

Volume 1

ISSN PENDING

**ACADEMY FOR STUDIES IN
BUSINESS LAW JOURNAL**

**An official Journal of the
Allied Academies, Inc.**

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Co-Editors
Western Carolina University**

**Academy Information
is published on the Allied Academies web page
www.alliedacademies.org**

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The Academy for Studies in Business Law Journal is published by the Allied Academies, PO Box 2689, 145 Travis Road, Cullowhee, NC 28723, (828) 293-9151, FAX (828) 293-9407. Those interested in subscribing to the Journal, advertising in the Journal, submitting manuscripts to the Journal, or otherwise communicating with the Journal, should contact the Co-Editors at that address.

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LETTER FROM THE EDITORS

Welcome to the first edition of the *Academy for Studies in Business Law Journal*. The Academy for Studies in Business Law is an affiliate of the Allied Academies, Inc., a non profit association of scholars whose purpose is to encourage and support the advancement and exchange of knowledge, understanding and teaching throughout the world. The *ASBLJ* is a principal vehicle for achieving the objectives of the organization. The editorial mission of this journal is to publish legal, empirical and theoretical manuscripts which advance the discipline.

The articles contained in this volume have been double blind refereed. The articles in this issue of the journal represent both submissions to conferences and direct submissions from authors and they conform to our editorial policies.

JoAnn and Jim Carland
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DEAR FDA: HERE'S MORE AMMUNITION FOR YOUR RESTRICTIONS ON TOBACCO PRODUCT ADVERTISEMENTS

Bernard J. Healey, King's College
Edward J. Schoen, King's College

ABSTRACT

On August 28, 1996, the Food and Drug Administration (FDA) promulgated its final regulations restricting the ability of tobacco companies to promote and advertise cigarettes and smokeless tobacco products to children and adolescents. While some believe the FDA should go even further in limiting tobacco product advertising, commercial speech decisions of the Supreme Court of the United States impose limits on the authority of the FDA to regulate advertising and may handcuff the FDA from imposing greater restrictions.

A study was undertaken to ascertain the use of tobacco products, alcohol and marijuana by children in Northeastern Pennsylvania. A letter was sent to several school superintendents requesting permission to survey all students in grades four through twelve. Six school districts, representing 15,543 students, agreed to allow the survey to be completed in their respective school districts. A questionnaire was developed and given to the cooperating school districts for administration.

This study found that 44.9% of the children tried alcohol, 37.3% experimented with cigarettes, 20.4% continue to smoke today, 8.3% have used smokeless tobacco, and 15.7% have used marijuana. The mean age for trying these products is 11.5 for cigarette use, 11.5 for smokeless tobacco, 11.6 for alcohol and 13.5 for experimentation with marijuana. There was an association between using tobacco, using alcohol and then using marijuana. Cigarettes are the first drugs used by children followed by smokeless tobacco, alcohol and finally marijuana.

Part I of this paper examines the constitutionality of the FDA's restrictions on tobacco product advertising and promotion in light of decisions of the Supreme Court of the United States protecting commercial speech. Part II of this paper demonstrates that cigarettes are a "Gateway Drug," and questions whether the FDA's regulations went far enough.

PART I: CONSTITUTIONALITY OF FDA'S RESTRICTIONS ON TOBACCO PRODUCT ADVERTISEMENTS AND PROMOTIONS

(1) Constitutional Protection of Commercial Speech

The First Amendment of the United States Constitution¹ protects freedom of speech. Full constitutional protection is provided to core First Amendment areas, such as political, religious and scientific speech.² If the expression is accorded full constitutional protection, the government may regulate it only if the regulation represents a “compelling” interest and is the “least restrictive means” available.³

In contrast, commercial speech, which has been defined as a proposal for a commercial transaction⁴ and an expression related solely to the economic interests of the speaker and its audience,⁵ receives a lower but nevertheless substantial level of protection, under which the government regulation is impermissible unless the governmental interest asserted to support the regulation is substantial, and the government regulation not only directly advances the asserted governmental interest but is no more extensive than is necessary to serve that interest.⁶

Over the past twenty five years, the Supreme Court of the United States has decided numerous commercial speech cases in an attempt to clarify the constitutional protection which must be accorded commercial speech. Two cases are particularly important in assessing the constitutionality of restrictions on advertising: *Central Hudson Gas & Electric Corp. v. Public Service Commission* (“*Central Hudson*”),⁷ and *44 Liquormart, Inc. v. Rhode Island* (“*44 Liquormart*”),⁸

In *Central Hudson*, New York’s Public Service Commission, attempting to focus attention on the necessity to conserve fuel oil in the wake of the embargo imposed by the Middle Eastern Arab countries on the importation of petroleum products into the United States, prohibited all advertising by electric companies promoting the use of electricity or appliances which would use more electricity.

While the Arab embargo was lifted in 1974, the advertising ban remained in effect. Seeking to have the ban terminated, and arguing that its First Amendment right to advertise was violated, Central Hudson Gas & Electric Corp. asked the state court to declare the advertising ban unconstitutional. The New York Court of Appeals upheld the advertising ban, holding that the continuing need for oil conservation was sufficient to justify the restriction.

The United States Supreme Court reversed, ruling that, under the First Amendment, states cannot prohibit all commercial speech, because accurate information, even if incomplete, is needed by the public. Hence, if the commercial message does not mislead and concerns lawful activity, the government’s power to regulate it is limited, depending upon the nature of both the expression and governmental interests served by the regulation. In order to ascertain whether the governmental restriction violates the

First Amendment, the court devised the following test: commercial speech may be restricted, provided the state's restriction satisfies the following four prongs:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.⁹

Applying the test to the New York commission's regulations, the court concluded the restriction on electric utility advertisement violated the First Amendment. Central Hudson's advertisement was not misleading, and did not promote unlawful activity. While the interests advanced by the commission as justification for the restrictions - encouraging the conservation of natural resources and keeping rates lower by holding down consumer demands for electricity - were deemed substantial, the court found: (1) it was not clear that the restriction on advertising advanced the governmental interest; and (2) the prohibition on speech was far more extensive than necessary to serve that interest, there being no demonstration by the utility commission that conservation could not be encouraged by more limited restrictions.

In *44 Liquormart*, the Supreme Court of United States decided that two Rhode Island statutes prohibiting advertisement of liquor prices violated the First Amendment. While all nine justices agreed to strike down the Rhode Island statutes, they splintered over the reasoning for that conclusion. Nonetheless, despite its quiltwork construction, *44 Liquormart* displays a robust defense of First Amendment protections of commercial speech.

Justice Stevens authored the commercial speech analysis which struck down Rhode Island's liquor advertisement restrictions. Three elements of his analysis bode well for protection of commercial speech: (1) restrictions on commercial speech are divided into two categories, those which seek to achieve an end directly related to the preservation of a fair bargaining process and those which to achieve an end not directly related to the preservation of a fair bargaining process, (2) commercial speech restrictions falling into the latter category will be subject to more rigorous First Amendment review generally reserved for core First Amendment areas, and (3) the resulting combination of "more rigorous review" with the fourth prong of the *Central Hudson* test (i.e., the restriction must be no more extensive than necessary) essentially dooms blanket advertising prohibitions, because, lesser non-speech alternatives routinely

being more efficacious, it is virtually impossible to justify a total ban on advertising. In effect, then, the *Central Hudson* test has been abandoned, and commercial speech is accorded elevated status.

