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From the Editor-in-Chief. . . .

This is the 1st 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>.

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

The papers herein were presented at the Southern Academy of Legal Studies in Business meeting in San Antonio, Texas, March, 2009. Congratulations to all our authors. I extend a hearty invitation to the 2010 meeting of the SALSb in San Antonio, Texas, March 4-5-6, 2010.

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

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

M.P. (Marty) Ludlum
Editor-in-Chief

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Forward: Ethics at Critical Mass

On behalf of the officers and members of the Southern Academy of Legal Studies in Business, I would like to welcome you to our newest journal, the **Southern Journal of Business and Ethics**.

Why is ethics at critical mass? Ethics is around us every day. Today we face a variety of crises. The former Illinois Governor was caught extorting bribe money in exchange for political favors. Baseball players have tested positive for taking steroids, despite denials. Bernie Madoff swindled investors in a \$50 billion Ponzi scheme, then tried to mail millions of dollars worth of jewelry to family members while under house arrest. CEOs of large banks asked for government bailouts while giving themselves bonuses worth millions. Twelve billion dollars intended for Iraqi rebuilding has disappeared. America now has admitted to secret prisons and less than secret torture methods, both of which fly in the face of our constitutional principles.

The business landscape is changing too. Unemployment is at the highest rate in three decades. The stock market has made violent shifts. The prospect of foreclosure seems to loom over every neighborhood. The economic crisis facing America will lead to a variety of changes in the law. Some have already asked for limits to executive compensation, protection for American workers, new regulations on banking practices and investment services. These are exciting times for those interested in business, ethics, and the law.

We had an excellent panel of papers and I believe the Associate Editors have done a fine job in selecting the premier papers. First, we have four papers discussion recent developments in the law.

Professors Burke and Lindsey start with a paper discussing the appropriateness of punitive damage limits in line with the recent decision of *State Farm v. Campbell*. Next, Professors Hunt, Karns, and Mawer examine the legal aspects of unauthorized wi-fi access, and include a comparison of jurisdictions. Professor Barger Johnson discusses the application of the Age Discrimination Employment Act on Indian tribal lands. Finally, Professor Poe examines the ethical challenges of Yahoo as it expanded its market into China.

We also had many quality papers on pedagogical ideas for legal environment and ethics classrooms. Professors Robertson and Sullivan explain the sometimes lacking concept of ethical leadership in some of America's financial firms. Next Professors Lee and Russell Usnick demonstrate a compliance exercise to begin a standard legal environment course. Professors Teske and Hallam describe the Gray Box as a strategic management decision-making tool. Next, Professors Cavaliere, Mulvaney, and Swerdlow use the Global Poverty Act as a method of teaching distributive justice. Professors John and Mary Keifer show a method for embedding ethical concepts into business analysis. Finally, Professors Lee and Russell Usnick describe how to incorporate a writing rubric into the legal studies course.

Again, on behalf of the entire Southern Academy of Legal Studies in Business, I welcome you to the **SJBE**. If you have any questions or contributions, please do not hesitate to contact me.

Marty Ludlum,
Editor In Chief
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EXCLUDING EXEMPLARY COMPANIES FROM EXEMPLARY DAMAGES

WILLIAM T. BURKE III* AND KEITH L. LINDSEY**

INTRODUCTION

The catastrophic economic crisis that the world now finds itself attempting to surmount can certainly be traced back to the presence of serious ethical lapses that grew exponentially over the past several years within the business as well as regulatory community. Unfortunately, as these lapses were smoldering, the consequences for liability if any fire ensued were being diminished. The “frivolous lawsuit” was linked with the punitive damage award and both arose as detrimental to the entrepreneurial wave that the country was riding. In this environment, the U.S. Supreme Court chose a new path for appellate courts to take when assessing the appropriateness of a punitive damage award. With its decision in *State Farm v. Campbell*,¹ the Court made double-digit punitive damage ratios highly suspect based on due process concerns² although expressing no intention to establish a fixed ceiling. But, in effect, many lower courts have reacted to the decision by determining that punitive damages exceeding single digit ratios should be presumed as barred, unconstitutional or very rare.³

Although businesses do have a right to virtually the same due process protections as those accorded to individuals, the Court’s decision in *State Farm* may have compromised its commitment to ethical business practices⁴ and tipped the balance too far toward such protection and away from just recourse for the aggrieved. Left alone, *State Farm* unintentionally creates a probable ceiling for costs associated with egregious corporate wrongdoing, thereby enabling cost-benefit analysis to become the determinant factor in choosing whether to prevent serious harm to the consumer or accept it as a cost of doing business just so long as it is profitable to do so.

Taking into consideration the traditional deference accorded to the jury’s “first-person” determination that reprehensible behavior exists; its subsequent assessment of what it would take to sufficiently rebuke such behavior by the wrongdoer; the respective State’s interest in doing likewise; and that *de novo* review has ensured that reasonable fairness had been exercised by the trial court and jury as opposed to collective vengeance for wrongs suffered by non-parties to the case at bar, the authors believe that an

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¹ *State Farm v. Campbell*, 538 U.S. 408 (2003).

² *Id.* at 416-17, 419; “[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, satisfy due process.”

³ See Don Willenburgh, *Fixing the Damage*, LOS ANGELES LAWYER (June 2004) assessing the consequences of *State Farm* and noting the Court’s admonition, “A defendant should be punished for the conduct that harmed the plaintiff, not for being ... unsavory ...” See also, Curt Cutting, *An Emerging Trend?: Federal Appeals Court Limits Punitive Damages to 1:1 Ratio*, 19 LEGAL OPINION LETTER 3, highlighting the growth in a number of appellate courts* reducing punitive damage awards based on language in *State Farm* stating “[w]hen compensatory damages are substantial, then a lesser ratio perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.”

⁴ See *United States v. Park*, 421 U.S. 658 (1975), reaffirming the Court’s decision and opinion in *United States v. Dotterweich*, 320 U.S. 277 (1943).

appropriate framework can be developed and implemented that would permit the co-existence of due process for the wrongdoer as well as the continued enforcement of ethical business practices.

Given the status of the economy, the importance of conducting business in a more responsible, yet viable, means and ensuring that legal protection as well as recourse exists that is just for both the entrepreneur and the consumer, the following research seeks to establish a clearer path toward achieving these desired consequences by introducing the concept of “exemplary” companies and redefining the concept of “exemplary” damages.

When exemplary is used to describe a company, this generally means that the principles of managerial decision making employed in that company seriously integrate ethical considerations, are above reproach, and should be emulated. When “exemplary” is used to describe a punishment, this generally means that a company’s behavior or operations have been so reprehensible and so outrageously harmful that the normal punishment would fail to accomplish either retribution or deterrence, requiring that additional measures be taken in order to “make an example” of that company whose behavior is so repulsive as to not ever be tolerated or emulated.

If the Court adopted a new, amplified meaning of the phrase “exemplary damages” which would go above and beyond its current status as equivalent to the definition of punitive damages, such a separation would permit the Court to continue its agenda of limiting punitive damages to the boundaries provided by due process, but only for those companies operating in an exemplary manner (i.e., those that are endeavoring to promote and exercise ethical managerial decision making). Additionally, this new distinction for “exemplary” would also bridge the undefined boundary that presently exists between punitive damages and the application of criminal liability.

BACKGROUND

The collapse of the U.S. financial services industry presents a clear and compelling example of the importance and value of ethical decision making in business. Although the causes and effects of this collapse will be debated for years to come, it is now widely believed that the primary cause for what has happened can be found in the so-called “sub-prime” mortgages and derivative securities based on those mortgages. The greed and voluntary ignorance exercised by hedge fund and investment bank operators have been widely covered by the press as the story of how the country reached this precipice of economic ruin has unfolded; but such reporting has tended to focus narrowly upon such behavior as the last step in a long line of many unethical decisions.

Hundreds of thousands of highly suspect sub-prime mortgages were written and traded, which makes it important to briefly grasp and understand how a series of small lies multiplied over thousands of transactions lead to the tumble of an already unsteady “house of cards.” What did it take to generate a sub-prime mortgage? It started with a consumer who wanted to buy more home than he or she could afford. The consumer was probably willing to overstate his or her income because, after all, it was only a paperwork requirement that had to be completed in order to “qualify” for that loan. Helping to “facilitate” this process was a mortgage originator, who was willing to look the other way when the prospective buyer said the wrong thing, or perhaps even “advised” the buyer of

the right answer to use in response to each of the questions on the application. Knowing that the buyer could never actually afford the home, the mortgage originator was likely to recommend a new type of mortgage (notably, “exotics”!) that required the consumer to pay only the interest payments for three years at a great rate. “Sure, after three years the rate would adjust upward and payment on the principle would have to begin; but, by that time, surely the house would have appreciated by \$50,000 more than it was valued when first acquired, thereby enabling easy refinancing with a 30 year conventional mortgage.” Mortgage lenders were willing to underwrite such loans in order to get a slice of this booming business, even though it required an “adjustment” of the standards of affordability which had been a mainstay of the mortgage lending industry for decades.

And then making matters even worse, there arose the collateralized debt obligation – a sort of insurance policy to cover the “unimaginable” event that such a mortgage could result in default. Nobody understood the risks of these instruments, and nobody even thought to ask why uninvolved third parties should be able to purchase these instruments. This tragic example shows how unethical decision making usually starts out on a small scale, but can rapidly grow to engulf an entire company, an industry, or even a society.

But, alternatively, there existed the relatively laudatory actions of JPMorgan Chase. While the other investment banks were rapidly buying up securitized subprime mortgages, JPMorgan Chase left the market in October 2006. At the time, the managers who chose to leave this market were subject to ridicule for leaving billions of dollars of supposedly easy money on the table. Although the actions of the managers at JPMorgan Chase were exemplary, they too will still suffer the disastrous effects of the meltdown in the world financial market.

Given the actions of the managers of the other firms who knowingly engaged in a market that had more risk than they could understand, the obvious characterization should be that they brought this trouble upon themselves, their competition, the United States government, and the taxpayers who provided the money to keep them in their jobs; and, as such, in a perfect world, should be subjected to the natural outcome of that risk – unemployment with any economic reward and longevity reserved for those managers who chose to ethically represent their shareholders and customers.

But, alas, it’s not a perfect world. While nothing can be done now for the managers of the financial service firms and investment banks who chose to act ethically, there is something that can be done in the world of civil punishments to bring it a little closer back to the ideal.

The U.S. Supreme Court has set off on a new path of broadly limiting the amount of punitive damages that may be awarded in civil cases. Its action is motivated by a major concern that there has existed an unconstitutional deprivation of due process in the determination and extent of punitive damage awards.

This concern has merit up to a point. In the event that a company is being operated within the law, and there is an observable agenda by top management and throughout the company to create an environment where ethics are promoted, these companies should indeed be shielded from double digit punitive damages multipliers. But, unfortunately, the Court’s present position sets limits that treat both the “good” and the “bad” company alike, therefore making the “good” company foolish in shouldering

the greater burden and costs associated with promoting and exercising ethically and socially responsible business decision-making and behavior.

In 2003, the U.S. Supreme Court held in *State Farm Mutual Automobile Ins. Co. v. Campbell*⁵ that “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” As a consequence, cost-benefit analysis has found its rebirth in business decision-making while the expectation of ethical and socially responsible considerations reflected in these decisions appears by the Court’s action to not be a significant factor in preventing reckless behavior. With the combination of the Court’s chilling view of double-digit punitive damages ratios and the rapid passage of state laws implementing ceilings on such awards, ethical failure on a grand scale will grow.

Given the present state of affairs, the authors contend that the Court can still maintain its anathema toward ratios it views as unconstitutional, yet reserve its Constitutional limitation to only those companies that can argue before a judge and/or jury that their actions that caused harm or injury were an unforeseeable and unpreventable aberration from their overriding status as an ethical company. Based on the principles of mitigation and widely accepted measures of industry achievement, a means for establishing such a status is presented by the authors in addition to a better way of identifying exemplary companies to be excluded from exemplary damages.

ARRIVING AT *STATE FARM*; DEPARTING WITH *MATHIAS*

The contemporary legal landscape for punitive damage awards is best characterized by a line of U.S. Supreme Court cases⁶ beginning with *Pacific Mutual Life Insurance Co. v. Haslip*,⁷ where the Court began to consider Due Process concerns regarding their asserted excessiveness, to the landmark decision of *State Farm Mutual Automobile Ins. Co. v. Campbell*⁸ where the Court made a complete break with the practice of deferring to the judgment of jurors confined by the state appellate courts.⁹

As the consideration of Due Process seemed to gain strength with each successive case, confidence that the jury system was the best means for assuring Due Process was initially questioned; then criticized; and now some question whether it is even possible for a jury to meet Due Process.¹⁰ It is as if the Court and society had begun to view jurors as an assortment of twelve economically and culturally diverse “hayseeds” who

⁵ *State Farm v. Campbell*, 538 U.S. 408 (2003)

⁶ *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991); *TXO v. Alliance*, 509 U.S. 443 (1993); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *State Farm v. Campbell*, 538 U.S. 408 (2003); and, *Philip Morris USA v. Williams*, 127 S.Ct. 1057 (2007))

⁷ *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991)

⁸ *State Farm v. Campbell*, 538 U.S. 408 (2003)

⁹ See *BFI v. Kelco*, 492 U.S. 257 (1989)

¹⁰ See *State Farm* at 417-418.

were no longer capable of discerning right and wrong and were guided solely by television rather than any commitment to duty or public service.¹¹

Surrounding the growing Due Process arguments, the marketplace of public opinion was also being heavily impacted by an extremely exaggerated connection of legal liability to every known economic and social ailment that existed within the country.

From the often distorted facts of the McDonald's Coffee case where very few people sought to learn the true facts behind it and its just resolution¹² to the totally judicially embarrassing case of the judge who fanatically exhausted every legal theory possible over damage done by the cleaners to his pants, a cognitive dissonance was perceived to have arisen in the public's mindset over the payment of large punitive damage awards to an individual in order to advance broader social interests.

While the internal operators of multinational companies such as Enron, Tyco, Lehman Brothers and Bear Sterns engaged in unethical or socially irresponsible business practices, it is as if the country had been told by these culprits, as Dorothy was instructed in the Wizard of Oz, to "never mind that man behind the curtain," ... it's the law that's your problem.

So, amid an antagonism, misplaced or not, toward alleged as well as appropriately labeled frivolous lawsuits in addition to a set of precedent setting decisions narrowing the application of large punitive damage awards, the decision in *State Farm v. Campbell*¹³ meant that the new measurement of Constitutional punitive damages would hence forward, in effect, be their limitation to single-digit ratios of the compensatory damage award.¹⁴

In *State Farm*, plaintiff Curtis Campbell caused an accident that killed one person and permanently disabled another. Investigators and witnesses concluded likewise, but Campbell's insurer, State Farm, contested liability, ignoring its own investigators' advice and declining to settle the ensuing claims for the \$50,000 policy limit. Assuring Campbell and his wife that they had no liability whatsoever for the accident and that State Farm would represent them, obviating the need for the Campbell's to hire their own attorney, State Farm took the case to trial.¹⁵ At trial, the jury returned a verdict for over

¹¹ See Dan Drazen, *The Case for Special Juries in Toxic Tort Litigation*, 72 JUDICATURE 292 (1989) for lamentation in toxic tort trials that "[l]ay jurors are being asked to digest information that is beyond their reach." See also *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 at 418 (2003) "Exacting appellate review ensures that an award of punitive damages is based upon an application of law, rather than a decision-maker's caprice." See conversely, Valerie Hans & Neil Vidmar, JUDGING THE JURY, 120, (Plenum Press 1986) indicating that supporters of the jury system point to group deliberation as an enhancement to jury competence as jurors have the opportunity to discuss and debate the evidence as well as correct each other's factual misunderstandings.

¹² Lectric Law Library, *The Actual Facts About The Macdonalds' Coffee Case*, at <http://www.lectlaw.com/files/cur78.htm> (last visited 27 August 2009)

¹³ *State Farm v. Campbell*, 538 U.S. 408 (2003)

¹⁴ See the impact of the Court's decision in *State Farm* aptly reflected by the Alabama district court in *McClain v. Metabolife Int'l, Inc.*, (fn: 259 F.Supp.2d 1225 (N.D. Ala. 2003). After a finding of fraud on the part of Metabolife in the sale of its diet pill products, the jury awarded varying amounts of compensatory and punitive damages to the plaintiffs. In addressing the ratio of between compensatory and punitive damages the district court stated, "... if the ratio of punitive to compensatory damages exceeds 9 (the highest possible single digit), a red flag goes up. This is the most potent ingredient in the witch's brew." *Id.* at 1231 As a consequence, the court proceeded to uphold each punitive damage award where there was no greater than a single-digit multiplier. *Id.* at 1236-37.

¹⁵ *State Farm*, 538 U.S. at 413.

three times the policy limit, to wit State Farm refused to appeal. The Utah Supreme Court denied the Campbell's own appeal and State Farm paid the entire judgment.

The Campbell's subsequently brought suit against State Farm for bad faith, fraud and intentional infliction of emotional distress. In the first phase of this litigation, the trial court granted summary judgment in favor of State Farm but this was reversed on appeal. When State Farm moved to exclude evidence of different conduct in other states, its motion was denied. State Farm's request for a jury instruction restricting the jury from considering in its deliberation any of the company's practices in other states in measuring any punitive damage award was also denied.

The jury awarded the Campbell's \$2.6 million in compensatory damages and \$145 million in punitive damages, which the trial court reduced to \$1 million and \$25 million respectively.¹⁶ On appeal to the Utah Supreme Court, State Farm renewed its objection to the consideration of its dissimilar out-of-state conduct. Applying its interpretation of the guidelines for punitive damages as established in *BMW of North America, Inc. v. Gore*,¹⁷ the Utah Supreme Court decided to uphold the reduction of compensatory damages to \$1 million, but reinstated the \$145 million punitive damage award against State Farm focusing on State Farm's "massive wealth," its secretive behavior, and other likely civil and criminal penalties that could have been assessed.¹⁸

When the time approached for the U.S. Supreme Court to address *State Farm*, the Court disaffirmed the Utah Supreme Court's ruling and its interpretation of the landmark punitive damage assessment case of *BMW* deciding instead in a similarly landmark fashion¹⁹ that, "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process" and stating further that an award of more than "four times the amount of compensatory damages might be close to the line of Constitutional impropriety."²⁰ The Court was also particularly distressed with the trial court for denying State Farm's request that the jury be instructed to not consider in any punitive damage award assessment potential harm done to out-of-state persons who were not parties to the case before the court.²¹

Justice Kennedy, writing for the Court, agreed that State Farm's handling of the case against the Campbell's merited no praise, but that a more modest punishment could have satisfied the State's legitimate objectives. According to Justice Kennedy, "Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff."²² ... [Furthermore], [s]ingle-digit multipliers are more likely to comport with due process, while still

¹⁶ *State Farm*, 538 U.S. at 415.

¹⁷ *BMW of North America, Inc. v. Gore*, 517 U.S. 575, 579 (1996)

¹⁸ *State Farm*, 538 U.S. at 415-416.

¹⁹ *In re Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001), LEXIS 31503 (Browning, C., dissenting) (statement that *State Farm* "significantly refined the Court's punitive damages jurisprudence").

²⁰ *State Farm*, 538 U.S. at 408 citing *Pacific Mutual*, 499 U.S. 1, 23-24, (1991); See also *BMW*, 517 U.S. 559, at 581 (1996); Vikram D. Amar, *The 2002-03 Supreme Court Term in Review: Landmark Cases Stress the Theme Of Equality* (2003), at <http://writ.corporate.findlaw.com/amar/20030711.html> (last visited 21 August 2009)

²¹ *State Farm*, 538 U.S. at 420, 422-423.

²² *Id.*

achieving the State's deterrence and retribution goals, than are awards with 145-to-1 ratios, as in this case."²³

Dissenting Justices Scalia, Thomas and Ginsburg felt that neither the Due Process Clause nor the Constitution constrained the size of punitive damage awards, especially in the Campbell's case. The couple appeared economically vulnerable and emotionally fragile with Mr. Campbell suffering from the residuary effects of a stroke and Parkinson's disease.²⁴ The testimony of several former State Farm employees affirmed that they were trained to target "the weakest of the herd"... "the elderly, the poor, and other consumers who are least knowledgeable about their rights and thus most vulnerable to trickery or deceit, or who have little money and hence have no real alternative but to accept an inadequate offer to settle a claim at much less than fair value."²⁵ ... "Application of the Court's new rule of constitutional law [according to a skeptical Justice Scalia] is constrained by no principle other than the Justices' subjective assessment of the 'reasonableness' of the award in relation of the conduct for which it was assessed."²⁶

Complicating the logic and limitations set by the Court in *State Farm*, there arose to this research the distinctive, yet significant case titled *Mathias v. Accor Economy Lodging, Inc.*²⁷

In *Mathias*, the plaintiffs were bitten by bedbugs during their stay at a Motel 6 in Chicago. They had not been the first, but among numerous guests who over the previous year had been bounced from room to room with management knowledge that probably most, if not all, of the rooms had the bedbug infestation. Many guests were given refunds. When EcoLab, an extermination company, was brought in to deal with the infestation prior to the plaintiff's stay, EcoLab discovered several rooms that needed treatment, but recommended that the entire motel be sprayed for the relatively paltry fee of \$500. Astonishingly, the motel refused EcoLab's offer.²⁸ The infestation went on from one year to the next with desk clerks being instructed to tell customers that the pests were ticks on the theory that customers would be less alarmed, even though ticks are more dangerous because they spread Lyme Disease and Rocky Mountain Spotted Fever. When the Mathiases checked into the motel, they were given Room 504 even though the motel has classified the room "DO NOT RENT UNTIL TREATED." The room had not been treated,²⁹ leading to the painful and unsightly bedbug bites sustained by the plaintiffs. Surely the plaintiffs were not alone in their plight. That night, 190 of the hotel's 191 rooms were occupied, even though a number of the rooms had the same "don't rent" status. Because the motel charged upwards of \$100 per day and would not like to be mistaken as a flophouse, the plaintiffs asserted that the motel was guilty of "willful and wanton conduct." The jury agreed and awarded each plaintiff \$186,000 in punitive damages though only \$5,000 in compensatory damages.³⁰

²³ *State Farm*, 538 U.S. at 410.

²⁴ See *BMW*, 517 U.S. at 576 ("... To be sure, infliction of economic injury, especially ... when the target is financially vulnerable, can warrant a substantial penalty.")

²⁵ *State Farm*, 538 U.S. at 433

²⁶ *BMW*, 517 U.S. at 599 (Scalia, J., dissenting)

²⁷ *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003)

²⁸ *Mathias* at 674

²⁹ *Mathias* at 675

³⁰ *Mathias* at 674

Defendant Accor Economy appealed the ruling to the U.S. Supreme Court asserting that, in light of the Court's decision in *State Farm*, \$20,000 should have been the maximum amount of punitive damages that a jury could constitutionally have awarded each plaintiff. Accor Economy recalled the high Court's admonition in *State Farm* that "four times the amount of compensatory damages might be close to the line of constitutional impropriety." In response, Seventh Circuit Court Judge Posner in writing the lead opinion in the case, stated that the U.S. Supreme Court did not lay down a 4 to 1 or single digit ratio rule, but only stated that "there is a presumption against an award that has a 145-to-1 ratio."

POSNER'S PERSPECTIVES

The views of Judge Posner regarding the proper assessment of punitive damages provide a faint glimmer that the future may see a return to the wisdom of the jury system once the consequences of the present constraints upon them are fully understood. In *Mathias*, Judge Posner made the following observations:

[Deterrence] ... limit[s] the defendant's ability to profit from its fraud by escaping detection and (private) prosecution. If a tortfeasor is "caught" only half the time . . . , then when he is caught he should be punished twice as heavily in order to make up for the times he gets away.³¹

Judge Posner astutely identified Accor Economy's actions as horrible enough to bring forth the criminal sanction by prosecutors. He quoted the relevant Illinois statute as follows:

"A person who causes bodily harm to or endangers the bodily safety of an individual by any means, commits reckless conduct if he performs recklessly the acts which cause the harm or endanger safety, whether they otherwise are lawful or unlawful." 720 ILCS 5/12-5(a). This is a misdemeanor, punishable by up to a year's imprisonment or a fine of \$ 2,500, or both. 720 ILCS 5/12-5(b); 730 ILCS 5/5-8-3(a)(1), 5/5-9-1(a)(2). (For the application of the reckless-conduct criminal statute to corporate officials, see *Illinois v. Chicago Magnet Wire Corp.*, 126 Ill. 2d 356, 534 N.E.2d 962, 963, 128 Ill. Dec. 517 (Ill. 1989).) Of course a corporation cannot be sent to prison, and \$ 2,500 is obviously much less than the \$ 186,000 awarded to each plaintiff in this case as punitive damages. But this is just the beginning. For, what is much more important, a Chicago hotel that permits unsanitary conditions to exist is subject to revocation of its license, without which it cannot operate. Chi. Munic. Code §§ 4-4-280, 4-208-020, 050, 060, 110. ...We can take judicial notice that deliberate exposure of hotel guests to the health risks created by insect infestations exposes the hotel's owner to

³¹ *Mathias* at 677

sanctions under Illinois and Chicago law that in the aggregate are comparable in severity to that of the punitive damage award in this case. ... We are sure that the defendant would prefer to pay the punitive damages assessed in this case than to lose its license.³²

Scholars from various academic disciplines have, as Posner suggests, analyzed the possibility of the criminal law and whether the criminal process should be more heavily and heartily involved in civil actions where egregious business decisions have caused serious harm to customers and/or the public welfare.

In his text titled *Corporate Ethics*, Professor Peter French cites Christopher Stone's *Where the Law Ends* as the seminal work championing court-ordered intrusions into the decision-making process within corporations. While willing to reserve such intrusiveness by the courts to only those companies that persisted in a pattern of socially irresponsible behavior, Stone would mandate that, somewhere in the flowchart for such decisions, watchdog directors be involved.³³

Alternatively, personal injury attorney Eric Turkewitz addresses the much greater involvement of the European courts in the civil arena with the following observation:

[Greater civil court] intervention means not only larger government with larger powers. It also means higher taxes to pay for it. So, wrongdoing is handled by the government, which the people pay for. While comparing tax rates is exceptionally difficult because of all of the exemptions and complications, not to mention state and local tax issues, I see that the top rate in Italy is 43%. Our top rate is 35%. And Italy isn't spending bazillions on two wars. ... So we could, in theory, create criminal penalties to take the place of civil wrongs, and spend much more on criminal prosecutions of those wrongs as they do elsewhere. But we have to pay for that, and money has to come from somewhere if you care about fiscal responsibility. Or we could let the private sector regulate itself by empowering people to bring the wrongdoers to court themselves, and let the private sector handle the costs. And the public, instead of paying, receives not only the benefits of stopping reckless conduct, but the financial benefits by taxing the punitive damage award.³⁴

The Court in *BMW of North America, Inc. v. Gore*³⁵ also cautioned:

Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protection of a criminal trial have been observed, including, of course,

³² *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d. 672.

³³ Peter French, *CORPORATE ETHICS*, 344 (Harcourt Brace College Publishers 1995).

³⁴ Eric Turkewitz, *Punitive Damages: Why America is Different than Europe* (March 26, 2008) at <http://www.newyorkpersonalinjuryattorneyblog.com/labels/Punitive%20Damages.html> (last visited 20 August 2009).

³⁵ *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.

Perhaps, the prospect of criminal prosecution or the possible loss of the appropriate licensing to continue providing lodging, bad publicity or, for the plaintiff, the probable reduction in the damages assessed at the trial court level led to the parties in *Mathias* deciding not to press their litigation any further. To have done so would have provided a true test as to whether the Court was sincere in its implication in *State Farm* that a narrow window still existed for the assessment of double-digit ratios when the behavior was so outrageous as to justify it. But, it has also been studied and asserted as well that had the *Mathias* decision been reviewed by the U.S. Supreme Court, the extent of the award and its ratio to actual damages would not have passed Constitutional muster.³⁶

REMOVING REDUNDANCY IN PUNITIVE VERSUS EXEMPLARY DAMAGES

There exists no distinction, at present, between punitive damages and exemplary damages. The authors propose that there is absolutely no value in having two terms with precisely the same meaning, but a great deal of value could be derived by imbuing the redundant term with additional meaning. In Black's Law Dictionary, the entry for exemplary damages says "See *punitive damages*." The entry for punitive damages states:

punitive damages. Damages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit; specific damages assessed by way of penalizing the wrongdoer or making an example to others. Punitive damages, which are intended to punish and thereby deter blameworthy conduct, are generally not recoverable for breach of contract. The Supreme Court has held that three guidelines help determine whether a punitive-damages award violates constitutional due process: (1) the reprehensibility of the conduct being punished; (2) the reasonableness of the relationship between the harm and the award; and (3) the difference between the award and the civil penalties authorized in comparable cases.³⁷

Perhaps unknowingly, Judge Posner may have laid the foundation for a whole new category of damages that goes beyond punitive; a category that the authors would distinguish as truly "exemplary." The authors propose that upon Posner's foundation a clear distinction between punitive damages and exemplary damages be created. Consistent with the Court's reservations regarding punitive damage awards exceeding single-digit ratios, additional monetary awards that are a multiple of actual damages would in ninety-five percent of cases conceivably fall under the punitive damage award

³⁶ See Booker T. Coleman, *Mathias v. Accor Economy Lodging: Just Desserts?*, 89 MARQUETTE L. R. 205 (2005).

³⁷ BLACK'S LAW DICTIONARY 418 (8th ed. 2004).

category with the single-digit limitation. But, in the remaining five percent of cases where executives and managers of corporations exhibit blatant disregard for societal norms and ethics, egregious misconduct, and a pattern of knowing participation in these activities, this new category of damages, “exemplary damages” would be appropriate. The meaning conveyed by the name would indicate that this type of behavior will not only be punished, but will be made an example of, to where cost-benefit analysis provides little or no basis whatsoever.

By creating a new and distinct meaning for the phrase “exemplary damages,” the Court would be able to ensure protection under the Due Process in restricting the extent of punitive damages, but at the same time acknowledge, as it raised in *State Farm*,³⁸ that some cases would possibly be so reprehensible as to deserve increased punishment thus merit being released from the constraints of precedent and *stare decisis* already governing this area.

RECOMMENDED CRITERIA FOR APPLYING EXEMPLARY DAMAGES

Having created this new category of damage awards, the challenge becomes determining when they are applicable. Broad application of these damages would be self-defeating. If exemplary damages are applied in order to make an example of particular egregious corporate wrongdoing, then they should only be considered in the most egregious cases.

Exemplary damages would be appropriate for application to outrageous corporate conduct for which punitive damages would be insufficient to likely generate a clear prevention of and that cost-benefit analysis couldn’t conceivably or foreseeably justify. Exemplary damages are applicable when a company not only masks a problem, but achieves the results desired in testing by evaluating, or submitting for objective evaluation, a product that is different than that being sold and then using the favorable results from the non-market item to promote or advance the sale of the problem item.

Exemplary damages are appropriate when remediation of a serious, persistent and egregious wrongdoing is rejected and attempts are made to “repackage” the problem thus heightening the damage or injury inflicted - a practice significantly evidenced in Mathias where hotel staff were being instructed to deny that bed bugs were a problem, but that “ticks” in the room were the cause of the guests’ discomfort. Another notable example of such behavior was the shifted sale of cars with exploding Bridgestone and Firestone tires from American consumers to Brazilian customers.

Such a standard would not be so foreign to the law or distant in its realistic application so as to exclude any consideration. Under tort law, the rare application of recovery for Intentional Infliction of Emotional Distress arises when the conduct of the tortfeasor reaches the point at which any reasonable person would view it as outrageous. Repossessions that have gone particularly bad in violating the “breach the peace”

³⁸ *State Farm* at 425 “... Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where “a particularly egregious act has resulted in only a small amount of economic damages.” ... The precise award in any case, of course, must be based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiff.

restriction stand out in this area. Examples range from a debtor's door being bashed in and children being shoved out of the way to get to a refrigerator to a woman who, seeking to avoid repossession of her vehicle, hopped inside of it and was suspended in mid-air as the tow truck drove away with her inside. Overzealous club bouncers who have not realized that ejecting a person from an establishment should end at the doorway and not continue with a "beat-down" in the parking lot have also been well represented in the application of this tort.

Under contract law, the defense of "unconscionability" is recognized as a justification to render "outrageous" contract provisions as unenforceable. Leases that have been signed by tenants are particularly notable for containing provisions in which the landlord or lessor seeks to avoid liability for failing to perform a responsibility or responsibilities customary associated with such a position such as having, at least, some lighting in the common tenant areas to ensure safety. Similarly, amusement parks often have the only parking lots available for patrons who must purchase a parking ticket that states that the park operator is not responsible for anything that happens to any vehicle parked there.

ALLOWING EXEMPLARY COMPANIES TO ESCAPE EXEMPLARY DAMAGES

An evaluation of some familiar and widely publicized cases of corporate wrongdoing could be instructive in distinguishing corporate actions that give rise to punitive damages from corporate actions that give rise to "exemplary" damages.

MCDONALD'S "EXCESSIVELY HOT" COFFEE

McDonald's knew that a significant number of medical claims had been made upon them by customers who had seriously burned themselves from its coffee. Similar claims had also been made against Burger King and Dunkin' Donuts. Thus, one could argue that injuries due to coffee at such a dangerously high temperature are part of industry custom. Notably, McDonald's knew of the injuries, but weighed them against the enhanced sale of more coffee at such a temperature; much the same way as a chainsaw manufacturer knows that on some occasions the chain will fly off and cause very serious injury to its user. Generally, perfect performance of a product is not expected; that is, of course, unless the injury or injuries for nonperformance are just too severe regardless of their very small chance of occurring. The authors believe that the facts here justify the application of punitive damages and thus the *State Farm* single-digit ratio punitive damage calculation.

THE FORD PINTO "EXPLODING GAS TANK"

Severe injury was the issue here as Ford executives chose not to implement design changes on its Ford Pinto sold in 1971 and several years thereafter. These changes would have minimized the loss of life in gas tank explosions from rear end

collisions with the vehicle. Projections were made as to the extent of the possible settlement of cases with the estates of those who, if no changes were made to the vehicle, were projected to be severely injured or lose their lives. These dangerous conditions became expressly known by Ford executives based on their own series of tests. Repairs for the problem would have cost an estimated ten to fifteen dollars per car - an expense Ford believed to be more than it would pay out in accident-related lawsuits. Among the numerous injuries and lawsuits against Ford, three teenage girls died in a fire which resulted after a Pinto was struck in the rear-end. Ford was charged with reckless homicide with the prosecutor asserting that Ford allowed the Pinto to remain on highways, knowing full well its defects. It was more likely the loss in sales due to the publicity surrounding the fiery injuries and deaths of children that led to the demise of the Ford Pinto rather than its very-delayed recall in 1978. This case illustrates the difficulty with bringing criminal action to change and deter egregious corporate wrongdoing. Prosecutors tend to react only to substantial public outcry from the citizenry. A jury has to conclude beyond a reasonable doubt that Ford executives had criminal intent to cause such severe injury and death. Ford was found not guilty of the reckless homicide charges.³⁹

Giving credence for the moment to the Court's contemporary assessment that jurors find the distinctions between compensatory and punitive damages just too challenging to understand, adopting a distinction between punitive and exemplary should go very far in remedying the perceived "malaise" that juries now have in reaching a computation of punitive damages that satisfies Constitutional Due Process.

It's not just important to jurors that a new definition of exemplary damages be established; it would be valuable to the judicial process including judges and courts at every level. As stated by the Court in *State Farm*, "[g]reat care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protection of a criminal trial have been observed, including, of course, its higher standards of proof."⁴⁰ By sharpening and widening the boundary between punitive damages and criminal prosecution, exemplary damages could provide a compromise position – allowing greater sanctions than currently available in the civil court, but avoiding the higher standard of proof (and further docket congestion) that would be incurred if such action was taken to the criminal court.

ASSESSING THE CRIMINAL SANCTION FOR EGREGIOUS CORPORATE WRONGDOING

Use of the criminal law as proffered by Judge Posner in *Mathias* has its own set of complications. First, it is important to distinguish the type of business behavior that may give rise to the criminal sanction that Justice Posner refers to in the *Mathias* case from the criminal laws and penalties that exist for embezzlement, bribery, insider trading and the like. As regards the latter, these crimes generally involve an individual or individuals acting solely in their personal interest without any regard or motivation for the value or welfare of any shareholders. There's no doubt here that serious criminal punishment

³⁹ *The Pinto Disaster*, at http://ibiblio.org/pub/electronic-publications/stay-free/archives/23/ford_pinto.html (last visited 3 September 2009).

⁴⁰ *State Farm*, 538 U.S. at 428.

exists resulting in large fines and substantial jail time. The behavior that Justice Posner refers to is that involving “business judgment” where grossly poor, unethical and/or socially irresponsible decisions are made or tolerated with the goal of making the business more profitable. Admittedly, there are, and will be, some business judgments/decisions that are made that could be more profitable to directors than choosing an alternative course of action. If self-serving enough, particularly where the ownership interests in a company are limited, the more serious crimes with serious criminal punishment could conceivably apply. However, the research presented here focuses primarily on those decisions made within the business organization by the various levels of management whose actions are primarily driven with the corporation or business welfare or profitability in mind.⁴¹

Throughout the legal community, it is understandable for judges and prosecutors to be reluctant to dramatically expand criminal prosecution to address irresponsible business behavior where the civil action can provide a just and, if necessary, proscriptive remedy. Similar to the deference accorded to the academic community in addressing improper student, faculty and/or staff conduct, judges typically do not have either the time or room on their full dockets to squeeze in criminal actions of this nature given much more serious cases of murder, assault and/or manslaughter that rightly have priority for resolution.

It is also worth noting that the Federal Sentencing Guidelines applicable to corporate criminal behavior have their greatest impact on small or medium-sized firms. A multi-million dollar fine is large, yet still subject to a cost-benefit analysis calculation for the large firm capable of paying the fine. Furthermore, the offenses subject to these guidelines do not appear to address the circumstances presented in *Mathias*, the Ford Pinto exploding gas tank or the McDonald’s hot coffee case. According to the Guidelines, any organization is liable to sentencing, fines, and to periods of probation for federal offenses connected with antitrust, securities, bribery, fraud, money laundering, criminal business activities, extortion and embezzlement, conspiracy, and others.⁴²

Regulatory authorities at the state and federal level recognize that they have to bear with the resources that their budgets allow to do the best they can to insure that the industries and professions they are charged with regulating follow the rules even without the justifiable staffing that enforcement objectively would require.

Fundamentally, criminal liability at the federal level stems from the implication that as long as an employee was acting within the scope of their employment and in the interests of their corporate employer, although not authorized to do or to not do so, vicarious liability is imputed to the corporation.⁴³ Many other states adhere to the

⁴¹ See, e.g., Daniel J.H. Greenwood, *Enronitis: Why Good Corporations Go Bad*, COLUM. BUS. L. REV. (2004) at 782 “... corporate actions that harm those around them in violation of regulatory law or societal norms that ought to restrain predatory or negligent behavior. These include corporations that produce dangerous products either without adequate testing or in the face of known safety concerns, such as asbestos, tobacco, 1-tryptophan, ephedra, the Ford Pinto exploding tank, or SUVs.”

⁴² See Dove Izraeli and Mark S. Schwartz, *What Can We Learn From the U.S. Federal Sentencing Guidelines for Organizational Ethics?* at <http://actrav.itcilo.org/actrav-english/telearn/global/ilo/code/whatcan.htm> (last visited 3/1/2009).

⁴³ See *United States v. Park*, 421 U.S. 658 (1975), reaffirming the Court's decision and opinion in *United States v. Dotterweich*, 320 U.S. 277 (1943). In *Park*, the Court made the *Dotterweich* opinion even stronger.

determination of corporate criminal liability on the basis of the Model Penal Code; primarily, the standard whereby liability is attached to the corporation if the offense was authorized, requested, commanded, performed or recklessly tolerated by the Board of Directors or by a high managerial official.

Considering for a moment the scenario in which a prosecutor chooses to bring the criminal assault action against the front desk employee, housekeeping supervisor or hotel manager in the *Mathias* case, for example, not only must the appropriate culpable state of mind be shown by the prosecutor, the jury must also find that said individual defendant is guilty beyond a reasonable doubt; which is likely a daunting challenge if the defendant happens to be perceived, by the similarly situated “average Joe or Jane” juror, as the “low man or woman on the totem pole” who is just the scapegoat, frightened that if they did not do or say as they were told they would surely lose the scarce job they have in a distressed economy.⁴⁴

Given the limited punishment, if any, meted out to the individual actor, what fate would exist for the corporation held guilty? In reviewing the Texas penal code provisions, it appears that the penal code penalties would have less power to impact behavior than would the damages that could be awarded in a civil court action; thereby, failing to advance the much greater deterrence potential as presented by the authors of the exemplary civil action.⁴⁵

CONCLUSION

Exemplary companies do things and act in a way to shield themselves from exemplary damages. The new glossary for damages as advanced by the authors preserves an ethical commitment within business with an entrepreneurial consideration that recognizes due process in the application of the law.

Actual damages exist to remedy simple negligence in which there has not been a prior or regular occurrence of the injury or wrongdoing within the company as well as the industry.

Punitive damages are appropriate when there exists a prior or regular occurrence of the injury or wrongdoing within the company as well as the industry. With very few exceptions, perfect performance of all goods and services is not generally required under the law. Such an expectation would be cost-prohibitive as businesses would have to pass along the costs of assuring and insuring such perfection. Therefore, cost-benefit analysis

⁴⁴ See, e.g., Alexander Volokh, *Punitive Damages and Environmental Law: Rethinking the Issues* at <http://www.reason.org/ps213.html> (last visited 29 August 2009) ... Just because lawyers want the greatest punishment doesn't mean that punishment is inevitably rendered. The lawyers have to convince a jury, and the defendants have an opportunity to convince the jury otherwise; the decision is still the jury's. But allowing private plaintiffs to keep punitive fines does carry with it some problems. First, since punitive damages punish offenses to society at large, not to the individual injured party (who has already been compensated by compensatory damages), allowing the injured party to keep the money is inherently inappropriate. These sorts of fines *ought* to go to the government (in its capacity as guardian of public peace). Second, allowing injured parties to keep punitive awards increases the incentive for frivolous suits.

⁴⁵ See *supra* P. French at 345 ... Fines, even rather hefty ones, hardly have a record of producing the significant changes in corporate decision structures and standard operating procedures that would be desirable if the offending corporate actors are to be brought into compliance.

as well as industry custom, up to a point, is a mitigating factor supporting the continued practice that results in injury. However, a greater frequency of injury and/or presence of severe injury considerably minimizes the duration under which some remediation and notice to consumers or the public should have occurred.

Exemplary damages apply to “outrageous” corporate malfeasance where there has been no change in behavior and no mitigation in addressing the problem, but, instead, the existence of a strategy to profit from the wrongdoing by masking and contributing to its probable occurrence. Exemplary damages should arise when a relatively minor problem to address at its onset or a reasonable time thereafter is permitted to get considerably worse. The corporate character of the company reflects an arrogance of size and power where there appears to exist a perceived invulnerability to legal action.

Now, given a clearer delineation between the types and criteria of damages that could be assessed for corporate wrongdoing, the only question left is whether the jury can be brought back to fulfill its traditional role as the objective arbiter empowered by the law to justly advance the ideals of society. The verdict, the authors believe, should be yes!

FROM PIGGYBACKING TO WAR-DRIVING: THE LEGAL ASPECTS OF UNAUTHORIZED WI-FI USE

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I. INTRODUCTION

There is no doubt that the rapid growth of the Internet has significantly affected the way we communicate, conduct business and socially interact with one another. Internet technology has been seamlessly integrated with our everyday activity to the point that most don't give its use a second thought. Especially oblivious to many Internet users are its mechanics, and the points at which networks are accessed. More than ever, computer users are connecting to the Internet through wireless networks. Laptop computers now come equipped with wireless network cards and software that searches for available wireless (Wi-Fi) connections to allow even novice computer users to access "open" or unsecured networks while roaming. Whether innocent, ignorant or nefarious, access to wireless networks is often accomplished without the knowledge or express permission of the network's owner. This type of "unauthorized" access (or piggybacking) creates many novel and controversial legal issues. Unfortunately, the current state of the law of open Wi-Fi access is inconsistent and unclear in many jurisdictions. This leaves roaming Wi-Fi users uncertain as to the legal status of connecting to an available, but unfamiliar, open network.

The proliferation of open Wi-Fi networks throughout our society has also given rise to a subculture of sophisticated computer users who find, track and report open Wi-Fi connections in a given locale. This phenomenon is known in the Internet community as the sport of "War-driving."¹ Although ostensibly war-drivers do not access open Wi-Fi networks themselves, they do report the existence and availability of an unsecured network, allowing others to discover and use the connection. Questions of how, and whether, the law should apply and/or respond to the fast moving world of Wi-Fi network

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¹ The term "war-driving" is derived from an earlier phenomenon known as "war-dialing," which was the practice of programming a computer to dial telephone numbers automatically until it detected and accessed another computer over a telephone modem. War-dialing was a computer security problem in the 1980's, and was made famous by the 1980's film *War Games*. Anita Ramasastry, Jane K. Winn and Peter Winn, *Will Wi-Fi Make Your Private Network Public? War-driving, Criminal and Civil Liability, and the Security Risks of Wireless Networks*, 1 Shindler J. L. Com. & Tech. 9, note 2 (2005).

access, including practices such as piggybacking and war-driving abound. This article explores several theories of criminal and civil liability for unauthorized Wi-Fi use under both federal and state statutory law. The article concludes with a discussion of the ongoing debate about how open Wi-Fi use should be viewed by society and the law, and whether it should be prohibited.

II. WI-FI TECHNOLOGY AND THE POTENTIAL FOR ITS (MIS)USE

Wireless Internet technology offers computer users the freedom to connect with one another while roaming, eliminating the need to be tied to a traditional landline modem or cable. Wireless local area networks (“WLANs”), also known as “Wi-Fi” (or “wireless fidelity”), utilize radio waves to connect computer users to various computer networks and the Internet.² A device called a router broadcasts Wi-Fi signals on unlicensed frequencies at transfer rates of up to 125 megabytes per second (Mbps).³ A Wi-Fi router transmits data between computers on the network and a modem connected to the Internet, serving as a wireless access point (WAP). Since the router uses radio frequencies, its signals are not impeded by walls or other objects and usually produce a range of approximately 300 feet.⁴ This range provides convenience to the network owner, but also allows others within the range to log on to the network if it is not secured.

