, 2023), assuming changes were implemented in 2023, and long-term results as shown in Table 2 above:

Year	Tax Revenues	Proceeds from Sale of 75% of Privatized Activities	Equity Income from 25% of Privatized Activities	Other, Net	Outlays – Social Security	Outlays – Income Security	Net SSTF Balance
2021, Actual							2,990
2022, Actual	1,568			72	1,614		3,016
2023	1,758			68	1,751	110	2,981
2024	1,841	504	19	80	1,872	113	3,440
2025	1,931	524	22	66	1,983	118	3,882
2026	2,015	115	28	62	2,075	122	3,905

Year	Tax Revenues	Proceeds from Sale of 75% of Privatized Activities	Equity Income from 25% of Privatized Activities	Other, Net	Outlays – Social Security	Outlays – Income Security	Net SSTF Balance
2027	2,092		35	59	2,167	126	3,797
2028	2,172		43	60	2,291	131	3,650
2029	2,256		51	42	2,345	135	3,519
2030	2,342		59	39	2,482	135	3,336
2031	2,430		67	19	2,601	147	3,103
2032	2,519		76	16	2,724	154	2,836
2033	2,609		85	16	2,895	161	2,490

This forecast assumes that the benefits age increase will have the effect of reducing SS outlays by \$25 billion in 2025, and by an additional \$25 billion annually thereafter. While this forecast shows a decline in the SSTF balance, it should be noted that this decline is not nearly as precipitous as under current law, and there are reasons to consider this forecast as highly conservative. For example, it does not consider the effects of the reduced inflation rate and additional kink point, which Table 2 indicates would increase the SSTF balance significantly (about .78% of GDP over 75 years). Results should be monitored to determine actual impact, and to identify the need for any further changes.

We urge that our proposed actions, or similar, be undertaken as soon as possible. The longer the delay, the more severe the corrections that will be required.

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