In her concurring opinion, Justice O'Connor concludes that Rhode Island's advertising ban was constitutional even under the less vigorous *Central Hudson* test.¹⁰ Reaching the same conclusion, Justice Scalia seriously criticizes *Central Hudson* as having "nothing more than policy intuition to support it," and invites alternative commercial speech analysis in future cases.¹¹ Justice Thomas expresses the most blistering indictment of the *Central Hudson* test, saying it was nothing more than a case-by-case balancing test without informing principles and concluding that the regulation of commercial speech cannot be justified any more than regulation of noncommercial speech.¹² Recognizing that the fourth prong of *Central Hudson* can never be fulfilled if an advertising ban is proposed and non-speech alternatives to the advertising ban are effective in achieving the same goal (for example, rationing, price controls, taxing and counterspeech), Justice Thomas recommends the abandonment of *Central Hudson* and a return to *Virginia Pharmacy*.¹³

The implications of these opinions are manifest: the Supreme Court is willing to provide greater constitutional protection of commercial speech than accorded by *Central Hudson*, and, unless directly related the preservation of a fair bargaining process, an advertising ban have difficulty passing constitutional muster, less intrusive alternatives invariably being more effective in achieving the objective for which the advertising ban is created.

2) FDA Restrictions on Tobacco Product Advertisements and Promotions

On August 28, 1996, the Food and Drug Administration finalized its "Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents." Those regulations significantly restrict the ability of tobacco companies to promote and advertise nicotine-containing cigarettes and smokeless tobacco products to children and adolescents by: (1) limiting advertising and labeling to which children and adolescents are exposed to black-and-white, text-only format; (2) banning the sale or distribution of branded non-tobacco items (such as hats and tee shirts); (3) restricting the sponsorship of events to corporate name only; and (4) requiring manufacturers to establish and maintain a national public education campaign aimed at children and adolescents to counter the pervasive imagery and reduce the appeal created by decades of pro-tobacco messages in order to reduce young people's use of tobacco products.¹⁴

(3) FDA's First Amendment Analysis

The FDA claims its advertising restrictions are consistent with First Amendment protections. Recognizing *44 Liquormart* was decided after its rule making record was closed, the FDA first attempts to mitigate the impact of *44 Liquormart* by observing no

rationale for the decision commanded a majority of the Court,¹⁵ and then tries to distinguish its regulations from those struck down in *44 Liquormart*.¹⁶

The bulk of FDA's First Amendment analysis and justification is provided within the *Central Hudson* framework. The FDA first argues that, to the extent tobacco product advertisements promote or induce sales of tobacco products to minors, those advertisements are related to unlawful activity and are not entitled to First Amendment protection. To the extent advertisements of tobacco products are aimed at adults, those advertisements relate to lawful activities, and are entitled to First Amendment protection. The latter factor compels the FDA to review the three remaining *Central Hudson* factors.

With respect to the second factor - whether the asserted government interest in restricting advertising is substantial - the FDA argues that the tobacco product advertising restrictions serve the substantial government interest of protecting the public health by reducing the use of cigarettes and smokeless tobacco by those under the age of 18 who are most vulnerable to addiction and the least capable of deciding to use tobacco products, and thereby reducing the risk of tobacco-related illnesses and deaths.¹⁷

With respect to the third factor - whether the advertising regulations directly advance the government interest asserted - the FDA contends it achieves a substantial government interest, namely protecting children and adolescents under the age of 18 from the appeal of tobacco advertising.¹⁸ More particularly, the FDA argues that extensive evidence demonstrates that tobacco product advertisement plays a material role in the decision of children and adolescents to engage in tobacco use behavior.¹⁹ Preventing tobacco product advertisements - other than those in the form of black text on a white background allowed by the FDA - from reaching people under the age of 18, will, the FDA argues, enable young people to delay their decision to use tobacco related products and to make that decision in a more objectively informed manner.

With respect to the fourth factor - whether the regulation is more extensive than necessary to serve that interest - the FDA contends that its restrictions are carefully crafted to focus on those media and aspects of advertising to which children are routinely exposed and which, the available evidence shows, has the greatest effect on youngsters, while leaving the informational aspects of advertising largely untouched.²⁰ The FDA also notes that it considered alternatives to the restrictions imposed, but determined none of them was an appropriate alternative to the restrictions adopted, especially in light of the fact that a 30-year effort by the government to eliminate young people's access to and use of tobacco products and the tobacco industry's voluntary code and educational programs have not succeeded in reducing cigarette consumption by young people.²¹ Hence, the FDA concludes, its regulations are reasonably tailored to promote a substantial government interest without burdening speech any more than is necessary to further the government's legitimate interests.²²

(4) Assessment of Constitutionality of FDA Regulations.

The FDA's constitutional defense of its regulations on tobacco product advertisement may be flawed. To begin with, the FDA gives short shift to *44 Liquormart*, which arguably provides greater constitutional protection to commercial speech, and focuses its justification on the *Central Hudson* framework, which appears to have fallen into the disfavor of the Supreme Court of United States. Critically, the *Central Hudson* framework, modified by *44 Liquormart*, requires a "close look" at the means of accomplishing the objective of the advertising restrictions to make sure the regulation directly advances the governmental interest asserted and is no more extensive than necessary to serve that interest.

This is exemplified by *Anheuser-Busch, Inc. v. Schmoke*,²³ in which the United States Court of Appeals for the Fourth Circuit, upon remand by the Supreme Court of the United States, determined that under *44 Liquormart* Baltimore's ordinance banning outdoor advertising of alcoholic beverages in certain areas of the city where children were likely to walk to school or play was constitutional. The court emphasized that the restriction did not ban all advertising, but merely restricted the time, place and manner of such advertisements; that the restriction was tailored to certain billboards only, leaving a plethora of other media (for example newspapers, magazines, radio, television, direct mail, and Internet) for advertising; that the restriction reinforced the existing policy of prohibiting underage consumption of alcoholic beverages without undermining dissemination of information to consumers who legally could consume such beverages; and that the protection of children warrants special solicitude in the First Amendment balance, because they lack the ability to assess and analyze fully the information presented through commercial media.²⁴ The FDA's tobacco produce advertisement and promotion regulations are not so narrowly tailored.

Second, and perhaps more importantly, the central justification advanced by the FDA for its tobacco product advertising restrictions is "to decrease young people's use of tobacco products by ensuring that the restrictions on access are not undermined by the product appeal that advertising for these products creates for young people."²⁵ This interest, while laudable, falls into the second category of commercial speech regulations crafted by Justice Stevens, i.e. restrictions which "prohibit the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process." This category may require the rigorous review generally demanded by the First Amendment in noncommercial speech cases.²⁶ If so, the FDA's regulations will be deemed constitutional only if they directly advance a "compelling" interest and are the "least restrictive means" available,²⁷ and it is an open question whether the government can demonstrate its regulations are sufficiently narrow to do so.

Consequently, it appears that the FDA has gone as far as it can go in regulating the advertising and promotion of tobacco products in order to decrease young people's use of tobacco products. Quite simply, courts can no longer defer to the FDA's judgment, and the FDA is now required to demonstrate that its tobacco advertising restrictions are limited in effect and targeted to a specific problem. Were it to go any farther, its advertising and promotion restrictions might not be viewed as a tailored response, but as a broad ban rendered suspect by *44 Liquormart*.