Although securing a Wi-Fi router has proved to be difficult, there are basic methods of security that an owner may implement to attempt to protect his/her signal from others. The most common forms of security for routers are Wired Equivalent Privacy (“WEP”) and Media Access Control (“MAC”) address filtering. The WEP is a password coding system implemented to keep out unwanted users. In order to gain access to a wireless network with WEP, the potential user must provide a secret key, or password. WEP keys may be effective at keeping out unsophisticated users, but it is well known in computer technology circles that WEP keys are not completely secure.⁵ Despite some WEP systems requiring up to a twenty-six character password, these systems are easily defeated, or “cracked”, by readily available software.⁶ Media Access Control (“MAC”) filtering is a security method that allows the Wi-Fi owner to restrict access to known users. Each device on a wireless network has a unique identifying address given to it by its manufacturer.⁷ A wireless router can be set up to allow only a pre-selected list of

² See Wi-Fi Alliance, *The How and Why of Wi-Fi*, http://www.wi-fi.org/knowledge_center/kc-howandwhyofwi-fi (last visited Feb. 22, 2009; lead author retains a copy).

³ See *Id.* (Wi-Fi routers utilize the unlicensed 2.4 GHz and 5 GHz radio bands, with data transfer rates of 802.11b (11 Megabits per second “Mbps”) and 802.11g (125 Mbps), under the Institute of Electrical and Electronics Engineers (“IEEE”) standards); See also, Ned Snow, *Accessing The Internet Through Neighbor’s Wireless Internet Connection: Physical Trespass in Virtual Reality*, 81 Neb. L. Rev. 1226 (2006).

⁴ See *Id.*

⁵ See *Id.*

⁶ See Laura D. Mruk, *Wi-Fi Signals Capable of Conversion: The Case for Comprehensive Conversion in Illinois*, 28 N. Ill. U. L. Rev. 347, 350 (2006).

⁷ Seth Fogie, *Security Reference Guide*, <http://www.informit.com/guides/content.aspx?g=security&seqNum=66> (last visited Feb. 22, 2009; lead author retains a copy).

MACs to connect to the network via Wi-Fi.⁸ Again, this method can be effective at keeping out unsophisticated users, but MAC addresses can be “spoofed”, or faked, by changing a computer’s wireless network card.⁹

The convenience, price and availability of Wi-Fi routers have made them common in public facilities, such as airports, hotels and restaurants, as well as in private residences. Many businesses and public facilities wish to provide free Internet access to their patrons through an unsecured, open Wi-Fi connection (called a “hot spot”) as a convenience or amenity. However, unless a network owner secures the signal, private or residential Wi-Fi networks may also remain open to anyone within range. Most laptop computers are now sold with built-in wireless cards or software capable of picking up Wi-Fi signals, allowing easy access to proximate wireless networks. In fact, one of the most popular operating systems available, Windows XP, contains a “Zero Configuration” feature designed to ease wireless access to the point that a user may connect to a wireless network unknowingly.¹⁰ Features like Zero Configuration and others, make it easy for users to gain network access without the express permission, consent or even knowledge of its owner.

It is common for many private, residential Wi-Fi network owners not to implement any security measures, either because they are unaware of the need for security or lack the sophistication to install it.¹¹ Some estimate that up to eighty percent of residential Wi-Fi networks are unsecured.¹² With so many unsecured networks, especially in urban areas, the temptation exists for outsiders to use the “open” networks instead of purchasing Internet service of their own. In the lexicon of the Internet community, logging on to another’s open Wi-Fi network is known as “piggybacking” or “joyriding.”¹³ Internet users piggyback on open Wi-Fi networks for a variety of purposes, from innocent to nefarious. Some users piggyback on a neighbor’s signal just to check e-mail or for quick searches, while others are attracted to an open Wi-Fi signal because of the anonymity it provides. While logged on to another’s open Wi-Fi network, a user can send spam, download pornography, commit fraud or other cybercrimes without the activity being traced back to the user’s own network or IP address.¹⁴

⁸ *Id.*

⁹ As an example of spoofing a MAC address, “the Dell TrueMobile includes software that allows a hacker to alter his MAC address to any address he chooses. Thus, this option is about as useful as trying to keep people from accessing a chat room by restricting chat handle names. To bypass such a restriction, a person only has to change his or her name.” *Id.*

¹⁰ See Benjamin D. Kern, *Whacking, Joyriding and War-Driving: Roaming Use of Wi-Fi and the Law*, CIPerati, Cyberspace/I.P. Law American Bar Association Newsletter, December 2005.

¹¹ See Matthew Bierlein, *Policing the Wireless World: Access Liability in the Open Wi-Fi Era*, 67 Ohio St. L.J. 1123, 1131 (2006).

¹² *Id.*

¹³ Michel Marriott, “Hey Neighbor, Stop Piggybacking on My Wireless,” New York Times Online, March 5, 2006, <http://www.nytimes.com/2006/03/05/technology/05wireless.html> (last visited Feb. 22, 2009; lead author retains copy).

¹⁴ Piggybackers may use another’s network to browse any unsavory content on the Web, which can be traced to the owner’s IP address. Additionally, disreputable piggybackers could implant malicious programs, including spyware, adware and Trojan horse applications, directly onto a computer, which could open the door to more serious problems such as online fraud or even identity theft. For example, a Los Angeles man pleaded guilty in 2004 to distributing pornography spam e-mails, sent out using other people’s Wi-Fi connections, which he accessed from inside his car. And in 2003, a man in Toronto was arrested for downloading child pornography using other people’s unsecured wireless networks. See

The remainder of this article will discuss the potential application of various sources of law to the phenomena of piggybacking and war-driving. Hereafter, the term “piggybacking” will be used only to describe only a casual, roaming Wi-Fi use, without the added complexities of hacking (obtaining access to another’s computer or network by avoid security measures), fraud, or other criminal online activities. Most often piggybacking is used to describe the use of another’s Wi-Fi router to access the Internet to conduct lawful activity, like checking e-mail and playing games. Likewise, the term “war-driving” will apply only to the acts of finding and disclosing the location of open Wi-Fi signals, without the additional step of accessing said open connection.

III. APPLICATION OF FEDERAL LAW TO PIGGYBACKING

A. THE COMPUTER FRAUD AND ABUSE ACT

The most relevant federal statute potentially applicable to piggybacking is the Computer Fraud and Abuse Act (CFAA). The CFAA is a broad statute regulating many types of unauthorized computer access, most of which are aimed at preventing hacking, or unauthorized use by means of eluding security measures. There are a few sections of the CFAA which prohibit intentional, unauthorized access to a computer or network either to obtain information or which result in damage that may be interpreted to apply to piggybacking.

Section 1030(a)(2) attaches potential criminal and/or civil liability for anyone who “intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains...(C) information from any protected computer if the conduct involved an interstate or foreign communication.”¹⁵ Although there are no reported cases of piggybacking being prosecuted under the CFAA, the federal government has hinted that “there may be criminal violations if the (Wi-Fi) network is actually accessed...including violations of the Computer Fraud and Abuse Act...”¹⁶ In order to determine whether the CFAA applies to piggybacking, one must first determine whether accessing an open Wi-Fi connection without explicit consent constitutes “intentional access...without authorization” and whether such access causes the user to “obtain information” from the owner’s computer.¹⁷

Matt Hines, Worried about Wi-Fi Security?, CNET News.com, Jan. 19, 2005, http://news.cnet.com/Worried-about-Wi-Fi-security/2100-7347_3-5540969.html?tag=mncol (last visited Feb. 22, 2009; lead author retains copy).

¹⁵ Computer Fraud and Abuse Act of 1986, 18 U.S.C. Sec. 1030 (2000 & Supp. II 2002).

¹⁶ Hines attributes the quote to an FBI special agent who distributed an e-mail in July of 2002, regarding the legality of war-driving and piggybacking. The e-mail read in part, “Identifying the presence of a wireless network may not be a criminal violation, however, there may be criminal violations if the network is actually accessed including theft of services, interception of communications, misuse of computing resources, up to and including violations of the Federal Computer Fraud and Abuse Statute, Theft of Trade Secrets, and other federal violations.” See Hines.

¹⁷ It may seem that term “protected computer” contained in Section 1030(a)(2) would limit the application of the section only to hacking, or to accessing computers with security devices installed on them. However, the term is defined broadly as a computer “used in interstate or foreign commerce or communication.” 18 U.S.C. 1030(e). Although no court has interpreted this language, it likely applies to any computer connected to the Internet.

1. INTENT AND ACCESS UNDER SECTION 1030

Since the CFAA contains criminal penalties, any offense contained in the statute must require proof of the requisite mental state, or *mens rea*. Section 1030(a)(2)(C) requires that the offender “intentionally” access a computer network, in excess of his/her authorization.¹⁸ Originally, the statute contained the “knowingly” mental state, but Congress amended it to change the requirement to “intentional,” in order to prohibit only “intentional acts of unauthorized access – rather than mistaken, inadvertent or careless ones.”¹⁹ Thus, in order to prove a violation, the prosecution must prove not only that the piggybacking user intended to access the network, but that he/she intended to access it *without authority*. In most cases of piggybacking, the network owner provides no indication of his/her lack of consent, and the user has no objective sign of authority or lack thereof. Thus, if a user intentionally accesses a wireless network, but has no reason to know that he/she does not have authority to do so, it seems to follow that he/she cannot be deemed to have intentionally engaged in unauthorized access.²⁰ However, no cases of access to open Wi-Fi networks have been prosecuted under the CFAA, so it is difficult to determine if a court would infer a piggybacker’s intention relative to authorization based on their use of the open signal. As discussed in Section ii below, whether access is “unauthorized” is not clear in the open Wi-Fi context.

Although the CFAA imposes liability on those who intentionally access another’s computer, it does not define the term access. Some courts, pointing to the dictionary definition of the term, have held that access means “the freedom or ability to obtain or make use of an object.”²¹ Similarly, other courts have broadly defined the term “access” as encompassing any successful interaction with a computer, including computers communicating via a wireless network.²² It seems likely that under such a broad interpretation of the term access, a user piggybacking on another’s Wi-Fi signal could be said to have accessed a computer under the statute.

One might argue that instead of accessing “a computer” as required by Section 1030, piggybacking on another’s Wi-Fi signal really only involves the user accessing a wireless access point, or router, not specifically a computer. The Seventh Circuit Court of Appeals addressed a similar argument, however, in *U.S. v. Mitra*, concluding that the “computer” requirement of Section 1030 applied to a wide variety of electronic devices with embedded processors, not just a typical computer.²³ In *Mitra*, the defendant, Rajib Mitra, a University of Wisconsin graduate student, used his own radio and computer equipment to interfere with the local police and fire radio communications system.²⁴ On

¹⁸ 18 U.S.C. Sec. 1030(a)(2)(C).

¹⁹ 1986 U.S.C.A.N.N. 2479, 2483.

²⁰ See Kern, *supra* note 9.

²¹ *Southwest Airlines Co. v. Boardfirst, L.L.C.*, 2007 WL 4823761 (N.D. Tex. 2007)(citing Merriam-Webster’s Collegiate Dictionary 6 (10th ed.1998)); see also, *America Online, Inc. v. Nat’l Health Care Discount, Inc.*, 121 F.Supp.2d 1255 (N.D. Iowa 2000).

²² *Id.* at *12; see also, Orin S. Kerr, *Cybercrime’s Scope: Interpreting “Access” and “Authorization” in Computer Misuse Statutes*, 78 N.Y.U. L. REV. 1596, 1646-47 (Nov.2003).

²³ *United States v. Mitra*, 405 F.3d 492 (7th Cir. 2005).

²⁴ See *Id.*

Halloween night 2003, Mitra send out a powerful radio signal essentially blocking the City's Smartnet radio transmission system.²⁵ Mitra was caught and prosecuted under the CFAA, but argued that he did not "access a computer" under the original intent of the statute. The Seventh Circuit Court held that, although Congress could not anticipate every type of technology that might be developed subsequent to the date of the statute, they can (and did) establish general guidelines applicable to existing and future technology.²⁶ The Court reasoned that since Congress did exclude some specific devices from coverage, like typewriters, typesetters and handheld calculators, it could amend the statute further to exclude other devices as they are created if it desired.²⁷ In fact, the Court said as to the CFAA, "as more devices come to have built-in intelligence, the effective scope of the statute grows."²⁸ What is interesting about the *Mitra* opinion is that, in dicta, Judge Easterbrook made reference to Wi-Fi networks specifically when discussing the scope of the statute. The opinion reads, "every cell phone and cell tower is a "computer" under this statute's definition; so is every iPod, *every wireless base station in the corner coffee shop*, and many another gadget (emphasis added)."²⁹ Obviously, left to interpretation by the Seventh Circuit Court, a wireless access point is a "computer" for purposes of the CFAA.

2. ACCESS WITHOUT AUTHORIZATION, OR IN EXCESS OF AUTHORITY, UNDER SECTION 1030

The real crux of the determination as to whether the CFAA applies to piggybacking is the issue of whether authorization is implicitly granted to third parties by a Wi-Fi network owner who leaves the network unsecured. The statute prohibits a user from intentionally accessing a computer without authority, or in a manner that exceeds the authority of the owner. Often, in the context of piggybacking, the owner simply leaves open his/her Wi-Fi network, without an explicit indication of his/her intent. Where a Wi-Fi network owner installs no security measures, or fails to post notice of his/her intention regarding others' use of the signal, does he/she implicitly grant permission to others to use the network? The language of the statute itself does not give an indication, and as previously mentioned, there have been no cases under the statute involving piggybacking. Further, the reported cases interpreting a computer owner's grant of "authority" in other contexts are diverse and do not leave a uniform test or analysis to be followed.

The CFAA attaches liability to one who "intentionally accesses a computer *without authorization or exceeds authorized access* (emphasis added)."³⁰ Some courts have recognized a distinction in the types of authority a computer might grant to others. The phrase "without authorization" implies that the user was either denied permission by the computer owner, or has never been granted specific authority to use the computer by the owner. "Without authority" is not defined by the CFAA, but the companion phrase,

²⁵ *Id.* at 493.

²⁶ *See Id.*

²⁷ *Id.* at 495.

²⁸ *Id.*

²⁹ *Id.*

³⁰ 18 U.S.C. Sec. 1030 (a)(2)(C).

“exceeds authorized access” has been defined as “access to a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter.”³¹ The Fifth Circuit Court of Appeals discussed the distinction between access without authorization and access exceeding authority in *U.S. v. Phillips*.³² The Court in *Phillips* looked to the legislative history of the statute in examining the distinction, holding “in conditioning the nature of the intrusion in part on the level of authorization a computer user possesses, Congress distinguished between ‘insiders, who are authorized to access a computer’ and ‘outside hackers who break into a computer.’”³³ Applying the insider-outsider distinction to piggybacking, it would be unlikely that a court would conclude that simply accessing an open, unsecured Wi-Fi signal would be an act of hacking, like that of an outsider.

The *Phillips* Court did not elaborate on unauthorized access by an outsider, but did apply the “intended functions test” to the question of insider access exceeding authority. Under the test, if a user accessed a computer in a way that is related to its intended function, then the access is deemed to be with authority. The “intended functions” test originally comes from another case, *U.S. v. Morris*, in which the defendant transmitted a computer virus via the Internet for the purpose of exploiting security defects in various computer networks.³⁴ The *Morris* Court found that the defendant exceeded his authority to use the others’ networks because his use of them to transmit the virus did not “in any way relate to their intended function.”³⁵ Likewise, the *Phillips* Court found that a university student’s use of computer programs to scan networks and steal encrypted data was not an intended use of the university’s network “within the understanding of any reasonable computer user and constitutes a method of obtaining unauthorized access to computerized data.”³⁶ Several subsequent courts have applied the intended functions test in cases where users violate explicit conditions of a website’s owner, i.e., its terms of use.³⁷ These courts have been criticized however for implementing the test, since a strict application could result in a violation of the CFAA each time a user violates a website’s terms and conditions.³⁸

³¹ 18 U.S.C. Sec. 1030(e)(6).

³² See *United States v. Phillips*, 477 F.3d 215 (5th Cir. 2007).

³³ *Id.* at 219 (citing S.Rep.No. 104-357, at 11 (1996)).

³⁴ *U.S. v. Morris*, 928 F.2d 504 (2nd Cir. 1991).

³⁵ *Id.* at 510.

³⁶ *Phillips*, at 220.

³⁷ See *Southwest Airlines v. Farechase, Inc.*, 318 F.Supp.2d 435 (N.D.Tex. 2004) (holding that Southwest stated a claim under CFAA where they had directly informed the defendant that its information “scraping” of southwest.com was unauthorized); *America Online, Inc. v. LCGM, Inc.*, 46 F.Supp.2d 444 (E.D.Va. 1998) (ruling that defendant’s use of AOL membership to obtain e-mail addresses of other AOL users was unauthorized access because it violated AOL’s stated terms of use); *EF Cultural Travel BV v. Explorica, Inc.*, 274 F.3d 577 (1st Cir. 2001) (finding that defendant’s use of information scraper to obtain information from plaintiff’s website likely exceeded authorized access where such use at least implicitly violated a confidentiality agreement).

³⁸ See e.g., Christine D. Galbraith, *Access Denied: Improper Use of the Computer Fraud and Abuse Act to Control Information on Publicly Accessible Internet Websites*, 63 MD. L. REV. 320, 368 (2004) (contending that the CFAA was designed to prevent hacking and was, “never intended to afford website owners with a method for obtaining absolute control over access to and use of information they have chosen to post on their publicly available Internet sites”); Orin S. Kerr, *Place and Cyberspace*, 91 CAL L. REV. 521, 528 (2003) (“An even more serious problem is the judicial application of the CFAA,

Implicit in the “intended functions” test is the notion that a network owner intends for his/her network to be used only in ways that he/she subjectively anticipates. The fundamental problem in applying such a standard to piggybacking is that, typically, the network owner leaves no indication as to his/her intentions. There are no posted “terms of use” available to the potential piggybacking user to determine whether access is authorized, or when such implicit authority may be exceeded. Thus, until the law or society settles on how open Wi-Fi access is viewed vis-à-vis authorization of the network owner, the “intended use” test does not seem to be useful.

Another test courts have developed to determine whether access is authorized or exceeds authorization under the CFAA is the “reasonable expectations” test. This test is essentially an objective test used to determine, based on the facts presented, whether the network owner exhibited an intent to allow access and to what extent. The reasonable expectations test was applied by the federal District Court for the Southern District of New York in *EF Cultural Travel BV v. Zefer Corp.* (hereinafter “Zefer”), but was rejected by the First Circuit Court of Appeals.³⁹ In *Zefer*, a travel company brought suit under the CFAA against the maker of a “scraper” software tool used to collect pricing information from the plaintiff’s website.⁴⁰ The District Court held that a lack of authorization could be inferred from the objective facts surrounding the access, using the reasonable expectations test.⁴¹ In applying the test, the Court pointed to three circumstances comprising an implicit warning to the website’s users: first, the copyright notice on the plaintiff’s home page, second, the plaintiff’s provision to the defendant of confidential information obtained in violation of employee confidentiality agreements, and last, that the website was configured to allow ordinary visitors to view only one page at a time (rather than downloading the site’s information all at once directly from the source code via a bot like the defendant’s).⁴² The First Circuit Court reviewing the decision agreed with the lower court that lack of authorization can be implicit, rather than explicit. However, the Court held, “we think that in general a reasonable expectations test is not the proper gloss on subsection (a)(4) and we reject it... instead, we think that the public website provider can easily spell out explicitly what is forbidden and, consonantly, that nothing justifies putting users at the mercy of a highly imprecise, litigation spawning standard like ‘reasonable expectations.’”⁴³ The Court went on to rule that if the plaintiff wanted to ban the use of bots, like scrapers, it could easily do so by changing the site’s terms of use.⁴⁴

As applied to piggybacking, the reasonable expectations test seems likely to yield unpredictable results. Application of an objective test, like the reasonable expectations test, requires a common standard against which to compare the defendant’s actions. Without a clear understanding of how society views piggybacking, either as acceptable or unacceptable in cases where the network owner is silent regarding authority, there is no norm or basis for a comparison. As it stands, society has not yet reached a consensus on

which was designed to punish hackers, to make it illegal – indeed criminal- to seek information from a publicly available website if doing so would violate the terms of a browserwrap agreement.”)

³⁹ *EF Cultural Travel BV v. Zefer Corp.*, 318 F.3d 58 (1st Cir. 2003).

⁴⁰ *See Id.* at 59-60.

⁴¹ *See Id.*

⁴² *See Id.*

⁴³ *Id.* at 63.

⁴⁴ *See Id.*

what constitutes “unauthorized” access in this context. Many people likely view access to a Wi-Fi connection at a public facility to be acceptable, or authorized, since such “hot spot” providers often have a financial incentive to provide a free connection to their patrons. However, the test becomes unclear where the context involves a private or residential network since the same incentives do not exist. Judging by the objective facts, that an open, unsecured connection exists and that the user (likely) is not familiar with the owner or his/her intentions, it is difficult to determine whether access would be judged to be with or without authority.

Rather than depend on a case by case analysis of what constitutes reasonable notice to a user, the First Circuit Court in *EF Travel* favored an approach requiring the owner to provide explicit limits, or restrictions, to define authorized access.⁴⁵ The Court recognized that lack of authorization need not be explicit, noting that password protection implicitly limits authority without express terms.⁴⁶ However, the Court stated that “our basis for this view is not, as some have urged, that there is a presumption of open access to Internet information.”⁴⁷ The only conclusion that may be drawn from the *EF Travel* case relative to a piggybacking context is that accessing an open WAP is not presumed to be with authority, if the owner has either explicitly or implicitly restricted such access. One may argue that *EF Travel* stands for the proposition that a Wi-Fi network owner must prohibit access either explicitly or implicitly before CFAA liability attaches. This puts the burden of establishing lack of authority on the network owner, requiring him/her to take some affirmative step restrict authority.

A last possible approach to determining lack of authorization under the CFAA would be to require any user of another’s computer or network to gain express permission prior to obtaining access. This position seems to have been rejected by the federal District Court for the Eastern District of Pennsylvania in *Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey, et al.*⁴⁸ In the case, the Plaintiff, a copyright holder, sued a law firm that represented an adversary in ongoing intellectual property litigation, claiming that the firm had violated the CFAA by obtaining computer images that once appeared on the Plaintiff’s Internet website.⁴⁹ The defendant used an Internet archive resource known as the “wayback machine” to access some of plaintiff’s archived screenshots for use in the litigation.⁵⁰ The Plaintiff had taken steps to deny access to its archived web pages, but due to a system malfunction, Defendants were able to access the old information.⁵¹ The Plaintiff, Healthcare Associates, argued that the law firm’s access to its archived web pages was unauthorized because the images were viewed without its explicit permission. The Court stated, “This fact is irrelevant. The statute only penalizes persons who exceed authorization... The Harding firm requested archived images from the Internet Archive’s database, and those requests were filled. The Harding firm got lucky, because the servers were malfunctioning, but getting lucky is not the equivalent to

⁴⁵ See *Id.*

⁴⁶ *Id.* at 63.

⁴⁷ *Id.*

⁴⁸ *Healthcare Advocates, Inc., v. Harding, Earley, Follmer & Frailey*, 497 F.Supp.2d 627(E.D. Pen. 2007).

⁴⁹ See *Id.*

⁵⁰ Defendants used a web site known as Internet Archives (at www.archive.org) to access the Plaintiff’s archived images. The “Wayback Machine” is an information retrieval system that allows the user to request archived screenshots of web pages that may be contained on the database. *Id.* at 631.

⁵¹ See *Id.*

exceeding authorized access.”⁵² The Court in *Healthcare Advocates* seems to hold that the CFAA does not require one to gain a computer owner’s express consent prior to accessing it. Of course, in the context of a public website on the Internet, it would not make sense to require express consent each time a different user wanted to access the site. It is unclear whether the same rule may be applied to an open WAP, but the *Healthcare Advocates* case could be used to argue against requiring prior consent of the WAP owner.

3. “OBTAINING INFORMATION” UNDER SECTION 1030(A)(2)(C) AND “CAUSING DAMAGE” UNDER 1030(A)(5)

The final requirement under Section 1030(a)(2)(c) of the CFAA is that the user “obtains information from any protected computer.”⁵³ While the phrase “obtains information” is not defined in the statute, the legislative history of the CFAA suggests that it could include “merely reading it.”⁵⁴ While this interpretation is extremely broad, at least one court narrowed its interpretation defining “obtaining information” as “the showing of some additional end – to which the unauthorized access is a means.”⁵⁵ In *U.S. v. Czubinski*, the court held that the purpose of the offender’s access must be to gain information from the user that isn’t available with authorization.⁵⁶ In the context of piggybacking Wi-Fi access, a user who accesses an owner’s network must exchange some technical information (IP addresses, data packets, etc.) with the owner’s computer in order to gain access to the Internet. However, the type of information exchanged is not the type of personal or private information that the CFAA and other laws typically protect.⁵⁷ A simple piggybacking user typically does not access an open WAP *in order to* gain access to any of the owner’s private information, only to gain a connection to the Internet. It is unlikely that the type of information sharing involved in using someone’s WAP log on to the Internet (the sharing of technical data) is the type of information contemplated under the CFAA. Additionally, if one were to strictly construe the Congressional intent on obtaining access, one might argue that it does not apply to piggybacking because the information obtained in that context is not “readable” by humans, only machines. The exchange of technical data by the computers happens invisibly or at least out of sight of both the piggybacking user and the WAP owner.

The requirements for criminal liability under Section 1030(a)(5) are identical to those under Section 1030(a)(2)(c), except that instead of requiring the unauthorized user to obtain information from the accessed computer, it requires the user to “recklessly cause damage” to the computer.⁵⁸ Section 1030(a)(5) also allows civil remedies under the same requirements. Both the civil and criminal actions under the Section 1030(a)(5) require proof that the user caused damage creating a loss to one or more persons during any one year period, aggregating at least \$5,000 in value.⁵⁹ The CFAA defines “damage” as any

⁵² *Id.* at 649.

⁵³ 18 U.S.C. Sec. 1030(a)(2)(C).

⁵⁴ S. Rep. No. 104-357, at 7 (1996).

⁵⁵ *U.S. v. Czubinski*, 106 F.3d 1069, 1078 (1st Cir. 1997).

⁵⁶ *See Id.*

⁵⁷ *See Id.*

⁵⁸ 18 U.S.C. Sec. 1030(a)(5)(A)(ii).

⁵⁹ 18 U.S.C. Sec. 1030(a)(5)(A)(i)(g).

impairment to the integrity or availability of data.⁶⁰ Some courts have interpreted “damage” broadly to include an interruption of computing functions, or even a slowdown in the system.⁶¹ In determining whether the \$5,000 damage requirement of the statute has been met, a few courts have been equally as liberal in their interpretation. Some courts allow “damages” to include the cost of assessing whether the unauthorized access at issue caused harm to the owner’s system and possibly could even include the cost of re-securing the system.⁶² Applying the damage requirement of Section 1030(a)(5) to Wi-Fi piggybacking, however it seems unlikely that the owner would be able to prove a loss of in excess of \$5,000. As mentioned previously, a piggybacker often only uses the access of another to log on to the Internet to check e-mail or other websites, not to take up significant bandwidth by downloading large files. Even where a piggybacking user does download large files, which may burden and slow the owner’s connection, the owner typically pays for his/her service at a flat rate. Thus, unless the piggybacker used the owner’s system continuously and extensively, such use would rarely exceed \$5,000. Calculating loss based on an interruption in the system caused by a Wi-Fi piggybacker alone would be difficult, if not impossible, and would rarely exceed \$5,000.

B. OTHER FEDERAL STATUTES

The Computer Fraud and Abuse Act is the most likely federal statute to apply to piggybacking, but there may be others that could apply given the right interpretation. One statute that could apply is the Electronic Communications Privacy Act (ECPA). Part of the federal Wire Tap Act, the ECPA imposes criminal and/or civil liability on anyone who intentionally intercepts, or attempts to intercept, any wire, oral or electronic communication.⁶³ A portion of the ECPA holds that it is not unlawful for “other users of the same frequency to intercept any radio communication made through a system that utilizes frequencies monitored by individuals engaged in the provision or the use of such system, if such communication is not scrambled or encrypted.”⁶⁴ The main thrust of the ECPA is to protect private information and communications. Thus, it is unlikely that the ECPA would prohibit simple piggybacking because the statute does not apply to radio signals accessible to the general public that are not scrambled or encrypted. As discussed

⁶⁰ The term damage “means any impairment to the integrity or availability of data, a program, a system, or information, that... causes loss aggregating at least \$5,000 in value during any 1-year period to one or more individuals.” 18 U.S.C. Sec. 1030(e)(8)(A).

⁶¹ *America Online, Inc. v. National Health Care Discount, Inc.*, 121 F.Supp.2d 1255, 1274 (N.D. Iowa 2000) (holding that the sending of a large amount of unsolicited bulk e-mails (spam) which caused Internet service provider’s system to slow down constituted damage under the CFAA); *American Guaranteed & Liability Co., v. Ingram Micro, Inc.*, 2000 WL 726789 (D. Ariz. Apr. 18, 2000) (The court noted, in dicta, that lawmakers around the country have determined that when a computer’s data is unavailable, there is damage; when a computer’s services are interrupted, there is damage; and when a computer’s software or network is altered, there is damage).

⁶² *See In re Middleton*, 231 F.3d 1207(9th Cir. 2000); *See also In re Doubleclick, Inc. Privacy Litigation*, 14 F.Supp.2d 497 (S.D.N.Y. 2001).

⁶³ 18 U.S.C. 2511 (1)(a)(2001).

⁶⁴ 18 U.S.C. 2511 (2)(g)(v).

above, a Wi-Fi signal is a radio transmission from a router on an open frequency, which is often not encrypted. The ECPA also requires that the user intentionally intercept communications. Often, in the typical piggybacking scenario, the user does not know that he/she is accessing another's private Wi-Fi network, making such access unintentional. At least one case has ruled that the interception must be a conscious objective, rather than a mistake or accident.⁶⁵

III. APPLICATION OF STATE STATUTORY LAW TO PIGGYBACKING

All states have statutes that regulate computer use, trespass, tampering and/or invasion of privacy. Most of the statutes reflect the same basic goals as the CFAA, but the content, structure and legal presumptions of the statutes vary greatly. Applying the various statutes to piggybacking depends in many cases on whether the user intentionally engaged in unauthorized access. Some statutes require users to have express authorization to access a computer or network before imposing liability, while others only impose liability on a user if the network owner expressly prohibits access. Some states focus on the user's intent and whether he/she had a reasonable expectation to believe that access was authorized.

A chart is included in the Appendix to this article contains a listing of all fifty states' statutes on unauthorized computer access. The chart includes the relevant statutory language from each statute and its potential application to piggybacking, including whether the statute imposes a duty on the user to establish that his/her access is with authority, or whether it imposes a duty on the network owner to establish valid authority by requiring an explicit grant or denial of authority.

A. STATE STATUTES REQUIRING THE USER TO ESTABLISH AUTHORIZATION

A few states' computer crimes statutes require a user to establish that he/she has the express authorization of the computer or network owner prior to access. Colorado's computer crime statute reads, "A person commits computer crime if the person knowingly: a) Accessed a computer, computer network or any computer system...without authorization."⁶⁶ The statute reads very much like the federal CFAA, but unlike the CFAA, the Colorado statute defines authorization as "the express consent of a person."⁶⁷ On its face, the Colorado statute seems to prohibit piggybacking, although no court has interpreted the statute in that context. Another state that seems to require express consent of a network owner is California. The California Penal Code imposes criminal liability on anyone who "knowingly and without permission accesses or causes to be accessed any computer, computer system or computer network."⁶⁸ Although

⁶⁵ U.S. v. Townsend, 987 F.2d 927, 931(2d Cir. 1993).

⁶⁶ Colo. Rev. Stat. Sec. 18-5.5-102 (1)(a).

⁶⁷ Colo. Rev. Stat. Sec. 18-5.5-101(1).

⁶⁸ Cal. Com. Code Sec. 502(c)(7).

there are no reported cases interpreting the language of this statute, the California Attorney General has indicated that such access would be considered without permission absent the express consent of the computer owner.⁶⁹

B. STATE STATUTES REQUIRING THE OWNER TO PROVIDE NOTICE OF AUTHORIZATION

Some states do not impose liability on the user unless the computer owner took affirmative steps to prohibit access. New York's Unauthorized Use Computer statute requires that the service accessed be equipped with any device coding system, a function of which is to prevent the unauthorized use of said computer system.⁷⁰ Under this statute, piggybacking would be prohibited only if the network owner has enabled encryption or other security measures. Similarly, Nebraska's Unauthorized Computer Access statute contains a provision requiring the computer user to penetrate a security mechanism prior to attaching liability. The Nebraska law also requires the owner to display on the computer a conspicuous warning to a user that the user is entering a secure system.⁷¹ A few states' statutes contain a presumption that computer use is unauthorized if the owner has put security measures in place.⁷² The same statutes do not say that computer use is authorized if the owner does not use security measures, but they imply that the owner must provide notice of authorization to the user before the user will be guilty of unauthorized access.

New Hampshire is the first state to contemplate the issue of piggybacking when it attempted to amend its Computer Related Offenses statute. A bill was presented to the legislature attempting to the burden of securing a wireless network on the owner and make clear that inadvertent access to a wireless network would not violate the law. The bill contained the following language:

The owner of a wireless computer network shall be responsible for securing such computer network. It shall be an affirmative defense to a prosecution... if the unauthorized access meets the following requirements: 1) The person reasonably believed that the owner of the computer network... had authorized him or her to access; or 2) the person reasonably believed that the owner of the computer... would have authorized the person to access without payment of any consideration; or 3) the person could not have reasonably known that his or her access was unauthorized.⁷³

The bill was passed in the New Hampshire House of Representatives, but did not make it to a vote in the New Hampshire Senate.⁷⁴

⁶⁹ See Kern.

⁷⁰ See N.Y. U.C.C. Law Sec. 156.05.

⁷¹ Neb. Rev. Stat. Sec. 28-1343.01(1995).

⁷² See 38 ILCS 16D-7; MCL 752.797Sec.7(6)(c); Mass. Gen. Laws Ch. 266, Sec. 120F.

⁷³ New Hampshire H.B. 495 (2003).

⁷⁴ See Kern at 28.

C. PROSECUTIONS OF PIGGYBACKING UNDER STATE STATUTES

While every state has a statute that could be applied to piggybacking, there have been relatively few prosecutions. There are many reasons for the lack of prosecutions - from difficulty tracking and finding offenders to the relative ambiguity of the applicable statutes. Of the few reported cases involve piggybacking users most involve accessing open public Wi-Fi connections after normal business hours. In 2006, David Kauchak, of Machesney Park, Illinois, was arrested for Computer Tampering for accessing the open WAP of a local nonprofit agency.⁷⁵ The local police noticed Kauchak sitting in his parked car near the agency in the early morning hours with a laptop computer and determined that he was using the agency's Wi-Fi network to access the Internet.⁷⁶ The Illinois statute for Computer Tampering applies to a person who, "knowingly and without the authorization of a computer's owner... accesses... a computer network."⁷⁷ The statute clarifies that one accesses a computer network with authorization if, "the owner authorizes patrons, customers, or guests to access the computer network and the person accessing the computer network is an authorized patron, customer, or guest and complies with all terms or conditions for use."⁷⁸ This statute is one of the few state statutes to recognize and anticipate Wi-Fi service offered to patrons and define its limits. According to the statute, the user seems to bear the burden of showing that his/her access was authorized by not exceeding the terms of use. Kauchak was alleged to have violated the owner's consent by obtaining access outside normal business hours. Rather than present a defense to the charge in the Illinois case, however, Kauchak pled guilty pursuant to a plea agreement and paid a \$250 fine.⁷⁹

Prosecutions for piggybacking similar to the Illinois case also have occurred in Michigan and Alaska. In both cases, the computer user accessed a Wi-Fi signal that was free and available to patrons of public facilities. In Michigan, Sam Peterson was arrested for using a café's open signal to check his e-mail.⁸⁰ Each day Peterson would drive to the Union Street Café, park his car on the street outside and access the Internet through the café's connection to check his e-mail.⁸¹ No one complained about his behavior, but a local police officer noticed his behavior and arrested Peterson under Michigan's fraudulent access law. Peterson was not aware of the law and freely admitted his actions. The Michigan statute prohibits Wi-Fi access in a manner that exceeds valid authority. Since Peterson was not a customer of the café, and did not have expressed permission of the café owner, he allegedly exceeded his authority to access its wireless network. Ironically, had Peterson gone into the café, his access would have been with authority and

⁷⁵ Chris Green, "Man Fined \$250 in First Area Case of Internet Piracy," Rockford Register Star, March 24, 2006.

⁷⁶ *Id.*

⁷⁷ 720 ILCS 5/16D-3(a)(1) (2006).

⁷⁸ 720 ILCS 5/16D-3(a-10)(a)(1).

⁷⁹ *See* Green.

⁸⁰ *See, Michigan Man Dodges Prison in Theft of Wi-Fi*, http://news.cnet.com/8301-10784_3-9722006-7.html (last visited February 22, 2009; lead author retains copy).

⁸¹ *See Id.*

he likely would have avoided prosecution. Instead, Peterson pled guilty, paid a \$400 fine and was sentenced to 40 hours of community service.⁸²

In a similar case from Alaska, 21 year old Brian Tanner was arrested for accessing an online game at night from the parking lot of the Palmer Alaska Public Library.⁸³ During business hours, the library's Wi-Fi connection was open to the public, but since Tanner had been told previously to stay away from the parking lot after hours, he was arrested for trespass and theft of services.⁸⁴ Alaska's Theft of Services statute defines the offense as when a person, "obtains the use of computer time, a computer system, a computer program, a computer network, or any part of a computer system or network, with reckless disregard that the use by that person is unauthorized."⁸⁵ Not certain of whether the Alaska statute applied to unsecured computers, and not sure of how a court would interpret "reckless disregard," the local prosecutor chose not to charge Tanner with Theft of Services.⁸⁶

While the previous cases involved casual Wi-Fi users accessing wireless networks for legitimate purposes, one reported case displays a more dangerous side of piggybacking. In 2005, Benjamin Smith III was arrested and charged under Florida's unauthorized computer access law after a St. Petersburg resident noticed Smith parked outside his home with what appeared to be a laptop computer.⁸⁷ The resident called the police, who determined that Smith was using the residential Wi-Fi network to access the Internet to download child pornography. The Florida statute criminalizes "whoever willfully, knowingly and without authorization...accesses or causes to be accessed any computer, computer system or computer network."⁸⁸ Smith's attorney filed a motion challenging the application of the statute to wireless networks, but the trial judge ruled against him. Smith later pled guilty to amended charges and was sentenced to five years of sex offender probation.⁸⁹ No cases of unauthorized computer access in the piggybacking context have been appealed to either the state or federal appellate courts, so it is difficult at this stage to gauge how courts will apply the language of the relevant statutes.

IV. APPLICATION OF FEDERAL AND STATE LAW TO WAR-DRIVING

As mentioned previously, war-driving is the term used to define the process of detecting and reporting the existence and location of unsecured wireless networks.⁹⁰ Many avid computer users and Internet aficionados volunteer to search and map the

⁸² *See Id.*

⁸³ Andrew Weller, "Freeloading Surfer Faces Trespass Charges," http://www.frontiersman.com/articles/2008/05/05/local_news/doc48 (last visited Feb. 22, 2009; lead author retains a copy).

⁸⁴ *See Id.*

⁸⁵ Alaska Stat. Sec. 11.46.200.

⁸⁶ *See Weller.*

⁸⁷ Eric Bangerman, "Florida Man Charged with Felony for War-driving," <http://arstechnica.com/news.ars/post/20050707-5068.htm> (last visited Feb. 22, 2009; lead author retains a copy).

⁸⁸ Fla. Stat. Sec. 815.06.

⁸⁹ *See Bangerman.*

⁹⁰ *See Ramasastry.*

locations of available Wi-Fi networks as a public service. Some war-drivers report their findings on websites in order to contribute to the known wireless coverage areas throughout the world.⁹¹ Like piggybacking, the legal status of war-driving is mostly undetermined. In theory, the same statutes potentially applicable to prohibit piggybacking may also apply to war-driving, since both actions involve interaction with others' Wi-Fi networks. However, unlike piggybacking, war-driving is likely to be seen as less culpable since it is less intrusive. Pure war-driving does not involve accessing another's computer network beyond detecting its Wi-Fi signal. Regardless, the federal and state statutes regarding unauthorized access could be interpreted broadly enough to prohibit war-driving.

The federal Wiretap Act imposes criminal liability on anyone who, "intentionally intercepts, endeavors to intercept, ... any wire, oral, or electronic communication."⁹² The Wiretap Act further defines "interception" as the "acquisition of the contents of any electronic communication through the use of any electronic...device."⁹³ War-drivers use their computers and locating software to scan areas for available Wi-Fi signals. A court could interpret the terms "electronic communication" under the Act broadly enough to include the wireless signal broadcast by an Wi-Fi router, and thus any acquisition of such a signal would be criminal. An accused war-driver might argue that they should not incur liability under the Wiretap Act because no private communications of an individual are being captured or recorded. However, the Wiretap Act does not require recording of information in order to constitute an acquisition, simply listening to or monitoring a communication will suffice.⁹⁴

As discussed previously in Section III(A) above, the federal Computer Fraud and Abuse Act (CFAA) may be interpreted to apply to war-driving, just as it may apply to piggybacking. However, it seems more difficult to apply the CFAA to war-driving since the "access" required to notice the existence of a Wi-Fi network is significantly less intrusive than using another's Wi-Fi network to access the Internet. Another federal statute that is potentially applicable is the Stored Electronic Communications Privacy Act (ECPA). The ECPA imposes criminal liability on anyone who, "(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceeds an authorization to access that facility...and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system."⁹⁵ This statute also seems unlikely to apply to simple war-driving since it requires not only access to a computer network without authority, but also that the user access stored electronic communications, like e-mail or other files, during the access. As mentioned above, war-drivers typically do not access others' networks in order to retrieve the network owner's files, so the requirement to obtain or alter stored files would likely go unmet.

Many of the state statutes for unauthorized computer access, or theft of computer services are likewise unlikely to apply to war-driving. Most state statutes potentially

⁹¹ Searchable maps of available Wi-Fi networks can be found at websites like www.wigle.net and www.wifimaps.com.

⁹² 18 U.S.C. Sec. 2511 (1)(a) (2005).

⁹³ 18 U.S.C. Sec. 2510 (4) (2005).

⁹⁴ See *Watkins v. L.M. Berry & Co.*, 704 F.2d 577, 584 (11th Cir. 1983) ("It is not necessary to recovery of damages that the violator hear anything in particular; she need do no more than listen.").

⁹⁵ 18 U.S.C. Sec. 2701(a) (2005).

applicable have an intent or knowledge component, evidence of which is normally absent in the war-driving context. Sometimes, like with piggybacking users, it is difficult to tell which open Wi-Fi networks are intended for public use and which are meant to be private. Since there are so many Wi-Fi networks open for public use, the act of searching for available networks could have a legitimate purpose. Connecting, or attempting to connect, to an open Wi-Fi network in good faith seems to be a defense to many of the intent requirements of the state statutes. Only one state, Oklahoma, seems to address the specific possibility of imposing liability on war-drivers. The Oklahoma statute states that it shall be unlawful to “willfully and without authorization provide or assist in providing a means of accessing a computer...or computer network in violation of this section.”⁹⁶ If a war-driver, in conveying the existence and location of an open Wi-Fi network to another person, knowing that the other person would access the network without authorization, then the war-driver may be liable under this statute. The Oklahoma statute seems to impose an accomplice-like liability on the war-driver for his/her role in the unlawful access. What is unclear from the statute is whether the war-driver in this scenario would be required to have a concurrent intent with the user who ultimately accesses the open network. Still, the statute’s language should be enough to give careless war-drivers in Oklahoma cause for concern.

V. PUBLIC POLICY DEBATE: SHOULD PIGGYBACKING\WAR-DRIVING BE ILLEGAL?

There are divergent views in our current society about whether Wi-Fi piggybacking is, or should be, considered ethical and/or legal. Some see piggybacking as a harmless sharing of a common good, while others view it as an intrusion, or trespass to a property right. One problem we have in reconciling piggybacking with our current law is that our courts and legislatures have yet to address it directly and are still struggling to find the right analogy. Those opposed to the practice equate it with entering a home because the front door is unlocked, or hanging on to the outside of a bus without paying the fare.⁹⁷ Those who feel piggybacking should be allowed claim it is more like listening to a neighbor’s music through an open window, reading a newspaper over a stranger’s shoulder, or using light from a neighbor’s porch.⁹⁸ Until society reaches a consensus on how to view piggybacking, the law likely will remain unclear.

Those who feel piggybacking is morally and legally wrong, point primarily to two dangers: theft and risk of harm. At its core, piggybacking amounts to using someone else’s personal property without explicit consent or contribution. Piggybacking presents a variation of the phenomenon economists call the “free rider” problem. A free rider is a person who takes more than their fair share of benefits, but do not shoulder a fair share of the costs of a resource.⁹⁹ In this case, the free rider is the computer user who acquires

⁹⁶ Okla. Stat. Sec. 21-1951.

⁹⁷ See Ryan Singal, Wired Blog, “Request for Analogies: Using Open Wireless Connections Without Permission is Like...” http://blog.wired.com/27bstroke6/2007/05/request_for_ana.html (last visited Feb. 22, 2009; lead author retains copy).

⁹⁸ See *Id.*

⁹⁹ Economy Professor, Free Rider Problem, <http://www.economyprofessor.com/economictheories/free-rider-problem.php> (last visited Feb. 22, 2009; lead author retains a copy).

Internet access through another's open Wi-Fi network without contributing the cost of the access. One could also argue that, legally and ethically, piggybacking is wrong as it constitutes a classic form of unjust enrichment.¹⁰⁰ This presents two ethical problems: first, the piggybacker is using an asset available only for money without paying (which is akin to theft) and second, it deprives the Internet service provider of its fee.

Most often, however, a network owner pays a monthly fee for virtually unlimited Wi-Fi use and doesn't realize a loss or suffer a notable harm as a result of piggybacking. Unless the piggybacker uses the open connection to download large files or otherwise occupy large amounts of bandwidth, causing the owner's network to slow down, the owner will not suffer any individual harm. It is foreseeable, however, that the Internet service providers (ISP) might suffer actual, monetary harm as a result of piggybacking. If consumers of Wi-Fi Internet access are able to piggyback on an open signal and essentially obtain Internet access for free, then ISPs will have fewer customers. If piggybacking became endemic, the network owners who do purchase Internet service ultimately would subsidize the practice through higher costs for service.

Applying the categorical imperative analysis of Kantian ethics to piggybacking, one could conclude that the practice is unethical. A categorical imperative is a decision that one must follow as determined through reason. For instance, in applying the analysis, one might ask "what if everyone piggybacked on another's Wi-Fi connection?"¹⁰¹ Reason tells us that no one would choose to pay for Internet service and consequently, ISPs would lose their incentive to provide it. Thus, the decision to refrain from piggybacking is an imperative and must be followed.

Those who believe piggybacking should not be illegal tend to reject the idea that Wi-Fi can be owned in the sense that real or personal property is owned. Wi-Fi is really nothing more than a radio signal broadcast on an unregulated frequency. Technically, a freely disbursed radio signal cannot be owned, and consequently cannot be stolen. There are those who claim that making such access illegal sends a mixed message from the government. On one hand the FCC has decided not to regulate the frequencies used in Wi-Fi transmission, thereby making them "free" to the public. On the other hand, the CFAA or other statutes would seek to criminalize, or impose civil liability, for use of an ostensibly free common good (radio waves).¹⁰²

There appears to be no consensus in society as to how to view piggybacking. Jeffrey Seglin, author of the New York Times Sunday Magazine's column called *The Ethicist* wrote that it is not unethical to piggyback on a neighbor's Wi-Fi, as long as the user is

¹⁰⁰ Unjust enrichment is defined as, "A general equitable principle that no person should be allowed to profit at another's expense without making restitution for the reasonable value of any property, services, or other benefits that have been unfairly received and retained." See, *Unjust Enrichment*, <http://legal-dictionary.thefreedictionary.com/Unjust+Enrichment> (last visited Feb. 22, 2009; lead author retains a copy).

¹⁰¹ See generally Oxford University, Immanuel Kant and Deontological Ethics, http://weblearn.ox.ac.uk/site/conted/biosci/ethicsbiosci/eb_content/EthicalPrinciples/ImmanuelKantAndDeontologicalEthics.html (last visited 2/22/09); See also Stanford Encyclopedia of Philosophy, Kant's Moral Philosophy, <http://plato.stanford.edu/entries/kant-moral> (last visited 2/22/09; lead author retains a copy).

¹⁰² See Steal More Wi-Fi!, <http://cybertelecom.blogspot.com/2008/01/steal-more-wifi.htm> (last visited 2/22/09; lead author retains a copy).

not hacking, or actively avoiding a known security measure.¹⁰³ He concluded that it is the Wi-Fi network owner's responsibility to secure his router if he wants to keep his network private. Thus, without such security, or other indication of lack of consent, permission to use the signal is implied.

Ultimately, however, the question of whether piggybacking on someone else's Wi-Fi signal is acceptable may become moot. There appear to be some practical solutions and/or market results that may resolve the current dispute about whether a Wi-Fi owner intends for others to use his/her signal by leaving it unsecured. One possible solution simply may be to encourage (or impose a rule by statute) Wi-Fi router manufacturers to install and enable some measure of security on the devices by default. Thus, when a novice consumer purchases a router for private use, it would already be secured, without the consumer having to take extra steps on his/her own to do so. This would drastically cut the number of unintended "open" WAPs, and establish a recognized maxim that if the connection is unsecured, then the owner intends for others to use it. The State of California has already taken a step toward this solution by passing a statute requiring a notice to be placed on all new Wi-Fi routers, informing purchasers of the risks of leaving a wireless network unsecured.¹⁰⁴ While stopping short of requiring all routers to be secured by default, the California statute is an attempt at notifying residential and unsophisticated Wi-Fi owners of the risks. What is not clear is how the courts will interpret the statute vis-à-vis the assumption of authority by users who encounter an unsecured connection. In other words, can one assume in California that any network owner who leaves his/her network unsecured, after being warned of the dangers, intends to allow access to others? Perhaps the courts will interpret this and similar statutes in a manner which establishes a norm or standard for our perceptions of intent and authority to access open Wi-Fi networks. Another possible solution/result may be that the ISPs will deny all users the right to share in their service contracts. Some ISPs already include such restrictions in their service agreements and could even implement a two tiered service plan, charging customers more for "sharing" access.

¹⁰³ See Jeffrey L. Seglin, *If Internet Connection Is Open, Feel Free to Use It*, The Columbus Dispatch, Feb. 26, 2006.

¹⁰⁴ The California statute reads in relevant part, "(a) A device that includes an integrated and enabled wireless access point, such as a premises-based wireless network router or wireless access bridge, that is for use in a small office, home office, or residential setting and that is sold as new in this state for use in a small office, home office, or residential setting shall be manufactured to comply with one of the following: (1) Include in its software a security warning that comes up as part of the configuration process of the device. The warning shall advise the consumer how to protect his or her wireless network connection from unauthorized access. This requirement may be met by providing the consumer with instructions to protect his or her wireless network connection from unauthorized access, which may refer to a product manual, the manufacturer's Internet Web site, or a consumer protection Internet Web site that contains accurate information advising the consumer on how to protect his or her wireless network connection from unauthorized access; (2) Have attached to the device a temporary warning sticker that must be removed by the consumer in order to allow its use. The warning shall advise the consumer how to protect his or her wireless network connection from unauthorized access. This requirement may be met by advising the consumer that his or her wireless network connection may be accessible by an unauthorized user and referring the consumer to a product manual, the manufacturer's Internet Web site, or a consumer protection Internet Web site that contains accurate information advising the consumer on how to protect his or her wireless network connection from unauthorized access." Cal. Bus. & Prof. Code Sec. 22948.6 (2008).

VI. CONCLUSION

Wi-Fi technology is prevalent, constantly improving and has changed the way we as a society view computing and interconnectivity via the Internet. The convenience it provides to computer users is a boon to online communication, whether commercial or social. However, near universal Wi-Fi coverage creates many novel legal issues. As Wi-Fi technology grows at an exponential rate, the law struggles to keep up. Delays in developing social and legal norms regarding Wi-Fi technology have created uncertainty in its use, including the phenomena of piggybacking and war-driving. The proliferation of Wi-Fi technology among unsophisticated network owners has contributed to the problem of access ambiguity, since most owners fail to secure their networks out of ignorance or convenience. Roaming Wi-Fi users, therefore, are given little direction in the proper legal and ethical interpretation of an “open” Wi-Fi signal. The crux of the issue seems to be the lack of universal interpretation of an unsecured Wi-Fi network vis-à-vis the owner’s consent to access. By leaving a Wi-Fi connection unsecured, does the owner intend for others to use it? Is access authorized absent some notice or measure of restriction? In some ways, this issue is a microcosm of the larger debate concerning access to computers and information in the age of interconnectivity. Philosophically, some believe that the Internet should be kept as accessible as possible to allow for collaboration and cooperation, as it was originally intended. Others feel that their personal computers and electronic data represent personal property, in which they expect privacy.

Most of the existing law relative to roaming Wi-Fi access was not developed with piggybacking and war-driving in mind. As discussed above, federal law, including the CFAA, may be interpreted to prohibit such “unauthorized” computer use, but problems with the concepts of “intent,” “access” and “damage” abound in relation to casual, roaming Wi-Fi use. State statutes regulating computer access are mostly imitations of the CFAA, but a few have anticipated the existence of widespread Wi-Fi networks. A review of the state statutory law reveals a split, similar to that in society, of who should be responsible for insuring authority for network access – the computer user or the network owner. The legal questions raised by piggybacking and war-driving likely will not be answered until or unless society itself settles on how to view access to another’s Wi-Fi network.

APPENDIX: STATE STATUTES' APPLICABILITY TO PIGGYBACKING

STATE	STATUTE	STATUTORY LANGUAGE	APPLICATION TO PIGGYBACKING
Alabama	Alabama Code Title 13A Article 5 Alabama Computer Crime Act.	Section 13A-8-102. Offenses against intellectual property. (a) Whoever willfully, knowingly, <i>and</i> without authorization or without reasonable grounds to believe that he or she has such authorization, attempts or achieves access...to a computer, computer system, or computer network commits an offense against intellectual property.	Not Applicable
Alaska	Alaska Statutes Sec. 11.46.200. Theft of services.	(a) A person commits theft of services if . . . (3) the person obtains the use of computer time, a computer system, a computer program, a computer network, or any part of a computer system or network, with reckless disregard that the use by that person is unauthorized . Sec. 11.46.484. Criminal mischief in the fourth degree. (a) A person commits the crime of criminal mischief in the fourth degree if, having no right to do so or any reasonable ground to believe the person has such a right: (3) the person knowingly accesses a computer, computer system, computer program, computer network, or part of a computer system or network;	Burden on Network User to establish authority
Arizona	Ariz. Rev. Stat. § 13-2316 Computer Tampering	A. A person who <i>acts without authority</i> or who exceeds authorization of use commits computer tampering by: 8. Knowingly accessing any computer, computer system or network or any computer software, program or data that is contained in a computer, computer system or network.	Not Applicable
Arkansas	Ark. Code 5-41-104. Computer trespass.	(a) A person commits computer trespass if the person intentionally and without authorization accesses, alters, deletes, damages, destroys, or disrupts any computer, computer system, computer network, computer program, or data.	Burden on Network User to establish authority
California	CAL. PENAL CODE § 502 (c)	Except as provided in subdivision (h), any person who commits any of the following acts is guilty of a public offense: (7) Knowingly <i>and</i> without permission accesses or causes to be accessed any computer, computer system, or computer network.	Burden on Network User to establish authority
Colorado	COLO. REV. STAT. § 18-5.5- 102	A person commits computer crime if the person knowingly: (a) Accesses a computer, computer network, or computer system or any part thereof without authorization; exceeds authorized access to a computer, computer network...or any part thereof without authorization or in excess of authorized access; 18-5.5-101. Definitions. (1) "Authorization" means the express consent of a person which may include an employee's job description to use said person's computer, computer network, computer program, computer software, computer system, property, or services as those terms are defined in this section.	Burden on Network Owner to provide notice of restricted access

Connecticut	CONN. GEN. STAT. Sec. 53a-251. Computer crime.	<p>(b) Unauthorized access to a computer system. (1) A person is guilty of the computer crime of unauthorized access to a computer system when, <i>knowing that he is not authorized to do so</i>, he accesses or causes to be accessed any computer system without authorization. (2) It shall be an affirmative defense to a prosecution for unauthorized access to a computer system that: (A) The person reasonably believed that the owner of the computer system, or a person empowered to license access thereto, had authorized him to access; (B) the person reasonably believed that the owner of the computer system, or a person empowered to license access thereto, would have authorized him to access without payment of any consideration; or (C) the person reasonably could not have known that his access was unauthorized.</p> <p>(c) Theft of computer services. A person is guilty of the computer crime of theft of computer services when he accesses or causes to be accessed or otherwise uses or causes to be used a computer system with the intent to obtain unauthorized computer services.</p>	Burden on Network Owner to provide notice of restricted access
Delaware	Del. Code § 932. Unauthorized access.	<p>§ 932. A person is guilty of the computer crime of unauthorized access to a computer system when, <i>knowing that the person is not authorized to do so</i>, the person accesses or causes to be accessed any computer system without authorization.</p> <p>§ 933. A person is guilty of the computer crime of theft of computer services when the person accesses or causes to be accessed or otherwise uses or causes to be used a computer system <i>with the intent to obtain unauthorized computer services</i>, computer software or data... (2) That person intentionally or recklessly and without authorization: (b). Interrupts or adds data to data residing within a computer system.</p>	Burden on Network Owner to provide notice of restricted access
District of Columbia		None Found	Not Applicable
Florida	FLA. STAT. § 815.06	(1) Whoever willfully, knowingly, and without authorization: (a) Accesses or causes to be accessed any computer, computer system, or computer network;	Burden on Network User to establish authority
Georgia	GA. CODE § 16-9-92 (18) ;§ 16-9-93.	<p>§ 16-9-92 (18) "Without authority" includes the use of a computer or computer network in a manner that exceeds any right or permission granted by the owner of the computer or computer network.</p> <p>§ 16-9-93. Computer crimes defined; exclusivity of article; civil remedies; criminal penalties... (b) <i>Computer Trespass</i>. Any person who uses a computer or computer network <i>with knowledge that such use is without authority</i> and with the intention of: (1) Taking or appropriating any property of another, whether or not with the intention of depriving the owner of possession...</p>	Not Applicable

Hawaii	HAW. REV. STAT. §708-890-1 Definitions	<p>§708-890. "Access" means to gain entry to, instruct, communicate with, store data in, retrieve data from, or otherwise make use of any resources of a computer, computer system, or computer network. ... "Without authorization" means without the permission of or in excess of the permission of an owner, lessor, or rightful user or someone licensed or privileged by an owner, lessor, or rightful user to grant the permission.</p> <p>§708-891. Computer fraud in the first degree. (1) A person commits the offense of computer fraud in the first degree if the person <i>knowingly, and with intent to defraud, accesses a computer without authorization</i> and, by means of such conduct, obtains or exerts control over the property of another.</p>	Not Applicable
Idaho	Idaho Code title 18-2202. COMPUTER CRIME.	(3) Any person who knowingly <i>and</i> without authorization uses, accesses, or attempts to access any computer, computer system, or computer network ... commits computer crime.	Burden on Network User to establish authority
Illinois	Illinois Compiled Statutes 720 ILCS 5/16D-3 Computer Tampering	(a) A person commits the offense of computer tampering when he knowingly <i>and</i> without the authorization of a computer's owner, as defined in Section 15-2 of this Code, or in excess of the authority granted to him: (2) Accesses or causes to be accessed a computer or any part thereof, a computer network, or a program or data, and obtains data or services; (a-10) For purposes of subsection (a), accessing a computer network is deemed to be with the authorization of a computer's owner if: (1) the owner authorizes patrons, customers, or guests to access the computer network and the person accessing the computer network is an authorized patron, customer, or guest and complies with all terms or conditions for use of the computer network that are imposed by the owner; or (2) the owner authorizes the public to access the computer network and the person accessing the computer network complies with all terms or conditions for use of the computer network that are imposed by the owner.	<p>Burden on Network User to establish authority</p> <p>[One of the few statutes that anticipates network access as a service offered to patrons - this statute still appears to place the burden on the user to ascertain knowledge that the user is authorized]</p>
Indiana	Indiana Code IC 35-43-2-3	(b) A person who knowingly or intentionally accesses: (1) a computer system; (2) a computer network; or (3) any part of a computer system or computer network; without the consent of the owner of the computer system or computer network, or the consent of the owner's licensee, commits computer trespass, a Class A misdemeanor.	<p>Burden on Network User to establish authority</p> <p>["Knowingly" does not modify "without consent"]</p>
Iowa	Iowa Code § 716.6B Unauthorized computer access	1. A person who knowingly <i>and</i> without authorization accesses a computer, computer system, or computer network commits the following: (c). A simple misdemeanor for any access which is not an aggravated or serious misdemeanor.	Burden on Network Owner to provide notice of restricted access
Kansas	Kansas Statute 21-3755	(b) (1) Computer crime is: (A) Intentionally and without authorization accessing and damaging, modifying, altering, destroying, copying, disclosing or taking possession of a computer, computer system, computer network or any other property;	Not Applicable

Kentucky	Kentucky Revised Statute 434.845 Unlawful access to a computer.	<p>434.851 Unlawful access in the third degree. (1) A person is guilty of unlawful access in the third degree when he or she, without the effective consent of the owner, knowingly and willfully, directly or indirectly accesses...any computer... computer system, computer network, or any part thereof, which results in the loss or damage of less than three hundred dollars (\$300).</p> <p>434.853 Unlawful access in the fourth degree. (1) A person is guilty of unlawful access in the fourth degree when he or she, without the effective consent of the owner, knowingly and willfully, directly or indirectly accesses... any computer... computer system, computer network, or any part thereof, which does not result in loss or damage.</p>	Burden on the Network User to establish authority
Louisiana	Louisiana Revised Statutes § 14: 73.5 Computer Tampering	<p>§14:73.7. A. Computer tampering is the intentional commission of any of the actions enumerated in this Subsection when that action is taken knowingly <i>and</i> without the authorization of the owner of a computer: (1) Accessing or causing to be accessed a computer or any part of a computer or any program or data contained within a computer.</p> <p>B. For purposes of this Section: (1) Actions which are taken without authorization include actions which intentionally exceed the limits of authorization. (2) If an owner of a computer has established a confidential or proprietary code which is required in order to access a computer, and that code has not been issued to a person, and that person uses that code to access that computer or to cause that computer to be accessed, that action creates a rebuttable presumption that the action was taken without authorization or intentionally exceeded the limits of authorization.</p>	Burden on Network User to establish authority
Maine	ME. REV. STAT. tit. 17-A, § 431	<p>§431. (11) " "Not authorized" and "unauthorized" mean not having consent or permission of the owner, or person licensed or authorized by the owner to grant consent or permission, to access or use any computer resource, or accessing or using any computer resource in a manner exceeding the consent or permission. "</p> <p>§432. Criminal invasion of computer privacy. 1) A person is guilty of criminal invasion of computer privacy if the person intentionally accesses any computer resource <i>knowing that the person is not authorized</i> to do so.</p>	Burden on Network Owner to provide notice of restricted access
Maryland	Maryland Code § 7-302. Unauthorized access to computers and related material.	<p>§ 7-302. (1) A person may not intentionally, willfully, <i>and without authorization access</i>, attempt to access, cause to be accessed, or exceed the person's authorized access to all or part of a computer network... . (2) A person may not commit an act prohibited by paragraph (1) of this subsection with the intent to: (i) cause the malfunction or interrupt the operation of all or any part of a computer, computer network, computer control language, computer software, computer system, computer services, or computer data.</p>	Burden on the Network User to establish authority
Massachusetts	MASS. GEN. LAWS Ch. 266, Sec. 120F - Unauthorized access to computer system; penalties	Whoever, without authorization, knowingly accesses a computer system by any means, or after gaining access to a computer system by any means <i>knows that such access is not authorized</i> and fails to terminate such access, shall be punished by imprisonment in the house of correction for not more than thirty days or by a fine of not more than one thousand dollars, or both. The requirement of a password or other authentication to gain access shall constitute notice that access is limited to authorized users.	Burden on Network Owner to provide notice of restricted access

Michigan	Michigan Law 752.795	752.795 Prohibited conduct. Sec. 5. A person shall not intentionally and without authorization or by exceeding valid authorization do any of the following: (a) Access or cause access to be made to a computer program, computer, computer system, or computer network to acquire, alter, damage, delete, or destroy property or otherwise use the service of a computer program, computer, computer system, or computer network.	Burden on Network User to establish authority
Minnesota	MINN. STAT. § 609.87	§609.87 "Subd. 2a. Authorization. "Authorization" means with the permission of the owner of the computer, computer system, computer network, computer software, or other property. Authorization may be limited by the owner by: (1) giving the user actual notice orally or in writing; (2) posting a written notice in a prominent location adjacent to the computer being used; or (3) using a notice displayed on or announced by the computer being used."	Burden on Network User to establish authority
Mississippi	Mississippi Code § 97-45-1	§ 97-45-3. Computer fraud; penalties. (1) Computer fraud is the accessing or causing to be accessed of any computer, computer system, computer network or any part thereof with the intent to: (a) Defraud;	Not applicable
Missouri	Missouri Code § 569.099. Tampering with computer users, penalties.	1. A person commits the crime of tampering with computer users if he knowingly <i>and</i> without authorization or without reasonable grounds to believe that he has such authorization: (1) Accesses or causes to be accessed any computer, computer system, or computer network; or (2) Denies or causes the denial of computer system services to an authorized user of such computer system services.	Burden on Network User to establish authority
Montana	Montana Code § 45-6-311.	Unlawful use of a computer. (1) A person commits the offense of unlawful use of a computer if the person knowingly or purposely: (a) obtains the use of any computer, computer system, or computer network without consent of the owner;	Burden on the Network Owner to provide notice of restricted access
Nebraska	NEB. REV. STAT. § 28-1343.01	28-1343.01. Unauthorized computer access; penalty (1) A person commits the offense of unauthorized computer access if the person intentionally and without authority penetrates a computer security system.	Burden on Network User to establish authority
Nevada	NRS 205.477 Unlawful interference with or denial of access to or use of computers; unlawful use or access of computers; affirmative defense.	205.477. 2). Except as otherwise provided in subsections 3 and 4, a person who knowingly, willfully <i>and</i> without authorization uses, causes the use of, accesses, attempts to gain access to or causes access to be gained to a computer, system, network, telecommunications device, telecommunications service or information service is guilty of a misdemeanor. 4. It is an affirmative defense to a charge made pursuant to this section that at the time of the alleged offense the defendant reasonably believed that: (a) He was authorized to use or access the computer, system, network... and such use or access by the defendant was within the scope of that authorization; or (b) The owner or other person authorized to give consent would authorize the defendant to use or access the computer, system, network... or information service.	Burden on Network User to establish authority

New Hampshire	N.H. REV. STAT. § 638:16 II	<p>638:16II. "Authorization" means the express or implied consent given by a person to another to access or use said person's computer, computer network, computer program, computer software, password, identifying code, or personal identification number.</p> <p>§ 638:17 I. A person is guilty of the computer crime of unauthorized access to a computer or computer network when, knowing that the person is not authorized to do so, he or she knowingly accesses or causes to be accessed any computer or computer network without authorization. It shall be an affirmative defense to a prosecution for unauthorized access to a computer or computer network that: (a) The person reasonably believed that the owner of the computer or computer network, or a person empowered to license access thereto, had authorized him or her to access; or (b) The person reasonably believed that the owner of the computer or computer network, or a person empowered to license access thereto, would have authorized the person to access without payment of any consideration; or (c) The person reasonably could not have known that his or her access was unauthorized.</p>	Burden on Network Owner to provide notice of restricted access
New Jersey	N.J. STAT. § 2C:20-23(q)	<p>"Authorization" means permission, authority or consent given by a person who possesses lawful authority to grant such permission, authority or consent to another person to access, operate, use...a computer, computer network... An actor has authorization if a reasonable person would believe that the act was authorized.</p> <p>2C:20-25 Computer criminal activity; degree of crime; sentencing. 4. A person is guilty of computer criminal activity if the person purposely or knowingly <i>and</i> without authorization, or in excess of authorization: a). Accesses any... computer, computer system or computer network;</p>	Burden on Network User to establish authority
New Mexico	N.M. Stat. 30-45-5	<p>30-45-5. Unauthorized computer use. A person who knowingly, willfully <i>and</i> without authorization, or having obtained authorization, uses the opportunity the authorization provides for purposes to which the authorization does not extend, directly or indirectly accesses... any computer, computer network, computer property, computer service, computer system or any part thereof, when the: A). damage to the computer property or computer service has a value of two hundred fifty dollars (\$250) or less, is guilty of a petty misdemeanor.</p>	Burden on Network User to establish authority

New York	NY State Penal Code § 156.00(8)	<p>NY State Penal Code § 156.00(8) "Without authorization" means to use or to access a computer... or computer network without the permission of the owner or lessor or someone licensed or privileged by the owner or lessor where such person knew that his or her use or access was without permission or after actual notice to such person that such use or access was without permission. It shall also mean the access of a computer service by a person without permission where such person knew that such access was without permission or after actual notice to such person, that such access was without permission. Proof that such person used or accessed a computer, computer service or computer network through the knowing use of a set of instructions, code or computer program that bypasses, defrauds or otherwise circumvents a security measure installed or used with the user's authorization on the computer, computer service or computer network shall be presumptive evidence that such person used or accessed such computer, computer service or computer network without authorization.</p> <p>§ 156.05 Unauthorized use of a computer. A person is guilty of unauthorized use of a computer when he or she knowingly uses, causes to be used, or accesses a computer, computer service, or computer network without authorization.</p>	<p>Burden on Network Owner to provide notice of restricted access</p> <p>[The Legislature has imposed the additional requirement that the computer be "equipped or programmed with any device or coding system, a function of which is to prevent the unauthorized use of a computer or computer system.]</p>
North Carolina	N. C. Statutes § 14-454 .	<p>§ 14-454. Accessing computers. (b) Any person who willfully <i>and</i> without authorization , directly or indirectly, accesses or causes to be accessed any computer, computer program, computer system, or computer network for any purpose other than those set forth in subsection (a)[by false pretenses] above, is guilty of a Class 1 misdemeanor.</p> <p>§ 14-453. Definitions. As used in this Article, unless the context clearly requires otherwise, the following terms have the meanings specified: (1a) "Authorization" means having the consent or permission of the owner, or of the person licensed or authorized by the owner to grant consent or permission to access a computer, computer system, or computer network in a manner not exceeding the consent or permission.</p>	Burden on Network User to establish authority
North Dakota	North Dakota Code 12.1-06.1-08 . Computer fraud - Computer crime - Classification - Penalty.	<p>2. A person commits computer crime by intentionally <i>and</i> either in excess of authorization given or without authorization gaining or attempting to gain access to...any computer, computer system, or computer network... . A person who commits computer crime is guilty of a class A misdemeanor.</p> <p>3. In addition to any other remedy available, the owner or lessee of a computer, computer system, computer network, or any part of the computer, computer system, or computer network may bring a civil action for damages, restitution, and attorney's fees for damages incurred as a result of the violation of this section.</p>	Burden on Network User to establish authority
Ohio	OHIO REV. CODE Chapt 2913	<p>§ 2913.04. (B) No person, in any manner and by any means, including, but not limited to, computer hacking, shall knowingly gain access to, attempt to gain access to, or cause access to be gained to any computer, computer system, computer network... without the consent of, or beyond the scope of the express or implied consent of, the owner of the computer, computer system, computer network...or other person authorized to give consent.</p> <p>§ 2913.03 (C) The following are affirmative defenses to a charge under this section: (1) At the time of the alleged offense, the actor, though mistaken, reasonably believed that the actor was authorized to use or operate the property.(2) At the time of the alleged offense, the actor reasonably believed that the owner or person empowered to give consent would authorize the actor to use or operate the property.</p>	Burden on Network User to establish authority

Oklahoma	Oklahoma §21 - 1953. Prohibited acts.	A. It shall be unlawful to: (1). Willfully, <i>and</i> without authorization , gain or attempt to gain access to and damage, modify, alter, delete, destroy, copy, make use of , disclose or take possession of a computer, computer system, computer network or any other property;... (5). Willfully and without authorization use or cause to be used computer services ;... (7). Willfully and without authorization provide or assist in providing a means of accessing a computer, computer system or computer network in violation of this section;	Burden on Network User to establish authority [Section 7 could be applied to War-driving if broadly construed]
Oregon	Oregon 164.377 Computer crime	(4) Any person who knowingly <i>and</i> without authorization uses, accesses or attempts to access any computer, computer system, computer network... commits computer crime.	Burden on Network User to establish authority
Pennsylvania	Pennsylvania Statute Title 18 § 3933 . Unlawful use of computer.	(a) Offense defined.-- A person commits the offense of unlawful use of a computer if he, whether in person, electronically or through the intentional distribution of a computer virus: (1) intentionally <i>and</i> without authorization accesses , alters, interferes with the operation of, damages or destroys any computer, computer system, computer network...or any part thereof;	Burden on Network User to establish authority
Rhode Island	R.I. Gen Laws § 11-52-1, §11-52-3	§ 11-52-3 Intentional access, alteration, damage, or destruction. - Whoever, intentionally, without authorization, and for fraudulent or other illegal purposes, directly or indirectly, accesses... any computer, computer system... or computer network shall be guilty of a felony and shall be subject to the penalties set forth in § 11-52-5.	Not Applicable
South Carolina	S.C. CODE § 16-16-10(l)	16-16-20 (1) It is unlawful for a person to willfully, knowingly, maliciously, and without authorization or for an unauthorized purpose to: (a) directly or indirectly access or cause to be accessed a computer, computer system, or computer network for the purpose of: (i) devising or executing a scheme or artifice to defraud; (ii) obtaining money, property, or services by means of false or fraudulent pretenses, representations, promises; or (iii) committing any other crime.	Not Applicable
South Dakota	S.D. Codified Laws §43-43B-1.	43-43B-1. Unlawful uses of computer system. A person is guilty of unlawful use of a computer system, software, or data if the person: (1) Knowingly obtains the use of, accesses or exceeds authorized access to, a computer system, or any part thereof, without the consent of the owner;	Burden on Network User to establish authority

Tennessee	Tennessee Code § 39-14-601.	<p>Part definitions. (1) "Access" means to approach, instruct, communicate, or connect with, store data in, retrieve or intercept data from, or otherwise make use of any resources of a computer, computer system, or computer network, or information exchanged from any communication between computers or authorized computer users and electronic, electromagnetic, electrochemical, acoustic, mechanical, or other means; (2) "Authorization" means any and all forms of consent, including both implicit and explicit consent;</p> <p>§ 39-14-602. Violations - Penalties. - (b) Whoever intentionally and without authorization, directly or indirectly: (1) Accesses any computer, computer system, or computer network commits a Class C misdemeanor. Operating a computer network in such a way as to allow anonymous access to that network shall constitute implicit consent to access under this part;</p>	Burden on Network Owner to provide notice of restricted access [seems to contain an exception for unsecured networks]
Texas	Tex. Bus. & Com. Code §33	<p>Sec. 33.02. BREACH OF COMPUTER SECURITY. (a) A person commits an offense if the person knowingly accesses a computer, computer network, or computer system without the effective consent of the owner.</p> <p>Sec. 33.01. DEFINITIONS. (12) "Effective consent" includes consent by a person legally authorized to act for the owner. Consent is not effective if: (A) induced by deception, as defined by Section 31.01, or induced by coercion; (B) given by a person the actor knows is not legally authorized to act for the owner; (C) given by a person who by reason of youth, mental disease or defect, or intoxication is known by the actor to be unable to make reasonable property dispositions; (D) given solely to detect the commission of an offense; or (E) used for a purpose other than that for which the consent was given.</p>	Burden on Network Owner to provide notice of restricted access
Utah	Utah Code §76-6-703	<p>76-6-703. Computer crimes and penalties. (2) (a) Except as provided in Subsection (2)(b), a person who intentionally or knowingly <i>and</i> without authorization gains or attempts to gain access to a computer, computer network...under circumstances not otherwise constituting an offense under this section is guilty of a class B misdemeanor.</p> <p>76-6-702 . Definitions. As used in this part: (1) "Access" means to directly or indirectly use, attempt to use, instruct, communicate with, cause input to, cause output from, or otherwise make use of any resources of a computer, computer system, computer network, or any means of communication with any of them. (2) "Authorization" means having the express or implied consent or permission of the owner, or of the person authorized by the owner to give consent or permission to access a computer, computer system, or computer network in a manner not exceeding the consent or permission.</p>	Burden on Network User to establish authority
Vermont	Title 13 Chapt 87 § 4102. Unauthorized access	A person who knowingly <i>and</i> intentionally <i>and</i> without lawful authority, accesses any computer, computer system, computer network, computer software, computer program, or data contained in such computer, computer system, computer program, or computer network shall be imprisoned not more than six months or fined not more than \$500.00, or both. (Added 1999, No. 35, § 1.)	Burden on Network User to establish authority
Virginia	Va. Code Ann. §18.2-152.3	<p>§ 18.2-152.3. Computer fraud; penalty. Any person who uses a computer or computer network, without authority and: 3. Converts the property of another; is guilty of the crime of computer fraud.</p> <p>§ 18.2-152.6. Theft of computer services; penalties. Any person who willfully obtains computer services without authority is guilty of the crime of theft of computer services, which shall be punishable as a Class 1 misdemeanor.</p>	Burden on Network Owner to provide notice of restricted access

Washington	RCW 9A.52.110 Computer trespass in the first degree.	RCW 9A.52.120 Computer trespass in the second degree. (1) A person is guilty of computer trespass in the second degree if the person, without authorization, intentionally gains access to a computer system or electronic database of another under circumstances not constituting the offense in the first degree.	Burden on Network User to establish authority
West Virginia	W. VA. CODE §61-3C-3.	§61-3C-4. Computer fraud; access to Legislature computer; criminal penalties. (a) Any person who, knowingly and willfully, directly or indirectly, accesses or causes to be accessed any computer, computer services or computer network for the purpose of: (2) obtaining money, property or services by means of fraudulent pretenses, representations or promises is guilty of a felony...	Not Applicable
Wisconsin	Wisconsin Statutes 943.70 (3) Offenses against computers	(a) Whoever willfully, knowingly <i>and</i> without authorization does any of the following may be penalized as provided in par. (b) : 2. Destroys, uses, takes or damages a computer, computer system, computer network or equipment or supplies used or intended to be used in a computer, computer system or computer network.	Burden on Network User to establish authority
Wyoming	Wyoming Statute 6-3-502. Crimes against intellectual property.	(a) A person commits a crime against intellectual property if he knowingly <i>and</i> without authorization: (i) Modifies data, programs or supporting documentation residing or existing internal or external to a computer, computer system or computer network;	Not Applicable

DOES THE AGE DISCRIMINATION IN EMPLOYMENT ACT APPLY TO THE EMPLOYMENT ACTIVITIES OF THE AMERICAN INDIAN TRIBES?

JENNIFER BARGER JOHNSON*

I. INTRODUCTION

In *Equal Employment Opportunity Commission v. Cherokee Nation*,¹ the Tenth Circuit Court of Appeals declined to give the Equal Employment Opportunity Commission (EEOC) jurisdictional authority over the Cherokee Nation of Oklahoma pursuant to the Age Discrimination in Employment Act (ADEA).² This court decided enforcement of the ADEA would directly interfere with the tribe's treaty-protected right of self-governance.³

This note examines the concerns associated when relating statutes of general applicability to the employment actions of the American Indian tribes. A historical perspective will examine the limitations of American Indian sovereignty and treaty rights to assist in interpreting the current law. A brief examination of the two established opinions on this issue and a summary of decisions in each line of cases will illustrate where the federal courts are moving in this area of American Indian law.

II. STATEMENT OF THE CASE

On June 27, 1986, precipitated by a 28 percent reduction in funding for the fiscal year of 1987, the Health and Human Services Director of the Cherokee Nation of Oklahoma conducted a reduction in force of all Community Health Representatives currently employed.⁴ Pursuant to Chapter 10 of the Cherokee Nation's Personnel Policy on non-disciplinary separation, the tribe's Health and Human Services Department anonymously rated all employees in this job category. However, to avoid any implication of age discrimination, all employees over the age of 40 were given a multiplication factor of two.⁵

At the time, the Cherokee Nation employed 37 Community Health Representatives. Of this number, 24 were over the age of 40. Lucille Gossett, who was 61 at the time, was one of four employees discharged because of the reduction.⁶ Prior to her discharge,

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¹ 871 F.2d 937 (10th Cir. 1989).

² 29 U.S.C. sec. 621-634 (1988).

³ 871 F.2d at 938.

⁴ Appellant's Brief at 6, *EEOC v. Cherokee Nation* (No. 88-2092).

⁵ *Id.*

⁶ *Id.* At 6-7.

Gossett was employed at the tribe's Redbird Smith Indian Health Services Clinic in Sallisaw, Oklahoma. As a Community Health Representative, Gossett was responsible for opening and closing the clinic making appointments, taking telephone calls, and assisting the doctor with initial tasks, such as blood pressure readings.⁷

Gossett first appealed her discharge to the Principal Chief's office, as provided in the Cherokee Nation's personnel policy.⁸ This policy provides that the Chief has the authority to approve, disapprove, modify or rescind the dismissal. Decisions of the Chief are final in cases involving employees with less than one year of tribal employment. However, those with more than one year of tribal employment may appeal the Chief's decision to the tribe's Judicial Appeals Tribunal.⁹

After a full review, the Chief recognized Gossett's discharge as a non-disciplinary action demanded by a reduction in funding. Further, the Chief determined the tribe had fairly and impartially conducted Gossett's discharge. Following the Chief's decision, Gossett appealed to the Cherokee Nation's Judicial Appeals Tribunal and on March 13, 1987 a formal hearing was held. The Tribunal's findings were consistent with those of the Chief, and no age discrimination was found in Gossett's case.¹⁰

On August 20, 1986, Gossett filed a charge with the EEOC's Oklahoma City area office alleging her discharge by the Cherokee Nation was based on her age.¹¹ Eight days later, the EEOC informed the Cherokee Nation of its support for Gossett's age discrimination claim.¹² Subsequently the EEOC issued a questionnaire and request for information and records to the Cherokee Nation.¹³ While the Cherokee Nation initially produced some records which directly applied to Gossett's case, the tribe later demanded an explanation from the EEOC concerning its basis for tribal jurisdiction.¹⁴

The matter before the Tenth Circuit arose when the EEOC attempted to judicially enforce an administrative *subpoena duces tecum* directing the Cherokee Nation to produce several documents.¹⁵ Along with requests for the identity of laid-off employees, the EEOC requested the personnel records and performance evaluations of similarly-situated individuals, and the names of Gossett's supervisors and evaluators.¹⁶ When the tribe informed the EEOC of its intended noncompliance, the Commission filed an application with the U.S. government to enforce its subpoena pursuant to the ADEA.¹⁷

The United States District Court for the Eastern District of Oklahoma, in enforcing the subpoena, concluded that the enforcement did not "infringe upon any attributes of tribal self-government or recognized concepts of tribal sovereign immunity," and that "[t]he enactment of the ADEA, with no exception for Indian tribes, is a valid exercise of Congress's plenary authority over [American] Indian affairs."¹⁸ The Cherokee Nation

⁷ Appellee's Brief at 2, *EEOC v. Cherokee Nation* (No. 88-2092).

⁸ Appellant's Brief at 5, *EEOC v. Cherokee Nation* (No. 88-2092).

⁹ *Id.* at 7.

¹⁰ Appellant's Brief at 5, *EEOC v. Cherokee Nation* (No. 88-2092).

¹¹ *Id.* at 2.

¹² *Id.* at 2-3.

¹³ *Id.* at 3.

¹⁴ *Id.* at 7-8.

¹⁵ *EEOC v. Cherokee Nation*, 871 F.2d at 937.

¹⁶ Appellee's Brief at 3, *EEOC v. Cherokee Nation* (No. 88-2092).

¹⁷ *Id.* at 4.

¹⁸ *EEOC v. Cherokee Nation*, 871 F.2d at 938.

appealed this decision to the Tenth Circuit Court of Appeals, which stayed the enforcement of the EEOC's administrative subpoena pending the Tenth Circuit's decision.¹⁹ Essentially, the parties asked the Tenth Circuit to decide whether the EEOC had jurisdictional authority over the Cherokee Nation pursuant to the ADEA.

III. HISTORY OF THE ISSUE

In determining whether laws of general applicability give jurisdictional authority over the American Indian tribes, an examination of tribal sovereign immunity's interrelationship with federal limitations on tribal sovereignty, treaty rights, and the nature of the laws of general applicability is important. The federal courts have long recognized tribal sovereignty through treaties, statutes, acts, and other federal laws, the courts have begun to have problems interpreting the federal government's intent regarding sovereign rights.²⁰

A. TRIBAL SOVEREIGNTY

As early as 1831, the United States Supreme Court recognized that a right to self-government was an essential part of the continuing recognition of tribal sovereignty.²¹ In *Cherokee Nation v. Georgia*, Chief Justice Marshall drafted an opinion which first recognized the Cherokee Nation as successful in demonstrating that the tribe was a "distinct, independent political community" with retention of original natural rights established by their unique status as Indian Nations that could manage and govern themselves.²² The next year, the Supreme Court recognized that the federal government's relationship with the American Indian tribes was similar to that England shared with the tribes. In making this generalization, Justice Marshall affirmed recognition of the Cherokee Nation as a "distinct community" which was not subject to the laws of the state of Georgia.²³ Most commentators have credited this language as the foundation of tribal jurisdictional law.

Because tribal self-government and sovereignty predate the existence the United States, the tribes are not held accountable to every federal rule regarding these issues.²⁴ However, tribal sovereignty is limited by its ultimate dependence on the broad plenary powers of Congress. For example, Congress has the authority to abrogate American Indian treaties by enacting federal laws that promote sufficiently important federal interests.²⁵

¹⁹ Appellee's Brief at 5, *EEOC v. Cherokee Nation* (No. 88-2092).

²⁰ See generally, Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 26 U.C. DAVIS L.REV. 85 (Fall 1991).

²¹ *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

²² *Cherokee Nation v. Georgia*, 30 U.S. at 16.

²³ *Worcester*, 31 U.S. at 561.

²⁴ *Cherokee Nation v. Georgia*, 30 U.S. at 16; *Worcester*, 31 U.S. at 557; *Talton v. Mayes*, 163 U.S. 376, 379-380 (1896).

²⁵ *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).

When a tribe's actions are reasonably designed to further the cause of tribal self-government and to make the Bureau of Indian Affairs (BIA) more responsive to the needs of its constituent groups was involved, the federal courts usually uphold the tribes' right to self governance.²⁶ For example, in *Morton v. Mancari*,²⁷ the Supreme Court upheld a statutory American Indian preference for employment by the BIA. The Court relied upon the statute's purpose in aiding Indian self-government, and rejected the claim of unconstitutional discrimination.²⁸ "Literally every piece of legislation" regarding American Indians, operates to single out the group for special treatment. Overriding such legislation would jeopardize the "solemn commitment" of the federal government toward the American Indians.²⁹ In note 24 of *Mancari*, Justice Blackmun reminded the federal courts that the employment preference was directed at a "federal recognized" tribe, more often seen as a "political" rather than "racial" group.³⁰

1. TRIBAL SOVEREIGN IMMUNITY

Tribal sovereign immunity "recognizes the sovereignty of [American Indian] tribes and seeks to preserve their autonomy, while protecting the tribes from suits in federal and state courts."³¹ The United States Supreme Court has stated unequivocally that American Indian tribes possess immunity from suit that sovereign powers traditionally enjoy. However, tribal sovereign immunity is not absolute; it can be waived in one of two ways: (1) by tribal consent,³² or (2) by congressional action.³³ The federal courts have also determined that waivers of sovereign immunity "cannot be implied but must be unequivocally expressed."³⁴

2. FEDERAL LIMITATIONS ON TRIBAL SOVEREIGNTY

The right of tribal sovereignty is ultimately dependent on and subject to the broad powers of Congress.³⁵ For example, when the exercise of tribal sovereignty would be inconsistent with an overriding national interest, federal limitations on tribal sovereignty arise. Acts that may cause an overriding national interest include such inconsistencies as acts of the tribes to establish foreign relations; to alienate their lands to non-Indians without federal consent; to prosecute non-Indians without federal consent; or to prosecute non-Indians in tribal courts which do not accord the full protections of the federal Bill of

²⁶ *Morton v. Mancari*, 417 U.S. 535, 554 (1974).

²⁷ *Id.*

²⁸ *Id.* at 552.

²⁹ *Id.*

³⁰ *Id.* at 553, note 24.

³¹ *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1459 (10th Cir. 1989), citing *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 771 (D.C. Cir. 1986).

³² See *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980)(*en banc*), affirmed on other grounds, 455 U.S. 130 (1982).

³³ See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196 (1978); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

³⁴ *Martinez*, 436 U.S. at 58-59.

³⁵ *Bracker*, 448 U.S. at 143.

Rights.³⁶ Such acts may be sufficient to trigger federal limitations over tribal sovereignty.³⁷

B. ESTABLISHMENT OF NATIVE AMERICAN TREATY RIGHTS

Until 1871, when the federal government abandoned regulatory American Indian treaty-making, such treaties were used to adjust the relations between the federal government and the tribes.³⁸ Since the federal government had most of the bargaining power in treaty-making, the tribes were at a disadvantage. In facilitation of the federal trust relationship with the tribes, the Supreme Court established rules of construction for treaty-making that were amenable to American Indian interests. Though it is expressed that the rules of construction are to favor the tribes, when the courts find that the language of the treaty is clear, the federal government may still apply the law to the tribe despite its effect, even if unfavorable to the tribe.³⁹

In 1870, the United States Supreme Court – for the first time – allowed the abrogation of an American Indian treaty in the famous case of *The Cherokee Tobacco*.⁴⁰ Here, the federal government required two prominent Cherokees to abide by the 1868 federal tobacco excise tax, though the Cherokee Treaty of 1866 had provided tribal members a tax exemption for tobacco and other products. The Supreme Court declared that the general terms of the federal statute overrode the specific provisions of the treaty, and had sufficient federal interest of establishing uniform national revenue.⁴¹

One year later, the decision of *The Cherokee Tobacco* case and the congressional end of statutory treaty-making combined to form a general suspicion that American Indian treaties had little validity. However, that occurred in 1871, and more than one-hundred years later the federal government still enforces many American Indian treaties. Today, the equivalent to treaty-making still occurs with the individual American Indian tribes through agreements.

C. LAWS OF GENERAL APPLICATION

A law of general application is a law that covers all persons and entities which fall within the particular law's definitions of employers and employees. Certain laws of general application expressly exclude certain persons from the law's definition of an employee or an employer.⁴² Others remain silent as to particular parties and thus the courts must determine their applicability.⁴³

³⁶ *Merrion*, 455 U.S. at 153, citing *Washington v. Confederated Tribes of the Colville Indians Reservation*, 447 U.S. 134, 147 n. 13 (1980).

³⁷ *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 153.

³⁸ Robert N. Clinton, *et al.*, AMERICAN INDIAN LAW (1991).

³⁹ *Oregon Department of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985).

⁴⁰ 78 U.S. 616 (1870).

⁴¹ *Id.* at 621.

⁴² Title VII of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000e (b) (1982), as amended (Title VII provides an express exclusion of the Native American tribes from its definition of employer.); Americans with Disabilities Act, 42 U.S.C. sec. 12111-12213 (1988), (ADA extends to private employers and affords

Because many courts fail to expressly identify and evaluate whether an intrusion into a specific treaty right guaranteed by the federal government is involved, the question of automatic application of federal laws of general application is often confusing. When these failures occur, some read certain statements for their literal meaning and take them to apply to all cases involving this issue – regardless of a specific right in opposition.⁴⁴ For example, *Tuscarora* says the “general acts of Congress apply to [American Indians] as well as to others in the absence of a clear expression to the contrary.”⁴⁵ That statement can be interpreted out of context and misconstrued to apply in all situations with American Indian involvement, despite any treaty conflict.

The federal court should start with the assumption that laws of general application do apply to American Indians, unless infringement of a specific treaty right can be found. The second step is to analyze whether the law’s general application has violated an American Indian treaty protected right. When a treaty right is involved, the courts require some clear and specific congressional intent to limit treaty rights in the law itself or its legislative history.⁴⁶ Without a specific right, the law of general application is applicable to the tribes.⁴⁷

D. CONFLICTING OPINIONS

In employment law cases related to the tribes, the federal courts are asked to detect congressional intent regarding American Indians for law of general application. In 1960, the United States Supreme Court was faced with the question of whether a provision of the Federal Power Act, a law of general applicability, could authorize power companies to condemn fee lands owned by an American Indian tribe.⁴⁸ The rule announced in *Tuscarora* was that laws of application include all persons without regard to their heritage.⁴⁹

Although the interpretation of laws of general application does not sound too difficult, over the last twenty-five years, this issue has developed into two distinct lines of cases that can be reconciled. The Tenth Circuit decided that Congress must specifically intend for federal intrusion into tribal self-governance before the federal government will hold laws of general application against the tribes.⁵⁰ Alternatively, the Ninth Circuit has held

the same coverage as Title VII, including an express exclusion of the American Indians tribes from the employer category.); Rehabilitation Act of 1973, 29 U.S.C. secs. 791, 793, 794 (1988), (Rehabilitation Act’s employers are limited to the federal government, contractors with contracts of \$10,000 or more, and entities receiving federal grants.).