Significantly, however, the results of this study may make it somewhat easier to justify the tobacco product advertisement and promotion restrictions, because it appears more is at stake than merely decreasing young people's use of tobacco products. Rather, this study demonstrates that there is an association between using tobacco, using alcohol and then using marijuana, and that cigarettes are the first drugs used by children followed by smokeless tobacco, alcohol and finally marijuana. In other words, by expanding the scope of the problem the advertisement restrictions attempt to ameliorate, the restrictions appear in contrast to be much more tailored, and may be better positioned to sustain First Amendment challenge even under the more stringent test envisioned in *44 Liquormart*.²⁸

PART II: CIGARETTES AS A "GATEWAY DRUG"

(1) Significance of Smoking by Children and Adolescents

Cigarette smoking remains by far the largest single preventable cause of premature mortality in this country. One million young people become regular smokers each year and for the vast majority the smoking habit begins before they leave high school. Former Surgeon General C. Everett Koop believes that children are being induced to use tobacco products at a very susceptible time in their lives. The Institute of Medicine has stated that smoking experimentation begins very early in childhood and addiction to nicotine occurs after approximately two years of using tobacco.²⁹

The Department of Health and Human Services has called children's use of tobacco a national public health crisis and contends that the crisis is worsening. Over 80 percent of these young tobacco users began their addictive habit before they were 18 years old. Dr. David Kessler, former commissioner of the Food and Drug Administration, has labeled addiction to nicotine from cigarettes a "pediatric disease."³⁰

One of the major long-term effects is found in increased and continued smoking as the child grows older. The sooner a child starts smoking the more likely he or she is to become strongly addicted to nicotine. The majority of young people who smoke on a daily basis confirm that they are unable to quit. Nicotine in tobacco causes and sustains addiction. Once a child becomes a regular smoker the number of cigarettes consumed each day begins to escalate. Manufacturers deliberately design the product to provide the consumer with a pharmacologically addictive dose of nicotine to continue the consumer's need for the product.³¹

About half of all smokers die in their middle ages, resulting in at least 20 to 25 years of potential life lost.³² It is well documented in the literature that nicotine addiction begins very early in life and most likely has occurred prior to high school graduation for most individuals who use tobacco. Health problems associated with smoking are a function of duration (years) and intensity (amount). Most people could avoid becoming addicted if they could be kept tobacco-free during the childhood years. The

IOM argues that if tobacco-related morbidity and mortality is to be reduced a youth-centered policy aimed at preventing children from beginning tobacco use must be aggressively pursued.

The Institute of Medicine believes that tobacco use is a learned behavior that has a preparatory stage during which the child forms attitudes and beliefs about the benefits of smoking cigarettes. It is useful to consider the addictive and interactive affects of multiple variables in predicting complex behaviors.³³

The Surgeon General's 1994 report believes that children's use of tobacco progresses in five stages: development of a positive attitude about smoking, trying tobacco, more experimentation, regular use of tobacco and finally addiction. Unhealthy behaviors are often ingrained in the lifestyle and culture of a society and are, therefore, very difficult to change. Most psychologists believe that behavior is a function of environment and learning.

The reduction in the number of children smoking seems to be the most effective way to reduce the nation's leading cause of preventable death in older Americans and perhaps to reduce the development of other high-risk health behaviors. The CDC reported that adolescents began cigarette smoking as a result of social influences, promotional efforts by tobacco producers, social pressure and curiosity. But once the habit is established it becomes the norm. Tobacco use by children is extremely dangerous.³⁴ What is not known is if this high-risk health behavior is a path or link to other high-risk health behaviors like the use of alcohol or marijuana. Is there a common path from one high-risk health behavior to the next high-risk health behavior?

(2) Northeastern Pennsylvania Study

This study was undertaken to describe the use of tobacco, smokeless tobacco, alcohol, and marijuana in Northeastern Pennsylvania. The argument for regulation of tobacco access and promotion is based on the fact that 3,000 young people become regular smokers every day, and if tobacco use rates among youth continue at current levels, 5,000,000 American children who are alive today will die from tobacco-induced disease. This statistic is frightening enough but does cigarette use at an early age create a path to other high-risk health behaviors like alcohol and marijuana use. In order to accomplish these goals the following study questions were developed and answered by this study.

<p><u>Study Question One:</u> What is the prevalence of cigarette, smokeless tobacco, alcohol, and marijuana use by children in Northeastern Pennsylvania?</p>
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Study Question Two: Is there an association between early use of tobacco, alcohol, smokeless tobacco products, and the subsequent use of marijuana?

(3) Methodology

(a) Study Population

The sample chosen for this study included six school districts in Northeastern Pennsylvania that included urban and rural students, and public and private schools. A letter was sent to fifteen randomly chosen school superintendents requesting permission to survey all students in grades four through twelve. To protect their privacy students were allowed to complete the survey anonymously, but their participation was mandatory. The questionnaire was administered by home room teachers during the last class period.

The final response for this study was 15,297 returned questionnaires. There were responses from all six school districts representing private, public and rural school districts in Northeastern Pennsylvania. These questionnaires were then evaluated for accuracy and entered into a computer utilizing a statistical software program provided by the CDC. There were 774 questionnaires containing unrealistic responses that were not entered into the computer. Therefore, the total number of questionnaires analyzed was 14,523.

(b) Instrument

The instrument used in this study was a two-page questionnaire consisting of nineteen questions about tobacco use, alcohol use and the use of marijuana. A review of the literature was utilized to establish face validity of the instrument. The questionnaire was then evaluated by three health experts to assess content validity of the instrument. The questionnaire was field-tested on several students from grades four through twelve in a school district not being utilized in this study.

(c) Data Analysis:

To address the first study question descriptive statistics (means, percentages) were calculated by grade for students in grades four through twelve in six school districts in Northeastern Pennsylvania. The percentage of students who experimented with cigarettes, smokeless tobacco, alcohol, and marijuana was determined.

To answer the second study question, a series of multiple regression analyses were performed. The dependent variable analyzed was "Have you tried marijuana?" The three independent variables that were regressed of the dependent variable were: 1)"Have you experimented with cigarettes?" 2)"Have you tried smokeless tobacco?" 3)"Have you tried alcohol?" Using a stepwise approach, the independent variable that accounts for the most unique variance to the dependent variable was entered first into the regression analysis. Other independent variables are added if they can account for a significant amount ($p < .05$) of unique variance over and above the first independent variable.

(4) Results

Regarding study question #1, this study found that in Northeastern Pennsylvania of the children surveyed 8.1 percent experimented with cigarettes, 3.7 percent used smokeless tobacco, 21 percent tried alcohol and 1.1 percent used marijuana in fourth grade. These numbers increased by grade twelve to 63.9 percent for cigarettes, 14.0 percent for smokeless tobacco, 79.5 percent for alcohol and 47.6 percent for marijuana experimentation. The mean age for cigarette and smokeless tobacco use is 11.5, and alcohol experimentation begins at is 11.6, followed by marijuana experimentation at 13.52. (Table 1). The mean number of cigarettes smoked each day is 2.0 for males and 1.1 for females in grade four and this number rises to 8.0 for males and 7.0 for females by grade twelve. (Table 2).