⁴³ Age Discrimination in Employment Act, 29 U.S.C. secs. 621-634.

⁴⁴ Clinton at 229, citing *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960).

⁴⁵ *Id.*

⁴⁶ See, e.g., *EEOC v. Cherokee Nation*, 871 F.2d 937; *Donovan v. Navajo Forest Products Industries*, 692 F.2d 709 (10th Cir. 1982).

⁴⁷ See, e.g., *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985); *United States v. Farris*, 624 F.2d 890, 893-894 (9th Cir. 1980), cert. denied, 449 U.S. 1111 (1981); *Tuscarora*, 362 U.S. at 120.

⁴⁸ *Tuscarora*, 362 U.S. at 116.

⁴⁹ *Id.*

⁵⁰ See generally, *Navajo Forest Products*, 692 F.2d 709.

that when Congress does not expressly exclude a particular group from the scope of a law of general application, then the particular group is included by default.⁵¹

1. NAVAJO FOREST PRODUCTS: PRESUMPTION OF INAPPLICABILITY

In 1978, the Supreme Court held that generally we should not interpret laws to allow a federal intrusion into tribal self-government unless Congress specifically intends for such interference.⁵² In deciding whether clear and plain intent to abrogate the treaty existed, the *Dion* court required “clear evidence” of congressional awareness of the effect that the intended action would have on particular American Indian treaty rights before Congress enacts the new law that makes a choice to resolve that conflict by abrogating the treaty.⁵³

In 1982, the Tenth Circuit found that the Occupational Safety and Health Act⁵⁴ (OSHA) was not applicable to a tribal business enterprise operating on the reservation because its enforcement would violate recognized treaty rights to exclude non-Indians from tribal lands, and dilute the principles of tribal sovereignty and self-government.⁵⁵ The *Navajo Forest Products* court declared that “[t]he Tuscarora rule does not apply to Indians if the application of the general statute would be in derogation of the Indians’ treaty rights.”⁵⁶ In doing so, the court also recognized that the Tuscarora case did not involve an Indian treaty.⁵⁷

Based on the language of these cases, the *Navajo Forest Products* court recognized two well-established concepts of Native American law. The first concept is that retained tribal powers are limited only by specific congressional withdrawal of aspects of tribal sovereignty. The second is that the federal government cannot infer limitations on tribal powers from a treaty or statute; they must be expressed or otherwise made clear from examination of the legislative history.⁵⁸

The rule followed in this line of cases, declared that American Indians have certain inherent rights created by natural law, and a federal law will not infringe upon those rights unless express evidence exists that the legislature was aware of the conflict that the law had with American Indian rights, but chose to enact the law despite such conflict.⁵⁹ Notice that this rule does not require congressional awareness when persons other than American Indians are involved. The majority of the circuits have followed this line of reasoning.⁶⁰

⁵¹ See generally, *Couder d’Alene*, 751 F.2d 1113.

⁵² *Martinez*, 436 U.S. at 60.

⁵³ *United States v. Dion*, 476 U.S. 734 (1986).

⁵⁴ Occupational Health and Safety Act of 1970, 29 U.S.C. secs. 651-678 (1988). OSHA is a law of general applicability.

⁵⁵ *Navajo Forest Products*, 692 F.2d at 712.

⁵⁶ *Id.* at 711.

⁵⁷ *Id.* at 711; See *Tuscarora*, 362 U.S. 99.

⁵⁸ *Navajo Forest Products*, 692 F.2d at 712, citing to *United States v. Wheeler*, 435 U.S. 313 (1978), and *Bryan v. Itasca County*, 426 U.S. 373 (1976); see also *Merrion*, 445 U.S. at 148-149 note 14; *Mancari*, 417 U.S. at 561; *United States v. Winans*, 198 U.S. 371, 381 (1905).

⁵⁹ *Navajo Forest Products*, 692 F.2d at 711.

⁶⁰ See generally, *EEOC v. Fond du Lac Heavy Equip. & Construction Co., Inc.*, 986 F.2d 246 (8th Cir. 1993); *Myrick v. Devils Lake Sioux Manufacturing Corp.*, 718 F.Supp. 753 (D. N.D. 1989) (Acknowledged this reasoning to illustrate that rule only applies when American Indian tribes are the employers.); *Nero*,

2. COEUR D'ALENE: PRESUMPTION OF APPLICABILITY

A few federal courts have taken the approach that when a federal law of general application is silent as to its effect on Native Americans, the law is presumed to apply to the tribes unless Congress has included an express exclusion to the contrary. These courts often view silence regarding American Indians as congressional expressions of intent to include tribal enterprises within the scope of the particular law.⁶¹

In 1985, the Ninth Circuit was presented with a case involving the Occupational Safety and Health Act and a commercial enterprise that was wholly owned and operated by the Coeur d'Alene Indian Tribe of northern Idaho.⁶² In *Coeur d'Alene*, the court held that OSHA did apply to commercial activities of the tribe. The *Navajo Forest Products* case was distinguishable from this case because it involved an American Indian treaty that conferred upon the tribe certain rights that were being threatened by the application of the law.⁶³

In the *Coeur d'Alene* decision, the Ninth Circuit limited the rule set out in *Tuscarora*⁶⁴ by adding three exceptions.⁶⁵ This three-part test begins by identifying the presumption that a law of general application generally includes American Indians within its scope. However, when a law of general application is silent as to the issue of applicability, the federal courts will deem the law inapplicable when: (1) the law affects the "exclusive rights of self-government in purely intramural matters;" (2) the result would be an abrogation of American Indians treaty rights; or (3) proof of congressional intent to apply the law to the American Indian tribes exists in legislative history or other means.⁶⁶ The final step of the test illustrates that even if the application of the law would interfere with tribal self-government over purely intramural matters, it is still applicable if express congressional application to the tribes can be found.⁶⁷

Arguments have been made that the Coeur d'Alene test applies only to those tribes that do not have an existing treaty right.⁶⁸ These litigators erroneously believe in a *per se* rule which says if a treaty exists, the tribe will not be bound. Simply because a treaty exists does not necessarily require the court to conclude that a federal law of general applicability is not binding on American Indian tribes.⁶⁹ Once an American Indian treaty

892 F.2d 1457; *EEOC v. Cherokee Nation*, 871 F.2d 937; *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *Navajo Forest Products*, 692 F.2d 709.

⁶¹ See generally, *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2nd Cir. 1996); *U.S. Department of Labor v. Occupational Safety and Health Review Commission*, 935 F.2d 182 (9th Cir. 1991); *Smart v. State Farm Ins. Co.*, 868 F.2s 929 (7th Cir. 1989); *Coeur d'Alene*, 751 F.2d 1113; *Tuscarora*, 362 U.S. 99.

⁶² *Coeur d'Alene*, 751 F.2d at 1114.

⁶³ *Id.* at 1116.

⁶⁴ 362 U.S. at 116. The *Tuscarora* rule is that a law of general applicability includes all persons without regard to their heritage.

⁶⁵ *Coeur d'Alene*, 751 F.2d 1116.

⁶⁶ *Id.* at 1116, (quoting *United States v. Farris*, 624 F.2d at 893-94).

⁶⁷ *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2nd Cir. 1996).

⁶⁸ *Smart v. State Farm Ins. Co.*, 868 F.2d 929. ERISA was applicable to an American Indian tribal employer for tribal employees at a reservation health center.

⁶⁹ *Id.* at 934.

right is found, the better question for illustrating this rule is whether the application of the law would jeopardize any right secured by the American Indian treaty.⁷⁰

IV. ANALYSIS

A. THE TENTH CIRCUIT'S OPINION

1. JUDGE MCKAY'S MAJORITY DECISION

In reversing the decision of the U.S. District Court for the Eastern District of Oklahoma, the Tenth Circuit Court of Appeals held the EEOC had no jurisdictional authority to enforce a subpoena *duces tecum* for documents pertaining to employees of the Cherokee Nation pursuant to the ADEA,⁷¹ because such an application of the ADEA to the tribe would interfere with the specific treaty right of tribal self-government.⁷² By comparing the language in the ADEA with that of Title VII,⁷³ the district court had concluded the EEOC was entitled to have its subpoena enforced because evidence showed that Congress, through principles of statutory construction, had intended the ADEA to apply to the American Indian tribes despite any specific treaty right.⁷⁴

Declaring that no evidence of an explicit abrogation of any specific treaty right in the ADEA's text exists, Judge McKay, writing for the majority, emphasized that "[w]hile normal rules of construction would suggest the outcome which the District Court adopted, the court overlooked the fact that normal rules of construction do not apply when Indian treaty rights, or even non-treaty matters involving Indians are at issue."⁷⁵ The Tenth Circuit interpreted the Supreme Court's categorical stance saying that in cases with ambiguity and no clear congressional intent with respect to sovereignty rights, the

⁷⁰ *Id.* at 935.

⁷¹ 29 U.S.C. sec. 621-34 (1982).

⁷² The right of tribal self-government was a specific treaty right established by the 1835 Treaty of New Echota, 7 Stat. 478 (1835). Article V of the treaty provides in pertinent part the following:

"[The United States] shall secure to the Cherokee Nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them: provided always that they shall not be inconsistent with the Constitution of the United States and such acts of Congress as have been or may be passed regulating trade intercourse with the Indians...."

⁷³ Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. sec. 2000e (b)(1982).

⁷⁴ *EEOC v. Cherokee Nation*, 871 F.2d at 938.

⁷⁵ *Id.* at 939; see e.g., *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) ("[T]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians. Thus, it is well established that treaties should be construed liberally in favor of the Indians, with ambiguous provision interpreted to their benefit. . . . The Court has applied similar cannons of construction in non-treaty matters."); *Merrion*, 455 U.S. at 152 ("[I]f there [is] ambiguity . . . the doubt would benefit the tribe . . ."); *Bracker*, 448 U.S. at 143-44 ("ambiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence.").

court will apply the “special canon of construction” to the benefit of tribal interests.⁷⁶ In holding that *Navajo Forest Products*⁷⁷ was applicable, the Tenth Circuit reaffirmed the reasoning for the court’s decision.

In note three of *EEOC v. Cherokee Nation*, the majority pointed out that the EEOC erroneously relied on the broad dictum in *Tuscarora*⁷⁸ to support its assertion that the ADEA applies to all persons including American Indians.⁷⁹ The *Tuscarora* case did not involve a treaty right, and therefore when a tribe can establish a specific treaty right, the *Tuscarora* rule is not applicable.⁸⁰

Relying on the language of *Dion*, the majority followed the class principle that the federal courts are “extremely reluctant to find congressional abrogation of treaty rights absent explicit statutory language.”⁸¹ While reiterating the importance of Native American treaty rights, the Tenth Circuit declared a limitation on allowing abrogation of existing treaty rights. The court declared that congressional intention to abrogate or modify a treaty will not be lightly imputed.⁸²

Next, the majority dismissed the Eastern District of Oklahoma’s attempt to use the comparison of the ADEA to the statute that served as its model, Title VII, for determining congressional intent. The district court pointed to congressional action leading up to the enactment of the ADEA, which said the ADEA’s definition of employer was patterned after Title VII’s definition which specifically excluded American Indians from its definition.⁸³ Judge Seay of the Eastern District of Oklahoma stated that “[i]t is a well-recognized rule of statutory construction that statutes ‘in pari materia’ should be construed together and compared with each other.”⁸⁴ The opinion concluded that Congress had exhibited its intent to remove the exclusion for American Indian tribes under the ADEA when it adopted Title VII’s opinion and deleted the words “Indian tribe” from that definition. In note four, the Tenth Circuit used the fact that Congress “knows how to extend ADEA’s coverage when it choose to do so,” to explain away any need for such a comparison.⁸⁵

In closing, Judge McKay focused on the important role that treaty rights play in interpreting rules of construction. Pointing out that the district court would have been correct if this case had involved parties other than American Indians, such as white employers of the tribe, the majority declared that the district court had “overlooked the fact that normal rules of construction do not apply” when American Indian matters are involved.⁸⁶ The Tenth Circuit closed by using Supreme Court precedent to strengthen its opinion by reiterating the proposition that the federal government should interpret laws

⁷⁶ *EEOC v. Cherokee Nation*, 871 F.2d at 939.

⁷⁷ 692 F.2d 709 (10th Cir. 1982).

⁷⁸ *Tuscarora*, 362 U.S. 99.

⁷⁹ *EEOC v. Cherokee Nation*, 871 F.2d at 938, footnote 3, citing to *Tuscarora*, 362 U.S. at 116.

⁸⁰ *Navajo Forest Products*, 692 F.2d at 712-13; *Coeur d’Alene*, 751 F.2d at 116; *Phillips Petroleum Co. v. United States Environmental Protection Agency*, 903 F.2d 545, 556 (10th Cir. 1986).

⁸¹ *EEOC v. Cherokee Nation*, 871 F.2d at 938, citing to *Dion*, 476 U.S. at 739.

⁸² *Id.*

⁸³ Appellant’s Brief at 4a, *EEOC v. Cherokee Nation* (No. 88-2092).

⁸⁴ *Id.* at 5a.

⁸⁵ *EEOC v. Cherokee Nation*, 871 F.2d at 939, note 4.

⁸⁶ *Id.*, citing to *Montana v. Blackfeet Tribe*, 471 U.S. at 766.

liberally in favor of the American Indian tribes.⁸⁷ Essentially, the Tenth Circuit Court of Appeals held that laws of general application require an explicit congressional intent to abrogate American Indian treaty rights.⁸⁸

2. JUDGE TACHA'S DISSENT

In a thoughtfully reasoned opinion, Judge Tacha dissented from the majority in *EEOC v. Cherokee Nation* because she felt that a "clear indication of congressional intent to apply the ADEA to the Indian tribes" existed.⁸⁹ Using various U.S. Supreme Court cases, the dissent confirmed that while the tribes do have sovereign power, the Congress, through its plenary power, can withdraw particular aspects of tribal sovereignty.⁹⁰

The dissent attacks the majority's interpretation of "clear intent"⁹¹ to mean "explicit language applying the statute to Indian tribes on the face of the statute or in its legislative history."⁹² To support this attack, Judge Tacha declared that an "explicit statement by Congress," although "preferable for ensuring legislative accountability," is not required.⁹³ In fact, according to *Dion*, all the court required was "clear evidence that Congress actually considered the [potential] conflict" and chose to resolve the conflict by abrogating the treaty.⁹⁴

The dissent also attacked the majority's dismissal of the EEOC's ADEA-Title VII comparison and analysis. Judge Tacha agreed that such analysis was necessary since Congress had relied on Title VII to draft the ADEA,⁹⁵ and would aid in determination of Congress's intent by eradicating many related ambiguities.⁹⁶ The dissent thought that the court should read the statute for "face value" with additional exceptions implied only after a showing of legislative intent.⁹⁷

Judge Tacha also felt it was important that Title VII had a specific purpose for allowing exclusion of American Indians,⁹⁸ in that it was to allow tribes to favor American

⁸⁷ *EEOC v. Cherokee Nation*, 871 F.2d at 939, citing *Montana v. Blackfeet Tribe*, 471 U.S. 759; *County of Oneida v. Oneida Indian Nations*, 470 U.S. 226; *Merrion*, 455 U.S. 130; and *Bracker*, 448 U.S. 136.

⁸⁸ *Id.*

⁸⁹ *Id.* at 939 (Tacha, J. dissenting).

⁹⁰ *Id.* at 940 (Tacha, J. dissenting), citing *Martinez*, 436 U.S. at 58-60; *Navajo Forest Products*, 692 F.2d at 712 and 714.

⁹¹ *Dion*, 476 U.S. at 738.

⁹² *EEOC v. Cherokee Nation*, 871 F.2d at 940 (Tacha, J. dissenting).

⁹³ *Id.* at 940 (Tacha, J. dissenting), citing to *Dion*, 476 U.S. at 739.

⁹⁴ *Dion*, 476 U.S. at 739.

⁹⁵ *EEOC v. Cherokee Nation*, 871 F.2d at 940, footnote 2 (Tacha J. dissenting); the dissent points out in footnote 2 evidence of Congress's awareness of Title VII while drafting the ADEA.

The evidence consists of the original attempts of certain Congressmen to include age as a protected class under Title VII protection, and the fact that the ADEA was promulgated only after the Secretary of Labor studied the area pursuant to the Title VII requirement provision.

⁹⁶ *EEOC v. Cherokee Nation*, 871 F.2d at 940 (Tacha, J. dissenting).

⁹⁷ *Id.* at 941 (Tacha, J. dissenting), citing *United States v. Motamedi*, 767 F.2d 1403, 1406 (9th Cir. 1985); *Kennedy v. Whitehurst*, 690 F.2d 951, 956-957 (D.C. Cir. 1982); *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17 (1980).

⁹⁸ In *Mancari*, 417 F.S. at 548, the Supreme Court held Title VII's express exemption would enable American Indian tribes to be free to give preference to the "political" group of American Indians in tribal government employment.

Indians in hiring preferences. No comparable reason could be found for their exclusion concerning the ADEA.⁹⁹ The dissent closed by reasoning that the *Navajo Forest Products* case was not relevant to the court's discussion because it involved facts that would not fit this case.¹⁰⁰

B. EXAMINATION OF THE TENTH CIRCUIT'S MAJORITY OPINION

Considering only the policy issues of preservation of the Tribe's interests, the Tenth Circuit was correct in reversing the district court's decision. To allow all laws of general applicability to apply to the tribes without express inclusion would place an insurmountable burden on the tribes to use most of their meager resources to defend themselves from suit. The Tenth Circuit opinion used two major concepts to illustrate its basis for ruling in the Cherokee Nation's favor:

1. LAWS OF GENERAL APPLICATION REQUIRE "EXPLICIT ABROGATION."

Looking to *Dion* for strength, the court reasoned that it had been "extremely reluctant to find congressional abrogation of treaty rights absent explicit statutory language."¹⁰¹ The court was also aware that it should not construe laws to abrogate treaty rights backhandedly. The court thought that treaty rights were too important to allow Congress to "impute by implication." Without an explicit intention of a Native American treaty abrogation, the court will not allow Native American treaty rights to be taken away. The Cherokee Nation holds the right of self-governance through specific treaty language.¹⁰²

The court thought that it was a better rule to allow Congress to act with express deliberation, rather than force the courts to try to interpret what Congress intended by implied means. This provides a clear-cut rule for the courts. Essentially, if the federal government typically affords American Indians such a right, then without express intent to abrogate said right, the courts will not interpret the law's meaning to include American Indians.

2. NORMAL RULES OF STATUTORY CONSTRUCTION DO NOT APPLY.

Though the Tenth Circuit admitted the ADEA's definition was modeled after Title VII and that the two statutes' definitions of "employer" were virtually identical except for the omission of the American Indian tribes in the ADEA exclusionary provision, the court

⁹⁹ *EEOC v. Cherokee Nation*, 871 F.2d at 940 (Tacha, J. dissenting).

¹⁰⁰ *Id.* at 942 (Tacha, J. dissenting).

The dissent expressed that it was important that the ADEA and Title VII were aimed at the same goal, which was prevention of discrimination, while the OSHA's was aimed at protection of employees from health and safety violations; Also, OSHA's definition for "employer" was not patterned after the Title VII definition, like that of the ADEA; and finally, unlike the ADEA, OSHA did not contain evidence of legislative intent to abrogate. *Navajo Forest Products*, 692 F.2d at 712.

¹⁰¹ *EEOC v. Cherokee Nation*, 871 F.2d at 938.

¹⁰² *Id.* at 939, note 2.

refused to apply “normal rules of [statutory] construction” that would lead to the conclusion that Congress was aware of the difference in the two statutes and intended the ADEA, unlike Title VII, to apply to American Indian tribes. Congressional silence on the question led the court to find the statute ambiguous with respect to whether it included American Indian tribes.¹⁰³

Using Supreme Court precedent,¹⁰⁴ this court correctly illustrated the judiciary’s stance on construction of federal statutes that affect tribal issues.¹⁰⁵ The majority agreed with the reasoning of the *Navajo Forest Products* case, holding that case out as precedent for the notion that laws of general applicability would generally have an adverse effect on tribal sovereign powers. The majority then attacked the reasoning of the Tuscarora rule declaring that the rule was not absolute. The court also acknowledged that *Coeur d’Alene*, which professes to be in line with the Tuscarora rule, had actually diminished the rule’s potency by providing exceptions.¹⁰⁶ However, the majority was unclear about why it chose not to follow or even give credence to the approach of the Ninth Circuit.

C. THE THOUGHTFUL DISSENT

Judge Tacha read the majority opinion to erroneously require explicit language in either the statute or its legislative history to satisfy the “clear indication of congressional intent” requirement of *Dion*.¹⁰⁷ The dissent continued to criticize the majority for ignoring the comparison of the language of the ADEA and Title VII, then cited to evidence of Congress’s awareness of Title VII’s provisions when promulgating the ADEA. The dissent reasoned that because Congress “relied upon” Title VII when it drafted the ADEA, and because the statutes share a “common purpose of proscribing employment discrimination” the two laws must be examined together.¹⁰⁸ The dissent expressed the opinion that Congress’s inclusion of the American Indian tribes in Title VII’s definition of “employer,” accompanied with its omission of American Indian tribes from the ADEA’s definition makes it clear that Congress intended any impingement upon tribal sovereignty by enforcement of the ADEA.¹⁰⁹

Next, Judge Tacha cited *Mancari* for the proposition that Title VII’s express exclusion of American Indian tribes from its definition of “employer” was “to enable Indian tribes to be free to give preference to Indians in tribal government employment.”¹¹⁰ However, this proposition is flawed. For example, if Title VII had provided the American Indian exemption for the sole purpose of employment preferences, a narrow provision that included an express provision for only Native American tribal employers, who are exercising an employment preference based on tribal membership, would better serve

¹⁰³ *Id.* at 939.

¹⁰⁴ See notes 62-65.

¹⁰⁵ *EEOC v. Cherokee Nation*, 871 F.2d at 939.

¹⁰⁶ *Id.* at 938.

¹⁰⁷ *Id.* at 940 (Tacha, J. dissenting).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 940.

¹¹⁰ *Id.* at 942 (Tacha, J. dissenting), citing *Mancari*, 417 U.S. at 548; 110 Cong. Rec. 13, 701-03 (1964).

Congress's purpose.¹¹¹ Congress can craft narrow rules to meet the particular purpose it intends. The current exemption allows total exemption for all tribal employers to discriminate based on race, color, religion, sex, or national origin without any retribution. The dissent's reference to *Mancari*¹¹² indicates a misreading of that case. The Supreme Court decision in that case was not based on a protected class of Title VII, since American Indians are "federally recognized political groups," and not racial groups.¹¹³

Though many American Indian tribes operate a variety of business enterprises, including Casinos, Bingo Outposts, and manufacturing plants, some tribes still function through "meager funding derived primarily from federal sources."¹¹⁴ The federal government should not require the tribes to deplete their limited resources intended to advance tribal interests, in defending themselves against the discrimination claims of disgruntled former employees. The better reasoned opinion about why Congress afforded a tribal exemption in Title VII is that the express exemption allows tribal employees to enjoy freedom from outside intrusion into limited federal funding. This would be consistent with the court's total exemption, since it would afford protection against all types of employment discrimination, and not just those based on race, national origin, or political affiliation.¹¹⁵

V. CONCLUSION

Today the clearest indication of congressional intent to abrogate American Indian treaty rights or limit tribal sovereign power is found in the *Navajo Forest Products*¹¹⁶ line of cases. This rule provides that absent a clear congressional intent to the contrary, laws of general application apply to the American Indian tribes, unless infringement of a specific American Indian treaty right can be found. The Tenth Circuit decision indicates that Congress must specifically intend for federal intrusion into tribal self-governance before the federal government will hold laws of general application against the tribes. This is obviously contrary to the established line of cases from the Ninth Circuit, which indicate that when Congress does not expressly exclude a particular group from the scope of a law of general application, then the particular group is included by default.

¹¹¹ 42 U.S.C. sec. 200 e-1 (a), (This provision expressly provides an exemption to religious organizations for discrimination on the basis of religion.)

¹¹² 417 U.S. 535.

¹¹³ *Id.* at 553, note 24.

¹¹⁴ Vicki J. Limas, *Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 Ariz. St. L. J. 681, 693 (Fall 1994).

¹¹⁵ See generally, *Mancari*, 417 U.S. at 553, note 24.

¹¹⁶ 692 F.2d 709.

YAHOO GOES TO CHINA: LESSONS FOR MULTINATIONAL FIRMS

Stephen L. Poe¹

Abstract

Major U.S. internet firms have spent a great deal of money and effort trying to break into the China market. In this regard, Yahoo has been accused of acting egregiously - supplying the Chinese government with account information that has been used to imprison dissidents who have engaged online in forbidden political speech. Yahoo's experience in China raises the question of whether a multinational firm can ethically justify its decision to conduct business in a foreign country governed by a repressive political regime. This paper discusses and explores this dilemma and the lessons that multi-national firms might learn from Yahoo's experience in China.

I. Introduction

With a population of over 1.3 billion people, China presents a very attractive business opportunity for multinational firms. This has been especially true for firms offering online services. Even though the internet is still relatively new in China, it now reportedly has over 253 million internet users, which is not even twenty percent of the country's population, and exceeds that of any other country, even the United States (Barboza, 2008). In fact, by 2012, China's online population is projected to reach about 490 million people, greater than the entire U.S. population, in a market that is expected to exceed \$20 billion by 2010 ('China Online,' 2008). With such potential, it is no wonder that the major U.S. internet firms – Google, Microsoft, and Yahoo – have spent a great deal of money and effort trying to break into the China market.

As this market has developed, these firms recently have been criticized by the media, industry observers, activist groups, and even members of the U.S. Congress for what appears to have been their willingness to compromise with the Chinese government. For example, in order to do business in China, U.S. internet firms have agreed to limit, or self-censor, the results of web searches and to comply with Chinese censorship laws (Public Pledge, 2002). Some, however, have been charged with going even further to pacify the Chinese government; in this regard, Yahoo has been accused of acting the most egregiously, by supplying the Chinese government with account information that has been used to prosecute and subsequently imprison several of Yahoo's Chinese customers who have engaged online in various types of forbidden political speech.

The plight of Yahoo and the other U.S. internet firms operating in China is not unique. When a multinational firm decides to do business in a foreign country that is governed by a repressive political regime, some level of cooperation with that regime is usually required as a condition of doing business in the country. In some instances, as in China, such cooperation may

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lead to helping the regime oppress fundamental human rights of its citizens. Since any action that helps a government oppress such rights is not ethical, the question arises as to whether the firm should do business at all in the foreign country or whether it can ethically conduct business despite such demands being made by the regime as a condition of doing business. As this paper demonstrates, not all firms have approached this dilemma in the same way, and lessons can be learned from the experience of U.S. internet firms who have conducted business in China.

The purpose of this paper is to discuss and explore this dilemma and the lessons that multi-national firms might learn from Yahoo's experience in China. The paper begins with a brief review of the events giving rise to the Yahoo controversy, including an overview of the justifications Yahoo offered for its actions in China. The paper then describes the dilemma facing multinational firms wishing to do business in a foreign country governed by a repressive political regime and proposes that such a firm may do so ethically if the firm can demonstrate that (i) its continued presence is likely to improve conditions for the citizens of that country, and (ii) it has taken steps to minimize the harm that its cooperation with the regime causes to human rights. The paper then outlines these steps, which include planning ahead using moral imagination to structure the firm's operations so as to limit its need to cooperate with the government as much as possible, and then acting proactively to mitigate any harm to human rights that may result from any cooperation that is unavoidable. Finally, using the example of Yahoo in China, the paper demonstrates how these steps might be followed and illustrates what may happen when they are not.

II. The Yahoo Controversy in China

A. The Events and Public Reaction

In the past three years it has come to light that Yahoo may have been involved with supplying account information to the Chinese government in several different instances that has led to the conviction and imprisonment of Chinese dissidents (see, e.g., Kahn, 2005; Kopytoff, 2006). In each of these cases, Chinese dissidents had used Yahoo e-mail accounts to engage online in various types of prohibited political speech. Following arrest of the dissidents, Chinese prosecutors introduced into evidence at trial detailed information about the date, the time, and the computers that the dissidents had used to engage in the prohibited activities. According to court transcripts, this information had been furnished by Yahoo's operations in Hong Kong. In each case, the dissident was convicted by the Chinese court and sentenced to multiple years in prison.

In the aftermath of these news revelations, along with those describing self-censorship efforts by other U.S. internet companies, members of Congress were outraged. One Congressman even described Yahoo's actions in releasing information to the Chinese government as tantamount to "turning Anne Frank over to the Nazis" (MacDonald, 2006, quoting Rep. Christopher Smith, N.J.). The U.S. government subsequently began to investigate the activities of U.S. internet companies doing business in China. In February 2006, a U.S. House of Representatives panel held hearings that were attended by representatives of Google, Microsoft, Cisco Systems, and Yahoo. At the hearings, all of these companies were strongly criticized by members of Congress for their cooperation with the Chinese government, and in their wake various types of regulation were proposed, including measures designed to punish

U.S. companies who help foreign governments stifle dissent by agreeing to self-censor information and by turning over customer information to the governmental authorities. Again, in November 2007, the U.S. House Foreign Affairs Committee held hearings at which Yahoo was urged to use its market power, along with other foreign companies doing business in China, to push for change in China rather than just accepting the status quo. One Congressman demanded that Yahoo's chief executive officer immediately apologize to family members of the dissidents in attendance at the hearings and several requested that Yahoo take action to help these families. As one observer noted, no member of Congress in attendance at the hearings argued in Yahoo's defense (Werner, 2007).

Yahoo's reported actions in these cases also brought swift and heavy condemnation from human rights activists, the media, and other observers. Some activists went beyond merely condemning Yahoo for its actions in the Chinese dissident cases by calling for action from Yahoo's shareholders. Rather than waiting for Congress to act, they argued, shareholders of Yahoo and other internet firms should take action to ensure that their companies' services were not facilitating the abuse of human rights in foreign countries. Some human rights groups even called for a worldwide consumer boycott of Yahoo to protest what they perceived to be Yahoo's attempt to boost profits through the oppression of human rights.

B. Justifications for Yahoo's Actions in China

Although Yahoo did not deny its alleged involvement in any of these cases, it certainly did not provide much in the way of specific information about its role in these affairs. However, the firm did offer several ethical justifications for its actions in these matters. In response to the growing media controversy over Yahoo's alleged cooperation with the Chinese government, Yahoo attempted to defend its actions using a legal compliance argument, an employee protection argument, and a "public good" argument.

1. The Legal Compliance Argument

When confronted with reports about its involvement with the prosecution of the Chinese dissidents, Yahoo's initial and primary defense was to claim that its actions were proper since it was bound to obey local law when doing business in foreign countries (Einhorn, 2005). According to this argument, Yahoo maintained that when any of its operations received a proper court order and supporting documentation, it must comply with local law, follow the legal process, and provide the requested information (Yahoo, 2006). As might be expected, however, Yahoo received much criticism for using legal compliance as an excuse for ignoring other ethical considerations. As one commentator put it: "What if local law required Yahoo to cooperate in strictly separating the races? Or the rounding up and extermination of a certain race? Or the stoning of homosexuals?" (Zeller, 2005, quoting Max Boot, Senior Fellow, Council on Foreign Relations).

Yahoo's experience supplements a basic lesson that is taught in every business ethics course: a firm should not use legal compliance as an excuse for ignoring ethical considerations. Following the law is ethical where the law itself is ethical but, as the Yahoo case demonstrates, such is not true when the law is the product of a repressive regime that has designed it to serve its

interests and has failed to recognize or protect fundamental human rights. Although the law may set minimum standards of behavior, good business ethics practice requires doing more than the minimally acceptable. Especially when, as here, legal compliance can lead to the violation of fundamental human rights, ethical considerations dictate that a firm must do more than blindly rely on the law.

2. The Employee Protection Argument

A second argument Yahoo advanced to justify its actions in China is that its release of information to Chinese officials was necessary to protect its employees: one consequence of its non-compliance, according to Yahoo, might have been that its employees would have been subject to arrest by the Chinese authorities, and as a matter of policy Yahoo refused to take any action that would place its employees at risk (Oates, 2007). As with the first theory, Yahoo's argument here is also suspect, as application of this theory to the facts of the Yahoo case is problematic in a couple of respects. First, it is difficult to evaluate the merit of this claim since Yahoo did not reveal the details of how it furnished the requested customer information to the Chinese authorities. Second, questions have arisen as to whether Yahoo's employees were in any danger from prosecution from Chinese authorities since it appears that the released information came from Yahoo's Hong Kong operation. According to critics, Hong Kong firms are not obligated to follow Chinese law, but instead are governed by "a long-established Western-style legal system" (Vittachi, 2005). It is hard to see how refusal to comply with Chinese authorities might have imperiled Yahoo's employees in its Hong Kong operations under these circumstances. A slight risk of harm to employees in this case would not seem to ethically justify the harm to the human rights of the Chinese dissidents (or to the cause of free speech in China) that eventually resulted from Yahoo's reported actions.

3. The "Public Good" Argument

A third argument that Yahoo raised to ethically support its actions in China relates to the utilitarian objective of furthering the public good. According to this claim, Yahoo's basic choice in China has been either to comply with Chinese law or not do business, as Chinese authorities would likely bar Yahoo from China in retaliation for non-compliance. Leaving China, however, ultimately would do more harm to the public good; i.e., the goal of achieving democracy in China, than would staying and complying with the current system (Yahoo).

Although Yahoo may have been sincere, its "public good" defense was also challenged. Critics claim that while the benefits of internet service in China may eventually lead to a more open and free society, cooperating with China to the extent Yahoo allegedly has is likely to do significant harm to the cause of freedom and democracy in China - rather than expedite democracy, such cooperation has actually delayed it. According to these observers, the chilling effect on free speech brought about by releasing customer information to Chinese officials enables the government to continue to suppress political debate and contributes to "the architecture of repression [in China that] ... could easily be exported to regimes in other nations" (Kopel, 2005). Also, it certainly does not seem to help the cause of democratic reform when internet companies appear to be helping the government imprison those most visible in promoting it; i.e., local journalists and other activists. So, rather than further the cause of

democracy, cooperation with the Chinese regime to this extent may actually be helping it resist reform and remain authoritarian.

As Yahoo's example demonstrates, a firm cannot justify the ethical validity of its actions on the basis of a utilitarian or common good approach when its actions have been inconsistent with that approach. The problem in Yahoo's case is that the firm's actions undercut the very freedom of political expression that Yahoo claims its presence in China would encourage. Although certain types of cooperation with the government – perhaps limited self-censorship – may be justified in the sense that allowing the public to access censored information is better than allowing the public to access no information, it is difficult to see how the cause of democratic reform is strengthened when the company appears to be helping the government imprison dissidents for engaging in political speech. In such a case, the potential long term benefit to the Chinese public also seems to be greatly outweighed by the immediate significant harm to the individual dissidents. Thus, the firm's "public good" justification for its conduct failed to mollify those who have found fault with Yahoo's actions in China.

Rather than persuading its critics, Yahoo's attempts to justify its conduct have been ineffective as they seem to be little more than after-the-fact rationalizations. One lesson that may be gleaned from Yahoo's experience in China is that a firm should not even appear to cooperate with a repressive political regime, especially when significant harm to human rights might occur. In such a case, just about any ethical justification that a firm subsequently offers for its cooperation is not likely to be persuasive.

III. Lessons for Multinational Firms: What Is An Ethical Company to Do?

Yahoo clearly considers itself to be an ethical company. Its own corporate documents state that the company is committed to open access to information and communication and to maintaining customer trust on a global basis (Yahoo).² Presumably, then, the company is ethically bound to make decisions and take actions that will not infringe on these commitments, even when strict compliance with foreign legal requirements might dictate otherwise. In honoring these commitments, the firm might also be expected to refrain from taking actions that would contribute to the ability of any political regime to suppress freedom of expression, which is a fundamental human right as guaranteed by the United Nation's International Covenant on Civil and Political Rights (United Nations, 1994). Assuming that Yahoo's commitment to these principles is sincere, the question arises as to what Yahoo as an ethical company should have done to avoid these conflicts in the first place and/or lessen the harm to others when they occurred.

One option, of course, would be to simply not do business in China, or to stop doing business in China, which some have called for Yahoo and other U.S. internet companies to do.³

² Yahoo reaffirmed its commitment to human rights in a public statement released in April 2007, "We believe deeply in human rights, and as a company built on openness, we strongly support free expression and privacy globally. Yahoo! has worked in different ways to address issues that arise at the intersection of human rights and technology" (Oates, 2007).

³ According to Thomas Donaldson's ethical algorithm for multi-national firms doing business in a foreign country, a business practice that conflicts with the values of the firm's home country is ethically permissible only if it is

Although in many cases this may be the optimal ethical choice for a firm operating in a country with a repressive political regime, it may not be the only ethical solution when the firm provides a service that can improve conditions for the country's citizens. In the case of U.S. internet firms, almost all observers concede that the continued presence of even a censored internet can contribute towards democratic change in China, since it allows Chinese citizens to engage in more open public communication more often than they could otherwise. One commentator has mentioned that even a censored internet "will level the playing field for China's enormous rural underclass" as "once the country's small villages are connected ... students thousands of miles from Shanghai or Beijing will be able to access online course materials from M.I.T. or Harvard and fully educate themselves (Thompson, 2006). Others have noted that with over tens of millions of internet users and 13 million bloggers in China (and only about 30,000 censors), China has not been particularly successful in censoring all offensive material (Kristof, 2006).

As Yahoo and other U.S. internet companies provide a service that may very well improve human rights conditions in China, then, refusing or ceasing to do business in China should not be the only ethical option these firms have. In fact, other courses of action may be open to them. As discussed below, in such cases a firm could ethically justify its business presence in the foreign country if it can demonstrate that it has taken steps to minimize the harm that its cooperation with the government may cause to human rights. Such a demonstration can be made, it is argued, if the firm can show that (1) when planning its business operations in the foreign country, it had looked ahead using moral imagination so as to limit its need to cooperate with the government as much as possible, and (2) it acted proactively to mitigate any harm to human rights that may result from any such cooperation that was unavoidable.

The first, and perhaps the most important step, is for the firm to show that it used what has been called "moral imagination" when planning its business operations in the foreign country so as to avoid cooperation with its governing regime as much as possible. Moral imagination has been defined as "an ability to imaginatively discern various possibilities for acting in a given situation and to envision the potential help and harm that are likely to result from a given action" (Lau, 2001).⁴ In order to use moral imagination, a firm needs to first consider the range of possible consequences of its actions and decisions and then take steps to avoid those that are likely to result in morally undesirable outcomes. In the case of multinational firms that operate in a country governed by a repressive political regime, it certainly seems foreseeable that (i) cooperation with that regime may lead to some violation of human rights and (ii) great care should be taken with a heightened sense of awareness to avoid ethical problems. So, when operating in such a foreign country, a company that wishes to be ethically responsible should

required to do business in the foreign country and it does not clearly violate fundamental rights (Donaldson, 1989, pp. 101-106). Under this analysis, to the extent that (i) cooperating with Chinese authorities in the release of user information is required to do business in China, and (ii) Yahoo's actions have infringed upon the political expression rights of its Chinese customers, Yahoo's only ethical option would appear to be to stop doing business in China.

⁴ Indeed, one of the most fundamental steps in any framework for ethical decision-making is to stop and think prior to taking action. In the case of a multinational firm, such planning must be undertaken prior to the firm making a substantial financial commitment to its operations in the foreign country, because if the commitment is made first, as the Yahoo case demonstrates, the local political regime may then have too much leverage on how the firm does business in the foreign country. For an in-depth discussion of moral imagination, see Johnson (1993); for a discussion of its use in business management, see Werhane (1999) and (2002).

structure its operations so as to anticipate and perhaps deter any required legal compliance with the governing regime that may result in human rights violations.

Although the goal of avoiding cooperation with the foreign government is a desirable strategy, it is not always attainable, so when such cooperation is unavoidable, what can an ethical firm do then? Here, it has been suggested that a second step must be taken: in order to lend ethical substance to its operations in the foreign country, the company needs to go beyond the status quo and demonstrate that it is actively working to improve human rights for the country's citizens and to mitigate any harm that might result from the firm's cooperation with the foreign government (Kirby, 2005, citing Professor Timothy Fort of George Washington University). How might this be achieved? It has been suggested that the firm should seek to work collectively with others in the industry and immediately undertake corrective action to mitigate any harm that the firm's cooperation may have caused (MacKinnon, 2006, citing Professor Jonathan Zittrain of Oxford University). The paper will now discuss each of these points more fully as it applies them to the Yahoo experience in China.

IV. Applying These Lessons to Yahoo's Experience in China

By neglecting to plan ahead when structuring its operations in China and then failing to mitigate the resulting harm caused by its cooperation with the Chinese government, Yahoo provides a good example of what a firm should *not* do when operating in a foreign country governed by a repressive political regime. In this section, the paper examines the lessons that multi-national firms might learn from Yahoo's experience and what Yahoo itself might have done to ethically justify its business presence in China.

A. Plan Ahead Using Moral Imagination

In the Yahoo example, a little forethought by the firm might have helped it entirely avoid the ethical conflict of whether to release customer information to the Chinese authorities.⁵ As mentioned above, Yahoo has identified certain ethical objectives to which it is committed, including the maintaining of customer trust on a global basis. Obviously, to maintain that trust, Yahoo should have identified customer privacy as an important ethical value of the company and the protection of customer privacy as an important ethical goal. This value and this goal should have influenced the business decisions Yahoo made when it set up its operations in China.

Recognizing that it would be doing business in a country known to have a repressive political regime, Yahoo should have anticipated the risks that collecting and retaining private information would pose to the individual privacy of its customers and planned ahead to lessen such risks. For example, it could have developed and implemented strategies for dealing with governmental demands for private information so as to more effectively protect its customers (Global Network Initiative, 2008). It might have narrowly construed such demands to provide as little information as possible or even challenged these demands within the Chinese legal process. Yahoo also could have provided training to its employees who would handle governmental demands for information.

⁵ As one observer has commented, "Given China's shoddy track record in human rights, such an outcome shouldn't have been too hard to foresee" (Elgin, 2006, at p. 9-9).

Another step Yahoo might have taken to lessen these risks is to disclose to its current and potential customers both the type of information it collects and retains on its users and the process the firm would follow when responding to government demands for personal information collected by Yahoo. Some commentators have suggested that Yahoo could have publicized requests for account information by Chinese officials, which might have drawn attention to this practice, alerted their Chinese customers, and perhaps allowed time for the U.S. government to intervene prior to Yahoo's compliance with these requests (Kirby).

Yet another step Yahoo might have taken is to more aggressively utilize technology that would allow its Chinese customers to send encrypted e-mail messages anonymously, and/or restricted the type of information it stored about their customers as well as the length of time such information was stored (Ibid). In ways like these, Yahoo could have taken action to help improve the climate for democracy and free political speech while still technically complying with the law.

Rather than planning ahead using moral imagination when setting up its business operations in China, it appears that the way that Yahoo decided to do business in that country made cooperation with the Chinese government inevitable. For example, as its critics have observed, the reason Yahoo might have been legally obligated to cooperate with the Chinese legal process is because it implemented a business plan that subjected it to Chinese jurisdiction (Einhorn, 2005). In an apparent attempt to provide faster access to its Chinese customers, Yahoo chose to offer e-mail services through internet servers that were physically located in China, within Chinese jurisdiction, rather than through servers located outside China. On the other hand, internet servers located outside Chinese borders might have resulted in slower performance, but would have enabled Yahoo to route requests for customer information through the U.S. government, rather than comply directly with the Chinese legal process.⁶

B. Proactively Mitigate Harm When Cooperation is Unavoidable

Yahoo also has failed to show that it has actively worked to improve human rights for China's citizens and to mitigate the harm to human rights that resulted from its cooperation with the Chinese government. Yahoo might have made this showing by seeking to work collectively with others in the industry and by taking corrective action to mitigate harm caused by the firm's cooperation.

1. Work Collectively with Others in the Industry

Although government involvement may be necessary at some point, an ethical company doing business in a foreign country with a repressive regime should take the initiative and self-regulate with other companies in the same industry rather than wait for governmental intervention while ethical controversies get out of hand. An example of this initiative can be found in the case of U.S. companies in the 1970s that conducted business in South Africa in the

⁶ "Yahoo! had a choice. ... It chose to provide an e-mail service hosted on servers based inside China, making itself subject to Chinese legal jurisdiction. It didn't have to do that. It could have provided a service hosted offshore only. If Shi Tao's e-mail account had been hosted on servers outside of China, Yahoo! wouldn't have been legally obligated to hand over his information" (Einhorn, 2005, quoting Rebecca MacKinnon).

era of apartheid. Rather than accepting the status quo or waiting for the U.S. government to act, and as a result of mounting opposition to U.S. business activity in South Africa, a group of American firms entered into the Sullivan Principles, a voluntary code of conduct that set out standards of ethical practice for companies doing business in South Africa. Such collective action provided these companies with the leverage to resist demands by the South African government regarding the practice of apartheid that they would not have had acting individually. This code also played a role in the eventual demise of the apartheid system in South Africa (Langberg, 2006).⁷

Rather than take the lead in working collectively with others in the industry, however, Yahoo initially argued that private companies could not change China's policies on their own; the U.S. government must intervene (Yahoo). Although Yahoo did call on the U.S. internet industry to get the U.S. government to intervene in China, its acceptance of the status quo while passively waiting for governmental negotiations to change the business climate was hardly acting proactively to ethically justify its operations in China.

2. Take Corrective Action

Another way a multinational firm could act ethically while doing business in a country like China is to take corrective action. When its attempts to avoid cooperation with the foreign government have failed and the company determines that its actions and/or decisions have resulted in harm to others, it has an ethical obligation to take responsibility by utilizing measures to help both current and prospective victims of its practices. For example, in Yahoo's case, the company may argue that it could not reasonably have anticipated the risk to its Chinese customers that resulted from how it structured its business operations in China. Even if that is true, such an excuse vanished after the first Chinese dissident was arrested. At that point, Yahoo should have taken steps to restructure its business in light of this experience to avoid having to assist the Chinese government in subsequent cases. Such measures would include moving its internet servers outside of Chinese borders so that it would no longer be legally required to supply user information to the Chinese government. Alternatively, at the very least, it should have provided clear and prominent disclosure to its Chinese customers that information about their internet activity would be released to Chinese authorities (MacKinnon, citing Jonathan Zittrain). It also should have promptly apologized and paid reparations to the families of each dissident jailed based on Yahoo's cooperation with the Chinese government (Kristof). In each of these ways, Yahoo would have mitigated some of the harm that its cooperation might have caused and fulfilled its ethical obligation to help the victims of its practices and decisions.

At this point, it might be asked whether these strategies could ever be successfully pursued by a multinational firm doing business in a country like China. One answer is the example provided by another U.S. internet company, Google, Inc. Although Google has taken a great deal of criticism regarding its own operations in China, it appears that Google did use some measure of moral imagination when planning these operations so as to avoid cooperating with the Chinese government as much as possible. For example, at the outset Google decided not to

⁷ Would such a strategy be possible in China? Many believe that in the long run China probably needs U.S. internet companies more than these companies need China, so they should at least attempt to use their collective power to gain concessions from the Chinese government when it comes to censorship and informant issues.

offer e-mail or blogging services to customers in China so that it would not be legally required to provide customer information to the Chinese government.⁸ Also, in the area of censorship, Google took measures to enable Chinese internet users to access as much information as possible. In this regard, Google gave its Chinese customers a choice by making two search engines available – one engine that was largely uncensored but subject to slow downs and periodic blocks by the Chinese government, and a second engine with results that were self-censored by Google but was faster and not subject to governmental interruptions (Thompson). Also, according to reports, Google took steps to mitigate some of the harm to human rights that may have resulted from its unavoidable cooperation with the Chinese government. At the February 2006 hearing before Congress, an attorney for Google issued a statement that Google and other internet companies were “actively exploring the potential for Internet industry guidelines, not only for China but for all countries in which Internet content is subjected to governmental restrictions” (Langberg). Google also engaged in forms of constructive resistance; when Google search results were censored, for example, it provided a notice along with the results to let the user know that some content had been removed as required by Chinese law (Thompson). In these ways, then, Google went beyond accepting the status quo in China; it attempted to plan its operations to avoid ethical problems and to mitigate some of the harm once such problems arose.⁹

C. Yahoo’s Change of Heart

In the aftermath of considerable public and political pressure which culminated in the Congressional hearing held in November 2007, Yahoo announced a series of positive steps it had undertaken in an effort to redress the situation brought about by its cooperation with the Chinese government. Some of these steps included recommended courses of action discussed previously in this paper. For example, it recently has been announced that Yahoo is part of an industry coalition working on a code of conduct that will apply to high technology companies doing business in countries with repressive political regimes (‘Google’, 2008). Yahoo has also apologized to and settled a lawsuit filed by the families of two imprisoned dissidents, established a human rights fund to provide financially for these families and other related needs, and established an internal employee team to explore potential human rights problems before it enters a new market (Chapman, 2008).

⁸ As one commentator has observed, “Still, Google deserves some credit. It clearly thought through the issues and ramifications of running an Internet operation from inside China. It has pushed the envelope slightly by putting a disclosure at the bottom of search pages where results have been removed. And the company's well-founded misgivings about retaining user information inside China sparked its decision to refrain from housing its e-mail or blog services there” (Elgin, at p. 9-9).

⁹ Are companies that take these steps when cooperating with a repressive foreign regime perceived as more ethical than those that do not? Not always. To show that no good deed goes unpunished, at the Congressional hearings held in February 2006, all three U.S. internet firms were berated, but Google received the most condemnation from Congressmen (Thompson, 2006). Others, however, have praised Google for attempting to act ethically when doing business in China. For example, even a Chinese dissident viewed Google’s behavior in China as far more ethical than Yahoo’s: “Google has struck a compromise,” he said, and compromises are sometimes necessary. Yahoo’s behavior, he added, put it in a different category: “Yahoo is a sellout. Chinese people hate Yahoo.” The difference, Zhao said, was that Yahoo had put individual dissidents in serious danger and done so apparently without thinking much about the human damage. ... Google, by contrast, had avoided introducing any service that could get someone jailed. It was censoring information, but Zhao considered that a sin of omission, rather than of commission” (Thompson, quoting Zhao Jing).

Although Yahoo finally appeared to be taking steps in the right direction, three points should be considered. First, Yahoo's initial reactions to the publicity crisis arising in the aftermath of its cooperation with China were denial and defensiveness - preferring to blame the U.S. government's lack of action for the plight of the dissidents rather than taking responsibility for its corporate actions. Not only did Yahoo refuse to take responsibility - it even went so far as to blame the dissidents themselves for assuming the risk of imprisonment (Liedtke, 2007). Only after the hue and cry of public outrage and the demand for immediate action by the media, human rights groups, and Congress itself did Yahoo begin to take these steps.

Second, although Yahoo has taken some corrective measures, it was not willing to go as far as members of Congress and others want them to go to redress the situation. Although Yahoo seemed willing to work with others in the industry, for example, it would not pledge to refuse to cooperate with future requests from foreign governments for information that might be used to punish political dissidents, and even refused to support the internet freedom bill proposed by Congress that would help ensure similar actions will not take place in the future (Holahan, 2007).

Third, as a result of Yahoo's willingness to take these steps only in response to public pressure and its unwillingness to fully commit itself to redressing the situation (the first two points), its attempts at corrective action have not yet been successful in restoring its reputation. Following the November 2007 congressional hearing, at which Yahoo announced its plans to take many of these steps, members of Congress continued to publicly berate Yahoo and the company continued to be criticized by the media, human rights groups, and other interested observers. For example, although Yahoo announced it would settle the lawsuit brought by the dissidents' families, the terms of the settlement were not publicly revealed. As a result of this secrecy, it has been charged that the settlement does little to ensure that Yahoo and other U.S. Internet companies will abide by international human-rights standards when they operate abroad (Pham, 2007). Also, despite Yahoo's actions, members of Congress continue to push for legislation making it a crime for internet companies to give personal information about their users to governments that use it to suppress dissent.

Although Yahoo has taken some positive steps to correct its earlier actions, these measures appear to have done little so far to repair the damage to Yahoo's reputation as an ethical company. The perception may be that Yahoo's recent actions may show its regret, but not true remorse - if such remorse includes a commitment to ensure that the same harm does not happen again. Under these circumstances, perhaps the best action Yahoo could take at this point is to make a firm pledge to avoid causing this type of harm to the users of its services in the future. In light of its refusal to make such a pledge, the question of whether Yahoo has really learned any lesson here remains valid. It is also important to remember that these actions have been taken after the fact; they would not have been necessary if Yahoo had avoided the problem entirely by planning ahead using moral imagination.

V. Conclusion

While Yahoo's apparent cooperation with the Chinese government is certainly regrettable from an ethical point of view, the dilemma Yahoo has encountered while doing business in China is not unique. Although the controversy Yahoo has become embroiled in may not have

been completely avoidable, its apparent after-the-fact rationalizations - based on its legal compliance argument, its employee protection argument, and the public good argument - have not been persuasive in appeasing Yahoo's critics and have done little to end the controversy. Even though it has recently made attempts to take some corrective action – after considerable public and political pressure – Yahoo so far has refused to commit to unilateral change and has yet to restore its reputation after its experience in China.

Obviously, a multinational firm doing business in a politically oppressed foreign country would do well not to follow in Yahoo's footsteps, but what is an ethical company to do? As has been suggested, and as this paper has discussed, such a firm could ethically justify its operations in such a country, and even some degree of cooperation with the foreign country's government, by (i) using moral imagination to avoid foreseeable ethical dilemmas when setting up its operations in the foreign country, and (ii) actively working to mitigate any harm caused by its operations in particular and to improve human rights for the country's citizens generally. Actively pursuing such strategies, rather than passive acceptance of the status quo, is likely to help the firm avoid many types of ethical conflicts and lessen any harm that may result from the firm's actions and decisions when such conflicts arise.

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BAD BOYS OF BUSINESS MAKE FOR BAD BUSINESS DECISIONS: A STUDY IN ETHICS

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I. INTRODUCTION:

In just the last year the stigma of going “bankrupt” seems to have all but disappeared. So too have the ethical standards that once limited, if not prevented, Chief Executive Officers (“CEO’s”) and other corporate high rollers from running their companies into the ground. Thanks to our newfound thirst for stability through our federal government, many of the larger corporations raided and abused by ethically challenged CEO’s will survive via federal emergency loans and other economic incentives. It is clear that something will need to be done to restore the integrity of corporate financial leadership; the more immediate question is how much damage has been done? Large, popular corporations have been able to turn to the government for a hand. Unfortunately for smaller companies faced with a similar lack of financial leadership, the future most likely leads to bankruptcy rather than bailouts, and with that bankruptcy comes a tangled web of documents few truly understand.

II. WHERE HAS THE CONCEPT OF FINANCIAL “LEADERSHIP” GONE

A. Stan O’Neal and John Thain – The Heckle and Jeckle of Corporate Ethics

In a time when our country should be able to look to our economic and industrial leaders, we have been flooded with stories of executive officers involved in acts of self-dealing at best, and criminal fraud and theft at worst. Citizens and shareholders place their faith in corporate and expect them to lead their companies through good times and bad. Not all decisions will be the right ones, but at a minimum, CEO’s are expected to make decisions that are in the best interests of the company and its shareholders. In 2002, Merrill Lynch chose Stan O’Neal to take the reins.³ Like many CEO’s, O’Neal was well taken care of, earning \$48 million dollars in 2006 alone.⁴ In June of 2007 O’Neal told investors the subprime defaults were “reasonably contained”.⁵ Shortly thereafter it was announced that Merrill suffered \$8 billion dollars in losses due to risky investments on mortgages and credit.⁶ When he was asked how he could lose so much money, O’Neal said, “We made mistakes”.⁷ Although it may seem a colossal understatement, O’Neal isn’t the only corporate officer making huge, repeated mistakes these

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³ Jenny Anderson and Landon Thomas Jr., *Merrill’s Chief Is Being Held to Account*, at http://www.nytimes.com/2007/10/25/business/25merrill.html?_r=2

⁴ J. Richard Finlay, *Outrage of the Week: Merrill Lynch’s Billion Dollar Boardroom Blunders*, at <http://finlayongovernance.com/?p=298>

⁵ *Id.*

⁶ *Id.*

⁷ Jenny Anderson and Landon Thomas Jr., *Merrill’s Chief Is Being Held to Account*, at http://www.nytimes.com/2007/10/25/business/25merrill.html?_r=2

days. It is hard to believe Merrill's Board of Directors never saw the writing on the wall, but it is important to note that O'Neal had essentially hand-picked his supervisors after almost a 100% turnover on the board.⁸ O'Neal also stood alone at the top of Merrill's officers, having been accused of replacing a team of experienced executives with hand-picked "yes men".⁹ His support base was very small by design, and O'Neal's strategies were laid out, in part, by long time ally Ahmass Fakahany, a co-president.¹⁰ Unfortunately for the firm and its investors, despite Fakahany's loyalty to O'Neal his position at Merrill was clearly another act of cronyism-his experience being almost completely administrative.¹¹ O'Neal was accused by his own employees of being arrogant, and the appointment of Fakahany was no exception.¹² Despite Mr. Fakahany's lack of previous experience as a broker or banker, O'Neal turned to his friend for advice regarding the decisions that would change-and ultimately destroy-Merrill's business.¹³

Once he took the top spot at Merrill Lynch O'Neal made the decision that Merrill should be more aggressive in its business.¹⁴ While aggressive business is not in and of itself unethical, O'Neal changed this business model at the same time that he fired all of the experienced executives (that may have resisted) in favor of his friends with little to no financial expertise. During this same period when O'Neal was involved in the forcing out or firing of Merrill's top executives he also struck a deal to take out additional Merrill bankers by working with federal prosecutors.¹⁵ Employees accused O'Neal of leading through intimidation and purging his way to the top.¹⁶ It was these types of actions that led analysts to proclaim, "... Merrill Lynch stands out as a model of misjudgment and flawed vision..."¹⁷ Many Merrill insiders point to the blind reliance on Fakahany and his inexperienced, overly aggressive proposals as one of the leading causes of the downturn during O'Neal's reign as CEO.¹⁸ Additionally, former executives are quick to add that O'Neal's destroying the culture of a successful firm caused a need for an immediate change in leadership.¹⁹ Few would argue that Stan O'Neal's tenure at Merrill was

⁸ J. Richard Finlay, *Outrage of the Week: Merrill Lynch's Billion Dollar Boardroom Blunders*, At <http://finlayongovernance.com/?p=298>

⁹ Gill Corkindale, *After Stan O'Neal, Some Questions for Merrill Lynch*, at http://blogs.harvardbusiness.org/corkindale/2007/11/after_stan_oneal_some_question.html

¹⁰ Jenny Anderson and Landon Thomas Jr., *Merrill's Chief Is Being Held to Account*, at http://www.nytimes.com/2007/10/25/business/25merrill.html?_r=2

¹¹ *Id.*

¹² Gill Corkindale, *After Stan O'Neal, Some Questions for Merrill Lynch*, at http://blogs.harvardbusiness.org/corkindale/2007/11/after_stan_oneal_some_question.html

¹³ Jenny Anderson and Landon Thomas Jr., *Merrill's Chief Is Being Held to Account*, at http://www.nytimes.com/2007/10/25/business/25merrill.html?_r=2

¹⁴ Jenny Anderson and Landon Thomas Jr., *Merrill's Chief Is Being Held to Account*, at http://www.nytimes.com/2007/10/25/business/25merrill.html?_r=2

¹⁵ Jenny Anderson and Landon Thomas Jr., *Merrill's Chief Is Being Held to Account*, at http://www.nytimes.com/2007/10/25/business/25merrill.html?_r=2

¹⁶ Gill Corkindale, *After Stan O'Neal, Some Questions for Merrill Lynch*, at http://blogs.harvardbusiness.org/corkindale/2007/11/after_stan_oneal_some_question.html

¹⁷ J. Richard Finlay, *Outrage of the Week: Merrill Lynch's Billion Dollar Boardroom Blunders*, At <http://finlayongovernance.com/?p=298>

¹⁸ Jenny Anderson and Landon Thomas Jr., *Merrill's Chief Is Being Held to Account*, at http://www.nytimes.com/2007/10/25/business/25merrill.html?_r=2

¹⁹ Jenny Anderson and Landon Thomas Jr., *Merrill's Chief Is Being Held to Account*, at http://www.nytimes.com/2007/10/25/business/25merrill.html?_r=2

anything but a disaster which has been described as "...corporate story of greed, arrogance, and poor leadership..."²⁰

O'Neal was eventually convinced to step down to the tune of a \$161 million dollar retirement package.²¹ After O'Neal's departure, Merrill chose John Thain to replace him.²² O'Neal had been accused of being careless with his employees' and investors' lives.²³ Surely, his successor needed to take extreme care in steering the company through the pitfalls that lay ahead. John Thain was a hot commodity at a time when Merrill needed all the help it could muster.²⁴ Thain came from Goldman Sachs, and had successfully guided the New York Stock Exchange through the challenge of going public.²⁵ Merrill was so dedicated to the pursuit of Thain, that it gave him a \$15 million dollar signing bonus just for joining the team.²⁶ Upon joining Merrill, Thain promised that as Merrill's new head he would live up to his reputation as "Mr. Fix it", and fix it he would.²⁷

Hard times require tough decisions, and in early 2008, Merrill and Thain were facing some of those tough decisions. Merrill was at the center of the harsh economic times the United States finds itself in today. Like many other companies, Merrill and Thain were facing the daunting tasks of shedding business, streamlining expenses and ultimately cutting jobs.²⁸ Circumstances like these are rough no doubt, and it is in these decisions require financial leadership from those at the top. It is through these tough times that Thain and other CEO's earn their exorbitant salaries and compensation packages. These leaders are expected to hold the company together, to make unpopular decisions, and at a minimum...lead. Yet, taking a page from his predecessor's playbook, John Thain was at the helm as more than 40 traders, bankers and executives left the company.²⁹ Eerily similar to O'Neal as well, was Thain's hiring of a Chief Financial Officer with no experience in a securities firm.³⁰ Unbeknownst to Merrill's investors, Thain was facing other challenges at the same time. Just as he was deciding how

²⁰ Gill Corkindale, *After Stan O'Neal, Some Questions for Merrill Lynch*, at http://blogs.harvardbusiness.org/corkindale/2007/11/after_stan_oneal_some_question.html

²¹ Andrew Leonard, *Countrywide and the "left-wing anti-business press"*, at http://www.salon.com/tech/htw/2008/03/06/angelo_mozilo_gets_annoyed/index.html

²² Charlie Gasparino, *John Thain's \$87,000 Rug*, at <http://www.thedailybeast.com/blogs-and-stories/2009-01-22/john-thains-87000-rug>

²³ Gill Corkindale, *After Stan O'Neal, Some Questions for Merrill Lynch*, at http://blogs.harvardbusiness.org/corkindale/2007/11/after_stan_oneal_some_question.html

²⁴ Mara Der Hovanesian, *John Thain Resigns from Bank of America*, at http://www.businessweek.com/bwdaily/dnflash/content/jan2009/db20090122_536174.htm?chan=top+news_top+news+index++temp_news+%2B+analysis

²⁵ Mara Der Hovanesian, *John Thain Resigns from Bank of America*, at http://www.businessweek.com/bwdaily/dnflash/content/jan2009/db20090122_536174.htm?chan=top+news_top+news+index++temp_news+%2B+analysis

²⁶ Josh Fineman and David Milkenberg, *Thain Pushed Out at Bank of America After Merrill Loss Widens*, at <http://www.bloomberg.com/apps/news?pid=20601087&sid=akKc0eTLjkLc&refer=home>

²⁷ Josh Fineman and David Milkenberg, *Thain Pushed Out at Bank of America After Merrill Loss Widens*, at <http://www.bloomberg.com/apps/news?pid=20601087&sid=akKc0eTLjkLc&refer=home>

²⁸ Charlie Gasparino, *John Thain's \$87,000 Rug*, at <http://www.thedailybeast.com/blogs-and-stories/2009-01-22/john-thains-87000-rug>

²⁹ Josh Fineman and David Milkenberg, *Thain Pushed Out at Bank of America After Merrill Loss Widens*, at <http://www.bloomberg.com/apps/news?pid=20601087&sid=akKc0eTLjkLc&refer=home>

³⁰ Josh Fineman and David Milkenberg, *Thain Pushed Out at Bank of America After Merrill Loss Widens*, at <http://www.bloomberg.com/apps/news?pid=20601087&sid=akKc0eTLjkLc&refer=home>

many Merrill employees would be out on the street Thain was also facing the challenging decision of how to spend his redecorating budget - drapes or vertical blinds. While Merrill was struggling to stay alive, Thain spent over a million dollars of Merrill's rapidly disappearing money to redecorate his Manhattan office.³¹ On the one hand, Thain was deciding the fate of hundreds of Merrill's dedicated employees, while on the other hand he found it to be a prudent use of Merrill's now limited resources to purchase for his own benefit such items as an \$87,000 dollar rug, a \$68,000 antique credenza, a \$13,000 chandelier for his private dining room, and a \$35,000 commode.³² As if redecorating the Titanic while throwing employees in the street wasn't offensive enough, Thain also paid a \$100,000 premium to have it done by the same celebrity designer who redecorated the White House for the Obama family, and allocated an additional \$230,000 a year for his personal driver.³³

Often when these types of indiscretions come to light, some minion is required to fall on their sword while the true perpetrator feigns surprise. However, Thain signed off on all of the redecorating expenses personally.³⁴ When questioned about the expenditures, Thain explained that they occurred in a different economic environment.³⁵ Interestingly enough, the company had just posted a loss of almost \$10 billion in the previous quarter.³⁶

While Thain fiddled, Merrill's losses continued through 2008.³⁷ Thain held on to subprime bonds worth more than \$40 billion dollars as the market crashed.³⁸ The few experienced officers that remained finally decided they had seen enough and Thain's antics brought on the resignation of his brokerage chief and banking head.³⁹ Incredibly, despite the losses brought in 2008, Thain pressured the board for a \$10 million dollar bonus.⁴⁰ Although he would never see that bonus, in what could only be seen as a direct attack on any idea that his actions were simply poor business decisions, Thain pushed through the distribution of executive bonuses immediately before a takeover by Bank of America.⁴¹ Far from the type of leadership needed by a floundering corporation, Thain's actions were an act of pure selfishness in the face of the implosion of a once great company. All of this followed a \$15.4 billion dollar 4th quarter

³¹ Charlie Gasparino, *John Thain's \$87,000 Rug*, at <http://www.thedailybeast.com/blogs-and-stories/2009-01-22/john-thains-87000-rug>

³² Charlie Gasparino, *John Thain's \$87,000 Rug*, at <http://www.thedailybeast.com/blogs-and-stories/2009-01-22/john-thains-87000-rug>

³³ Shannon Stapleton, *John Thain's Top 16 Outrages*, at <http://www.thedailybeast.com/blogs-and-stories/2009-01-22/john-thains-top-16-outrages/>

³⁴ Charlie Gasparino, *John Thain's \$87,000 Rug*, at <http://www.thedailybeast.com/blogs-and-stories/2009-01-22/john-thains-87000-rug>

³⁵ J. Richard Finlay, *The Disingenuous Fleeing to the Indefensible*, at <http://finlayongovernance.com/?p=1118>

³⁶ J. Richard Finlay, *The Disingenuous Fleeing to the Indefensible*, at <http://finlayongovernance.com/?p=1118>

³⁷ Charlie Gasparino, *John Thain's \$87,000 Rug*, at <http://www.thedailybeast.com/blogs-and-stories/2009-01-22/john-thains-87000-rug>

³⁸ Josh Fineman and David Mildenberg, *Thain Pushed Out at Bank of America After Merrill Loss Widens*, at <http://www.bloomberg.com/apps/news?pid=20601087&sid=akKc0eTLjLc&refer=home>

³⁹ Charlie Gasparino, *John Thain's \$87,000 Rug*, at <http://www.thedailybeast.com/blogs-and-stories/2009-01-22/john-thains-87000-rug>

⁴⁰ Mara Der Hovanesian, *John Thain Resigns from Bank of America*, at http://www.businessweek.com/bwdaily/dnflash/content/jan2009/db20090122_536174.htm?chan=top+news_top+news+index++temp_news+%2B+analysis

⁴¹ Mara Der Hovanesian, *John Thain Resigns from Bank of America*, at http://www.businessweek.com/bwdaily/dnflash/content/jan2009/db20090122_536174.htm?chan=top+news_top+news+index++temp_news+%2B+analysis

loss.⁴² Having been refused his requested personal bonus, Thain was forced to squeak by on a 2008 salary of only \$750,000.⁴³

Unlike many past indiscretions, these bonuses would not go unnoticed. Although John Thain and a few other top executives at Merrill did not take bonuses in 2008, under his watch four executives alone took home bonuses totaling more than \$121 million dollars.⁴⁴ The last minute perks were not reserved for a select few. In total, over 700 employees received a bonus of at least \$1 million dollars or more, for a total of over \$3.6 billion dollars.⁴⁵ Under Thain's leadership, Merrill had thrown billions of dollars around while losing almost \$2 billion dollars in the fourth quarter of 2008.⁴⁶ It is normal to expect corporate leaders to be good stewards of their company's resources, and eventually investors totally lost confidence and began to pull financing from the brokerage firm.⁴⁷ In September, rather than go through liquidation, Merrill was sold to Bank of America (BOA).⁴⁸ Even in this last ditch sale, Thain and his executives came very close to blowing the deal. Due to the higher than expected fourth quarter losses, Bank of America almost pulled out of the deal at the last minute.⁴⁹ It was only through the government sweetening the deal with \$138 billion dollars in assistance that BOA shareholders were willing to approve the purchase of the now decimated Merrill.⁵⁰

Facing continued criticism for his poor leadership, Thain was forced to resign in January 2009, less than a month after Bank of America picked up the pieces of Merrill Lynch.⁵¹ The leadership of BOA was surprised by how bad the Merrill losses really were, and even after what should have been a traumatic course of events, Thain was unwilling to change enough to convince BOA that he was trying to keep costs down or even minimize losses.⁵² Even though the duo of O'Neal and Thain are gone, their ghosts continue to plague BOA. Since the purchase, Bank of America CEO Ken Lewis has faced criticism for rushing through the purchase of

⁴² Mara Der Hovanesian, John Thain Resigns from Bank of America, at http://www.businessweek.com/bwdaily/dnflash/content/jan2009/db20090122_536174.htm?chan=top+news_top+news+index++temp_news+%2B+analysis

⁴³ Josh Fineman and David Milkenberg, *Thain Pushed Out at Bank of America After Merrill Loss Widens*, at <http://www.bloomberg.com/apps/news?pid=20601087&sid=akKc0eTLjkLc&refer=home>

⁴⁴ Stephen Bernard and Ieva M. Augstums, *New York Attorney General Blasts Merrill Lynch Executives On Bonus Plan*, at http://www.wsjs.com/sls/news/national/article/new_york_attorney_general_blasts_merrill_lynch_executives_on_bonus_plan/27472/

⁴⁵ Stephen Bernard and Ieva M. Augstums, *New York Attorney General Blasts Merrill Lynch Executives On Bonus Plan*, at http://www.wsjs.com/sls/news/national/article/new_york_attorney_general_blasts_merrill_lynch_executives_on_bonus_plan/27472/

⁴⁶ Charlie Gasparino, *John Thain's \$87,000 Rug*, at <http://www.thedailybeast.com/blogs-and-stories/2009-01-22/john-thains-87000-rug>

⁴⁷ Charlie Gasparino, *John Thain's \$87,000 Rug*, at <http://www.thedailybeast.com/blogs-and-stories/2009-01-22/john-thains-87000-rug>

⁴⁸ Charlie Gasparino, *John Thain's \$87,000 Rug*, at <http://www.thedailybeast.com/blogs-and-stories/2009-01-22/john-thains-87000-rug>

⁴⁹ Charlie Gasparino, *John Thain's \$87,000 Rug*, at <http://www.thedailybeast.com/blogs-and-stories/2009-01-22/john-thains-87000-rug>

⁵⁰ Charlie Gasparino, *John Thain's \$87,000 Rug*, at <http://www.thedailybeast.com/blogs-and-stories/2009-01-22/john-thains-87000-rug>

⁵¹ Shannon Stapleton, *John Thain's Top 16 Outrages*, at <http://www.thedailybeast.com/blogs-and-stories/2009-01-22/john-thains-top-16-outrages/>

⁵² Josh Fineman and David Milkenberg, *Thain Pushed Out at Bank of America After Merrill Loss Widens*, at <http://www.bloomberg.com/apps/news?pid=20601087&sid=akKc0eTLjkLc&refer=home>

damaged Merrill Lynch, which has added to BOA's own financial woes.⁵³ Because of the poor financial standing of both companies, Lewis plans to eliminate at least 35,000 jobs from the two over the next couple of years.⁵⁴ Additionally, it has come to light that while BOA slashed its own bonus plans it was at least aware of those last minute bonuses paid out to Merrill employees.⁵⁵ Andrew Cuomo, the New York Attorney General, took up the cause calling Merrill executives "irresponsible".⁵⁶ Cuomo had requested that Merrill forward any bonus plans to his office, but perhaps not surprisingly, considering Thain's past history, the date of the bonuses was instead moved up.⁵⁷ Merrill had a history of paying bonuses in January or February, but in order to beat the purchase by BOA they were instead paid in December of 2008.⁵⁸

Thain came to Merrill with a glowing reputation, promising to fix Merrill Lynch. After what could only be described as a tenure lacking any financial leadership, he went out with a whimper while under investigation for ethical, and possibly criminal, violations. John Thain was a poor CEO. He may or may not be the worst, but he was certainly not the last.

B. Richard Fuld/Lehman Brothers

Former Lehman Brothers' (Lehman) CEO Richard Fuld has led the good life. In 2007 alone his total take home compensation was over \$45 million, including a \$22 million bonus.⁵⁹ Not bad work if you can get it, and some argue that to keep good talent you have to be willing to pay for it. Lehman was so impressed that almost half of that \$45 million dollars was a \$22 million dollar bonus.⁶⁰ Lehman had good reason to place its faith in Fuld, who had led the company through challenging times in the past. As recently as 1998, Fuld had competently steered the company through the Asian Debt crisis.⁶¹ His intimidating presence even earned him

⁵³ Charlie Gasparino, *John Thain's \$87,000 Rug*, at <http://www.thedailybeast.com/blogs-and-stories/2009-01-22/john-thains-87000-rug>

⁵⁴ Josh Fineman and David Milkenberg, *Thain Pushed Out at Bank of America After Merrill Loss Widens*, at <http://www.bloomberg.com/apps/news?pid=20601087&sid=akKc0eTLjKc&refer=home>

⁵⁵ Stephen Bernard and Ieva M. Augstums, *New York Attorney General Blasts Merrill Lynch Executives On Bonus Plan*, at

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⁵⁶ Stephen Bernard and Ieva M. Augstums, *New York Attorney General Blasts Merrill Lynch Executives On Bonus Plan*, at

http://www.wsjs.com/sls/news/national/article/new_york_attorney_general_blasts_merrill_lynch_executives_on_bonus_plan/27472/

⁵⁷ Stephen Bernard and Ieva M. Augstums, *New York Attorney General Blasts Merrill Lynch Executives On Bonus Plan*, at

http://www.wsjs.com/sls/news/national/article/new_york_attorney_general_blasts_merrill_lynch_executives_on_bonus_plan/27472/

⁵⁸ Josh Fineman and David Milkenberg, *Thain Pushed Out at Bank of America After Merrill Loss Widens*, at <http://www.bloomberg.com/apps/news?pid=20601087&sid=akKc0eTLjKc&refer=home>

⁵⁹ Emily Anderson and Chuck Hadad, *Former Lehman Brothers CEO Subpoenaed*, at http://money.cnn.com/2008/10/17/news/companies/lehman_subpoena/

⁶⁰ Christian Plumb and Dan Wilchins, *Lehman CEO Fuld's hubris contributed to meltdown*, at <http://www.reuters.com/article/newsOne/idUSN1341059120080914>

⁶¹ Christian Plumb and Dan Wilchins, *Lehman CEO Fuld's hubris contributed to meltdown*, at <http://www.reuters.com/article/newsOne/idUSN1341059120080914>

the nickname, “The Gorilla”.⁶² By the end of 2008 Richard Fuld was out at Lehman – taking no bonus or severance.⁶³

Mr. Fuld has distinguished himself to be sure. In addition to taking home that nice paycheck for himself in 2007, Mr. Fuld was able to lead Lehman to its demise in 2008, leaving in his wake a bankrupt corporation over \$600 billion in debt.⁶⁴ The fall of the company was fast. Lehman had never posted a quarterly loss prior to June of 2007.⁶⁵ In 2008, CNN voted Richard Fuld the #9 culprit in America’s current economic collapse.⁶⁶

Due in part no doubt to Mr. Fuld’s well-compensated abilities, the bankruptcy of Lehman brothers was able to far surpass that of Worldcom, who filed for Bankruptcy in 2002.⁶⁷ Fuld’s charge went belly up leaving over 100,000 investors holding in excess of \$150 billion in bond debt alone.⁶⁸ Mr. Fuld refused to take credit for the collapse, instead pointing at the failure of government to take timely action and a loss of confidence in the economy.⁶⁹ It is hard to deny that it takes a special talent to drive a company that has been in existence for over 158 years into oblivion.⁷⁰ Occasionally bad things happen to good people. The business world is vicious, and it can chew up those with even the best intentions. Fuld was certainly facing trying times. Lehman was at the forefront of the credit crisis, having underwritten about 10 percent of the mortgage market through 2006 and 2007.⁷¹ Lehman led the underwriting market in the United States due in large part to Fuld.⁷² Although Lehman’s aggressiveness in the market mirrored that of its leader, there was an undetected flaw in the company’s philosophy. Lehman’s business centered on underwriting dangerous mortgages, repackaging them and then passing that risk on to other investors.⁷³ Unfortunately for investors there were no contingencies, and when the

⁶²Christian Plumb and Dan Wilchins, *Lehman CEO Fuld's hubris contributed to meltdown*, at <http://www.reuters.com/article/newsOne/idUSN1341059120080914>

⁶³Louise Story, *For \$10, Fuld Sold Florida Mansion to His Wife*, at http://www.nytimes.com/2009/01/26/business/26fuld.html?_r=2&scp=2&sq=fuld&st=cse

⁶⁴Sam Mamudi, *Lehman folds with record \$613 billion debt*, at <http://www.marketwatch.com/news/story/story.aspx?guid={2FE5AC05-597A-4E71-A2D5-9B9FCC290520}&siteid=rss>

⁶⁵Christian Plumb and Dan Wilchins, *Lehman CEO Fuld's hubris contributed to meltdown*, at <http://www.reuters.com/article/newsOne/idUSN1341059120080914>

⁶⁶Anderson Cooper, *Culprits of the Collapse*, at <http://ac360.blogs.cnn.com/2008/10/10/culprits-of-the-collapse-10-richard-fuld/>

⁶⁷Reuters and the Associated Press, *US Major Bankrupt Companies 2008- The Latest Casualty Count* <http://investment-blog.net/us-major-bankrupt-companies-2008-the-latest-casualty-count/>

⁶⁸Sam Mamudi, *Lehman folds with record \$613 billion debt*, at <http://www.marketwatch.com/news/story/story.aspx?guid={2FE5AC05-597A-4E71-A2D5-9B9FCC290520}&siteid=rss>

⁶⁹Emily Anderson and Chuck Hadad, *Former Lehman Brothers CEO Subpoenaed*, at http://money.cnn.com/2008/10/17/news/companies/lehman_subpoena/

⁷⁰Sam Mamudi, *Lehman folds with record \$613 billion debt*, at <http://www.marketwatch.com/news/story/story.aspx?guid={2FE5AC05-597A-4E71-A2D5-9B9FCC290520}&siteid=rss>

⁷¹Christian Plumb and Dan Wilchins, *Lehman CEO Fuld's hubris contributed to meltdown*, at <http://www.reuters.com/article/newsOne/idUSN1341059120080914>

⁷²Christian Plumb and Dan Wilchins, *Lehman CEO Fuld's hubris contributed to meltdown*, at <http://www.reuters.com/article/newsOne/idUSN1341059120080914>

⁷³Christian Plumb and Dan Wilchins, *Lehman CEO Fuld's hubris contributed to meltdown*, at <http://www.reuters.com/article/newsOne/idUSN1341059120080914>

market started to plummet, Lehman was unable to unload the bad mortgages.⁷⁴ Lehman filed for bankruptcy the same weekend Merrill Lynch was bought by Bank of America.⁷⁵

If Lehman Brothers went down solely due to poor economics, bad timing, or even some poor business decisions, you might even feel a little sorry for Richard Fuld. It is true that Lehman did have some bad luck. This economy is tough, and it did not take long for the markets or the media to notice Lehman. Since the dust settled, it is becoming more and more clear that Lehman Brothers did not suffer solely because of simple business mistakes. Mr. Fuld became the target of investigations as three separate grand juries tried to sort out the company's failures.⁷⁶ Fuld is also the target of investigations into whether or not he led Lehman executives in misleading investors about the health of the company.⁷⁷ Many have since come forward to question the leadership of Richard Fuld. As seems all too often with America's CEO's, it was only after the total collapse of the company that accusations of Fuld's management deficiencies came to light. Experts now assert that he did far too little to try and save the firm.⁷⁸ The industry was quick to point out that Fuld had many chances to sell Lehman, having turned down an approximately five billion dollar offer for a twenty-five percent share of the company from Korea Development bank as late as August of 2008.⁷⁹ Experts are left to speculate that Fuld's decisions to decline offers which could have prevented the bankruptcy were simply dismissed as they were not consistent with his own concepts of the value of the firm.⁸⁰

It is becoming more apparent that Fuld's lack of financial judgment was not limited to his professional life. Just as he was becoming the focus of investigations regarding his dealings at Lehman, it appears that Mr. Fuld was attempting to hide assets from potential lawsuits. In November of 2008 he sold the mansion he purchased for \$13,000,000 for only \$10.00.⁸¹ At what point do individuals start to question the ethics of these men chosen to lead industry?

C. Angelo Mozilo / Countrywide

It isn't hard to see that many high-profile, corporate CEO's fail to provide sound leadership. What may be even more disturbing, however, is when the behavior not only approaches the line that divides unethical behavior from illegal behavior, but also jumps right over the line to the illegal side.

Forty years ago, Angelo Mozilo founded Countrywide and grew the company to one of the largest mortgage providers in the country. For his efforts, he received over \$470 million

⁷⁴Christian Plumb and Dan Wilchins, *Lehman CEO Fuld's hubris contributed to meltdown*, at <http://www.reuters.com/article/newsOne/idUSN1341059120080914>

⁷⁵Josh Fineman and David Milkenberg, *Thain Pushed Out at Bank of America After Merrill Loss Widens*, at <http://www.bloomberg.com/apps/news?pid=20601087&sid=akKc0eTLjkLc&refer=home>

⁷⁶Emily Anderson and Chuck Hadad, *Former Lehman Brothers CEO Subpoenaed*, at http://money.cnn.com/2008/10/17/news/companies/lehman_subpoena/

⁷⁷Louise Story, *For \$10, Fuld Sold Florida Mansion to His Wife*, at http://www.nytimes.com/2009/01/26/business/26fuld.html?_r=2&scp=2&sq=fuld&st=cse

⁷⁸Louise Story, *For \$10, Fuld Sold Florida Mansion to His Wife*, at http://www.nytimes.com/2009/01/26/business/26fuld.html?_r=2&scp=2&sq=fuld&st=cse

⁷⁹Christian Plumb and Dan Wilchins, *Lehman CEO Fuld's hubris contributed to meltdown*, at <http://www.reuters.com/article/newsOne/idUSN1341059120080914>

⁸⁰Christian Plumb and Dan Wilchins, *Lehman CEO Fuld's hubris contributed to meltdown*, at <http://www.reuters.com/article/newsOne/idUSN1341059120080914>

⁸¹Louise Story, *For \$10, Fuld Sold Florida Mansion to His Wife*, at http://www.nytimes.com/2009/01/26/business/26fuld.html?_r=2&scp=2&sq=fuld&st=cse

dollars in total compensation while serving as CEO for Countrywide.⁸² As CEO, he pushed his people to continue writing risky loans long after the warning signs were clear.⁸³ While Mozilo was ruining Countrywide, it seemed that his primary concern was his compensation package. As the subprime mortgage business was crashing around him, Mozilo continued to charge full speed ahead as he took home offensively large paychecks.⁸⁴ Mozilo was recognized as one of the “People Who Mattered” in Time Magazine’s search for the Person of the Year 2007, not for outstanding leadership, but because the editors felt that no one came closer to summarizing how screwed up the subprime mortgage business had become.⁸⁵ Mozilo also edged out former Lehman Brothers CEO Richard Fuld by garnering the #4 position on CNN’s “Culprits of the Collapse” to Fuld’s lowly #9 spot.⁸⁶ Mozilo is also a target of California Representative Henry Waxman who has opened an investigation into executive compensation in the wake of the mortgage crisis.⁸⁷

Although mortgages were beginning to falter, one could always get a sweetheart deal at Countrywide as long as he or she was a “Friend of Angelo”.⁸⁸ Although interest rates were dropping and there was a huge demand for refinancing loans, during that time Countrywide was loaning millions to politicians, government officials and others through its VIP program.⁸⁹ Many high-profile individuals were able to take advantage of their friendship with Mr. Mozilo. Current investigations have determined that at least two U.S. senators, two former cabinet members, and a former ambassador received loans that waived borrowing rules, points, and fees.⁹⁰ Even President Obama was affected by the corruption when his advisor, James Johnson, was forced to resign after reports that he had received a Countrywide loan at VIP reduced rates.⁹¹ These individuals were informed that Mozilo had personally priced their loans.⁹²

Even inside Countrywide there appeared to be concerns about Mozilo lining his pockets even as his company was burning to the ground. As early as 2006 Countrywide hired a

⁸² Wall Street Journal, *Executive Incentives*, at http://online.wsj.com/public/resources/documents/st_ceos_20081111.html

⁸³ David Von Drehle, *People Who Mattered*, at http://www.time.com/time/specials/2007/personoftheyear/article/0,28804,1690753_1690758_1693577,00.html

⁸⁴ David Von Drehle, *People Who Mattered*, at http://www.time.com/time/specials/2007/personoftheyear/article/0,28804,1690753_1690758_1693577,00.html

⁸⁵ David Von Drehle, *People Who Mattered*, at http://www.time.com/time/specials/2007/personoftheyear/article/0,28804,1690753_1690758_1693577,00.html

⁸⁶ Anderson Cooper, *Culprits of the Collapse*, at <http://ac360.blogs.cnn.com/2008/10/20/culprits-of-the-collapse-4-angelo-mozilo/>

⁸⁷ Andrew Leonard, *Countrywide and the "left-wing anti-business press"*, at http://www.salon.com/tech/htww/2008/03/06/angelo_mozilo_gets_annoyed/index.html

⁸⁸ Citizens for Responsibility and Ethics in Washington, *Countrywide’s Many “Friends”*, at <http://citizensforethics.org/node/31982>

⁸⁹ Citizens for Responsibility and Ethics in Washington, *Countrywide’s Many “Friends”*, at <http://citizensforethics.org/node/31982>

⁹⁰ Citizens for Responsibility and Ethics in Washington, *Countrywide’s Many “Friends”*, at <http://citizensforethics.org/node/31982>

⁹¹ Citizens for Responsibility and Ethics in Washington, *Countrywide’s Many “Friends”*, at <http://citizensforethics.org/node/31982>

⁹² Citizens for Responsibility and Ethics in Washington, *Countrywide’s Many “Friends”*, at <http://citizensforethics.org/node/31982>

consultant to try and restructure Mozilo's compensation. In response, Mozilo hired his own consultant (at Countrywide's expense) to counter the efforts of the Countrywide board to adjust his compensation.⁹³ During a time of record foreclosures, which was costing Countrywide billions, Mozilo continued to have a single focus--himself.⁹⁴ Emails between Mozilo and his consultant reveal that it was clear that Mozilo's primary area of concern at the time was that the new contract offers reduced his "...maximum opportunity significantly..."⁹⁵ Just a month after agreeing to a new contract, Mozilo complained that when his wife traveled with him on the corporate jet he was forced to pay taxes.⁹⁶ Countrywide's concern was that the company needed to avoid extravagant or unnecessary travel expenses, but Mozilo still balked and insisted it just was not right.⁹⁷ In reality, while Mozilo was clamoring about relative pennies he was making big money coming and going. In addition to his new contract Mozilo sold some \$474 million dollars in Countrywide stock from 2004-2007, apparently bailing out as the crisis drew near.⁹⁸

Preoccupied with his salary, Mozilo continued to lead Countrywide astray. Even in light of all the failures, Countrywide and others like it continued to draw homebuyers into mortgages they could never afford.⁹⁹ Based on its over-aggressive lending practices, Countrywide has been singled out for criticism that Mozilo spurred the mortgage crisis.¹⁰⁰ In early 2008, a federal judge opened an investigation into Countrywide's internal lending procedures to determine if the company systematically abused its customers.¹⁰¹ The judge is presiding over almost 300 bankruptcy cases involving claims of misconduct by Countrywide including claims that the company further burdened bankrupt customers by adding improper fees to their accounts.¹⁰²

The facts are that Mozilo, a pillar of the industry and leader of the one time largest mortgage lender in the United States, had a duty to do more than take care of himself. He owed duties to his employees, shareholders, customers and others including the general public --and he failed to meet any of those obligations. To paraphrase David Von Drehle of CNN.com, Mozilo may have lost his company, but unlike many of his customers at least he won't lose his home.¹⁰³

⁹³ Greg Farrell, *Fight over Countrywide CEO's pay shows boards role*, at http://www.usatoday.com/money/companies/management/2008-04-09-ceo-pay-countrywide--mozilo_N.htm

⁹⁴ Andrew Leonard, *Countrywide and the "left-wing anti-business press"*, at http://www.salon.com/tech/htww/2008/03/06/angelo_mozilo_gets_annoyed/index.html

⁹⁵ Greg Farrell, *Fight over Countrywide CEO's pay shows boards role*, at http://www.usatoday.com/money/companies/management/2008-04-09-ceo-pay-countrywide--mozilo_N.htm

⁹⁶ Greg Farrell, *Fight over Countrywide CEO's pay shows boards role*, at http://www.usatoday.com/money/companies/management/2008-04-09-ceo-pay-countrywide--mozilo_N.htm

⁹⁷ Greg Farrell, *Fight over Countrywide CEO's pay shows boards role*, at http://www.usatoday.com/money/companies/management/2008-04-09-ceo-pay-countrywide--mozilo_N.htm

⁹⁸ Citizens for Responsibility and Ethics in Washington, *Countrywide's Many "Friends"*, at <http://citizensforethics.org/node/31982>

⁹⁹ Andrew Leonard, *Countrywide and the "left-wing anti-business press"*, at http://www.salon.com/tech/htww/2008/03/06/angelo_mozilo_gets_annoyed/index.html

¹⁰⁰ Citizens for Responsibility and Ethics in Washington, *Countrywide's Many "Friends"*, at <http://citizensforethics.org/node/31982>

¹⁰¹ Dow Jones/AP, *Court Approves Review of Countrywide Practices*, at <http://www.nytimes.com/2008/04/03/business/03lender.html>

¹⁰² Dow Jones/AP, *Court Approves Review of Countrywide Practices*, at <http://www.nytimes.com/2008/04/03/business/03lender.html>

¹⁰³ David Von Drehle, *People Who Mattered*, at http://www.time.com/time/specials/2007/personoftheyear/article/0,28804,1690753_1690758_1693577,00.html

III. FOR THE LITTLE GUYS IT IS EVERYONE FOR THEMSELVES

There have always been good leaders and bad leaders. In recent years, however, we have seen a change in the industry. While there always has been and unfortunately always will be corruption in same boardrooms, the current crop of executives seems to have suffered from a disproportionately large percentage of individuals that are not only out for themselves, but also willing to go further outside the boundaries than those before them. Of course, these actions are not limited to large corporations. There are poor financial decisions being made from Manhattan all the way to Madisonville, Texas. Although the actions that bring both large and small companies to the brink of bankruptcy and beyond may be very similar, the consequences for those left in the rubble may be very different.

If you are in a popular industry or have a big lobby in Washington you might be able to convince Uncle Sam to keep you out of bankruptcy – at least for a while. One of the industries most symbolic of this phenomenon is the auto industry. In December the federal government floated emergency loans to General Motors and Chrysler to the tune of some \$17.4 billion dollars.¹⁰⁴ Less than two months later they were back begging for a mere \$21.6 billion in additional funding to try to keep their heads above water.¹⁰⁵ Although the federal government is going all in to help big corporations like auto manufactures, a record number of auto dealerships closed in 2008.¹⁰⁶ The credit crunch created a powerful double blow with auto dealers unable to finance cars for their inventory and potential customers unable to finance a purchase.¹⁰⁷ Unfortunately there is no bailout for the little guys, and many of these dealers now face the prospect of wading through the confusing world of bankruptcy. A bad economy certainly contributed to many of these closures, but just as Ford has thus far been able to avoid taking federal money through impressive financial leadership, many of these smaller companies could have accomplished the same outcome.¹⁰⁸ This may be too much to expect from individuals who open the Wall Street Journal daily only to read about another O'Neal, Thain, or Fuld.