TABLE 1
PERCENT OF CHILDREN EXPERIMENTING WITH CIGARETTES,
SMOKELESS TOBACCO, ALCOHOL AND MARIJUANA BY GRADE
NORTHEASTERN PENNSYLVANIA
DECEMBER, 1996

Grade	N	Percent experimenting with cigarettes	Percent experimenting with smokeless tobacco	Percent experimenting with alcohol	Percent experimenting with marijuana
4	1560	8.1%	3.7%	21%	1.1%

5	1666	11.4%	3.2%	24.6%	0.6%
6	1828	16.5%	3.7%	20.6%	1.5%
7	1793	31.5%	6.7%	31.6%	7.2%
8	1780	42.8%	7.6%	46.2%	13.0%
9	1631	54.3%	11.3%	58.8%	22.6%
10	1511	56.1%	13.2%	64.1%	28.5%
11	1411	62.2%	13.9%	73.3%	36.6%
12	1332	63.9%	14.0%	79.5%	41.6%
MEAN AGE		11.54	11.61	11.61	13.52

TABLE 2
MEAN NUMBER OF CIGARETTES SMOKED
EACH DAY BY GRADE AND GENDER
NORTHEASTERN PENNSYLVANIA
DECEMBER, 1996

GRADE	MALE	FEMALE
4	2.0	1.1
5	1.5	1.0
6	2.5	2.1
7	3.4	3.3
8	3.7	3.7
9	6.1	4.9
10	6.2	6.0
11	8.0	6.1
12	8.0	7.0

Regarding study question #2, there is an association between experimentation with cigarettes at an early age and experimentation with marijuana at a later age. Of 2,287 children who said yes to trying marijuana, 2,075 said yes to experimentation with cigarettes (90.7%) whereas of 12,242 who said no to trying marijuana, 3,337 said yes to ever trying cigarettes (27.3%).

There was also an association between continuing the smoking habit and trying marijuana at a later age in life. Of 2,073 children who said yes to marijuana, 1,488 said yes to continuing to smoke today (71.8%), whereas of 3,325 who said no to trying marijuana, 1,472 said yes to smoking today (44.3%).

There was also an association between drinking alcohol and trying marijuana at an older age. Of 2,287 children that said yes to using marijuana, 2,174 said yes to trying alcohol at a younger age (95.1%), whereas of 12,238 who said no to trying marijuana, 4,349 said yes to trying alcohol (35.9%).

There was a strong positive relationship between early age of cigarette use and later use of marijuana. Table 3 indicates that cigarette use is the best predictor of marijuana but alcohol use and smokeless tobacco use are also strong predictors of marijuana use. This association was the same for males and females in this study (Table 3).

TABLE 3
OVERALL STEPWISE REGRESSION RESULTS
NORTHEASTERN PENNSYLVANIA
DECEMBER, 1997

Overall Stepwise Regression Results

DEPENDENT VARIABLE	MULTIPLIER	P-VALUE
HAVE YOU TRIED MARIJUANA?		
TRIED CIGARETTES	.48	.001
TRIED SMOKELESS TOBACCO	.53	.001
TRIED ALCOHOL	.53	.001
MALE		
N = 7,153		
HAVE YOU TRIED MARIJUANA?		

TRIED CIGARETTES	.48	.001
TRIED CIGARETTES AND ALCOHOL	.53	.001
TRIED CIGARETTES, ALCOHOL AND SMOKELESS TOBACCO	.53	.001
FEMALE		
N = 7,339		
HAVE YOU TRIED MARIJUANA?		
TRIED CIGARETTES	.48	.001
TRIED CIGARETTES AND ALCOHOL	.53	.001
TRIED CIGARETTES, ALCOHOL AND SMOKELESS TOBACCO	.53	.001

(5) Discussion

The results of this study demonstrate that children are beginning experimentation with tobacco and alcohol at a very early age in Northeastern Pennsylvania. A large number of those early experimenters then move on to using marijuana approximately two years later. The addiction to nicotine by children produces a path to the use of other dangerous products as the child grows older. This study uncovered a strong association between the use of tobacco, the use of alcohol and the use of marijuana.

The First Amendment guarantees certain very important rights to all citizens of the United States but there is still a very important obligation for adults to protect children from dangers that can cause serious and often deadly consequences later in their life.

The morbidity and mortality associated with tobacco products produced a strong reason for the FDA to implement strong regulations regarding those products. If the results of this study are duplicated in other parts of our country, perhaps the recent FDA regulations need to go even further in protecting our children from a life of addiction.

ENDNOTES

1. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. amend. I.
2. Edward J. Eberle, *Practical Reason: The Commercial Speech Paradigm*, 42 Case W. Res. L. Rev. 411, 437 (1992).
3. *Id.* 477-478.
4. *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385, 93 S.Ct. 2553, 2558, 37 L.Ed.2d 669 (1973), and *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 421, 113 S.Ct. 1505, 1512, 123 L.Ed.2d 99 (1993).
5. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of New York* (“*Central Hudson*”), 447 U.S. 557, 561, 100 S.Ct. 2343, 2348 (1980).
6. *Rubin v. Coors Brewing Company*, 514 U.S. 476, 480, 115 S.Ct. 1585, 1589, 131 L.Ed.2d 532 (1995).
7. 447 U.S. 557, 100 S.Ct. 2243, 65 L.Ed.2d 341 (1980)
8. ___ U.S. ___, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996).
9. 447 U.S. at 566, 100 S.Ct. at 2351.
10. ___ U.S. at ___, 116 S.Ct. at 1522.
11. ___ U.S. at ___, 116 S.Ct. at 1515.
12. ___ U.S. at ___, 116 S.Ct. 1518.
13. ___ U.S. at ___, 116 S.Ct. 1520.

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14. Food and Drug Administration Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco products to Protect Children and Adolescents, 61 FR 44396.
 15. 61 FR 44469.
 16. *Id.*
 17. 61 FR 44472. In making this argument, the FDA distinguishes *Carey v. Population Services International*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977), in which the United States Supreme Court struck down a ban on all advertisements and distributions of contraceptives, on the grounds that the use of contraceptives by minors is legal and constitutionally protected, while the use of tobacco products by minors is not.
 18. 61 FR 44473.
 19. *Id.*
 20. 61 FR 44497.
 21. 61 FR 44499.
 22. 61 FR 44500.
 23. 101 F.3d 325 (4th Cir. 1997).
 24. *Id.* at 329.
 25. 61 FR 44465.