One Mid-western telecommunications company burst upon the scene during the “dot .com” boom, only to suffer when the bubble burst due to gross mismanagement.

McLeodUSA Incorporated (“McLeod”) is a competitive telecommunications provider to residences and businesses in the midwest, southwest, northwest and rocky mountain states. McLeod was founded in 1992 and quickly grew in size through a series of business acquisitions. The rapid growth clouded the true financial picture that McLeod portrayed in their financial statements and often times it would have been difficult to have an accurate view in a year over year comparison after all the accounting benefits of an acquisition had been taken.

¹⁰⁴ Sharon Silke Carty, James R. Healey, and Chris Woodyard, *GM, Chrysler Seek a combined \$21.6B More In Loans To Survive*, http://www.usatoday.com/money/autos/2009-02-17-chrysler-bailout-request-job-cuts_N.htm

¹⁰⁵ Sharon Silke Carty, James R. Healey, and Chris Woodyard, *GM, Chrysler Seek a combined \$21.6B More In Loans To Survive*, http://www.usatoday.com/money/autos/2009-02-17-chrysler-bailout-request-job-cuts_N.htm

¹⁰⁶ Soyoung Kim, Record 881 U.S. auto dealerships closed in 2008: data, at http://news.yahoo.com/s/nm/20090219/us_nm/us_autos_dealers

¹⁰⁷ Soyoung Kim, Record 881 U.S. auto dealerships closed in 2008: data, at http://news.yahoo.com/s/nm/20090219/us_nm/us_autos_dealers

¹⁰⁸ Sharon Silke Carty, James R. Healey, and Chris Woodyard, *GM, Chrysler Seek a combined \$21.6B More In Loans To Survive*, http://www.usatoday.com/money/autos/2009-02-17-chrysler-bailout-request-job-cuts_N.htm

As a result of McLeod growth which occurred too quickly and was not properly managed, McLeod was forced to file for Chapter 11 bankruptcy in April of 2002. McLeod's primary objective through the bankruptcy process was to eliminate some \$3 billion in bond debt which the Company had used to make various acquisitions in support of its fast growth strategy. McLeod emerged from bankruptcy in 2002. McLeod, like many companies around this timeframe, filed bankruptcy prior to the revised bankruptcy laws of 2005. McLeod is later forced to file bankruptcy again in 2005 and emerged from bankruptcy for the second time in 2006.

In 1992, Clark McLeod founded McLeod. He grew the company quickly by acquiring smaller entities across the midwest, southwest, northwest and rocky mountain states. This growth strategy allowed the business to grow, while at the same time hide any losses that may have been incurred through the acquisition. Financing was readily available during the mid to late nineties and McLeod took full advantage of this. Mr. McLeod served as the CEO until 2001, when the financial free-for-all was ending and capital was not as readily available.

In order to stay afloat, McLeod sought financing from *Fortmann, Little & Company* ("Forstmann"). *Forstmann* appointed a new CEO, *Chris A. Davis*, in 2001 and Clark McLeod left with the Company reeling in financial chaos. In 2002, McLeod filed a voluntary petition for relief under Chapter 11 of the United State Bankruptcy Code. On April 16, 2002 McLeod emerged from bankruptcy proceedings pursuant to the terms of its reorganization plan. The primary goal for the reorganization plan was to eliminate the nearly \$3 billion dollars in bond debt that McLeod had amassed in order to support its growth strategy. Through the Company's recapitalization plan several changes occurred. The bond holders reluctantly agreed to accept \$670 million in cash and 10,000,000 shares of Series A Preferred Stock and 5-year warrants to purchase 22,159,091 shares of Class A Common Stock in exchange for the cancellation of the bond notes. Further, the investment by *Forstmann* was eliminated in exchange for 74,027,764 shares of Class A Common Stock and 5-year warrants to purchase 22,159,091 shares of Class A Common Stock for \$30 million. Further, *Forstmann* had its Series D and E stock upgraded to Class B and C Common Stock respectively. It was at this point that *Forstmann* became a 58% shareholder of McLeod.

It is during this same time period that McLeod began to sell off various assets that it had acquired during its growth strategy. Many of these assets were sold at substantial losses. For example, McLeod purchased Caprock Services Corp. for \$532 million in debt and stock only to sell it a couple of years later for \$21 million in cash. Splitrock Services was probably one of McLeod's most expensive acquisitions, in which McLeod assumed \$261 million in debt and exchanged 100% of the outstanding stock and options for McLeod stock. Splitrock was sold by McLeod in 2002 for approximately \$50 million in cash and the assumption of certain liabilities. While it is true the industry in general was in a downturn, the examples listed above prove that McLeod was not spending its money wisely. There was simply a rush to grow, and it did not appear to matter whether or not the deal was a wise acquisition.

In October 2005, McLeod filed for bankruptcy for a second time and emerged from bankruptcy protection in January 2006. In that same month, *Chris A. Davis* resigned and was replaced by *Royce Holland*. Mr. Holland joined the McLeod team from *Allegiance Telecom*. Post

bankruptcy McLeod carried \$82 million in debt and was slightly “cash flow positive,” according to Holland. The Company has gone from employing well over eleven thousand employees to only sixteen hundred. For the most part, all ancillary businesses have been sold off and its focus is primarily on higher value and lower-churn business customers.

In February 2008, McLeod was sold to Paetec Holding, Corp. Paetec is a telecommunications company headquartered in New York. Its primary focus is on mid to large sized businesses. Its customer focus is very much in line with McLeod’s new focus. Paetec’s acquisition resume looks eerily similar to the acquisition hungry early days of McLeod. One can only hope that Paetec is managing its growth more responsibly than McLeod did.

IV. CONCLUSION

It is clear that the United States is in the middle of economic upheaval with companies small and large failing daily. Fourteen banks have gone bankrupt in 2009 alone.¹⁰⁹ Many of these have been driven to extinction by careless or even corrupt CEO’s and executive officers. Ironically some of the biggest perpetrators, Richard Fuld of Lehman, Jimmy Cayne of Bear Stearns, and even Bernie Madoff – who ran possibly the largest Ponzi scheme in history, all reside in the same area of Manhattan’s Upper East Side.¹¹⁰ Somehow these executives have succumbed to a type of infection that destroys any moral compass and clouds all ethical judgment. After sending their companies to the grave these men walk away with their lucrative compensation packages to look for the next sucker. Perhaps they are too isolated in a culture that fails to hold them accountable. It may be that their small circle has allowed them to believe that these actions are acceptable. Whatever the reasoning, they have set a trend that is forcing many less-fortunate companies through the very trying and often unsuccessful path of bankruptcy.

Only rarely do the misdeeds of these men catch up with them. In 2005, Dennis Kozlowski, the former CEO of Tyco was convicted of grand larceny after accusations that among other things he made \$125 million in inflated stock prices.¹¹¹ Clearly many have committed the same offense and walked away. Former Worldcom CEO Bernard Ebbers was convicted of fraud, yet all indications are he was simply unlucky enough to be singled out for prosecution.¹¹² Even those chosen to get another chance at the life ring seem unwilling to change their ways. After receiving millions in bailout money American International Group (AIG) paid former chief executive a \$5 million dollar performance bonus and sent top performers on a half-million dollar resort trip, all on taxpayer money.¹¹³

In four short years beginning in 2002 the CEO’s of Merrill Lynch, Countrywide, and now struggling Citigroup took home combined paychecks of over \$460 million dollars, yet today their companies look as if they had no one at the wheel.¹¹⁴ During this same time thousands of investors saw their life savings disappear along with the integrity of big business. Many of the

¹⁰⁹ FDIC, *Failed Bank List*, at <http://www.fdic.gov/bank/individual/failed/banklist.html>

¹¹⁰ J. Richard Finlay, *The Disingenuous Fleeing to the Indefensible*, at <http://finlayongovernance.com/?p=1118>

¹¹¹ Andrew Dunn, *Tyco’s Kozlowski Guilty of Stealing, Faces 25 Years in Prison*, at <http://www.bloomberg.com/apps/news?pid=10000006&sid=a.PKjSbULgJw&refer=home>

¹¹² Andrew Dunn, *Tyco’s Kozlowski Guilty of Stealing, Faces 25 Years in Prison*, at <http://www.bloomberg.com/apps/news?pid=10000006&sid=a.PKjSbULgJw&refer=home>

¹¹³ Peter Whoriskey, *AIG Spa Trip Fuels Fury on Hill*, at <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/07/AR2008100702604.html>

¹¹⁴ Andrew Leonard, *Countrywide and the "left-wing anti-business press"*, at http://www.salon.com/tech/htww/2008/03/06/angelo_mozilo_gets_annoyed/index.html

companies destroyed by these men will rise from the ashes in one form or another. The “Gorilla” and “Mr. Fix It” have moved on, but for the many thousands of businesses not lucky enough to be chosen for federal assistance, the future is dim at best.

UTILIZING A STUDENT COMPLIANCE EXERCISE TO BEGIN A LEGAL ENVIRONMENT OF BUSINESS COURSE

LEE USNICK*
RUSSELL USNICK**

The introductory legal environment of business course covers a wide range of topics. While most students find some aspects of the law interesting, many students also find it difficult to envision the relationship between their personal career objectives and the implications of a vast legal system. This paper discusses a first-week-of-class student exercise which connects the course requirements and syllabus with the legal environment of business by requiring students to formally certify to the course instructor the fact of their review and understanding of the course syllabus and course requirements. The discussion includes the justifications for the exercise, the practical issues involved, and some observations on the outcomes.

I. INTRODUCTION

Encouraging students to carefully examine the course syllabus at the beginning of the course has never been easy. As syllabi have grown significantly in size owing to expanding disclosure requirements and the inclusion of ever more detailed learning objectives, the task of enticing the student to carefully scour the document has grown more difficult.

A. JUST READ THE SYLLABUS

Our response, like that of others before us, was to adopt a system where, during the first week of class, we ask students to submit a certification that they have read and understood the course syllabus. Over time, extensions to this exercise have been added such that the process is now an integrated part of the learning objectives of the course. In the process of documenting for accreditation purposes the ways in which an assignment serves the learning objectives of the course, we have concluded that an exercise such as this one should no longer be viewed as a single purpose activity, but rather should be adjusted and modified so that it serves multiple course objectives. Over time, in addition to becoming more integrated into the overall course objectives, it has also been adjusted to meet emerging accrediting and assessment initiatives.

B. CERTIFICATE OF ACKNOWLEDGMENT

We have named the exercise, "Certificate of Acknowledgment." It begins with the statement, "I hereby certify that the following statements below are true and accurate:"¹

* J.D., Associate Professor, University of Houston-Downtown.

** J.D., Doctor of Environmental Design, Principal, Usnick and Associates, Houston, Texas.

¹ See Appendix.

and is followed by a number of statements about the syllabus starting with an acknowledgment that the student has accessed the syllabus on the course website and has read and understood it. The acknowledgment repeats topics from the syllabus which can be sources of confusion for students such as make up exam policies and details regarding the major research assignment for the course.

C. THE ASSIGNMENT

The acknowledgment is then followed by specific instructions as to the manner for submitting the Certificate of Acknowledgment. The submission response mandates specific wording on the email submission and also specifies that the certificate itself be submitted in a specific file format. Assignments which are not received in exactly correct form are returned to the student with an indication that they are "not in compliance with the assignment" along with directions to re-read the Certificate file in its entirety, then problem-solve their non-compliance. Continued failures result in incremental "helpful hints" and information about university resources which can help if basic computer skills are contributing to the problem. Failure to successfully complete the assignment before the first exam results in a loss of five points on that exam. If they remain non-compliant at subsequent exams, they lose five points from those exams as well.

D. THE RESULTS

Without having computed actual numbers, we estimate that about eighty percent of the students successfully complete the assignment during the first week of class as directed. Another fifteen percent are somewhat late or need to make multiple submissions before achieving compliance. About five percent either fail to try or have serious problems with the assignment. Around two percent are not compliant by the first exam.

II. WHY A CERTIFICATE OF ACKNOWLEDGMENT GENERALLY

The assignment originated out of the frustration of being barraged with student questions that were already clearly answered in the syllabus. Additionally, getting students to visit the course website early in the semester has become much more important as paper copies of assignments and other class materials have moved to the website.

A. SHOW OF FORCE

The assignment forces students to achieve an acceptable level of computer and website competency at the outset of the course. Likewise, forcing the student to become familiar with the syllabus early in the course is valuable. In addition to insuring that they understand the operations of the course, it assures that they are on notice of the various policy statements, such as prerequisites and academic honesty that are now mandated parts

of most syllabi.

B. UNEXPECTED OUTCOMES

As the exercise has evolved, it has also served to put students on notice early that the course is about problem solving, that critical thinking is an important part of the course, that carefully following directions is crucial, and that tenacity will be a necessary part of successful completion of the course. Additionally, it now serves as early notice that the course itself will be run in a legalistic manner.

III. WHY BASED IN COMPLIANCE

The concept of just what compliance means is hard to explain to students solely through text or lectures. It is important to successfully introduce the idea that compliance is everywhere, and that all business activities face a world where regulatory compliance is rapidly expanding. Students are confronted with a world demanding skill at deciphering and then implementing compliance provisions, regardless of the industry they work in.

A. DEALING WITH THE NEW COMPLIANCE WORLD

As compliance issues expand in number and complexity, compliance becomes a pervasive cornerstone of successful management. No business enterprise is immune from the need to address compliance as a core function of the enterprise. Even universities distribute emails introducing integrated university compliance systems.² Compliance with rules is a hallmark of a mature social order, and it is important to introduce students to the idea that all businesses, even this course, must be conducted within the framework of the law.³

There are consequences for not acting according to the rules, and every business venture needs to understand the rules and how to address them. There is little doubt that for the near future, complying with government regulations will play an ever larger role in businesses.⁴ In this environment, businesses are undertaking compliance activities to assure themselves that they are on track, and they are making their compliance efforts more transparent to assure the larger world that they are on track. Compliance acts as the new means of showing good faith effort.

B. ACCELERATING GROWTH

² E-mail from Chaney Anderson, Vice-President for Administration and Finance, University of Houston-Downtown, to University of Houston-Downtown All Users (April 13, 2005). Author retains copy.

³ George J. Siedel, *Commentary: Six Forces and the Legal Environment of Business: The Relative Value of Business Law Among Business School Core Courses*, 37 Am. Bus. L.J. 717, 731 (2000).

⁴ Carly Fiorina, *Corporate Leadership and the Crisis*, WALL ST. J., Dec. 12, 2008, at A19.

Interestingly, prior to the 1980s, the term compliance program was meaningless.⁵ Now, the list of compliance vehicles is long, starting with well known programs such as Sarbanes-Oxley, Gramm-Leach-Bliley, the Anti-Money Laundering Act, and extending to numerous less known programs.⁶

An example of the growth and breadth of compliance activities can be found in the health care industry. Compliance concerns in the health care arena originally focused on kickback issues for participating service providers who participate in government programs, then spread to larger reimbursement issues, and continued growing to the extent that today, they encompass even general health care finance issues.⁷ A recent Google search for "health care compliance" resulted in 80,000 hits.⁸ The five thousand member Health Care Compliance Association holds a four day annual conference with more than 100 topical sessions, some narrow and technical, and some broad and general.⁹ Clearly, compliance efforts now permeate all aspects of the industry.

C. CRITICAL LINKAGES

Compliance must integratively mesh with all other aspects of a business.¹⁰ It is extremely important in entrepreneurship where the law touches everything.¹¹ Private firms do well or poorly as a function of their ability to grasp the nuances of concepts such as the legal environment.¹² In corporations, compliance now means a compliance department with executive level leadership who report directly to the board of directors.¹³

Compliance and ethical considerations are increasingly linked.¹⁴ In the relationship between law and ethics, compliance and ethics standards need to require rigorous, unwavering compliance with the law.¹⁵

Compliance requires leadership,¹⁶ and the reward for doing compliance well can be significant. According to one study, where well run compliance programs existed, workers were more likely to report misconduct, felt more empowered to do the right thing, felt more comfortable raising compliance/ethical concerns, and believed top leaders valued

⁵ Russ Berland, Office of Business Practices, Hewlett Packard Co., powerpoints accompanying *A New Model for Corporate Internal Investigations*, presentation at the South Texas College of Law Conference: Houston, We Have a Serious Problem: Tackling the Corporate Internal Investigation (April 14, 2005). Author retains copy.

⁶ Paul Roberts, *Calculating Risk, Navigating Compliance*, INFOWORLD.COM, June 19, 2006, 21, at 21. Author retains copy.

⁷ Andrew J. Demetriou, *Some Thoughts on Compliance in the Modern Age*, HEALTH LAW., Dec. 2007, at 2. Author retains copy.

⁸ *Id.*

⁹ See <http://www.hcca-info.org>.

¹⁰ Ben W. Heineman, *Are You a Good Corporate Citizen?*, WALL ST. J., June 20, 2005, B2.

¹¹ Siedel, *supra* note 3, at 736.

¹² Daniel Diermeier, Tim Fedderse, *Social Enterprise Management*, Teaching Innovation Program, Kellogg Sch. of Mgmt., Northwestern U., Aspen Inst. Center for Bus. Educ., <http://www.aspenbce.org/networks/tip/kellogg.html> (last visited Aug. 29, 2009). Author retains copy.

¹³ Demetriou, *supra* note 7.

¹⁴ Berland, *supra* note 5.

¹⁵ Heinman, *supra* note 10.

¹⁶ *Id.*

compliance and ethics.¹⁷

D. THE ROLE OF FEDERAL GOVERNMENT

There is a strong push across the federal government to force companies to institute and strengthen compliance programs.¹⁸ Recent changes in the federal approach have resulted in compliance plans becoming a standard component of deferred adjudication and non-prosecution agreements, and when implemented, they are often operated outside of the corporate counsel offices.¹⁹ The timeliness of the "Certificate of Acknowledgement" assignment is reinforced by recent actions and cases where the enforcement issues focused on the failure to make certifications regarding compliance. For example, in several instances, telecommunications companies who were required by the Federal Communications Commission (FCC) to file annual certifications that they had complied with certain rules, failed to do so, and the FCC imposed fines for not filing the required annual certification of compliance.²⁰ These fines were subsequently upheld.²¹ The Open Compliance and Ethics Group is a non-profit organization which keeps comprehensive, up to date tracking on the status of compliance actions.²²

Compliance programs need to be based on objectives.²³ The government's power to place federal monitors into a company's management is now tantamount to telling an entity that it will have a good compliance program or the government will do it for them.²⁴ Under the Thompson Memo, the government can take compliance and ethics-related actions based on its determination of whether a compliance program is real or merely a paper program.²⁵

IV. TYING TO LEARNING OBJECTIVES, AACSB, SACS, AND BEYOND

The introductory business law course is, today, caught up in the wide ranging changes occurring in universities in general and in business education programs in particular. As regional accrediting bodies and AACSB align with movements toward better documentation and assessment of student learning outcomes, and toward systems focused on continual quality improvement, the introductory business law course will inescapably shoulder some of the burden of addressing these new initiatives. This compliance exercise relates strongly to satisfying many of these evolving assessment needs.

¹⁷ http://www.kpmg.com/aci/docs/050362_ForIntegritySurvNEW.pdf, at 1 (last visited Aug. 29, 2009).

¹⁸ Sue Reisinger, *Police Yourself: More Companies Are Adopting Compliance Reform to Avoid Prosecution*, CORP. COUNS., Mar. 2009, at 20, available at <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202428368480>.

¹⁹ *Id.*

²⁰ Amy Schatz, *FCC Proposes Fines Over Data Protection*, WALL ST. J., Feb. 25, 2009, at B5.

²¹ *In re Frank*, DA 09-328, F.C.C. (Feb. 26, 2009).

²² See Open Compliance and Ethics Group at www.oceg.org.

²³ Berland, *supra* note 5.

²⁴ *Id.*

²⁵ *Id.*

A. EXPERIENTIAL LEARNING

There is a clear movement toward applied, practical skills and capabilities on the ascendancy, both across the academy and within business education. There is a perceived need to expand activities in classrooms across the entire university. Experiential learning is becoming the cutting edge view of 21st century business education.²⁶ Business programs are focusing on becoming part of the growing experiential movement.²⁷ There is a slowly developing view that legal environment courses should require students to engage in more activities that are similar to tasks they would perform in business, as opposed to briefing cases which they will never do in business.²⁸ The compliance exercise starts the course with a meaningful experiential exercise that can be referred back to throughout the semester.

B. GLOBAL PERSPECTIVES

Both business and business education are extending compliance and ethics considerations to a global level. A 2009 AACSB memo includes numerous additions related to the global dimension of business in proposed new accreditation standards.²⁹ International legal compliance is a new and very fast growing area of international law generally,³⁰ and some believe the law serves as a valuable framework for addressing globalization issues.³¹ While the relation of compliance to the implications of the globalization of business seems remote, compliance considerations are a rapidly growing aspect of globalization. The compliance exercise, while certainly not global in one sense, has strong potential since compliance issues will play an ever expanding role in the move to integrate the global business environment into the standard business curriculum.

C. DEFINING OBJECTIVES AND DOCUMENTING OUTCOMES

A 2009 study by the Council for Higher Education Accreditation (CHEA), the entity

²⁶ *Making a Difference in Global Societies*, AACSB eNEWSLINE, http://www.aacsb.edu/publications/enewsline/archive_print/vol7-issue5.pdf (May 2008) (last visited Mar. 1, 2009). Author retains copy.

²⁷ Gretchen Vik, Douglas Micklich, Monique Forte, *How Simulations and Experiential Learning Fit as We Comply With Legislative and AACSB Assessment Guidelines: How to Develop Academically Sound Courses That Also Meet Stakeholder Needs*, DEV. BUS. SIMULATIONS & EXPERIENTIAL LEARNING (2005), <http://sbaweb.wayne.edu/~absel/bkl/vol32/32bx.pdf> (last visited Aug. 29, 2009).

²⁸ Donna J. Cunningham, *A Description of a Business Approach To Teaching the Legal Environment of Business*, 2005 ACAD. LEGAL STUDIES IN BUS. PROCEEDINGS 1, <http://www.alsb.org/Proceedings%20Files/2005/Cunningham.pdf> (last visited Aug. 29, 2009). Author retains copy.

²⁹ Jerry E. Trapnell, AACSB Int'l., <http://www.aacsb.edu/accreditation/StandardsReport-Revised23Jan09.pdf> (last visited Aug. 29, 2009).

³⁰ William Bradford, *International Legal Compliance: Surveying the Field*, GEO.J.INT'L L. (Jan. 1, 2005), <http://www.allbusiness.com/legal/3589154-1.html> (last visited Aug. 29, 2009). Author retains copy.

³¹ Siedel, *supra* note 3, at 733.

that accredits the accrediting bodies, sets out a very clear direction for the future, and that future is more evidence-based, learning-outcome centered accreditation.³² This portends an extension and growth of the current trend toward mandating the setting out of clear learning objectives, early benchmarking for skills deficiencies in specific competencies (such as technical skills, following directions, critical thinking, and problem solving), and creating identifiable paths to assure that ultimate student outcomes demonstrate empirically that learning objectives are accomplished. The potential objectives for this compliance exercise can be both delineated at the outset and measured and adjusted with implementation, making it very consistent with the trends in accrediting standards.

D. CRITICAL AND OTHER THINKING

Where once the university and business programs could simply assert that they taught critical thinking skills, they now need to identify what that means, and demonstrate effectiveness toward that end. This requires changed thinking about the delivery of both specific and general legal understanding.³³ Some argue that focusing legal environment of business courses more heavily on legal framework analysis tools will result in enhancing the ability of students to explore and analyze rules.³⁴ The introductory compliance exercise moves in this direction both tactically and strategically by establishing from the course beginning a dual nature of legal studies of business, one where there is a balance between understanding the practical need for mundane tactical compliance coupled with an appreciation of the complex web that is a compliance society and economy. The emergence of graduate degrees which focus solely on compliance issues,³⁵ illustrates the critical role compliance now occupies in the legal environment of business.

V. TACTICAL CLASSROOM IMPLICATIONS

The implementation of the compliance exercise has affected the daily operation of the course in some unanticipated and useful ways.

A. IMMEDIATE SENSE OF THE NATURE OF THE COURSE AND THE TOPIC

The exercise has served to establish a predictable, stable, acknowledged framework for the course. Students quickly appreciate that careful attention to exact processes and

³² Stanley O. Ikenberry, Council for Higher Education Accreditation, WHERE DO WE TAKE ACCREDITATION, 4 (2009), http://www.chea.org/pdf/2009_AC_Where_Do_We_Take_Accreditation_Ikenberry.pdf (last visited Aug. 29, 2009).

³³ Elaine D. Ingulli, *Transforming the Curriculum: What Does the Pedagogy of Inclusion Mean for Business Law?*, 28 Am. Bus. L. J. 605 (1991).

³⁴ *Id.* at 606.

³⁵ Cory Levine, Education in Regulation: A New Master's Degree Program Seeks to Ease Regulatory Burdens With an Influx of Highly Educated Compliance Professionals, Wall Street and Technology (Mar. 21, 2006), <http://www.wallstreetandtech.com/showArticle.jhtml?articleID=183701444> (last visited Aug. 29, 2009). Author retains copy.

timelines has an important role in their future business ventures. Overcoming their desire to be told exactly the nature of their mistakes has had an excellent effect on many students. Students seem much better prepared to understand and deal with the topical material. For example, students were introduced to a recent article about judges who, needing to foreclose many houses a day, limited discussion to only two questions: first, is the homeowner behind on payments, and second, is the homeowner living in the property, whereupon an answer of "yes" to both questions resulted in ordering the foreclosure, all of which was often executed in less than one minute.³⁶ Students reacted to the story by hearkening back to the exercise, saying that any other discussion would be superfluous since the homeowner's mortgage status is one in which he is either in compliance or he is not.

B. LINKAGE TO SUBSEQUENT LEGAL TOPICS

The exercise has proven invaluable as a reference point when introducing specific topical materials. The compliance exercise has been used to make various points in covering such topics as crime, contracts, notice concepts, due process concepts, statutes of limitation, and Sarbanes-Oxley. Being able to refer back to the exercise from the first week of class enhances the sense of continuity and interrelatedness of the course topics. It is surprising how the single task can provide an experiential relationship between a number of topics over the course of a semester.

C. SIGNING DOCUMENTS

Interestingly, the act of "signing" a certification seems to create an enhanced sense of the significance of signing important documents, or for that matter, signing any document. The students seem to have a much greater sense that there will be future consequences as a result of having signed the document.

VI. POSITIVE EFFECTS ON CLASS GENERALLY

Since the implementation of the compliance exercise, many aspects of the course have changed noticeably. Some effects are narrow and tactical while others are broad and strategic.

A. NARROW SPECIFIC EFFECTS

The exercise certainly results in an enhanced appreciation of the importance of deadlines in the law generally, and in the course in particular. This extends beyond simple deadlines to a wider appreciation of the nature of the subject matter. It generates a sense

³⁶ Michael Corkery, *A Florida Court's 'Rocket Docket' Blasts Through Foreclosure Cases: 2 Questions, 15 Seconds, 45 Days to Get Out; 'What's to Talk About' Says a Judge*, WALL ST. J., Feb. 18, 2009, at A2.

that understanding the specific rules from the outset is an essential part of any venture. Additionally, the successful completion of this task for some students is part of developing self-sufficiency in problem solving as they move into upper level courses for the first time.

The assignment helps set the context for the course and provides a better understanding of the valuable practical business implications of the course.³⁷ There is value in letting students perceive a business-like approach to the course.³⁸ Certainly students have a much clearer understanding of the operating rules of the course. The assignment also creates a sense of the course as a contract which has clearly defined terms of operation. They seem to approach decisions about missing exams and major deadlines in a much more reasoned manner. Requests for exceptions are now virtually non-existent.

Somewhat surprisingly, there seems to be a heightened sense that there is one system of justice which is applied evenly to everyone. There are vastly fewer inquiries about what the specific course rules are, and when a question is raised, it tends to be an intelligent question where the student has already gone to some effort to determine the answer on his own.

It certainly simplifies later enforcement of the rules. For example, in our courses, we announce from the outset in the syllabus that there will be no extra credit, on the argument that government agencies such as the IRS are not known to give extra credit when a missed deadline has caused problems. Before this exercise, students always petitioned for extra credit toward the end of the semester to rectify less than acceptable performance along the way. This necessitated an involved discussion with each student as to the reasons behind the no extra-credit rule. Since the compliance exercise has been initiated, these requests have nearly disappeared, especially after word spreads that the initial instructor response is to inquire whether the student misrepresented when he certified that he carefully read and understood the syllabus at the beginning of the course.

B. WIDER EFFECTS

Students resoundingly indicate on course evaluations that the Certificate of Acknowledgment exercise significantly altered their view of both the course and the material. Many commented that it significantly altered their view of signing any document. Surprisingly, they profoundly appreciate how signing the document certifying awareness of the syllabus terms limited their ability to later dispute the implications of the document.

Instead of viewing compliance as a threatening and negative thing, some suggest that there can be a strategic advantage from wise use of compliance in business.³⁹ Arguing that compliance can serve as a strategic differentiator,⁴⁰ the implications are simple: there will be business advantage to those who understand and embrace the emerging compliance era. Students seem to grasp and appreciate that the effect of a compliance regime can be either an impediment or an opportunity to be leveraged, and that by recognizing and embracing the growing role of compliance, they stand to gain advantages over those less willing or

³⁷ Cunningham, *supra* note 28.

³⁸ Cunningham, *supra* note 28, at 7.

³⁹ Levine, *supra* note 35, at 22.

⁴⁰ *Id.*

able to appreciate the central role it plays in all business settings.

VII. CONCLUSION

Compliance is a growing aspect of the legal environment of business. Course syllabi are assuming a larger role in universities and in business programs. There is a growing focus on expanding experiential learning. Students never read the syllabus. By beginning a legal environment of business course with a compliance exercise in which activity focuses on understanding the course syllabus, the students begin the course with a useful experiential learning opportunity which also generates a number of additional benefits throughout the course.

APPENDIX

Certificate of Acknowledgment

Legal Environment of Business

I hereby certify that the following statements are true and accurate:

1. I have accessed the course materials on Blackboard Vista.
2. I have read the syllabus and schedule, and I understand their requirements, and hereby certify that I meet the prerequisites for this course.
3. I have noted important dates on my calendar, including exam dates, the report due date, and the make-up exam date.
4. I understand the exam rules stated in the syllabus, and I agree to abide by all rules.
5. I understand the make-up exam policy, and should I be granted a make-up exam, I agree to take it at the College of Business on the date and time specified in the syllabus.
6. I understand the requirements and expectations for the Compliance Interview and Report. In particular, I agree to explain my assignment to and obtain the consent of my interviewee before conducting my interview.
7. I understand that the Report must be submitted as directed through Blackboard Vista, that submission other than as directed is NOT permitted and will receive a grade of zero. I agree to retain a copy of my report for 1 year.
8. I understand that submission of the Report after the deadline will receive a 4 point deduction (from a total of 10 points possible) from the grade. Reports submitted more than 2 weeks after the deadline will receive NO points. Submission date/time is determined by the date and time of my Blackboard Vista transmittal email. Knowing that problems often arise with on-line access, I will make every effort to complete and submit the Report in a timely manner, allowing time to address unforeseen computer, server, Blackboard Vista or

other problems.

9. I have read the University Academic Honesty policy referenced in the syllabus, and I agree to abide by the policy in all aspects of my behavior in this class.

10. I agree to bring official identification (with my photograph) to all exams, and I understand that failure to show my photo ID will disqualify me from taking any and all exams.

11. I will print a copy of this Certificate of Acknowledgment to keep with my course materials.

12. I will print the instructions below and use as a guide to ensure compliance with submission requirements, acknowledging that all instructions must be met for a successful submission.

Type your name here to certify:

INSTRUCTIONS for submission (Do not include instructions in your saved file):

1. Copy and paste the signed Certificate into a new document. Save the above completed Certificate as a Rich Text Format (.rtf) file. For direction on how to create a Rich Text Format file, go to <http://www.uwec.edu/Help/Word07/rtf.htm#SavingRTF>. Do not include these directions in your saved file. Name the document, Certificate_of_Acknowledgment.

2. In Blackboard Vista, go to the Course homepage and create an email to the professor (professor's name is available in Browse function).

3. The subject box of the email must read exactly as follows:

(Last Name), (First Name), Acknowledgment.

4. In the text box of the email, state the following: My signed Certificate of Acknowledgment is attached.

5. Attach the Certificate .rtf file to the Blackboard Vista email, then send the email.

6. Submission in a Word file or through a platform other than our Blackboard Vista course is deemed non-compliant.

7. You must complete this course requirement before taking Exam 1. (See Course Schedule for date of Exam 1, and subsequent exams). Failure to complete this requirement will result in a loss of 5 points from your Exam 1 score. Failure to complete this requirement prior to subsequent exams will result in a loss of 5 points from those scores.

8. Compliance must be 100%. Any deviation will result in an invalid submission. The professor will notify you if your submission is not in compliance, and you will be asked to try again. There is no limit to the number of submission attempts.

9. Once you have successfully complied with all the above requirements, the professor will send an email stating you have successfully complied with this course requirement.

Welcome to the "Legal Environment of Business" course!

THE GRAY BOX: AN ORGANIZATIONAL DECISION-MAKING TOOL FOR INCLUSIVE ETHICS AND LEADERSHIP CONSIDERATIONS IN STRATEGIC BUSINESS ISSUES AND ANALYSIS

Raymond H. C. Teske III*
Cory R. A. Hallam**

The metaphor of the gray box can be used to describe an environment where individuals and organizations make daily business decisions that may involve potentially ethically challenging scenarios. In these cases it is often difficult to explicitly distinguish between what is right and wrong, the *gray area*, because decision-making is not based on a discrete set of absolute action-based laws. Given the ambiguity associated with much decision-making that occurs in the gray area, and the prevalence of many apparent “gray area” issues that have crept into our current business climate, there is a need for a management tool that helps students understand and manage these gray area ethical issues. Current ethical models exist that provide students with a visual of how ethics tie into the decision-making process, however they are typically limited to an application of only one frame, and not one that includes all four frames. To improve the management of ethics in a business environment, a business and ethics teaching model is proposed called The Gray Box, which can be utilized for the individual and organizational decision-making process, and more specifically to address actual or perceived ethical business issues. The Gray Box is a four-frame analysis that includes an organizational/individual review of the following: economic and finance issues; legal and political issues; ethical, moral, and social issues; and a management/leadership application. The Gray Box helps translate these four frames into all three bottom lines in an organization, namely, the quantitative, the qualitative, and the environmental.

Introduction

The Gray Box (see attached Exhibit “A”) is a model that can be utilized for the individual and organizational decision-making process, and more specifically as it relates to implementing strategies and issues analysis to address actual or perceived issues in an organization. Its intention is to broaden the perspective of individuals to include all three bottom lines in the decision-making process. In today’s society, attention is placed on the economic and financial frame in organizations, and the other three frames tend to be neglected until they can be reviewed at a later date, and often in a reactive mode. Especially with business start-ups, the emphasis is placed on the business plan, the financials, and implementing the plan to make money, and never take into consideration also implementing the other three frames from the very beginning. The result is the business begins to grow and there is never time to focus on the other three frames. Teaching students and individuals in organizations to have a bigger picture review of an issue will allow for the opportunity to take a proactive approach with issues management and analysis, as opposed to a reactive response to issues, and thus minimize potential illegal or unethical misconduct. John R. Boatright states “decision making in business should involve an integration of all three points of view: the economic, the legal, and the

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moral.”¹ A Venn diagram is used to show the correlation between decision-making and economic responsibility, legal responsibility, and ethical responsibility.² We propose adding a fourth point, the leadership frame, having broader perspective, and the use of a mantra. Also, character, leadership, and experiences are factors that will enhance the decision-making process. This paper provides a pedagogical application of the Gray Box to these factors for use in a classroom or organizational setting, and includes an application for each of the four frames for analysis.

Perspective

The perspective of students and individuals in organizations today toward an issue or event is often too narrow, in that individuals tend focus on one aspect of the issue and miss the bigger picture. This is evident from exercises conducted in the classroom in which students have a limited view of what the issues actually are; everything is black and white in relation to the right answer. This is because our decisions are based on what we think we know and our past experiences, and not on the reality of the issue before us. If we do not broaden our perspective, or if we focus too heavily on only one part of the issue, this can affect our ability to make the right decisions because it can exclude important elements. A comparison would be expanding an organization's perspective on issues analysis using the stakeholder model in lieu of the stockholder model.³ An exercise used in the classroom setting is showing a video of individuals in a circle passing basketballs to each other.⁴ The students are instructed to pay very careful attention and count the number of times the basketballs are thrown, passed, or bounce-passed by one individual to another, and to write the number on a piece of paper. To add a little anxiety, I inform the students that the students with the correct number will receive extra credit points. After reviewing the video students are asked for the correct number, and it ranges anywhere from 20-40. I inform them that I do not know the answer, that it may be 32, and that the number of times the basketballs are thrown, passed, or bounce-passed is not important. They are shown the video a second time and instructed not to focus on the basketballs. What the students see is someone is a gorilla walk through the middle of the group while the basketballs are being passed, turn toward the camera with raised arms, and walk out of the other side of the group. The gorilla was actually in the video the first time it was shown; the students were so focused on the basketballs that they missed the bigger picture. The video you just saw illustrates a phenomenon called “inattention blindness” – when people are engaged in an attention-demanding task, they often fail to notice unexpected objects or events. Based on the developers

¹ Boatright, John Raymond, Ethics and the Conduct of Business 9 (Upper Saddle River, NJ: Pearson Prentice Hall 2006).

² Carroll, Archie B., and Ann K. Buchholtz, Business and Society Ethics and Stakeholder Management 249-50 (New York: South-Western College Pub, 2008).

³ Shaw, William H., and Vincent Barry, Moral Issues in Business 215 (Thomson Wadsworth, 2007); Weiss, Joseph W., Business Ethics a Stakeholder and Issues Management Approach 51 (Mason, OH: Thomson South-Western, 2006); Boatright, 385.

⁴ "Movie 1." VisCog placeholder, 04 Mar. 2009 <<http://viscog.beckman.uiuc.edu/flashmovie/15.php>>. Note that this site states the video is for personal use, and that the author has a license from the publisher to use this video in the classroom.

of this video, approximately 50% of the viewers fail to notice the gorilla walk through the center of the group.⁵

In business the focus tends to be on specific issues, a ratio or the financial statements (or in the case of Enron the analysts' projections and the stock price) and miss all of the other quantitative and qualitative aspects of a decision. The purpose often becomes focused on the economic frame, which is to make money. It has been my experience with business start-ups that this becomes the most important thing, and other aspects such as a stated ethical foundation, people and relationships are neglected. The pace of our society has increased, and the analysis and answers are often expected in a hurry – decisions must be made quickly, and this increases the margin of error for illegal or unethical conduct. The students were asked to count the number of times the basketballs were thrown, passed or bounce-passed, and had to make a quick decision as to the number. For the most part, the students were close to the correct answer (which is comparable to financial forecasting). But, they missed an even bigger part of the situation – someone in a gorilla suit walking through the center of a group of individuals passing basketballs. They missed the bigger picture of what was actually occurring right in front of them.

Outside of the classroom, the focus is on what we are told or what we think we know. We do not take the time to look around and ask the bigger questions, such as taking the time and ask “what do we not know?” Another area where individuals in our society are suffering is with the news. A media source provides a story that is often one-sided, slanted to provide the reader or viewer with only part of the story that supports the conclusion its wants to the reader to walk away with. And, unfortunately in the U.S., most individuals accept the story presented as is. They do not take the time to ask the following questions:

- What am I not being told?
- What is the historical perspective of the issues?
- What are the bigger policy implications here?
- What additional facts or information do I need to drawn my own conclusion?

The Gray Box is a tool that can be utilized to expand the perspective of the decision making process as part of the issues analysis to include all four frames as discussed below.

Economic/Financial Frame

The economic/financial frame represents the first frame of the Gray Box, and the first bottom line in for-profit organizations: revenue and profit. For individuals, the emphasis is making as much money as possible, as soon as possible, and with the least amount of effort. It is a short-term perspective. The first bottom line relates to things that can be quantified, such as profits and productivity. This frame has received the most attention in the media over the last decade based on the corporate scandals that have occurred, from

⁵ Simons, D. J., and C. F. Chabris. "Gorillas in our midst: Sustained inattention blindness for dynamic events." *Perception* 28 (1999).

Enron, WorldCom, Tyco, Health South, Adelphia, and ImClone, to more recent issues with AIG, Fannie Mae and Freddie Mac. Even individuals are not immune to financial failures due to the significant focus placed on this frame, such as Bernard Madoff and R. Allen Stanford. This relates to today's mantra in society: Business is a game in which the goal is to make as much money as possible while staying within the rules.⁶

Factors that fall under this frame include the free market analysis, the stockholder analysis, and the cost-benefit analysis. One example that has been cited in ethics text books is the Ford Pinto case involving the cost-benefit analysis and the focus on this frame as a primary source in making decisions.⁷ The author of this case states that "all of us structure information all the time; we could hardly get through the workday without doing so. But there is a penalty to be paid for this wonderful cognitive efficiency: we do not give sufficient attention to important information that requires special treatment because the general information pattern has surface appearances that indicate that automatic processing will suffice." Management at WorldCom placed its focus on the Monthly Revenue Reports and the line cost ratio, which were two of the issues that contributed to the accounting scandal within the company.⁸

Not all decisions will have a direct economic or financial focus, such as decisions in non-profit organizations, yet a decision can still have an economic or financial impact that is tied into another frame (e.g., someone losing their job due to unethical conduct).⁹

Students and individuals in organizations must consider the economic frame as part of an organization's daily operations, including issues analysis and strategic planning. But they also need to be cognitive of the other three frames and their concurrent use in the decision-making process.

Legal/Political Frame

The legal and political frame also represents the first bottom line of the Gray Box. Society relies on the legal and political frame to provide a foundation to establish what is right and wrong. A few issues with this point of view is that a law or rule does not exist for every action or inaction, the law is often slow to develop, the law is difficult to understand, the law is not applied consistently, and just because a law exists does not mean that it is full-proof.¹⁰ Enron was very good at poking holes in existing laws, all in the name of profit. Boatright states that as part of the decision-making process individuals must provide self-regulation in relation to industry-wide issues or the result will be a forced change from outside of the industry. He states that "systemic problems

⁶ Boatright, 13.

⁷ Weiss, 158.

⁸ Zekany, Kay E., Lucas W. Braun, and Zachry T. Warder, *Behind Closed Doors at WorldCom: 2001*, 19 Issues in Accounting Education, 101, 108 (2004).

⁹ <http://sportsillustrated.cnn.com/2009/highschool/01/22/covenantschool100.ap/>;
<http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/012609dnspocovenantnu.2781526.html>

¹⁰ Boatright, 17-18.

are best solved by some form of [legal or government] regulation or economic reform.”¹¹ Most of the students polled in the classroom on this question over the past two years do not agree that legal or government regulation is the best solution. One class changed this statement to read: “Systemic problems are *usually* solved by some form of [legal or government] regulation or economic reform.” A lack of ethics, or self-regulation, has recently led to immediate government regulation to satisfy society’s concerns (e.g., SOX, TARP, Captive Primate Safety Act, etc.), or it takes time for the law to develop so that by the time a resolution occurs, the issues are long forgotten. This is applicable to the 4-Stage Issues Life Cycle.¹² An issue occurs, receives little attention in the beginning and the media picks up on it and makes it an issue. Special-interest groups become involved demanding action, then Congressional hearings, legislation is passed, and litigation ensues. The issue falls off of society’s radar, yet the effects of the legislation and litigation often have an impact for many years to come (e.g., Sarbanes-Oxley and its compliance requirements today). The lack of an issues analysis and self-regulation lead to government or legal regulation.

What we have seen over the last ten years is a reliance on the law to provide the floor as to what is right and wrong, yet there are a few problems with this. One is that we do not have a law that correlates to every action and definitively provides an absolute as to whether the action is right or wrong. Second, the law is not applied uniformly or consistently based on geography or jurisdiction, or the type of action (e.g., white collar crime). Third, attempts are made to discredit the laws in place by looking for loopholes, creating excuses when the law is violated, and justifying or rationalizing why the law doesn’t apply to us individually in a given situation. Finally, the law only provides a minimum, yet we rely on it as the primary source of what is right and wrong, when ethics should dictate this. Finally, law is a reactive response to an issue, as opposed to a proactive approach to the decision making process. An ethics component is generally not factored into our decision making process because greed takes over, and the end result is legislation, litigation, and government regulation. In response to the reliance on the law as a minimum standard, the ethical and leadership frames must be included in the decision making analysis of individuals and organizations to be more proactive and minimize the risk of legislation, litigation, and government regulation.

Ethical/Moral/Social/Environmental Frame

The ethical, moral, social and environmental elements of the third frame of the Gray Box represent the second and third bottom lines in an organization. The factors that fall under this frame include the ethical principles, the stakeholder analysis, and the concept of a mantra. This frame entails the qualitative aspects of an organization; things that are difficult to quantify and reduce to a line item in the financials.

The ethical principles that have been the focus of classroom lectures are:

¹¹ *Id.*, 7.

¹² Weiss, 77; Carroll, 206.

Ethical Principle	Application	Example
Cultural Relativism	What does society or the culture think is right or wrong?	When in Rome
Subjectivism	One's personal opinion as to right or wrong is not based on outside rules that determine your beliefs	Past experiences have formed the basis for one's beliefs
Religion	Rules based on religious institutional beliefs	The Golden Rule
Rights	Human; Property; Legal; Moral; Entitlements	Social programs
Justice	Fairness and righting wrongs	Punishment/Policies/Due Process
Utilitarianism	What act produces the greatest good?	Torture may produce the greatest good
Kantian Ethics	What we should do or not do if we are rational; our actions are based on our duties or obligations	Act how you would want everyone else to act; Never use another human being as a means to an end
Virtues	How should one act based on character traits	What will your PowerPoint slides say? What do you want your 100 pictures to be? The sleep test Your picture on the front page of the newspaper

Although this list is not conclusive, it is representative of the ethical principles that are taught in business ethics text books.¹³ One of the issues with the ethical principles is that the definition of each is hard to grasp for students, as well as the application. It has been opined that our virtues have more influence an individual's decisions than any of the other ethical principles, and this carries over to decisions made in an organizational setting. These relate to how we should act based on our character. A survey of Harvard MBA graduates found that "young managers resolved the dilemmas they faced largely on the basis of personal reflection and individual values, not through reliance on corporate credos, company loyalty, the exhortations of senior executives, philosophical principles, or religious reflection."¹⁴ Values result in either virtues (positive attributes) or vices (negative attributes). These virtues and vices translate into vision, which is how one sees life and work, and from this a reputation is established identifying the individual. The collective values of individuals then create an identity for the organization.¹⁵

Conflicts of interest can infringe upon these values. There are more conflicts that these days and encountered at an earlier age than in past, and can largely be attributed to our mobile, pluralistic and global society. One's self, family, friends, religious organization, school, multiple jobs, numerous associations, extra-curricular activities, and the media all have an effect on who we are and how we act in each setting. Another way of looking at

¹³ Shaw, William H., *Business Ethics* 42-72 (Thomson Wadsworth, 2008); Boatright, 32-46; Carroll, 231-282; Weiss, 120-134.

¹⁴ Badaracco, Jr., Joseph L., and Allen P. Webb, *Business Ethics: A View from the Trenches*, California Management Review, Winter 1995, at 9.

¹⁵ Solomon, Robert C, *A Better Way to Think About Business: How Personal Integrity Leads to Corporate Success*, xvi (New York: Oxford UP, USA, 2003).

this is individuals wear more hats today than in the past, and each setting may require the individual to conform to a different set of standards or code of conduct – written or unwritten (e.g., culture) – that creates a conflict. Take for example a debt collector who wakes up in the morning, eats breakfast with his family, and kisses the wife and kids before he leaves for work. When he arrives at work, he takes off his family hat and puts on his debt collector hat. He then proceeds to lie and threaten individuals for eight hours a day, due to the fact his commission is based on the amount he is able to recover in bad debt. He has rationalized his actions because he has a mortgage to pay and a family to feed. At the end of the day, how can he take off his debt collector hat and put the loving husband and father hat before entering the door to sit down for dinner with the family, segmenting his actions from the last eight hours to the next four hours? This scenario only reviews two hats. Imagine five or more hat as an individual enters a daily tug-of-war with different groups and beliefs.

Mission, vision, ethics, CSR statements, codes of conduct and compliance training are all attributes of organizations today. In some part of our lives we are associated with a written statement defining what actions are acceptable and those that are not. Most organizations have a written statement defining the organization and the parameters of acceptable conduct, yet most members of an organization are not able to recite the written statement or even provide a summary (this is based on informal surveys taken in the classroom and in the community at-large). These statements look good on the company Web site, but they do not hold any value for the members of the organization who are required to abide by them on a daily basis. Guy Kawasaki, a former evangelist at Apple and currently a venture capitalist, opines that organizations should focus on making a mantra, three or four words that define why the company exists for the employees, in lieu of a mission statement (his focus being directed toward entrepreneurs and technology start-ups).¹⁶ The example he uses is a mission statement for Wendy's: The mission of Wendy's is to deliver superior quality products and services for our customers and communities through leadership, innovation and partnerships.¹⁷ When the employees, much less the customers, do not know or understand the mission statement, or if they do and there is no buy-in, then the mission statement fails in its purpose other than a catchphrase that sounds good for PR purposes. He states the mantra for Wendy's should be Healthy Fast Food.¹⁸ The same correlation should apply to ethics or CSR statements. Companies and organizations have numerous Web pages dedicated to ethics, CSR reports, sustainability reports, and the environment, yet the employees usually do not look at this information until they are required attend the annual ethics or compliance training either in person or online. The general response received from the students in the classroom and those informally interviewed in the community is that this form of training is "nothing more than a joke", with little to no information retained as part of the training. In an interview of Harvard MBA graduates regarding ethics in their organizations, "[r]oughly half of the young managers we interviewed had worked for companies with a formal ethics program of some sort. In general, these ethics programs seemed to make

¹⁶ "The Art of the Start Video." [How to Change the World](http://blog.guykawasaki.com/2006/06/the_art_of_the_.html). 04 Mar. 2009
<http://blog.guykawasaki.com/2006/06/the_art_of_the_.html>.

¹⁷ *Id.*

¹⁸ *Id.*

little difference.”¹⁹ Furthermore, the authors of the Harvard MBA study discovered that the ethics programs in their organizations “failed to address the issues commonly faced by young managers, other people in the organization paid no attention to them, and the principles espoused in the codes and programs seemed inconsistent with ‘what the company was all about.’”²⁰

As is the case in many organizations, compliance training and policies are often identified or misconstrued as ethics; compliance relates to rules or acceptable conduct, whereas ethics is an analysis of one’s own internal rules as to what is right and wrong. Take for example the summary of the compliance policies (also referred to as ethics by the employees) at an unnamed organization:

The purpose of the Standards of Conduct Guide is to emphasize the need for and the responsibility of all employees of the organization to perform their duties and responsibilities in compliance with all applicable federal and state laws, local rules and regulations; the policies of the Board; and the policies and procedures of organization. Although the guide addresses a number of specific laws, policies, rules and regulations, it is not intended to be a comprehensive list of legal and ethical standards, but provides organization employees with information about some of the laws, policies, rules and regulations that have a direct effect on the organization and its operations. It is also an educational tool used by the organization’s Institutional Compliance Program to train employees regarding the conduct required of them in the workplace. Generally if you have questions, please see your supervisor.

The employees then begin a four to six hour process of completing the online compliance training, ensuring that the compliance training is not completed too quickly so they do not receive a phone call from the organization requiring them to complete the training again. They then forget the information covered in the online training until it is required to be reviewed 12 months later.

Three or four words that define what an organization stands for, e.g., People, Service, Relationships, that the employees are then able to expand on, can provide a foundation for the core values, beliefs, and buy-in within an organization. The organization must ensure that the mantra is known, discussed in dialogue, and lived within the organization on a daily basis, from the top down and back up again.

The individual and organizational decision making occurs so quickly in today’s business communities that individuals are often forced to make a quick decision that has an immediate short-term effect, without taking into account the long-term consequences. The Gray Box is one resource to assist in expanding this perspective. Another resource used in the classroom setting is a self-analysis assignment referred to as the Personal Ethics Reflection Paper. This paper is written in five segments over the semester and

¹⁹ Badaracco, at 14.

²⁰ *Id.*

requires students to commit what they believe in writing. It is easy to say what you believe based on the group you are with at the moment, but committing what you believe in writing is a much more difficult process. This assignment requires students to write in the first person, and the general response is that it is one of the most difficult papers they have written up to that point in their life. Students return semesters later describing the impact it had on their life based on the self-reflection and analysis required – that they had never been required to go through such an analysis and probably never would have but for the assignment. Individuals in organizations are not required to conduct a self-analysis such as this in relation to what they believe, and there could be a benefit to organizations including an assignment such as this in the annual compliance training.

Leadership/Management Frame

The final frame of the Gray Box is the leadership frame. This frame represents the second bottom line and the qualitative aspects of an organization. The leadership frame encompasses an application of the other three frames, in that like the other frames it cannot stand alone in its application in an organization. The elements that fall under the leadership frame include: culture, relationships, allowing for the exchange of communication, creating a legacy, allowing others to be creative, innovative, and make mistakes, and ensuring their individual success. It also includes speaking up when no one else will, having a forward thinking focus with a perspective larger than the economic and financial frame, taking risks, and suspending assumptions.

In the Abilene Paradox, Jerry Harvey states that organizations often “take actions in contradiction to what they really want to do and therefore defeat the very purposes they are trying to achieve.”²¹ He also states that the basic problem of organizations is the “inability to cope with agreement, rather than the inability to cope with conflict, is the single most pressing issue of modern organizations”²² This means that organizations spend more putting out fires on a daily basis than focusing on their purpose and direction from a proactive big picture analysis.²³ This paradox is evident in one major U.S. organization, Wal-Mart, in that the very culture that created the organization has also caused recent turmoil resulting in litigation by its own employees.²⁴

Because of ineffective leadership in an organization, individual spend more time taking bus trips to Abilene when they should be focusing on the purpose of the organization: people and relationships. The leadership frame is imperative in ensuring the individuals in an organization expand their perspective on strategic planning and issues analysis to ensure that they and the organization are successful, that illegal and unethical issues are minimal, and that the organizational culture is strong.

²¹ Harvey, Jerry B, The Abilene Paradox and Other Meditations on Management 15 (San Francisco: Jossey-Bass, 1996).

²² *Id.*, 17.

²³ *Id.*, 17.

²⁴ Fishman, Charles. The Wal-Mart Effect: How the World's Most Powerful Company Really Works—and How It's Transforming the American Economy 48 (New York: The Penguin Press, 2006).

Application of the Gray Box Model

The application of the Gray Box in a classroom setting is utilized through an assignment called the Ethics in Print. This can be an individual or team exercise in which a salient news story is chosen, summarized in class, and then the students walk through the four frames of the Gray Box by expanding the perspective on the issues analysis in the story. This assignment includes class discussion on the key issues stated in the news story, and then by expanding on the issues that are not presented in the story by asking questions and providing additional insight. The goal is to expand the context of the story from a local perspective to a national, international, and/or global application.

Conclusion

The Gray Box model was developed to correlate to an issues-analysis perspective in an organizational setting, and to assist with expanding the perspective of individuals personally and in an organizational setting for the purpose of strategic planning or issues resolution.

The ethics and leaderships frames are essential elements in the decision-making process, yet they are often neglected for the sake of short-term monetary gains. Without a daily analysis of these two frames in an organizational setting, the focus will typically remain on the economic and financial frame, and the issues analysis will be fall in line with the business culture we have experienced over the last decade. By starting this four frame analysis in the classroom, students will have a foundation to take with them into an organization setting, thus having a direct opportunity to include the ethics and leadership frames in a day-to-day business context. By utilizing this model in organizations, the organization can expand its annual compliance training to include a broader perspective on issues analysis on a daily basis.

**THE GRAY BOX: AN ORGANIZATIONAL DECISION-MAKING TOOL FOR
INCLUSIVE ETHICS AND LEADERSHIP CONSIDERATIONS IN STRATEGIC
BUSINESS ISSUES AND ANALYSIS**

EXHIBIT A

The GRAY Box



GLOBAL POVERTY ACT - A TEACHING LESSON ON DISTRIBUTIVE JUSTICE

FRANK J. CAVALIERE^{*}, TONI P. MULVANEY^{**} & MARLEEN R. SWERDLOW^{***}

I. INTRODUCTION

For better or worse, the current economic crisis has the potential to be truly transformative. President Barack Obama was elected, in part, on a platform calling for change that was made extremely compelling by the crumbling economy. His Inaugural Address called attention to the lack of ethical and responsible behavior in business today: "Our economy is badly weakened, a consequence of greed and irresponsibility on the part of some, but also our collective failure to make hard choices and prepare the nation for a new age."¹ Newsweek Magazine famously ushered in this new age with a cover story entitled, "We're All Socialists Now."² Colleges of Business, especially those that are members of The Association to Advance Collegiate Schools of Business (AACSB), have stressed teaching ethics for more than twenty-five years, but few could argue with a straight face that the effort has been a resounding success. Teachers of courses such as business ethics, business law, and business and society can expect to be busy for years to come, fashioning new and different responses to improving the ethics of the graduates of their colleges. Doing more of the same by adding another few hours of ethics into the curriculum will not likely make much difference. As the old saying goes, when you are in a hole, the first rule is to stop digging.

In an effort to stimulate classroom conversation and critical thinking on one particular aspect of business ethics, this paper has several goals: a) to introduce readers to the proposed Global Poverty Act, a bill co-sponsored by then-Senator Obama, described as a moral document evidencing an ethical responsibility owed by rich countries to poor ones; b) to illustrate how this proposed Act can form the basis for a lesson on ethics, and especially that form of ethics that is concerned with the ethical distribution of wealth and resources, namely, distributive justice; c) to identify some controversial policies seeking wealth redistribution, nationally and globally; and d) to attempt to gauge student attitudes and receptiveness toward these concepts.

II. THE GLOBAL POVERTY ACT

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¹ Full Transcript: President Barack Obama's Inaugural Address (January 20, 2009), *available at* <http://abcnews.go.com/Politics/Inauguration/story?id=6689022&page=1> (last visited April 3, 2009).

² Jon Meacham & Evan Thomas, We're All Socialists Now, Newsweek (February 16, 2009), *available at* www.newsweek.com/id/183663 (last visited April 3, 2009).

The inauguration of President Barack Obama was an historic event, not only for the United States, but also for many other nations around the world. It was a particular source of hope for poor nations that could take heart from language in his speech addressed to them:

To the people of poor nations, we pledge to work alongside you to make your farms flourish and let clean waters flow; to nourish starved bodies and feed hungry minds. And to those nations like ours that enjoy relative plenty, we say we can no longer afford indifference to suffering outside our borders; nor can we consume the world's resources without regard to effect. For the world has changed, and we must change with it.³

Even before his inaugural speech, then-Senator Obama made the plight of the poor outside the United States a personal priority. He was a leading sponsor of The Global Poverty Act,⁴ a controversial piece of proposed legislation that aims to relieve the plight of the poorest of the poor, those people subsisting on \$1 a day or less.

The Global Poverty Act contains five sections: 1) Short Title; 2) Findings; 3) Declaration of Policy; 4) Requirement to Develop Comprehensive Strategy; and 5) Definitions. The substantive portions of the Act are contained in Sections 3 and 4, but the heart of this moral document is contained in the lengthy compilation of eleven findings in Section 2. The majority of the Findings fall into four categories: a) We have previously gone along with United Nations commitments to end poverty⁵; b) Other wealthy countries are doing it⁶; c) It is in our own national interest to end extreme global poverty⁷; and d) It is the moral thing to do⁸.

³ Full Transcript: President Barack Obama's Inaugural Address (January 20, 2009), *available at* <http://abcnews.go.com/Politics/Inauguration/story?id=6689022&page=1> (last visited April 3, 2009).

⁴ The Global Poverty Act, S. 2433, 110th Cong. 2nd Session (2008), *available at* <http://www.govtrack.us/congress/billtext.xpd?bill=s110-2433> (last visited September 9, 2009).

⁵ *Id.* Section 2(2): "At the United Nations Millennium Summit in 2000, the United States joined more than 180 other countries in committing to work toward goals to improve life for the world's poorest people by 2015." Section 2(4): "The Millennium Development Goals include the goal of reducing by one-half the proportion of people worldwide, between 1990 and 2015, that live on less than \$1 per day, cutting in half the proportion of people suffering from hunger and unable to access safe drinking water and sanitation, reducing child mortality by two-thirds, ensuring basic education for all children, and reversing the spread of HIV/AIDS and malaria, while sustaining the environment upon which human life depends." Section 2(10): "At the United Nations World Summit in September 2005, the United States joined more than 180 other governments in reiterating their commitment to achieve the . . . Millennium Development Goals by 2015."

⁶ *Id.* Section 2(9): "At the summit of the Group of Eight (G-8) nations in July 2005, leaders from all eight participating countries committed to increase aid to Africa from the current \$25,000,000,000 annually to \$50,000,000,000 by 2010, and to cancel 100 percent of the debt obligations owed to the World Bank, African Development Bank, and International Monetary Fund by 18 of the world's poorest nations."

⁷ *Id.* Section 2(5): "We fight against poverty because hope is an answer to terror. Section 2(6): The 2002 National Security Strategy of the United States notes: "[A] world where some live in comfort and plenty, while half of the human race lives on less than \$2 per day, is neither just nor stable." Section 2(7): "The 2006 National Security Strategy of the United States notes: "America's national interests and moral values drive us in the same direction: to assist the world's poor citizens and least developed nations and help integrate them into the global economy." Section 2(8): "The bipartisan Final Report of the National Commission on Terrorist Attacks Upon the United States released in 2004 recommends: "A comprehensive United States strategy to counter terrorism should include economic policies that encourage development,

Section 3 declares that "It is the policy of the United States to promote the reduction of global poverty, the elimination of extreme global poverty, and the achievement of the Millennium Development Goal of reducing by one-half the proportion of people, between 1990 and 2015, who live on less than \$1 per day."⁹ Section 4 purports to achieve this goal by:

- Requiring the President to develop and implement a comprehensive strategy to carry out this policy.
- Specifying specific and measurable goals, efforts to be undertaken, benchmarks, and timetables;
- Specifying components of the strategy that include aid, trade, debt relief, working with other governments, businesses and agencies, coordinating with global health and environmental sustainability initiatives; and
- Requiring the President to report back to Congress on progress made in the implementation of his strategy.¹⁰

A. CRITICISMS OF THE GLOBAL POVERTY ACT

Few pieces of proposed legislation have stirred up as much conservative opposition as The Global Poverty Act. Opponents include self-styled capitalists who believe that this bill, if enacted, will place United States taxpayers in a state of perpetual servitude,¹¹ the conservative icon, The Heritage Foundation, that fears the Bill is misguided and superfluous,¹² and the conservative watchdog organization, Accuracy in Media, that fears it will result in a global tax on U.S. citizens.¹³

more open societies, and opportunities for people to improve the lives of their families and enhance prospects for their children.”

⁸ *Id.* Section 2(6): “[A] world where some live in comfort and plenty, while half of the human race lives on less than \$2 per day, is neither just nor stable. Including all of the world’s poor in an expanding circle of development and opportunity is a moral imperative and one of the top priorities of U.S. international policy.” Section 2(7): “America’s national interests and moral values drive us in the same direction: to assist the world’s poor citizens and least developed nations and help integrate them into the global economy.” Section 2(5): “We fight against poverty because faith requires it and conscience demands it. We fight against poverty with a growing conviction that major progress is within our reach.”

⁹ *Id.* at Section 3.

¹⁰ *Id.* at Section 4

¹¹ Edward Cline, Obama's Global Poverty Act, *Capitalism Magazine* (April 3, 2008), *available at* <http://www.capmag.com/article.asp?ID=5152> (last visited September 9, 2009): "I rarely write commentary from anger, preferring a properly objective, pseudo-dispassionate approach to a subject deserving my attention. But news of the details, nature and scope of pending legislation in the U.S. Senate has caused me to make an exception to that rule. . . . Congress is proposing, in Barack Obama's Global Poverty Act (S.2433, based on H.R. 1302, passed by the House September 25, 2007), that Americans be delivered into a state of indentured servitude as laborers for the United Nations. Perhaps 'indentured servitude' is too kind a term, for as horrendous a condition as it is, there is usually a time limit to such servitude. Slavery would be the more accurate term in this instance, for what Congress is considering is servitude by Americans in perpetuity, in exchange for nothing but the privilege of laboring to 'save' the world without thanks or reward, of filling the alleged needs of others, of performing unlimited 'community service' for the offense of merely existing."

¹² Ambassador Terry Miller & Brett D. Schaefer, The Global Poverty Act: The Wrong Track for U.S. Aid Policy (April 1, 2008), *available at* <http://www.heritage.org/research/foreignaid/wml1878.cfm> (last

B. THE 0.7% SOLUTION

A headline for the ultraconservative Web site Newsmax.com proclaimed: "Obama Bill: \$845 Billion More for Global Poverty: Democrat Sponsors Act OK'd by Senate Panel that Would Cost 0.7% of Gross National Product."¹⁴ This headline¹⁵ points out one of the main bones of contention surrounding the proposed Global Poverty Act: the unanswered question concerning its cost to the American taxpayers. Opponents of the Bill claim that, if passed, it will result in a commitment from the U.S. government to pay 0.7% of its Gross Domestic Product to poor nations, a claim vehemently disputed by the Bill's proponents, who state that it "neither authorizes nor obligates the federal government to spend more money."¹⁶ Some critics dispute the methodology used to arrive at that figure but acknowledge that "0.7%" has become a mantra and obtained a life of its own.¹⁷

visited March 3, 2009): "The Global Poverty Act of 2007, currently before Congress, is superfluous, misguided, and dangerous." . . . "The widespread failure of poor countries to develop despite extensive foreign aid and concern that the objectives of the declaration would not be met led donor nations to meet and reevaluate the Millennium Declaration's development strategies at meetings such as the 2002 Monterrey Conference on Financing for Development, the June 2005 G-8 meetings, and the 2005 U.N. World Summit. While these meetings have produced voluminous documents filled with admirable goals, they have failed for the most part to confront the failure of past aid efforts."

¹³ Cliff Kincaid, Obama's Global Tax Proposal Up for Senate Vote, (February 12, 2008) *available at* <http://www.aim.org/aim-column/obamas-global-tax-proposal-up-for-senate-vote/> (last visited March 3, 2009). "A nice-sounding bill called the 'Global Poverty Act,' sponsored by Democratic presidential candidate and Senator Barack Obama, is up for a Senate vote on Thursday and could result in the imposition of a global tax on the United States. The bill, which has the support of many liberal religious groups, makes levels of U.S. foreign aid spending subservient to the dictates of the United Nations."

¹⁴ Obama Bill: \$845 Billion More for Global Poverty: Democrat Sponsors Act OK'd by Senate Panel that Would Cost 0.7% of Gross National Product, Newsmax.com, (Feb. 18, 2008), *available at* <http://www.worldnetdaily.com/index.php?fa=PAGE.view&pageId=56405> (last visited March 3, 2009).

¹⁵ *Id.* Citing Cliff Kincaid of Accuracy in Media: "He said the legislation, if approved, dedicates 0.7 percent of the U.S. gross national product to foreign aid, which over 13 years he said would amount to \$845 billion 'over and above what the U.S. already spends.'"

¹⁶ Fact Sheet: The Truth About the Global Poverty Act (S. 2433) from Bread for the World, *available at* <http://www.bread.org/take-action/ol2008/gpa-fact-sheet.pdf> (last visited March 3, 2009):

"MYTH: The Global Poverty Act would commit the U.S. to spending 0.7 percent of its gross national product on foreign aid. This would require a new tax on all Americans.

TRUTH: The legislation neither authorizes nor obligates the federal government to spend more money. Rather, it seeks to put our current foreign aid programs into a comprehensive strategy involving trade policy, debt cancellation, and private sector efforts to ensure that existing U.S. programs are more effective and efficient. The legislation calls for a strategy to determine the right mix of aid, trade and debt policies and investment. The strategy also includes the private sector, civil society organizations, and the developing countries themselves as critical components in global development. The Congressional Budget Office has estimated the bill would cost less than \$1 million to implement."

¹⁷ Michael A. Clemens & Todd J. Moss, Ghost of 0.7%: Origins and Relevance of the International Aid Target, Center for Global Development Working Paper, (Sept. 6, 2005), *available at* <http://www.cgdev.org/content/publications/detail/3822> at 10-11 (last visited March 3, 2009): "No rich country, in any of these international fora prior to 2005, promised to actually give 0.7% of its income in development aid. In these documents, they promised to walk uphill, but not to attain the summit. In 2005, for the first time ever, individual donors have unilaterally pledged to actually reach 0.7% of GDP by 2015. At the time of this writing, Britain, France, Finland, Ireland, Belgium and Spain have made such a promise."

The search for a definitive answer on this question is seemingly answered by the United Nations itself. A Web site for the United Nations Millennium Project ("Commissioned by the U.N. Secretary General and Supported by the U.N. Development Group"), titled "The 0.7% target: An in-depth look" asks the question: "What is the 0.7% target?" and answers thusly:

0.7 refers to the repeated commitment of the world's governments to commit 0.7% of rich-countries' gross national product (GNP) to Official Development Assistance.

First pledged 35 years ago in a 1970 General Assembly Resolution, the 0.7 target has been affirmed in many international agreements over the years, including the March 2002 International Conference on Financing for Development in Monterrey, Mexico and at the World Summit on Sustainable Development held in Johannesburg later that year.

In Paragraph 42 of the Monterrey Consensus, world leaders reiterated their commitment, stating that "we urge developed countries that have not done so to make concrete efforts towards the target of 0.7 percent of gross national product (GNP) as ODA to developing countries."

Ours is the first generation in which the world can halve extreme poverty within the 0.7 envelope. In 1975, when the donor world economy was around half its current size, the Millennium Development Goals would have required much more than 1 percent of GNP from the donors. Today, after two and a half decades of sustained economic growth, the Goals are utterly affordable.¹⁸

The following two tables¹⁹ reflect the latest data on giving to poor countries from richer countries that have and have not yet committed to the 0.7% goal.

Germany, Italy, and Portugal have made qualified commitments to the goal, conditional on domestic budget processes and without a firm timetable. Five countries—praised by the Dutch Development Cooperation Minister as the 'G 0.7'—have surpassed the goal: Norway, Sweden, Denmark, Luxembourg, and the Netherlands."

The Europeans may have settled on this 'accepted' number largely because the press and nongovernmental actors have focused intensively on the 0.7% figure."

¹⁸ What is the 0.7% target? Millennium Project (2002-2004), available at <http://www.unmillenniumproject.org/press/07.htm> (last visited April 3, 2009).

¹⁹ OECD 2005, available at http://www.unmillenniumproject.org/documents/07_OECD_2005.pdf (last visited April 3, 2009).

Table #1

2005 Giving by Countries that have committed to 0.7%

<u>Country</u>	<u>% of GNI</u>
Norway	0.93
Sweden	0.92
Luxembourg	0.87
Netherlands	0.82
Denmark	0.81
Belgium	0.53
Austria	0.52
U.K.	0.48
Finland	0.47
France	0.47
Ireland	0.41
Germany	0.35
Italy	0.29
Spain	0.29
New Zealand	0.27
Greece	0.24
Portugal	0.21

Table #2

2005 Giving by Countries that have not committed to 0.7%

<u>Country</u>	<u>% of GNI</u>
Switzerland	0.44
Canada	0.34
Japan	0.28
Australia	0.25
United States	0.22

III. A REVIEW OF ETHICS TRAINING IN THE BUSINESS CURRICULUM

Teaching ethics in the aftermath of the current financial crisis is an enormous opportunity and societal obligation for business educators to train this generation to do better than the last generation. According to Ira Jackson, Dean of the Drucker School of Management at Claremont Graduate University, the one thousand business schools in the United States have been teaching the wrong thing, or, at least are allowing graduates to go out and do the wrong thing.²⁰ A Business Week survey shows that 56% of all MBA students in America admit to cheating while they are earning their degrees.²¹ Dean

²⁰ Ira Jackson, Teaching Ethics After the Financial Crisis, available at <http://www.ireport.com/docs/DOC-121376> (last visited April 3, 2009).

²¹ *Id.*

Jackson queries, “What does that tell us about how they will behave in business?”²² He urges business educators to “return to first principles and teach this next generation to 1) do no harm; 2) act ethically; and, 3) think about the relationship of business to society—yes, a focus on profitability and shareholders, but, sustainable growth and a purpose beyond profitability. Better ethical preparation of the next generation of business professionals is a big responsibility, as well as a big opportunity for business educators.”²³ Given the magnitude of the current global economic crisis, a crisis, which in the minds of many, is primarily based on lapses of ethics, it is important to anticipate new directions ethics education may take. One thing is certain--the path on which we have been has not taken us where we wanted to go.

The AACSB has for many years sought to incorporate ethics education into the business curriculum. Various scandals, such as the savings and loan debacle of the 1980s, and the Enron, WorldCom, Tyco scandals of the early 2000s, cast a spotlight on ethical deficiencies in the business community. Most business texts that are written with an eye on AACSB accreditation standards try to incorporate ethics throughout the course material. The Business Law curriculum, more so than most others, contains a significant amount of material that relates to ethics. Most Business Law and Legal Environment of Business texts have at least one entire chapter devoted to the topic of Ethics and the Law²⁴, and most also incorporate ethics throughout the text.²⁵ In Business and Society texts, there can be as many as six chapters devoted to the topics of Social Responsibility and Business Ethics, with ethics content running throughout all chapters of the book.²⁶ In the aftermath of Enron and the Sarbanes-Oxley Act, states, such as Texas,²⁷ now require accounting majors to take a separate ethics course. Given the magnitude of the current ethics-based crisis, it is not a stretch to imagine a reinvigorated emphasis on business ethics from governmental and accreditation sources.

While business professors are uniquely qualified to address ethical issues in business, they may not be as confident when it comes to teaching abstract philosophical ethics concepts. The traditional approach used by many texts presents an array of philosophical approaches to ethical decision-making. The two main philosophical

²² *Id.*

²³ *Id.*

²⁴ CHARLES R. MCGUIRE, *THE LEGAL ENVIRONMENT OF BUSINESS*, Chapter 2 “Ethics and the Law” (Merrill Publishing 1989); JEFFERY F. BEATTY & SUSAN R. SAMUELSON, *LEGAL ENVIRONMENT*, Chapter 2 “Business Ethics and Social Responsibility” (Thompson/West 2008); GEORGE D. CAMERON, III & PHILLIP J. AND SCALETTA, JR., *BUSINESS LAW AND REGULATORY ENVIRONMENTS*, Chapter 44 “Business Ethics, Corporate Social Responsibility, and the Law” (Dame Publications 1993); MARIANNE MOODY JENNINGS, *BUSINESS: ITS LEGAL, ETHICAL, AND GLOBAL ENVIRONMENT*, Chapter 4 “Business Ethics and Social Responsibility” (Wadsworth, Inc. 1994); JOHN D. BLACKBURN, ELLIOT I. KLAYMAN, & MARTIN H. MALIN, *THE LEGAL ENVIRONMENT OF BUSINESS*, Part I “Law and Ethics in a Global Environment” (Richard D. Irwin, Inc. 1994).

²⁵ ROGER E. MEINERS, AL. H. RINGLEB & FRANCES L. EDWARDS, *THE LEGAL ENVIRONMENT OF BUSINESS* (South-Western 10th ed. 2009).

²⁶ JOHN F. STEINER & GEORGE A. STEINER, *BUSINESS, GOVERNMENT AND SOCIETY: A MANAGERIAL PERSPECTIVE, TEXT AND CASES* (McGraw-Hill/Irwin 2002) (four chapters); DAVID P. BARON, *BUSINESS AND ITS ENVIRONMENT* (Prentiss-Hall Inc. 2000) (six chapters); CARROLL, ARCHIE CARROLL & ANN K. BUCHHOLTZ, *BUSINESS AND SOCIETY: ETHICS AND STAKEHOLDER MANAGEMENT* (South-Western 2003) (six chapters).

²⁷ Texas Administrative Code, Rule Section 511.58 (2009), *available at* <http://www.tsbpa.state.tx.us/education/education-requirements.html> (last visited September 2, 2009).

approaches to Ethics are teleology and deontology. A *teleologist* is concerned with the consequences, a simplified definition being “the ends justify the means”²⁸ while a *deontologist* is not concerned with the consequences. He/she focuses on “the rights of individuals and on the intentions associated with a particular behavior;” this moral philosophy is based upon “respect for persons”.²⁹ A deontologist believes that an individual has certain absolute rights: freedom of conscience, freedom of consent, freedom of privacy, freedom of speech, and due process.³⁰

Many texts list and summarize these various approaches without making a judgment or taking a stand on what is the *right* approach. Professor Laura Nash in a transformative 1981 article in the Harvard Business Review recognized this problem. She proposed a different approach, eschewing the traditional approaches to teaching business ethics, opting, instead, to take a practical, shorthand approach, listing twelve questions that can be asked when trying to resolve an ethical issue.³¹ Both approaches are typically offered in the textbooks, but can anyone point with pride to the results? The study of Ethics needs to be more than an academic exercise, but perhaps Dr. Nash's accommodation to the executive's antipathy toward philosophical reasoning may no longer fit the national mood.

Another approach is offered by the Josephson Institute of Ethics and its Ethical Principles for Business Executives. The Josephson Institute lists twelve principles that are secular and noncontroversial -- honesty, integrity, promise-keeping and trustworthiness, loyalty, fairness, concern for others, respect for others, being law-

²⁸ O.C. FERRELL, JOHN FRAEDRICH, & LINDA FERRELL, BUSINESS ETHICS ETHICAL DECISION MAKING AND CASES 150 (South-Western 2008) The two principle types of teleological approaches to ethics are egoism and utilitarianism. An *egoist* defines “right or acceptable behavior in terms of its consequences for the individual,” *i.e.*, he/she “should make decisions that maximize [his/her] own self-interest, which is defined differently by the individual.” *Id.* “The egoist’s creed can be generally stated as ‘Do the act that promotes the greatest good for oneself.’” *Id.* at 151. A *utilitarian*, on the other hand, “seeks the greatest good for the greatest number of people,” *i.e.*, he/she makes decisions that achieve the “greatest benefit for all those affected by the decision.” *Id.*

²⁹ *Id.* at 153.

³⁰ *Id.* at 154. There are various forms of deontological philosophies, two of which are the Golden Rule and Kant’s Categorical Imperative. In business, the *Golden Rule* would provide that people should treat everyone in their business activities as they would want to be treated. *Id.* The *categorical imperative* provides, “Act as if the maxim of thy action were to become by thy will a universal law of nature,” *i.e.* “if you feel comfortable allowing everyone in the world to see you commit an act and if your rationale for acting in a particular manner is suitable to become a universal principle guiding behavior, then committing that act is ethical.” *Id.* at 153.

³¹ Laura L. Nash, *Ethics Without the Sermon*, Harv. Bus. Rev. 79-89 (Nov.-Dec. 1981). “What is needed is a process of ethical inquiry that is immediately comprehensible to a group of executives and not predisposed to the utopian, and sometimes anticapitalistic, bias marking much of the work in applied business philosophy today.” *Id.* at 80. Her twelve questions follow: “1 Have you defined the problem accurately? 2 How would you define the problem if you stood on the other side of the fence? 3 How did this situation occur in the first place? 4 To whom and to what do you give your loyalty as a person and a member of the corporation? 5 What is your intention in making this decision? 6 How does this intention compare with the probable results? 7 Whom could your decision or action injury? 8 Can you discuss the problem with the affected parties before you make your decision? 9 Are you confident that your position will be as valid over a long period of time as it seems now? 10 Could you disclose without qualm your decision or action to your boss, your CEO, the board of directors, your family, society as a whole? 11 What is the symbolic potential of your action if understood? if misunderstood? 12 Under what conditions would you allow exceptions to your stand?” *Id.*

abiding, commitment to excellence, leadership, reputation and morale, and accountability.³² Who can dispute that these are good values?

IV. THE GLOBAL POVERTY ACT AS AN ETHICS LESSON IN DISTRIBUTIVE JUSTICE

A. DISTRIBUTIVE JUSTICE DEFINED

In the future, having to balance individuals' rights and public interest could make it more difficult for business people to make decisions; therefore, business students should also consider the principle of justice when studying ethics. A *theory of justice* defines what individuals must do for the common good of society. A basic principle of justice is to act in such a way that the bonds of community are maintained. In broad terms, this means acting fairly toward others and establishing institutions in which people are subject to rules of fair treatment.³³

The *principle of justice* requires "fair treatment" of individuals, but then the issue becomes: how does one "decide what is fair to each person? How do you decide what each person is due?"³⁴ What does justice mean? In business, the rules used to decide the justice of a situation could be based on "the perceived rights of individuals and on the intentions of the people involved in a given business interaction," *i.e.*, "justice deals more with the issue of what individuals feel they are due based on their rights and performance in the workplace."³⁵ There are several types of justice – procedural justice, compensatory justice, interactional justice, and distributive justice.³⁶ "Distributive justice refers to the distribution of benefits and burdens,"³⁷ *i.e.* whether coworkers are receiving equal pay for the same work.³⁸ The driving value behind distributive justice is to guarantee a social contract for those who are disadvantaged; in other words, a proponent of distributive justice would propose "never implement[ing] a course of action that harms the less powerful."³⁹

³² ARCHIE CARROLL & ANN K. BUCHHOLTZ, *BUSINESS AND SOCIETY: ETHICS AND STAKEHOLDER MANAGEMENT* 141 (4th ed. South-Western College 2000)

³³ JOHN F. STEINER & GEORGE A. STEINER, *BUSINESS, GOVERNMENT AND SOCIETY: A MANAGERIAL PERSPECTIVE, TEXT AND CASES* 236 (McGraw-Hill/Irwin 2009).

³⁴ ARCHIE B. CARROLL & ANN K. BUCHHOLTZ, *BUSINESS & SOCIETY ETHICS AND STAKEHOLDER MANAGEMENT* 209 (South-Western 2003).

³⁵ FERRELL, FRAEDRICH & FERRELL at 159.

³⁶ "Procedural justice refers to fair decision-making procedures, practices, or agreements." CARROLL & BUCHHOLTZ at 209. It deals with what processes and activities were used to produce the result. Ferrell, FRAEDRICH & FERRELL at 159. "Compensatory justice involves compensating someone for a past injustice." CARROLL & BUCHHOLTZ at 209. "Interactional justice is based on evaluating the communication processes used in the business relationship," *i.e.*, how accurate is the information provided by an organization or an individual. FERRELL, FRAEDRICH & FERRELL at 159.

³⁷ CARROLL & BUCHHOLTZ at 209.

³⁸ FERRELL, FRAEDRICH & FERRELL at 159.

³⁹ PETER A. STANWICK & SARAH D. STANWICK, *UNDERSTANDING BUSINESS ETHICS* 162 (Pearson Prentice Hall 2009).

John Rawls, a Harvard faculty member and a proponent of distributive justice, believes that justice is “the first value of social institutions” just as truth is “the first value of belief systems.”⁴⁰ He proposes

. . . society is an association of individuals who cooperate to advance the good of all. At the same time, society and the institutions within it are marked by conflict as well as by collaboration. The collaboration comes about since individuals recognize that joint actions generate much greater benefits than solitary efforts. The conflict is inherent because people are concerned by the just distribution of those benefits. Each person prefers a greater to a lesser share and proposes a system of distribution to ensure that greater share. These distributive systems can have very different bases: to each person equally, or to each according to his or her need, to his or her effort, to his or her contribution, or to his or her competence. Most modern economic systems make use of all five principles.⁴¹

Professor Rawls considers all of these systems unjust and proposes that “the primacy of justice in the basic structure of our society requires greater equality. Free and rational persons, he suggests, would recognize the obvious benefits of cooperation and, concerned about the just distribution of those benefits, would accept social and economic inequalities only if they could be shown to result in compensating benefits for everyone, [including] the least advantaged members of society: poor, unskilled, and with native intelligence but little education or training.”⁴² This concept of distributive justice can be shifted from “an economic system for the distribution of benefits to an ethical system for the evaluation of behavior in that acts can be considered to be ‘right’ and ‘just’ and ‘fair’ if they lead to greater cooperation by all members of our society.”⁴³

B. POLICIES AND POLITICS UNDERLYING REDISTRIBUTION

Every introductory text in economics, introduction to business, and business and society discusses the different economic systems and how they answer the basic economic questions dealing with the production, distribution and consumption of goods and services. The different economic systems of capitalism, socialism, and communism generally answer these questions differently. How they answer questions concerning how goods and services are to be distributed is based on political conceptions of distributive justice. Since there are approximately 250 books and articles on the topic of distributive justice available at the Stanford Encyclopedia of Philosophy's Extended Bibliography on Distributive Justice⁴⁴, a thorough discussion of distributive justice in economic systems is

⁴⁰ LARUE TONE HOSMER, *THE ETHICS OF MANAGEMENT* 110 (McGraw-Hill Irwin 6th ed. 2008)

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 111

⁴⁴ See JULIAN LAMONT & CHRISTI FAVOR, *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY'S EXTENDED BIBLIOGRAPHY, Distributive Justice* (2008), available at <http://plato.stanford.edu/entries/justice->

beyond the scope of this paper. Suffice it to say, that many theories of distributive justice exist and those that address economic justice are concerned with the appropriate allocation of wealth and resources to the members of society.

The American political landscape, for example, is littered with examples of distributive justice compromises that can be used as a basis for classroom discussion.⁴⁵ Civil rights advocates who demand reparations for the descendants of slaves are threatening to open a distributive justice Pandora's box.⁴⁶ President Obama has already seen a firestorm of resentment arising from his proposals to raise taxes on those Americans whose taxable incomes exceed \$250,000.⁴⁷ In 2010 the federal estate tax disappears, but will be resurrected the following year absent Congressional action. These are just a few examples of topics for discussion of the ethics of redistribution.

The United Nations has long ago entered into the discussion with the General Assembly's passage in 1974 of the Declaration of the Establishment of a New International Economic Order, the Programme of Action on the Establishment of a New International Economic Order, and the Charter of Economic Rights and Duties of States.⁴⁸ This call for a new economic order has been linked to distributive justice and largely stems from ramifications from decolonization of Asian and African countries.⁴⁹ Lawyers from those countries, like American lawyers and legislators favoring reparations, insist that international law imposes obligations to redistribute wealth from the rich to the poor.

The Global Poverty Act is fundamentally based on the premise that wealthier nations should share their wealth; because it is wrong for billions of people around the world to live on less than the daily price of a cup of Starbucks coffee. In the eyes of many, inside and outside of the United States, we have been less than good role models or stewards of the environment. Critics of our materialistic lifestyles like to point out that with less than 5% of the world's population, the United States enjoys more than a 20% share of the global GDP, while being accountable for some 35% of greenhouse emissions. Are we enjoying more than our fair share of the world's resources? Should

[distributive/bib.html](#) (last visited April 3, 2009). See also *Distributive Justice*, available at http://www.distributive-justice.com/mainpage_frame-e.htm (last visited April 3, 2009).

⁴⁵ Some leading examples include the progressive income tax, the social security payout scheme, and the federal estate tax.

⁴⁶ Commission to Study Reparation Proposals for African-Americans Act, H.R.40, 111th Cong. (2009), available at <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.40>: (last visited April 3, 2009).

Complete Title: "To acknowledge the fundamental injustice, cruelty, brutality, and inhumanity of slavery in the United States and the 13 American colonies between 1619 and 1865 and to establish a commission to examine the institution of slavery, subsequently de jure and de facto racial and economic discrimination against African-Americans, and the impact of these forces on living African-Americans, to make recommendations to the Congress on appropriate remedies, and for other purposes."

Sponsor: Rep Conyers, John, Jr. [MI-14] (introduced 1/6/2009), available at (<http://thomas.loc.gov/cgi-bin/bdquery>) (last visited April 3, 2009).

⁴⁷ See Larry Kudlow, "Obama Declares War on Investors, Entrepreneurs, Businesses, And More," available at <http://www.cnbc.com/id/29434104> (last visited April 3, 2009): "Let me be very clear on the economics of President Obama's State of the Union speech and his budget. He is declaring war on investors, entrepreneurs, small businesses, large corporations, and private-equity and venture-capital funds. That is the meaning of his anti-growth tax-hike proposals, which make absolutely no sense at all — either for this recession or from the standpoint of expanding our economy's long-run potential to grow."

⁴⁸ U.N.G.A. Res. 3201, Res. 3202, and Res. 3281 (1974).

⁴⁹ MARK W. JANIS, *INTERNATIONAL LAW* 49 (5th ed., Wolters Kluwer 2008).

other nations be encouraged to aspire to our levels of affluence? Can we continue along our path and still sustain the environment for future generations? These are among the biggest questions that must, and will, be answered by our society as we go forward, and they create exciting opportunities to stimulate student thought and debate.

C. THE GLOBAL POVERTY ACT AS AN ETHICS LESSON IN DISTRIBUTIVE JUSTICE

The Global Poverty Act, sponsored by President Obama while he was in the Senate, is a controversial piece of legislation that can be used to introduce the topic of distributive justice in a practical context for business students. Incorporating a discussion of The Global Poverty Act as a teaching lesson for distributive justice can be done in many different ways. Students can hear a lecture, receive a handout, participate in a presentation or debate, engage in a critical thinking exercise, or any combination of these methods.

Using the proposed legislation as a critical thinking exercise is one method for implementing a practical example of the concept of Distributive Justice into a business law curriculum. Following the introductory unit and first examination, students can be given a Critical Thinking Exercise⁵⁰ that presents two short readings with opposing views on the proposed legislation. Along with the handouts⁵¹, students receive a set of six questions asking them to identify issues, stakeholders, assumptions, evidence, and consequences. Also, students are asked to formulate a personal point of view about the material presented and discuss both the weaknesses and strengths of that point of view. This exercise could be completed by the students in forty-five minutes.

V. GAUGING STUDENT ATTITUDES

One way to get students thinking about these issues is to engage in critical thinking exercises, such as the one described above. Upon completion of the exercise, a survey was distributed to 135 students in several sections of a freshman-level course, Business Environment and Public Policy⁵². The survey questions and results follow:

⁵⁰ Critical Thinking is one of the outcomes that we attempt to measure at Lamar University and other AACSB accredited schools of business. At Lamar University, freshman classes are given critical thinking exercises and graded according to a rubric that measures each student's ability to identify and explain issues, recognize stakeholders and contexts, frame personal responses and acknowledge other perspectives, and evaluate assumptions, evidence, implications, conclusions, and consequences. When students reach their senior level capstone course, their critical thinking is measured again using a similar exercise and the same rubric.

⁵¹ The two articles used in our handout were "Fact Sheet: The Truth About the Global Poverty Act (S.2433)" from Bread for the World available online at <http://www.bread.org/take-action/ol2008/gpa-fact-sheet.pdf> and "Obama's \$845 billion U.N. plan forwarded to U.S. Senate floor" Unruh, Bob World Net Daily, July 25, 2008.

⁵² BULW 1370 is a freshman level Business and Society class required as part of the business core curriculum for business majors in the College of Business at Lamar University in Beaumont, Texas. While many colleges of business offer this course at the junior and senior levels, Lamar University requires it at the freshman level, even though it is not an Introduction to Business course. It is a survey course that includes many topics including ethics and the macroenvironment of business.

	Stongly agree	Agree	Neutral/undecided	Disagree	Strongly Disagree
It is ethically wrong to refuse to help a starving person.	39%	36%	10%	12%	3%
It is a good thing for wealthier nations to tax themselves to help eliminate poverty in poor nations.	10%	30%	33%	17%	10%
The morally right thing is for wealthy nations to give to poor nations until all nations attain the same economic level.	7%	23%	24%	30%	17%
The United Nations should be in control of distributing money from rich to poor nations.	10%	16%	31%	21%	22%
In the long run, giving financial aid to poor nations will not eliminate poverty; it is better to let capitalist principles help them to raise their own living standards.	21%	32%	25%	16%	6%
The morally right thing to do is for rich countries to give money to poor countries even when the rich country is having economic problems.	1%	11%	24%	34%	28%

About the same number of men as women answered the survey (51% male-49% female), almost all of the students were U.S. citizens (97%), and over half of the students were freshmen (52% freshman, 27% sophomore, 13% junior, and 7% senior).

As shown in the table above, 75% of those surveyed agree starving people should be helped (what to do with the 25% that are undecided or disagree with that is the topic of another paper). How to help the poor in other nations was without much consensus among the students who answered. Forty percent of them believed the wealthy should be taxed to help the poor; but only thirty percent believed the wealthy should be taxed until all nations attained the same economic level. And while over 50% believed capitalist principles should be used to help them raise their own standard of living, only 12% believed in aid to poor countries in hard economic times.

One insight that can be gleaned from this survey is that 25 to 33% of the students were neutral or undecided on each question. What is unknown is whether those students lacked the enthusiasm to think critically and did not care. Hopefully, they can be interpreted as representative of a collective *fertile ground* of open minds willing to absorb more information about the concepts and who will consequently be more likely to become ethical thinkers and doers. It is also worth noting that there were several differences between the way the males and females answered the survey.⁵³

VI. CONCLUSION

Our country is faced with a financial crisis of mammoth proportions; a crisis rooted in ethics, or rather, the lack of ethics. Business teachers, the AACSB, and business law teachers, in particular, need to step up and question the effectiveness of our ethics curriculum and shoulder much of the responsibility for seeing that teaching ethics equates to learning ethics. When the dust settles, society may well demand that ethics education translates into ethical behavior in the workplace.