26. ___ U.S. ___, 116 S.Ct. at 1507. In establishing only two categories for reviewing commercial speech restrictions, Justice Stevens effectively rejects the notion that all commercial speech regulations should be subject to intermediate review, and arguably raises the review of regulations falling into the second category to “more rigorous review that the First Amendment normally demands.” See Arlen W. Langvardt and Eric L. Richards, *The Death of Posadas and the Birth of Change in Commercial Speech Doctrine: Implications of 44 Liquormart*, 34 Am. Bus. L.J. 483, 548 (1997).
27. Langvardt at 477-478.
28. The tobacco companies raised a constitutional challenge to the FDA regulations in the federal district court for the Middle District of North Carolina in *Coyne Beahm, Inc. v. U.S. Food & Drug Administration*, 966 F.Supp. 1374 (M.D. N.C. 1997), but the court, upholding the authority of the FDA to regulate nicotine and cigarettes, declined to take a position in the First Amendment issues. 966 F.Supp. at 1400. Significantly, however, the court also ruled that the FDA lacked authority to impose restrictions on the advertisement and promotion of tobacco products under the Food, Drug and Cosmetic Act, 21 U.S.C.A. §321 et seq. 966 F.Supp at 1398-1400.
29. U.S. Department of Health and Human Services, *Preventing Tobacco Use Among Young People: A Report of the Surgeon General*, Atlanta, GA: U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control and Prevention. National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking And Health, 1994.
30. Russell. M.A.H. “The Nicotine Addiction Trap: A 40 Year Sentence For Four Cigarettes.” *British Journal of Addiction*. 85:2 (1990): 293-300.
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32. Centers for Disease Control and Prevention, CDC Surveillance Summaries, *Morbidity and Mortality Weekly Report*, November 18, 1994. Vol. 43 (No. SS-3).

33. K. Conrad et al. "Why Children start smoking cigarettes: Predictors of onset," *British Journal of Addiction* 87, (1992) 1711-1724.
34. Centers for Disease Control and Prevention, "Surveillance for Selected Tobacco-Use Behaviors -- United States, 1990-1994", *Morbidity and Mortality Weekly Report*, November 18, 1994, Vol. 43 (No. SS U.S). 35.

**SAME-SEX SEXUAL HARASSMENT:
IS NON-HOMOSEXUAL, SAME-SEX SEXUAL
HARASSMENT DESERVING OF PROTECTION
UNDER THE LAW? AN ISSUE FOR THE
U.S. SUPREME COURT AND THE U.S. JUSTICE
DEPARTMENT, AS THE STATE AND DISTRICT COURTS CONTINUE TO
PRODUCE A POTPOURRI
OF CONFLICTING DECISIONS AND RATIONALES**

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INTRODUCTION

As a starting point, please consider the following scenario taken from the workplace of Hypothetical, Inc:

Stacy Shannon had been a secretary to Chris Williams for over six years. Throughout that time, Chris repeatedly commented on how sexy Stacey's clothes were, on how physically fit Stacy appeared to be, and how Stacey must be dynamite in bed. Chris would caress Stacey's buttocks on a daily basis and provide Stacey with unsolicited and unwelcome backrubs. Chris would also stare up and down Stacey's body at every available opportunity. To make matters worse, Chris would frequently bring in pornographic material and show it to Stacey, all the while bragging to Stacey in a lewd and graphic manner about recent sexual conquests. Chris would even make frequent inquiries about Stacey's

sexual history sexual fantasies. All of this upset Stacey very much, and Stacey ended up in therapy for major depression. Although Stacey repeatedly complained to the Human Resources Department about Chris' behavior, they refused to do anything about it. This was so even though Stacey's coworkers completely corroborated everything that Stacey reported

The foregoing vignette represents a flagrant and seemingly open and shut case of hostile environment sexual harassment. Open and shut, that is, unless Stacey and Chris are both males or Stacey and Chris are both females. (The use of unisex names such as "Stacey" and "Chris" was deliberate. The reader is invited to reread the hypothetical. Regardless of the reader's initial subjective perception, no gender identifying pronouns appear). No matter how offensive, unwelcome and sexual the conduct may be, and as absurd as it may seem, whether Stacey has a valid legal claim may turn on issues such as the respective gender of the parties and the sexual orientation of not the victim but rather the harasser.

An alarming number of federal judges have lost sight of the law and its underpinnings in a wave of decisions dealing with harassment between members of the same sex. Numerous decisions examining alleged sexual harassment between members of the same sex have ignored logic and Title VII precedent and instead applied a mismatch of various rationales and theories to deny plaintiffs' sexual harassment claims. As a result, the law is currently in a state of flux on many of the issues surrounding same sex harassment. Much of the confusion is a result over the definition of sexual harassment as being "based on sex."

This paper analyzes what happens when a heterosexual employee is accused of sexually harassing an employee of the same gender -- in such cases, is the harassment be "based on sex?" The U.S. Supreme Court asked the Clinton Administration on December 16, 1996 to issue an opinion on whether same-sex sexual harassment violates federal law. Moreover, the U.S. Supreme Court has recently agreed to review this issue and will issue a much-needed ruling. (*Oncala v. Sundowner Offshore Services*, 83 F.3d 118 (5th Cir. 1996), cert. granted, 65 U.S.L.W. 3814 (U.S. June 9, 1997)(No. 97-)). The purpose of this paper is to explore how the Justice Department and the U.S. Supreme Court should decide this hotly-debated topic. The outcome will determine the direction of future litigation in the area of workplace sexual harassment.

The issue of non-homosexual sexual harassment is an evolving topic. Much case law has been generated in the last three years. As a result of fact-sensitive decisions and conflicts among and within district courts, much of the law has become at least partially outdated or in dispute. This article will provide a unique and up to date account of the law in this area with recommendations regarding the position that should be taken by the Clinton Administration and the U.S. Supreme Court.

DEFINING "BASED ON SEX"

Courts have long recognized "traditional" cases of sexual harassment in which typically a female employee is harassed by a male employee or supervisor. Courts also recognize cases in which male employees are harassed by female employees or supervisors.

Eventually, the first homosexual sexual harassment cases appeared; in these cases, a homosexual employee or supervisor would sexually harass a person of the same gender. These cases were complicated, however, by the "bisexual" issue -- was bisexuality a defense to sexual harassment, which must be "based on sex". The word "sex", however, is not defined by Title VII or most state statutes. (In other words, does the expression "based on sex" mean "based on sexual content" or does it mean "based on gender?")

Confusion has resulted from the fact that the term "sex" possesses two different connotations; it may relate to the "traditional" notion of sex as a gender-based classification or it can relate to erotic desires or content. (Johnson, Kristi J., *Chiapuzio v. BLT Operating Corporation: What Does It Mean to Be Harassed "Because of" Your Sex?: Sexual Stereotyping and the "Bisexual" Harasser Revisited*, 79 Iowa Law Review 731, at 737 (1994)). The lower federal courts and the EEOC have long favored the definition of sex as a gender-based classification, with many courts requiring proof that "but for" the victim's gender the victim would not have been subjected to such treatment. (*Id.* At 738). This analysis led, inevitably, to the equal opportunity harassment defense. In other words, if a harasser equally harassed both males and females, there was no sexual harassment claim under Title VII because the employee's gender was not a "but for" cause of the discrimination. (*Id.* at 738; see also, *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982); and *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 621-622 (6th Cir. 1986)). Eventually the Third, Sixth and Ninth Circuits rejected *Rabidue*. (See *Ellison v. Brady*, 924 F.2d 872, 877-878 (9th Cir. 1991); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3rd Cir. 1990); and *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987)). The rejection of *Rabidue*, however, was based more upon the extent to which a victim's psyche was affected by the sexual harassment, leaving open the issue of just what is "based on sex?"