Academically speaking, ethics is the branch of philosophy concerned with the systematic investigation of values.⁵⁴ Too often, perhaps, the study of ethics is treated as a mere academic exercise - the history of ethical thought. Offering a smorgasbord of historical ethical *approaches* can result in *paralysis by analysis*. A better approach may be for business teachers to take a stand and actually attempt to impart ethics; to teach *right* behavior, which is the approach taken by the Josephson Institute of Ethics in its Ethical Principles for Business Executives. As noted previously the Josephson Institute's principles are secular and should not be considered controversial.⁵⁵ Perhaps it is once again time to teach ethics with the sermon, to run the risk of being considered judgmental and old-fashioned. Perhaps it is time to require our leaders, business and political, to demonstrate a solid moral code.

⁵³ More males (83%) than females (75%) believed it to be ethically wrong to refuse to help a starving person. There was no difference in attitude among the genders with regard to reallocating wealth between the wealthy and poor nations and very little difference in attitude about using capitalist principles to help the poor raise their own standard of living (53% female, 58% male in support of capitalism). But there was a big difference in attitude on the issue of giving money to poor countries when the rich country is having economic problems—only 5% of females agreed while 21% of males agreed. Sixty-eight percent of females disagreed with the idea of helping another nation in hard economic times, while only 55% of males disagreed.

⁵⁴ GROVER GROVER, *THE CHANGING ENVIRONMENT OF BUSINESS* 58 (3rd ed. PWS-Kent 1988).

⁵⁵ ARCHIE B. CARROLL & ANN K. BUCHHOLTZ, *BUSINESS AND SOCIETY: ETHICS AND STAKEHOLDER MANAGEMENT* 141 (4th ed. South-Western College 2000).

A METHOD FOR EMBEDDING BUSINESS ETHICS INTO TRADITIONAL BUSINESS ANALYSIS

John L. Keifer* and Mary Carter Keifer⁺

Abstract

Professional MBA students recently were asked to opine on the state of affairs when it comes to the topic of business ethics. To a person, they voiced the most pessimistic and discouraging view that any alignment of the good of society and that of the firm is at best serendipitous; that a strong disconnect can exist between the interests of society and firms, between doing what is right or good and being profitable. Certainly, the amorality evidenced in the student responses likely reflects the realities of the recent financial meltdown and the tough work-related decisions that it has forced. However, the authors contend that such attitude also reflects the shortcoming in management education and its overly narrow reliance on an economic paradigm which largely bases conventional decision making on immediate economic outcomes. The authors argue that this apparent trade-off between what is right and what is profitable can only be rectified by an approach which encompasses a litany of factors beyond the standard macro and micro environment of the firm and its strategic fit. Embedded in the standard PEST and SWOT analyzes, and their counterpart, Porter's Five Forces, should be a broader look at the social and environmental footprint of the firm and the long-term sustainability of a firm's activities. The authors contend that effective instruction in business ethics will remain little more than an aspiration in the absence of such embedment due to the overwhelming power of an otherwise unabated economic paradigm. While such an approach to decision making will not eliminate the need for tough decisions impacting people and communities given the inherent changes in entrepreneurial context, it is believed that it would reduce considerably the pessimism that exists today among corporate managers and result in better decisions for both firms and the larger community which they inhabit and affect.

I. Introduction

By historic design regulation of corporate governance in America has been largely feckless when it comes to the public good. This approach has been largely driven by economic thought and particularly the notion of the "invisible hand" which posits the public benefits of self-serving, productive behavior and a corresponding belief in the self-regulating nature of markets.¹ Recent events have called into question such beliefs especially in situations where globalization of markets has created systemic risks which go well beyond the welfare of individual firms. In fact, it has resulted in calls from unlikely places for moderating economic incentives in a deliberate effort designed to moderate risk-taking going forward.² Even before the current economic debacle, there were signs that economic thought and its focus on monetary

gain was having an overly dehumanizing and increasingly detrimental impact on firm decision making to society's detriment.³

The authors are not looking simply to find fault with management education over its heavy reliance on economic thought and the importance of incentives.⁴ They argue instead that the rightful place of economics is as a filter by which managers test the strategic fit of their ideas against an assortment of metrics including their social and environmental impact and sustainability from both a temporal and spatial perspective. The authors argue prescriptively that the scope of managerial consideration should be broadened to include the firm's environmental and social footprint, which is strictly governed by the two maxims: (1) do no harm⁵; and, (2) look, where possible, to do good.⁶ Economic considerations, in other words, should be relegated to a final benchmark (1) to justify or reject a decision after it has been made, (2) to aid in the derivation of a decision as a result of an iterative process, or (3) to provide a rational explanation for a decision once made.⁷

The paper is divided into three separate but interrelated propositions. First, it posits that ethics cannot be taught as an aside or as an additional consideration and be effective when it comes to moderating future behavior. This is true because the compelling nature of the profit incentive is simply too great when it comes to doing business. In other words, unless doing the right or good thing lies at the center of a person's approach to decision making, it is foolhardy to think that any instruction in ethics will have a significant impact on future decision making as born witness from experience. Second, as commonly taught across business schools worldwide, the traditional approach to decision making which assesses the merits of an idea largely on a cost-benefit analysis focusing primarily on the anticipated revenues and expenses has the effect of pushing issues of ethics largely to the periphery. The net effect of such relegation has been the ancillary development of the concept of negative externalities and the concomitant call for regulation to force the internalization of certain costs otherwise born by the public, a solution that has proven to be totally inadequate in the multiple jurisdictions of the global economy given the power wielded by multinational corporations. Finally, the paper posits that the only way to put ethical concerns at the center of decision making is to require firms to consider both spatial and temporal implications of their decisions (i.e., their social and environmental footprints) from the standpoint of their social and environmental sustainability.

We would like to make one additional comment. Ethics is a complex matter when viewed from the perspective of the firm. This complexity can be minimized by treating ethics from the multiple foci of micro (individual level), meso (group level) and macro (firm level) perspectives. While wonderful materials exist that look at ethics from the micro and meso perspectives⁸, firm level treatment of ethics has begun only recently, but has not been adequately addressed from a pedagogical standpoint. The paper looks to address this shortcoming since what may happen at the individual or group levels will surely be constrained by firm level decisions of a strategic nature.

II. Ad Hoc Approach to Ethical Instruction

Agency law and its fiduciary obligations have been the dominate paradigm when it comes to identifying the role of firm management and its primary responsibility to maximize firm profits. "The only business is business," reminds Milton Friedman, and

the only social [read moral] responsibility of a business general manager is to “increase its profits.”⁹ While this has been tempered somewhat beginning with the New Jersey Supreme Court decision in 1953 holding the corporate philanthropy in moderation was authorized and consistent with their obligation to “acknowledge and discharge social as well as private responsibilities as members of communities in which they operate,”¹⁰ the amoral argument still holds that firms should not internalize costs beyond those expenses mandated by law when it comes to their operations. For instance, McKinsey & Company, the premier management consulting firm globally, argued in the third edition of its famed publication,

This book is about how to value companies and use information about valuation to make wiser decisions. Underlying it is our basic belief that managers who focus on building shareholder value will create healthier companies than those who do not. We also think that healthier companies will, in turn, lead to stronger economies, higher living standards, and more career and business opportunities for individuals.¹¹

While the advent of the Internet and cable news has upped the ante considerably for firms which fail to take into consideration the external effects of their operations, The Economist magazine reported as late as January 2008 that only sixty percent of 2000 firms surveyed actually required codes of conduct of their suppliers, and only forty-two percent even regularly assessed ethics risks in their supply chains.¹²

The influence of economic theory on the profession of management has not gone without its critics. Ghoshal and Moran (2003), for instance, argue persuasively that the “issue of intentionality” must be included in any systematic analysis of social phenomena or “sidestepped.” In suggesting that sidestepping has largely been the order of the day, they say,

In most causal theories, sidestepping is accomplished by making some assumptions about human nature—assumptions that are often not explicitly in the theory but remain implicit, hidden from causal logic. Our more pragmatic ground for making the distinction between good and bad theories relate to the nature of the assumptions that underlie much of management theory.¹³

For them, the assumptions are all too “negative, pessimistic, and empirically unsupported, lacking not only in moral grounding but also in common sense.”¹⁴

More recently, Khurana (2007) has called for putting the teaching of ethics in business schools within a “holistic, institutional context.”¹⁵ Criticizing business schools for their poor handling of the topic of ethics in the wake of corporate scandals, he stated,

The effect of these corporate scandals on business schools has been confined mostly to debate and, to some degree, action with respect to the subject of business ethics. In the wake of Enron and Tyco, some business school deans argued that the scandals reflected the presence in the corporate world of a few “bad apples,” not any systemic problems that reflected in any way on business

schools, which, they maintained, should not be held accountable for the moral failings of their graduates. At other schools, deans recycled their talking points about business ethics from the insider trading scandals of the 1980's, describing what their schools were doing to strengthen the ethics component of their curricula, which in some cases entailed the creation of new centers or programs on business ethics. Debates about ethics in the business school curriculum centered on whether instruction in ethics should be provided in a single, freestanding course or integrated into the entire MBA curriculum.¹⁶

Ironically, his call for action was predicated on what he calls "investor capitalism" which has placed enormous pressure on managers to show increases in quarterly earnings each year as a result of the dynamics of the market for financial control. The current financial meltdown, we would argue, raises a whole different genre of concern when it comes to the management of agency costs.

Newly initiated social science research questions the negative assumptions made about human beings and offers great insight into our ability to tap into the creative energies of people. For example, behavioral economists have shown that people can be trusted experimentally to do the right thing when reminded on their responsibilities as principled adults.¹⁷ Even more interesting is the work being done in cognitive psychology that people have evolved an universal moral instinct, "compelling us to render judgments of right and wrong independent of race, gender or education."¹⁸ This research stream needs further development but the strong suggestion there that formalizing ethics instruction may well lead to better decision making is not just Pollyanna-type thinking.¹⁹

III. The Peripheral Nature of Business Ethics

The traditional approach to decision making pushes issues of ethics largely to the periphery as students are taught to assess the merits of any proposal largely on a cost-benefit analysis and various ways to measure a firm's return on investment. This is especially true when it comes to management education given the pervasive influence on economic thought on strategic theory. Both Porter's value chain analysis and the Resource-Based View of the Firm (RBV) are undergirded by economic thinking or marginal analysis. As currently taught, business ethics is an anathema to questions of strategic fit or competitive advantage. As further proof of this fact, Dranove and Marciano's very popular book, "Kellogg on Strategy," makes a compelling case linking the firm's financial footprint to its strategic drivers.²⁰ The topic of ethics is not even covered in the book.

The law itself offers little reason for a firm to look beyond its own interest and the interest of its shareholders. First, as explained previously, for much of their existence, American corporations have been under a fiduciary mandate to act solely in the best interest of their shareholders. While this has been tempered by both court decision and state legislation in some instances, top managers and boards are under no illusions when it comes to the reason for their retention. In the absence of a positive case being made for taking a broader view of a firm's obligation to the larger community of stakeholders or otherwise compelling legislation, the safe course for managers and boards to take will remain looking after the best interest of their shareholders. Secondly, states have vied to attract business to their borders with Delaware doing the best job when it comes to

offering lenient corporate governance regulation. As it stands, boards in Delaware are protected under the business judgment rule to the extent that they seek to be informed and otherwise act in good faith even if they fail to follow best practices.²¹ In the case of Wall Street's financial collapse, it is not clear that liability could be established even though a warning of potential systemic collapse was sounded as early as 1999.²²

The feckless nature of American law offers little hope that managers and boards will respond consistently in a positive fashion to social and environmental concerns short of some form of mandatory regulation. Given political exigencies, they may well find that to be the case. In the meantime, business schools can seek to require their students to engage in analyzes that serve for a firm and society's interests.

IV. Moving Ethics to the Center of Decision Making

Historic developments have brought to the forefront the need for firms to consider their social and environmental impact. In 1971 the World Economic Forum first identified the stakeholder concept—the idea that a firm has a clear responsibility to the community beyond just its shareholders.²³ This was followed some twenty years later by the 1992 Rio Conference of the United Nations on Environment and Development (UNCED), which began the discussion on global warming and sustainable development which has now become a centerpiece in the discussions of world business and governmental leaders at the World Economic Forum in Davos, Switzerland each year. While it began with a focus on the natural environment, it now has broadened into the topic of corporate social responsibility which “incorporates a host of concepts and practices, including the necessity for adequate corporate governance structures, the implementation of workplace safety and standards, the adoption of environmentally sustainable procedures, and philanthropy.”²⁴ This now has further broadened into the relatively recent topic of corporate social entrepreneurship which involves transforming socially responsible principles and ideas into commercial value.²⁵ For instance, it has been reported that Hindustan Unilever actually profits more from shampoo sales to rural India in small, individual packets than they do from bottle sales.²⁶

These developments beg the question as to how business school curriculum should be adapted to capture the benefits of these developments. The question comes down to how students should be trained to analyze business situations. Presently, the *choix du jour* is to have students do both a macro (PEST)²⁷ analysis and a micro or industrial (SWOT)²⁸ analysis of the firm environment in an effort to determine its existing and prospective circumstances and the changes needed to maximize its financial performance.

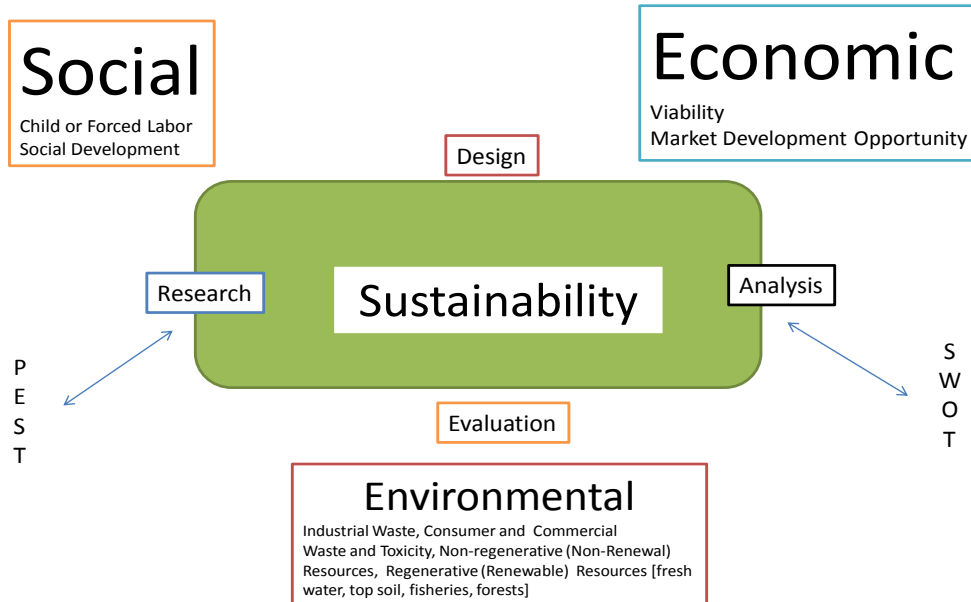
A problem has been that there has been little discussion within the academy relates to how ethics can be incorporated systemically into business instruction²⁹. Khurana notes,

As things stand, there is little sustained discussion among business school faculty and administrators about whether new technologies, the globalization of trade, demographic trends, the growing inequality between rich and poor, and sustaining social norms may be rendering the investor capitalism model unsustainable, if not obsolete. Yet these and other developments in the world since the rise of investor capitalism suggest that a new model—one akin to the stakeholder model...one that recognizes legitimate economic and social interests of many members of society other than shareholders—may be called for.³⁰

We propose that social, environmental and economic sustainability be added to the traditional analysis done in business schools. Students should be expected to add to their macro/micro analyzes a sustainability analysis in which they consider social and environmental sustainability in addition to a project's economic sustainability.

What follows is our model for decision making that business schools should adopt when it comes to matters of firm strategy.

Creating and Maintaining Sustainability



This model would look to incorporate traditional analysis into a sustainability model which looks to focus the attention of students on the critical issues when it comes to both innovative opportunities and possible threats or hazards from a sustainability standpoint.³¹

V. Conclusion

Business schools are not keeping pace with the changes happening in the world when it comes to their instructional models. We know that courses in ethics have not been effective when it comes to modifying the effects on behavior that ethicists find desirable. While it may be impossible to eliminate malfeasance altogether, we certainly can create instructional models that force future business leaders to think through the consequences of their decisions from the standpoint of their firm's footprint on society and the environment. This could greatly aid innovative thinking and lead to positive changes in the law especially when it comes to the business judgment rule. With such analysis, it would be more difficult for directors to benefit from the presumption of good faith when it comes to their decisions.

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¹ See Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Prometheus Books 1991) (1776).

² See statement of Lloyd Blankfein, chief executive of Goldman Sachs Group Inc., as reported on April 7, 2009, that the financial industry needed a "renewal of common sense" and pay standards

to "discourage selfish behavior, including excessive risk-taking." Walter Hamilton and Tiffany Hsu, Executive-pay overhaul gets backing from Goldman Sachs CEO, Los Angeles Times, April 8, 2009 <<http://www.latimes.com/business/la-fi-execpay8-2009apr08,0,3574531.story>>.

³ See Ghoshal, S. & Moran, P. "Towards A Good Theory of Management." Birkinshaw, J. & Piramal, G. Sumantra Ghoshal on Management: A Force for Good. Prentice Hall, 2005, 21.

⁴ Friedman, M. "The Social Responsibility of Business Is To Increase Its Profits." New York Times Magazine, 9/13/70: 32

⁵ Paine, L. Value Shift: Why Companies Must Merge Social and Financial Imperatives to Achieve Superior Performance. Tata McGraw-Hill, 2003.

⁶ See Prahalad, C.K. The Fortune at the Bottom of the Pyramid: Eradicating Poverty Through Profits (Enabling Dignity and Choice Through Markets). Wharton School Publishing, 2005.

⁷ A principal benefit of economic theory lies in its ability to adapt to changing phenomena and provide a coherent explanation. For instance, technology has permitted specialization along an industry's value chain due to a technically enabled ability to organize and coordinate business activity effectively across intermediate markets. This would be consistent with Coases' transaction cost approach since technology better enables greater monitoring of related firm activity and therefore reduces the threat of transaction costs related to market failure.

⁸ For a comprehensive set of materials (articles and cases) developed in collaboration between the Center for Business Education at the Aspen Institute and Yale School of Management for the macro and meso perspectives, see: <http://www.AspenCBE.org>.

⁹ *Supra* note 4.

¹⁰ See *A.P. Smith Manufacturing Company v. Barlow*, 13 N.J. 145, 154 (Sup. Ct. of N.J. 1953).

¹¹ Copeland, T., Koller, T. & Murrin, J. Valuation: Measuring and Managing the Value of Companies. 3rd edition. Wiley, 2000, 3.

¹² See "A Stitch in Time: How Companies Manage Risks to Their Reputation", The Economist (January 17, 2008)

¹³ *Supra* note 3, 21.

¹⁴ *Id.*, 21.

¹⁵ Khurana, R. From Higher Aims To Hired Hands: The Social Transformation of American Business Schools And The Unfulfilled Promise of Management As A Profession. Princeton, 2007, 365.

¹⁶ *Id.*, 364.

¹⁷ See Ariely, D. Irrational Predictability: The Hidden Forces That Shape Our Decisions. Harper, 2008.

¹⁸ See Hauser, M.D. Moral Minds: The Nature of Right and Wrong. Harper Perennial, 2006.

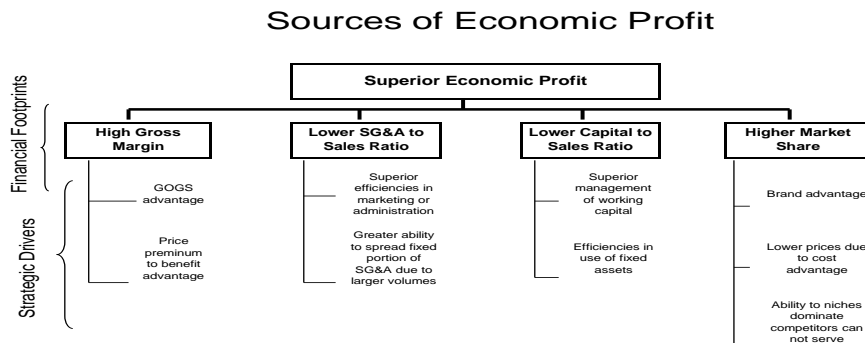
¹⁹ *Supra* note 15. Skepticism can dominate sometimes the business school agenda unfortunately when it comes to ethics instruction. As reported by Khurana (365):

One dean made the case for treating ethics in the context of the existing curriculum by noting that the most intelligent MBA students would not get much out of an ethics course because the subject could not be reduced to equations: 'unless the student is really interested in the issue [ethics], it's not effective because it's too easy to blow off. It's not like there's a formula that you absolutely have to learn. If you're not interested in a required course of this kind,

you don't have to spend much time on it if you're a smart student, and you don't get anything out of it and the whole thing is lost.'

He then goes on to say, however, "Other schools have a more optimistic view about their ability to educate students on ethics and have incorporated ethics courses either throughout the curriculum or through required courses."

²⁰ See Dranove, D. & Marcinano, S. Kellogg on Strategy: Concepts, Tools and Frameworks For Practitioners. Wiley, 2005: Figure 1.1, Economic Profit and Its Sources, page 12:



²¹ See *In re The Walt Disney Company Derivative Litigation* (Del.S.Ct. 411,2005)

²² Steven A. Holmes, Fannie Mae Eases Credit To Aid Mortgage Lending, New York Times, September 30, 1999,

<http://query.nytimes.com/gst/fullpage.html?res=9C0DE7DB153EF933A0575AC0A96F95>

²³ See Schwab, K. Global Corporate Citizenship: Working With Government and Civil Society. Foreign Affairs, January/February 2008, 107-118.

²⁴ *Id.*,107.

²⁵ See Prahalad, C.K. The Fortune at the Bottom of the Pyramid: Eradicating Poverty Through Profits (Enabling Dignity and Choice Through Markets). Wharton School Publishing, 2005.

²⁶ *Id.*

²⁷ The acronym stands for political (regulatory), economic, social and technical analysis of the firm's environment and their expected trends.

²⁸ The acronym stands for the strengths and weaknesses of the firm and the opportunities and threats provided by or present in its external environment.

²⁹ A suggestion by Ghoshal and Moran is to think of employees as "voluntary investors" in the enterprise. Our concern is that that would result in little more than a feel good concept at times of real stress in the organization. Also, it fails to take into consideration necessarily the impact that the firm's activities socially and environmentally.

³⁰ Khurana goes on to say, "if university business schools...are to continue to play a role that could not be filled equally well by corporate training programs or for-profit, purely vocational business schools, they belong in the forefront of the decision now taking place among informed and thoughtful citizens all around the globe about the shape that capitalism should take in the twenty-first century."

³¹ For an absolutely wonderful book detailing how the environmental component of the model can be taught, see: Peter Senge, Bryan Smith, Nina Kruschwitz, Joe Laur and Sara Schley. The Necessary Revolution: How Individuals and Organizations Are Working Together To Create A Sustainable World. Doubleday, 2008.

UTILIZING A WRITING RUBRIC IN THE INTRODUCTORY LEGAL ENVIRONMENT OF BUSINESS COURSE

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I. INTRODUCTION

The term "rubric" does not appear in the Fifth Edition of Black's Law Dictionary.¹ In spite of this absence, legal business environment faculty have developed, or soon will develop, a close familiarity. The term is now widely used to describe any system which utilizes explicit statements about expected performance to rate that performance on a scale.² The concept has been in use for some time, and most faculty have consciously or subconsciously utilized rubrics. But through a progression of events, the rubric, sometimes in the form of a writing rubric, is poised to become a regular component of legal environment of business courses. This paper briefly traces the rise of the writing rubric and examines the impact of its eminent incursion into the legal environment of business curriculum.

II. THE MOVEMENT TO MEASUREMENT

A. ACCREDITING THE ACCREDITORS

Accrediting organizations which accredit accrediting organizations, such as the Council for Higher Education Accrediting (CHEA),³ have been moving steadily toward stressing outcome measurement of student learning at various stages in degree progress.⁴ Additionally, there has been increasing focus on the integration of core competencies at every level of the university.⁵ The result is a growing attention to measurable outcomes.⁶

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¹ Not found at Black's Law Dictionary 1195 (5th ed. 1979). See Michel Mitri, *Automated Rubric Generation and Analysis for Assurance of Learning Tasks*, 6 ISSUES IN INFO. SYS. 296, at 297 (2005), available at http://www.iacis.org/iis/2005_IIS/PDFs/Mitri.pdf (defining "rubric") (last visited Aug. 23, 2009). Author retains copy.

² Michel Mitri, *Automated Rubric Generation and Analysis for Assurance of Learning Tasks*, 6 ISSUES IN INFO. SYS. 296, at 297 (2005), available at http://www.iacis.org/iis/2005_IIS/PDFs/Mitri.pdf (discussing dual accreditation by AACSB and Accreditation Board for Engineers and Technology (ABET) Computing Accreditation Commission (CAC)) (last visited Aug. 23, 2009). Author retains copy.

³ See Council for Higher Educ., <http://www.chea.org> (last visited Aug. 23, 2009). Author retains copy.

⁴ Linda Fraser, Katrin Harich, Joni Norby, Kathy Brzovic, Teeanna Rizkallah, Dana Loewy, *Diagnostic and Value-Added Assessment of Business Writing*, 68 BUS. COMM. Q. 290, at 290 (2005), available at <http://bcq.sagepub.com/cgi/content/abstract/68/3/290> (last visited Aug. 23, 2009). Author retains copy.

⁵ *Id.* at 291.

⁶ *Id.* at 290.

B. ASSESSMENT

The net effect of this focus on measurable outcomes is a concerted effort by various accreditors to mandate an assessment process that is essentially a quality assurance program.⁷ One core of this assessment movement is focused on the relationship between program goals and student learning.⁸ In particular, the accrediting bodies are interested in the linkage between goals and objectives.⁹

In the old days, proof of achieving learning goals could be developed indirectly by means such as surveys and focus groups.¹⁰ Under the new approach, the accrediting bodies are focused on more direct evidence of educational results.¹¹ Their rationale is that this is the best course in attempting to establish sustainable assessment processes.¹² There is a growing body of literature addressing assessments generally.¹³

C. ASSESSMENT AND AACSB

The Association to Advance Collegiate Schools of Business, International (AACSB), the accrediting body of choice for many business programs, has embraced the assessment approach by requiring what is labeled "assurance of learning" or "AOL"¹⁴ as part of an overall "learning assurance philosophy."¹⁵ AACSB's stated purposes of requiring measurement of AOL are to first demonstrate accountability, and second to assist in the improvement of courses and programs.¹⁶ The assessment process is becoming an integrated part of ongoing planning processes at AACSB schools.¹⁷

⁷ See Dep't Accounting, Coll. Bus., Tenn. Technological Univ., AACSB International Fifth-Year Maintenance Report (undated), at 4.1, http://www.tntech.edu/cob/Strategic_Assessment_Planning/final_accounting_report.pdf (Vol.1 Self-Evaluation Report for Department of Accounting and Business Law for years 2001-02 through 2005-06) (Section 4 "Assurance of Learning" describes the continuous nature of assessment of learning, particularly the Curriculum Improvement Cycle illustrated in Section 4.1 "Learning Process") (last visited Aug. 23, 2009). Author retains copy.

⁸ Steve Adams, Gail Corbitt, Lorraine Gardiner, Faculty, Coll. of Bus., Cal. State Univ. Chico, 2005 AACSB Optimizing Teaching and Delivery Conference: Building an Assessment Foundation: Technology Support for Course-Embedded Measures (June 6, 2005) Coll. of Bus., Cal. State Univ. Chico, 5, at <http://www.aacsb.edu/handouts/OTD05/B2-%20Gardiner.ppt> (illustrating the relationship between program goals and student learning, and generally, providing a step by step demonstration of building AACSB course-embedded measures, including rubric and measurement results) (last visited April 8, 2007). Author retains copy.

⁹ *Id.*

¹⁰ *Supra* note 2, at 296.

¹¹ *Supra* note 8.

¹² *Id.*

¹³ DePaul Univ., Assessment Resources, http://condor.depaul.edu/~tla/html/assessment_resources.html#rubrics (last visited Aug. 23, 2009) (a compilation of rubrics, web sites, general articles, discipline specific articles, classroom assessment techniques, and measures of learning outcomes). Author retains copy.

¹⁴ *Supra* note 2, at 296. See website of the Association to Advance Collegiate Schools of Business, International (AACSB), <http://www.aacsb.edu/accreditation/papers/AOLPaper-final-11-20-07.pdf> (last visited Aug. 23, 2009).

¹⁵ *Supra* note 7.

¹⁶ *Supra* note 2, at 296.

¹⁷ Gary Stading, Coll. of Bus., Univ. Houston-Downtown, Assessment Process in the UHD School of Business, <http://www.uhd.edu/academic/affairs/COB.pdf> (last visited Feb. 25, 2007) (includes an AACSB Timeline for the 5 year assessment cycle, and an example of STEPS assessment software from California State University Chico for automated web-based assessment). Author retains copy.

AACSB has developed an assessment system which has at its core a philosophy of continuous improvement.¹⁸ In order to accomplish this, the level of student achievement is compared to stated learning goals of the program, the school, and the university.¹⁹ To this end, AACSB identifies two direct assessment vehicles: first, stand alone tests which measure progress toward stated goals, and second, course-embedded measures which are incorporated into the courses themselves.²⁰

D. MEASUREMENT

Current AACSB standards mandate direct measurement of student performance,²¹ that is, an assessment which is a measurement against a consistent scale.²² AACSB standards 16, 18, 19, and 21 mandate measurement of learning in baccalaureate, master, special masters, and doctoral degree respectively.²³

The measurement system which most impacts classroom activities is the course embedded measurement. The course embedded approach emphasizes utilization of existing course assignments for measurement of student progress toward stated learning goals.²⁴ Business programs must include course embedded assessments which directly measure student performance.²⁵ This can be accomplished by a number of means. For example, some departments designate courses that are “writing intensive” and look to student writing performance measures in that course to evidence student progress toward stated goals.²⁶ Most programs seek to employ course-embedded measures whenever possible.²⁷

III. THE ROLE OF THE RUBRIC

A. CHARACTERISTICS OF RUBRICS

Typical rubric definitions identify certain elements, usually including a list of learning objectives, a set of ratings identifying the evaluation scale tied to each objective, a table which grids the objectives and the evaluation ratings scale, and sometimes an instructor comment section.²⁸ In this manner, the rubric functions as a guideline for distinguishing student work

¹⁸ *Supra* note 7, at 4.

¹⁹ *Supra* note 4, at 291.

²⁰ *Supra* note 2, at 296.

²¹ *Id.*

²² Teaching and Learning Center, Fayetteville State Univ., Assessment, <http://www.uncfsu.edu/tlc/Assessment.htm> (last visited Aug. 23, 2009) (a compilation of links to step-by-step instructions on how to create your own rubrics, “Best Practices” for rubrics, AACSB Assessment Response Center, and others).

²³ *Supra* note 2, at 296.

²⁴ *Supra* note 8.

²⁵ *Supra* note 2, at 296.

²⁶ George Mason Univ., Writing Assessment Reporting Format for George Mason Departments, at 1, http://chhs.gmu.edu/pfd%20files/d_writing_guide/pdf/writingassessment.pdf (last visited Aug. 23, 2009). Author retains copy.

²⁷ *Supra* note 8.

²⁸ *Supra* note 2, at 297.

products by the quality of the student effort on a specified learning objective.²⁹ Rubrics are quickly becoming the generally accepted means of identifying and documenting assessments.³⁰ The ability to gain useful assessment information stems from utilizing a carefully designed scoring rubric.³¹

In a course embedded use, a writing rubric can be used for diagnostic assessment or can be designed as part of in-class value added evaluation.³² In either case, the concept is that the rubric should serve as guidance for continuous improvement in student performance.³³ At the core of the rubric approach is a simple formulation contained in two questions: first, what are the students supposed to learn, and second, what have the students learned?³⁴

B. USING RUBRICS

Some writers divide rubrics into two types, those used for summative assessments and those used for formative assessments.³⁵ Summative assessment is generally considered a final one-time demonstration of student mastery of a learning objective.³⁶ The summative assessment rubric holistically measures student mastery of the learning objective and responds with one-time global feedback as to the degree of mastery of the learning objective.³⁷ Formative assessment is any process whereby data is gathered to measure student progress in moving toward mastery of the learning objective.³⁸ Historically, summative assessment has been utilized over formative assessment,³⁹ but the trend is moving toward favoring sequential formative assessments which are believed to hold more measurement value through the use of incremental rubrics based analysis.⁴⁰ The rubric is viewed as a key tool in formative assessment.⁴¹

Measurement of student progress toward learning objectives does not inherently require that every student be measured, and often the realities of resource allocation require a choice between rubric based evaluation of every student and rubric based measurement of only a sample of students.⁴² Either way, collated and evaluated rubric data is analyzed to lead to course and

²⁹ Nancy Pickett, Steps in Rubric Development, http://edweb.sdsu.edu/triton/july/rubrics/Rubric_Guidelines.html (last visited Aug. 23, 2009). Author retains copy.

³⁰ *Supra* note 2, at 296.

³¹ *Supra* note 8.

³² *Supra* note 4, at 292.

³³ *Supra* note 8.

³⁴ *Supra* note 17.

³⁵ *Supra* note 22.

³⁶ *Id.*

³⁷ Darrell Pearson, Krista P. Terry, Performance Assessment: More than a WebQuest and a Rubric, http://conference.merlot.org/2003/presentations/MIC03_Pearson_rubric.ppt (exemplifying the notion that a program's context is determinative in the development of assessment activities, providing a step-by-step model for developing unique program standards, learning outcomes, and accompanying rubrics) (last visited Aug. 23, 2009). Author retains copy.

³⁸ *Supra* note 22.

³⁹ *Id.*

⁴⁰ *See supra* note 37.

⁴¹ *Supra* note 22.

⁴² Linda Malgeri, Chair, Coles Coll. Assurance of Learning Council, AACSB Int'n Accreditation Maintenance Meeting (Dec. 6, 2004), http://coles.kennesaw.edu/documents/AACSB_Maint_Pres.ppt (for a representation of the assessment cycle, measures, feedback, and timetables) (last visited Aug. 23, 2009). Author retains copy.

program improvement.⁴³ Underpinning the approach is a belief that rubric based response facilitates both more meaningful feedback and more timely feedback.⁴⁴

Underlying the effectiveness of any rubric implementation is the need for consistency of goals and measures at every level in the university, from the course to the program, the school, and ultimately, the university.⁴⁵ Examples of such integration abound as programs seeking accreditation and re-accreditation look more and more to rubrics for measurements to underpin assessments which provide the data for continual improvement in pursuit of assurance of learning by students in the program.⁴⁶

IV. THE WRITING RUBRIC AND STUDY OF THE LEGAL ENVIRONMENT OF BUSINESS

A. WRITING AND BUSINESS TEACHING

When business programs or schools identify desired capabilities possessed by graduates, skill in effective business writing is nearly always an important goal.⁴⁷ Historically this has been addressed in a number of ways, including utilizing dedicated business writing courses, writing assessments at program entry and at capstone,⁴⁸ and occasionally, the creation of a writing portfolio.⁴⁹ A threshold question is whether there should be one central, universal writing rubric, or individual course or instructor specific rubrics.⁵⁰ Additionally, the connection between classroom grades and the writing assessment scheme must be addressed.⁵¹ Several existing measurement systems provide for cross referencing of multiple writing assessments as a means to obtain a clearer picture of student progress toward program writing objectives.⁵² There is a rapidly growing literature, available in a variety of mediums, on business writing generally and in specialty areas.⁵³

B. PRACTICAL CONSIDERATIONS

On the practical level, the writing rubric lives a double life, first setting the performance standard expected of the student with feedback on progress, and second as a vehicle for identifying to the instructor and the program shortcomings in either student progress or in the assessment of that progress. In fulfilling that dual role, some believe that transparency is critical so that students know how they will be required to demonstrate their mastery.⁵⁴ Feedback loops

⁴³ *Supra* note 2, at 296.

⁴⁴ *Supra* note 42.

⁴⁵ *Supra* note 4, at 292.

⁴⁶ *Supra* note 42.

⁴⁷ *Id.*

⁴⁸ *Supra* note 4, at 290.

⁴⁹ *Supra* note 26.

⁵⁰ *Supra* note 8.

⁵¹ *Supra* note 4, at 293.

⁵² *Id.* at 292.

⁵³ *See, e.g., supra* note 4, at 291.

⁵⁴ *Supra* note 22.

are crucial to this movement of information.⁵⁵ Unfortunately, course embedded measures are often labor-intensive for instructors.⁵⁶ Converting rubric data to usable analysis can be a major logistical undertaking.⁵⁷ Most agree that rubric efficiency is tied to the effectiveness of the data entry method.⁵⁸ There are a growing number of sources for technology based approaches to such assessment.⁵⁹ One author describes an integrated system of automated rubric generation, scoring, and summarization of assessment results.⁶⁰

C. WRITING RUBRIC RULES OF THUMB

Rules of thumb are useful when initiating a rubric system. Begin with a focus on student learning.⁶¹ Decide whether to measure student knowledge or student performance.⁶² Determine whether to evaluate the full spectrum of performance or to use a threshold achievement measure.⁶³ Use standards of measure which reflect the standards that will be expected in practice.⁶⁴ Evaluate only measurable things.⁶⁵ Try to identify relevant benchmarks.⁶⁶ Have each rubric item focus on a discrete skill.⁶⁷ Try to measure the identified skill and not generic skills.⁶⁸ Build the rubric so that two different raters would usually assign the same score.⁶⁹ And finally, keep the rubric short,⁷⁰ and design it so that it will fit on one sheet of paper.⁷¹

D. RUBRIC OPPORTUNITIES AND PITFALLS

As a part of the assessment movement and a related movement to integrate certain topics across the curriculum, some writers question the value of the standard three credit hour course characterized by minimal interdisciplinary integration, referring to such courses as "silos",⁷² and arguing that there are a variety of alternative ways to teach in an integrated manner avoiding

⁵⁵ *Supra* note 42.

⁵⁶ *Supra* note 2, at 297.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *See supra* note 37.

⁶⁰ *Supra* note 2, at 296.

⁶¹ *Supra* note 29.

⁶² Barbara M. Moskal, Jon A. Leydens, *Scoring Rubric Development: Validity and Reliability*, Practical Assessment, Research and Evaluation, 2000, <http://pareonline.net/getvn.asp?v=7&n=10> (last visited Aug. 23, 2009). Author retains copy.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Supra* note 29.

⁶⁶ *Creating a Rubric for a Given Task*, <http://webquest.sdsu.edu/rubrics/rubrics.html> (last visited Aug. 23, 2009). Author retains copy.

⁶⁷ *Supra* note 29.

⁶⁸ *Supra* note 62.

⁶⁹ *Id.*

⁷⁰ *Supra* note 29.

⁷¹ *Id.*

⁷² Patricia Sendall, Susan E. Pariseau, *Curriculum Redesign Update: On Integrating Six Business Disciplines in the Undergraduate Business Core Curriculum*, Acad. Bus. Educ. 2006 Conference Proceedings, at 1, <http://www.abe.sju.edu/proc2006/sendall.pdf> (on re-designing core courses into an integrated curriculum focused on learning outcomes in the context of continuous improvement) (last visited Aug. 23, 2009). Author retains copy.

"silo" course limitations.⁷³ Such moves to use teams of faculty which combine the "hard" and "soft" sides of the business disciplines⁷⁴ can increase the need for rubrics which are based heavily in judgments, though there are examples of rubrics designed for such settings.⁷⁵

Every faculty who utilizes a writing rubric must consider how to address the possibility that a well designed writing rubric results in documenting more than expected. For example, a rubric might document that many students have poor underlying writing skills, or that some students lack core skills required to successfully learn the subject at hand. Finally, an integrated writing rubric may even point to student cheating where scores on in-class work are far below out-of-class work.

E. RUBRIC RESOURCES AND ALTERNATIVES

A number of resources related to rubrics are available.⁷⁶ Some resources address how to create rubrics,⁷⁷ or provide information on rubric related topics,⁷⁸ or assessments and learning outcomes.⁷⁹ One college posts what it labels a "rubric library".⁸⁰ Also, AACSB maintains an online assessment resource center.⁸¹

As the rubric becomes ever more utilized, interesting alternatives appear, such as a design for spreadsheet-based macros for rubric implementation.⁸² In addition, there are evolving a number of alternative assessment models.⁸³ In the legal environment of business setting, writing rubrics can be enhanced by looking to rubrics designed to measure critical thinking.⁸⁴ Other substantive business areas, such as accounting, are developing frameworks which can serve as measurement models,⁸⁵ including efforts such as the American Institute of Certified Public Accountants (AICPA) Core Competency Framework.⁸⁶

⁷³ *Id.* at 2.

⁷⁴ *Id.* at 1.

⁷⁵ Sch. of Bus. Admin., Univ. of Houston-Victoria, MBA Conference Presentation Rubric, <http://www.uhv.edu/bus/conference/rubric.asp> (example of a rubric for assessing a team presentation) (last visited Aug. 23, 2009). Author retains copy.

⁷⁶ *See supra* note 13.

⁷⁷ *See supra* note 22.

⁷⁸ See Office of Assessment, Trinity College of Arts and Sciences, Duke University, <http://assessment.aas.duke.edu/resources.php#Rubric> (last visited Aug. 23, 2009). Author retains copy.

⁷⁹ *See supra* note 13.

⁸⁰ Institutional Research, Assessment & Planning, Cal. State Univ., Fresno, Rubric Library, <http://www.csufresno.edu/ir/assessment/rubric.shtml> (providing rubrics for critical thinking and writing, and scoring guides with recommendations, last updated May 9, 2006) (last visited Aug. 23, 2009). Author retains copy.

⁸¹ Assessment Resource Ctr., AACSB Int'l, http://www.aacsb.edu/resource_centers/assessment (includes resource guides as well as a schedule of assessment seminars) (last visited Aug. 23, 2009). (Additional resources on rubric development are available at http://www.stfrancis.edu/assessment/Rubric_Development.pdf) (last visited 8 April 2007).

⁸² *See supra* note 2, at 297.

⁸³ *See supra* note 7.

⁸⁴ *See supra* note 78.

⁸⁵ *See* 2005 Annual Meeting of the Am. Accounting Ass'n, Assessment of Learning Outcomes and Accounting Programs, <http://aaahq.org/AM2005/cpe/cpe10.htm> (format for an all day presentation that could serve as a template for other professions) (last visited Aug. 23, 2009). Author retains copy.

⁸⁶ Am. Inst. of Certified Public Accountants (AICPA), Core Competency Framework for Entry into the Accounting Profession (The Framework), <http://www.aicpa.org/edu/corecomp.htm> (last visited Aug. 23, 2009).

V. GETTING STARTED

The research for this paper was one part of an effort to initiate and refine a writing rubric in an introductory legal environment of business course taught usually as a first semester, junior year offering in an AACSB accredited college of business. A rubric designed within the college was applied to two different samples of student work, one an in-class written response to an exam essay question, and the other a compliance interview report. The rubric is included as an appendix to this paper.

The writing rubric addressed seven criteria: organization, sentence structure, transitions, background, punctuation and spelling, professionalism, and introduction and conclusion. Each writing sample was scored as unacceptable, acceptable, or superior on each of the seven criteria.

The results are useful only anecdotally owing to a sample size of only one hundred students. Additionally, the writing rubric was applied outside of the grading system for this pilot project. While the students knew that it would be utilized, and that in the case of the compliance report, they would be informed of their scores, they were not under a specific grade threat from the rubric score.

The results were for the most part as expected. The students scored far higher on the paper prepared out of class than on the hand written in-class work. As with other reported experiences, grammar was a weak point.⁸⁷ Of the seven criteria, students performed lowest on the punctuation and spelling criterion on the out-of-class paper. Sentence structure and professionalism ranked weakest on the hand written in-class essay. The strongest out-of-class criterion score was background, while the strongest in-class criterion score was introduction and conclusion.

The exercise was, in hindsight, heavily weighted toward evaluating existing writing capabilities which lie primarily outside of the learning objectives of the course. Further, the rubric served only to report generic writing skill shortcomings summatively rather than to formatively expand writing skills on the topic areas of the legal environment of business.

VI. NEXT STEPS

Assessments, measurements, and rubrics will not disappear soon. Legal environment courses are a natural place to impose learning objectives which necessitate evaluation using a writing rubric. Utilization of a general purpose, one-size-fits-all, generic writing rubric has troubling implications, most of which can be addressed by the careful, proactive crafting of writing rubrics specific to important legal environment of business learning objectives capable of evaluation through peer benchmarking.

⁸⁷ See *supra* note 26, at 3.

APPENDIX
Writing Rubric
UHD School of Business
AACSB Assessment
 Authored by Assessment Sub-Committee

Criteria	Unacceptable (1)	Acceptable (2)	Superior (3)
Organization	Writing is not concise and has a tendency to ramble. Lack of focus interferes with understanding.	Focus and direction of writing are acceptable and do not interfere with understanding; organization could be improved.	Writing is concise. Information is easy to understand. Focus and direction of the writing are extremely clear.
Sentence Structure	Sentence structure is poor, making understanding difficult. Sentences are awkward and/or lack structure.	Sentences are not generally awkward or lacking in appropriate structure. Overall, most sentences clearly express ideas.	Sentences are clear, well developed, and express concise ideas.
Transitions	Connections between topics, ideas, or arguments are confusing.	Most sentences within a paragraph build upon a single issue. A few ideas lack good transitional sentences.	Writing enhances readability. Sentences build upon singular ideas. Transitions are good.
Background	Arguments lack support, or are supported with personal views. Arguments are not well constructed.	Arguments are supported with occasional citations or with class lessons. Paragraphs generally support the main idea.	Arguments are supported with cited references or relevant facts. Arguments support ideas which support the premise.
Punctuation and Spelling	Writing contains numerous and/or significant errors, distracting from the message.	Writing contains occasional errors that do not distract from the message.	Writing is nearly error free.
Professionalism	Document is not professionally written. Tone, word choice, and/or aesthetics are inappropriate.	Writer uses familiar but not sophisticated words that are not distracting. Document is fairly professional looking.	Wit, insights, and sophistication provide evidence of due diligence. Tone adds to the writing quality. Document is neat and professional looking.
Introduction and Conclusion	Main idea is not established in the introduction, and/or conclusion is weak.	Main idea and direction of the paper are established in the introduction. Conclusion is satisfactory.	Introduction not only establishes the main idea and direction, but also has an interesting hook. Writing is brought to closure with justifiable insight and/or supportable revelations.

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