The federal appellate courts currently seem to be split into three "camps" over the issue of same sex harassment, whether it must be "based on sex" and just what "based on sex" means. The Eight Circuit appears ready to allow all same sex sexual harassment claims to proceed under Title VII. (*Quick v. Donaldson Co.*, 90 F.3d 1372 (8th Cir. 1996)). The Fourth, Sixth and Eleventh Circuits apply the "but for" test of the EEOC to justify including sexual harassment within the umbrella of sex discrimination, reasoning that "but for" the victim's sex (i.e. gender), the victim would not have been harassed. As such, it is opined that such victims are being discriminated against "because of sex." (See *Wright v. Pizza Hut of America, Inc.*, 99 F.3d 138 (4th Cir. 1996); *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443 (11th Cir. 1997); and *Fredette v. BVP Management Assoc.*, 112 F.3d 1503 (11th Cir. 1997). Finally, the Fifth Circuit has held that same sex harassment claims are not recognized under Title VII. (*Oncale* at 119). The U.S. Supreme Court recently agreed to review the *Oncale* case. Until then, it remains unclear just what constitutes "based on sex" within the confines of alleging sexual harassment.

EEOC GUIDELINES REGARDING SAME SEX SEXUAL HARASSMENT

Both the Clinton Administration and the U.S. Supreme Court will likely begin their review of same sex harassment with the EEOC guidelines. According to those guidelines, Title VII does not prohibit discrimination based on sexual orientation. (EEOC Compliance Manual (CCH) par. 3101, s.615.2(b)(3)(Example 2), at 3204 (July 1987) (citing Commission Decision Nos. 76-67 and 77-28). The guidelines do, however, provide that the victim and harasser may be of the same sex and even provide an example of a hypothetical case in which a male supervisor makes unwelcome sexual advances toward a male employee but does not make sexual advances toward a female employee. (EEOC Compliance Manual (CCH) par. 3101, s.615.2(b)(3)).

As previously discussed, much of the confusion over whether same sex sexual harassment is actionable stems from the assumption by many lower federal courts that “sex” means “gender” and that under Title VII the sexual harassment must have occurred because of the victim’s gender. (*DeSantis v. Pac. Tel & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979)). The EEOC appears to have also made this same assumption. (EEOC Compliance Manual (CCH) par. 3101, s.615.2(b)(3)(Example 2), at 3204 (July 1987) (citing Commission Decision Nos. 76-67 and 77-28). The EEOC guidelines indicate that the motivation for the harasser’s behavior need not be sexual (i.e. desire), but the conduct must be sexual: “Sexual harassment is sex discrimination not because of the sexual nature of the conduct to which the victim is subjected but because the harasser treats a member or members of one sex differently from members of the opposite sex. However, it is the sexual nature of the prohibited conduct which makes this form of sex discrimination sexual harassment.” (EEOC Compliance Manual (CCH) par. 3102, s.615.3(a), at 3205 (Jan. 1982)).

The EEOC defines sexual harassment as (1) sexual advances; (2) requests for sexual favors; or (3) verbal or physical conduct of a sexual nature. (29 C.F.R. s 1604.11(a)(1996)). In the case of the non-homosexual same sex harasser, the conduct at issue would likely fall into the third category, verbal or physical conduct of a sexual nature. These would not be cases of sexual advances or requests for sexual favors, because the harasser’s motivation is not sexual desire or gratification. Under the EEOC, however, the issue of whether the treatment is imposed because of sex, or gender, however, must still be answered. If the motivation for the conduct is hatred of one gender, then the conduct is sex discrimination and also sexual harassment. The difficult case is when a harasser engages in verbal or physical conduct of a sexual nature, aimed at a person of the same sex, but does not treat others of the victim’s gender in the same way — is this sexual harassment? Or is the person being treated that way simply because the harasser hates them, but with no regard to gender? And is a distinction and differential treatment in such a case even warranted? The courts do allow cases to go forward in which, for example, a male harasser engages in verbal or physical conduct of a sexual nature against

one particular female, but does not treat other females in this way. If that is the case, why should it make any difference that the harasser and victim are of the same gender?

SUPREME COURT GUIDANCE

Arguably, the U.S. Supreme Court has provided some guidance regarding the issue of same sex harassment in the *Harris v. Forklift Systems* decision. (*Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993)). Though *Harris* was a case of male-female sexual harassment, the Court did state that Title VII makes it unlawful for an employer to discriminate against an individual with respect to compensation, term, conditions or privileges of employment because of the individual's sex. Moreover, according to the Court, the language of Title VII evinces a congressional intent "to strike at the entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment." (*Harris* at 369). Of particular note is that the Court used the terms "men and women" and "people" instead of only referring to women. *Harris* is one of only two U.S. Supreme Court cases dealing with sexual harassment (the other is *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)), therefore it would seem that the Court would refer to *Harris* and *Vinson* for guidance on how to analyze same sex harassment cases.

DOES TITLE VII PROVIDE PROTECTION FOR SAME SEX , NON-HOMOSEXUAL HARASSMENT?

The much cited case of *Goluszek v. Smith* has been very influential in recent decisions governing same sex harassment. (*Goluszek v. Smith*, 697 F.Supp. 1452 (N.D. Ill. 1988)). The *Goluszek* decision and that court's interpretation of Title VII, though involving allegations of harassment based on sexual orientation, has been used by several different courts to destroy the previously recognized quid pro quo same sex harassment cause of action. (See, e.g., *Barnes v. Castle*, 562 F.2d 983 (D.C. Cir. 1977); and *Wright v. Methodist Youth Services, Inc.*, 511 F. Supp. 307 (N.D. Ill. 1981)). In some ways, *Goluszek* may be viewed as a bridge between the sexual orientation harassment cases and the same sex harassment cases, insofar as it has given courts the rationale, under Title VII, for denying same sex harassment claims. *Goluszek* is cited more often than any other case in the recent multitude of cases denying plaintiffs' same sex harassment claims. The *Goluszek* rationale states that:

[t]he discrimination Congress was concerned about when it enacted Title VII is one stemming from an imbalance of power and abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group. Title VII does not make all forms of harassment actionable. The ‘sexual harassment’ that is actionable under Title VII is ‘the exploitation of a powerful position to impose sexual demands or pressures on an unwilling but less powerful person.’ Actionable sexual harassment fosters a sense of degradation in the victim by attacking their sexuality. In effect, the offender is saying by words or actions that the victim is inferior because of the victim’s sex. (*Goluszek* at 1455).

Because the victim in *Goluszek* was a male in a male-dominated environment, the court held that he was not a victim of actionable sexual harassment. (*Id.* At 1456). *Goluszek*, in a sense, has restrictively taken the gender subordination theory of sexual harassment to the point that it is applicable only to sexual harassment against women. While gender subordination is a part of understanding Title VII, nowhere in Title VII is it stated that sexual harassment and discrimination is only applicable to women. As discussed previously, the U.S. Supreme Court in *Harris* stated explicitly that both sexes are protected under Title VII against sexual harassment.

The *Goluszek* court’s interpretation regarding the legislative intent of Title VII is disingenuous inasmuch as there is virtually no legislative history to guide courts in interpreting Title VII and in defining the term “sex.” In *Barnes v. Castle*, the U.S. Court of Appeals for the District of Columbia recognized that “for an eight year period following its original enactment, there was no legislative history to refine the congressional language.” (*Barnes* at 987). When the 1964 Act was amended in 1972, there was considerable discussion on the topic, indicating that Congress was deeply concerned about discrimination based on gender, and intended to combat it as vigorously as any other type of forbidden discrimination. (*Id.*) Moreover, the inclusion of “sex” as a protected category was a last minute addition to the 1964 version of Title VII that was inserted by opponents in an attempt to defeat it! (Adler & Pierce, *The Legal, Ethical, and Social Implications of the “Reasonable Woman” Standard in Sexual Harassment Cases*, 61 *Fordham L. Rev.* 773, 778, n.30 (1993)).

The *Goluszek* holding cannot be reconciled with the expanding definition of sexual harassment under the EEOC guidelines. The EEOC guidelines state that widespread favoritism based upon the granting of sexual favors in the workplace can give rise to Title VII hostile work environment claims by both males and females, regardless of whether the conduct is even directed at them, assuming that the conduct is severe and pervasive. (EEOC Notice No. 915-048 (Jan. 12, 1980)). Moreover, the EEOC has devoted a

lengthy section of its Compliance Manual to articulate standards for how to judge the sexual nature of a hostile work environment, but pays virtually no attention to the question of how to judge whether the offensive conduct was directed to one or more employees because of their gender. (Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sexual Discrimination Under Title VII*, Geo. L.J. 1, 15, n.59 (1993)).

**U.S. SUPREME COURT REVIEW OF THE FIFTH CIRCUIT'S HOLDING IN
*ONCALE V. SUNDOWNER OFFSHORE SERVICES***

At this writing, the U.S. Supreme Court has announced that it will review the *Oncale* case, in which the plaintiff has alleged that his supervisor and two co-workers sexually harassed him. (*Oncale* at 118). In that case, it is alleged that the co-workers restrained Oncale while the supervisor placed his penis on plaintiff's neck; that Oncale was threatened with homosexual rape; and that a supervisor forced a bar of soap up Oncale's anus while a co-worker restrained him when he was showering at the workplace. (*Id.* at 118-119). The district court granted defendant's motion for summary judgment, citing no other reason than an earlier decision holding that same sex harassment was not actionable under Title VII. (*Id.* at 118-119).

The prior decision cited in *Oncale* was the case of *Garcia v. Elf Atochem North America*, in which the Fifth Circuit held in 1994 that Title VII does not permit a claim of sexual harassment by a male supervisor against a male subordinate, even if the harassment has sexual overtones. (*Garcia v. Elf Atochem North America*, 28 F.3d 446, 451-452). Ironically, the *Garcia* case gave no logical rationale for its holding, aside from citing *Goluszek* and making the broad statement that Title VII addresses gender discrimination, and therefore concluding that what happened to Garcia could not be sexual harassment. (*Id.* at 451, 452). Absent any compelling and extensive rationale within the Fifth Circuit cases, the U.S. Supreme Court will need to review decisions within other circuit courts.

The Eight Circuit, several district courts and at least one state court take the opposite view of the Fifth Circuit, holding that all same sex harassment claims should be permitted under Title VII. (See, e.g., *Quick v. Donaldson Co.*, 90 F.3d 1372 (8th Cir. 1996); *Waag v. Thomas Pontiac Buick*, 930 F.Supp. 393 (D. Minn. 1996); *EEOC v. Walden Book Co.*, 885 F. Supp. 1100 (M.D. Tenn. 1995); *Melnychenko v. 84 Lumber Co.*, 424 Mass. 285 (1997)). In *Quick*, the Eighth Circuit held that the harasser need not be gay for a same sex harassment claim to proceed under Title VII. In that case, the plaintiff alleged that other employees grabbed and squeezed his testicles (referred to as "bagging") more than one hundred times and that he was poked in the buttocks with a stick ("goosed"). (*Quick* at 1374). The plaintiff was a heterosexual male who was harassed by other heterosexual males because he did not fit in with the others males in the workplace. (*Id.* at 1376). No sexual advances were made toward Quick, yet the conduct he endured was of a sexual nature. (*Id.* at 1374-1375). The *Quick* court held that this treatment fit into the EEOC's third category of sexual

harassment, namely, verbal or physical conduct of a sexual nature. (*Id.* at 1379; 29 C.F.R. s 1604.11(a)(1996)). The *Quick* court further held that protection under Title VII is not limited to disadvantaged or vulnerable groups, but extends to all employees to prohibit disparate treatment of an individual, male or female, based on that person's sex. (*Quick* at 1378; citing *Harris* at 379 and *Vinson* at 67).

Significantly, *Quick* outlined the elements necessary to allege a claim for Title VII sexual harassment. (*Quick* at 1377-1378). The elements include membership in a protected group, which may be either gender; being subjected to unwelcome sexual harassment; and exposure to disadvantageous terms or conditions of employment to which members of the other sex are not exposed. (*Id.* at 1377-1388). Subjection to "unwelcome sexual harassment" was broken down even further with each word defined. According to the *Quick* court, "unwelcome" means uninvited and offensive. (*Id.* at 1378). "Sexual" was defined as not limited to merely behavior and comments of a sexual nature, but also including acts of physical aggression and violence and incidents of verbal abuse which constitute discriminatory intimidation, ridicule or insult. (*Id.* at 1377). Finally, "harassment" was defined as sufficiently severe or pervasive to constitute a hostile or abusive work environment in the eyes of both the actual victim and a reasonable person, though not necessarily causing tangible psychological injury. (*Id.* at 1378; citing *Harris* at 371).

Perhaps the most significant aspect of the *Quick* holding is that the court rejected the holdings of many courts that there can be no Title VII claim for sexual harassment by a heterosexual, same sex harasser motivated by "personal enmity or hooliganism." (*Id.* at 1379). "The proper inquiry for determining whether discrimination was based on sex is whether 'members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" (*Id.* at 1379; citing *Harris* at 1372). Because only males were subjected to the assaults described in *Quick*, all elements for a Title VII sexual harassment claim were met.

Oncle has a similar factual scenario as *Quick*. For instance, in both cases, the harassers were male heterosexuals harassing other male employees. Additionally, in both cases, the male victims did not appear to fit in with the other males in the workplace and were therefore disliked. Finally, in both cases, the harassment was not in the form of sexual advances or requests for sexual favors. Should the U.S. Supreme Court deem to follow the reasoning of the Eighth Circuit in *Quick*, almost all same sex harassment would be actionable under Title VII. The Court may, however, opt for the middle ground. If so, a review of decisions from the Fourth, Sixth and Eleventh Circuits would be appropriate.

The middle ground adopted by the Fourth, Sixth and Eleventh Circuits applies the "but for" test of the EEOC and the Supreme Court in *Vinson* to justify including sexual harassment within the definition of sex discrimination. (42 U.S.C. s 2000e-2(a)(1); *Vinson* at 64). This brings us full circle, once again using the following test: "but for" the victim's sex, the victim would not have

been harassed; being treated differently than if their gender were different means they are being discriminated against “because of sex.” Under this scenario, some, but not all, same sex harassment claims will be permitted.

Courts laying claim to the middle ground require that the victim was treated differently “because of sex,” and go on to define this under the EEOC guideline stating that the critical inquiry is whether the harasser treats a member or members of one sex differently than members of the other sex. (EEOC Compliance Manual (CCH) par. 3101, s. 615.2(b)(3), at 3204 (July 1987); *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138 (4th Cir. 1996); *Fredette v. BVP Management Associates.*, 112 F.3d 1503 (11th Cir. 1997); *Yeary v. Goodwill Inds.-Knoxville, Inc.*, 107 F.3d 443 (6th Cir. 1997)). Moreover, the Fourth, Sixth and Eleventh Circuits distinguish between homosexual and heterosexual harassers. In other words, if a homosexual harasser chooses a victim because of the victim’s gender (i.e. not because of the victim’s sexual orientation), a claim of sexual harassment under Title VII may proceed under the same theory as that of a heterosexual harasser — because the harasser’s actions are motivated by the victim being a member of the gender the harasser prefers. (*Wrightson* at 142; *Fredette* at 1510; *Yeary* at 448). Logically, this makes absolutely no sense at all. If a harasser prefers that gender, then how may it be argued that the harasser is discriminating (since harassment is a subset of discrimination)? In the case of male on female harassment, of course, there is a long history of the subordination of females to male. On the other hand, are we to believe that there is a long history of homosexuals subordinating other homosexuals, so as to fit the necessary element of discrimination against that gender?

Approaching the rationale of the Fourth, Sixth Eleventh Circuits from another angle, none of these circuits permit a claim based on a homosexual victim who is harassed because of sexual orientation. (*Id.*) This creates a situation where a homosexual harasser may be liable for sexual harassment based on the harasser’s sexual preference, yet a victim of sexual harassment has no claim under Title VII if the harassment occurs because of the victim’s sexual preference! The obvious problem with this alleged middle ground is that it seems to violate equal protection.

Another problem with basing viability of a claim on the harasser’s sexual preference is the problem of bisexuals. As the law currently stands, sexual harassment is a form of sexual discrimination, and requiring that the harassment occurred because of the victim’s gender leads to the odd result of the failure to state a claim in the case of a bisexual who targets both males and females. Stated another way: “The identical offense is sex discrimination under Title VII when perpetrated by a man against a woman, or by a woman against a man; yet, if a bisexual of either sex preys equally upon men and women, he (or she) is beyond the reach of Title VII.” (Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 Yale L. & Pol. Rev. 333, 346 (1990)). In the dissenting opinion in *Vinson v. Taylor*, Judge Bork asserted that if sexual harassment was governed by Title VII, “subsidiary doctrines” should be adjusted to prevent against bizarre situations where victims of sexual harassment have no protection from attack by bisexuals. (*Vinson v. Taylor*, 760 F.2d 1330, 1333, n.7 (D.C. Cir. 1984)). It should, of course, be noted that Judge Bork did not favor allowing

sexual harassment claims to come within the purview of Title VII. Nevertheless, the idea of “subsidiary doctrines” that would prevent such bizarre outcomes is not a bad idea. In reality, none of the circuits has managed to develop a fully workable analysis, one that would provide protection for the maximum number of employees, yet not violate due process or produce inconsistent and unfair results.

RECOMMENDATIONS TO THE CLINTON ADMINISTRATION AND THE U.S. SUPREME COURT

The challenge to the Clinton Administration and the U.S. Supreme Court is monumental. Whatever the outcome, much of the current case law will be outdated when the U. S. Supreme Court renders its decision in *Oncale*. A checklist (or “wish list”) of elements in the high court’s ruling should read as follows: no equal protection violations; a workable analysis that leads to consistent results; no escape from liability based on the harasser’s sexual preference (in fact, no consideration whatsoever of the harasser’s or the victim’s sexual preference); and a definition of “based on sex” that allows for claims of sexual harassment as a form of sexual discrimination, but also an expanded definition of “based on sex” that permits claims for acts that contain sexual content.

By borrowing analysis from various circuits, a workable definition of “based on sex” and the scope of sexual harassment is possible. The Eighth Circuit has come closest to the best result, and the U.S. Supreme Court should seriously analyze the elements of a sexual harassment claim, as set forth in the *Quick* case. (*Quick* at 1377-1378). Under the *Quick* court’s enlightened view, membership in a protected group includes both genders and “sexual” is defined as not limited to behavior of a sexual nature, but including acts of physical aggression and violence and verbal abuse which constitutes discriminatory intimidation, ridicule or insult. (*Id.* at 1377). Where *Quick* needs amending is the requirement that members of one sex be exposed to disadvantageous conditions of employment to which members of the other sex are not exposed. (*Id.* at 1379). As the cases demonstrate, continuing to require discrimination as an element of sexual harassment severely limits who may bring a claim. If an employee is being subjected to hostile and unwelcome acts or words of a sexual nature, should it really matter whether the acts are done and the words are said because of the person’s gender? Should not the goal be to eliminate such unwelcome sexual hostility from the workplace, regardless of the motivation? This is not to suggest that we divorce sexual harassment from the notion of sexual discrimination, but rather that we broaden the concept of sexual harassment, as some courts have already done, to include inappropriate and sexually hostile behavior in the workplace, even when it is not based on a discriminatory motive.

Other circuits have indicated in dicta a likelihood that they would permit same sex, non-homosexual sexual harassment claims. For instance, the Ninth Circuit addressed the issue of the equal opportunity harasser in the context of a lawsuit by a female

plaintiff against a male harasser. (*Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994)). The defendant argued that his treatment of males was just as bad as his treatment of females, therefore he could not be held liable. The Ninth Circuit rejected his argument, holding that employer may not cure verbal conduct toward women by using language that is equally degrading to men. (*Id.* at 1464). The court further opined that “we do not rule out the possibility that both men and women working at Showboat have viable claims against Trenkle [the harasser] for sexual harassment.” (*Id.* at 1464). The First, Second and Seventh Circuits have also indicated, in dicta, that they might be willing to entertain same sex harassment claims. (See, e.g., *McDonnell v. Cisneros*, 84 F.3d 256, 260 (7th Cir. 1996); *Morgan v. Massachusetts General Hospital*, 901 F.2d 186 (1st Cir. 1990); and *Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134, 148 (2nd Cir. 1993)).

CONCLUSION

Just as this paper began with a hypothetical, so shall it end with one:

Val Victim walks into a police station and cries out “I’ve been shot!” Immediately Pat Policeperson asks “Was the shooter holding the gun with the right hand or the left hand?” Startled at the seeming irrelevance of such a question, Val asks “What possible difference does that make?” “Well,” Pat answers, “You see, if the shooter was holding the gun with the right hand, a crime has been committed. But if the shooter was holding the gun with the left hand, then there has been no crime.”

Absurd? Of course it is. But likewise, if an employee in the workplace is subjected to offensive and unwelcome “verbal or physical conduct of a sexual nature,” should whether such a sexually hostile work environment is actionable really turn on the gender and/or sexual orientation of the harasser? If that were the case, extremely serious equal protection issues would be implicated: Two workers of the opposite sex, subjected to identically horrific hostile work environments of a sexual nature, might find a legal system receptive to one claim but not the other. No person, male or female, heterosexual or homosexual, should be forced to endure abusive harassment of a sexual nature in the workplace. Victims of sexual harassment often suffer from depression, low self-esteem and self-blame, regardless of the reason why the harasser was engaging in the behavior. The circuit courts have struggled with this issue for several years, with inconsistent and often blatantly unfair results. The time has come for a clear statement on sexual harassment in the workplace and, with the *Oncale* case before it, the U.S. Supreme Court has the perfect opportunity to take a stand and make a statement that will be heard and cited throughout America’s halls of justice.

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NOTE

Shortly after the authors began writing this article, the U.S. Supreme Court agreed to hear a case that directly took up the very issue upon which the article is based. Prior to any ruling from the U.S. Supreme Court, however, the paper was completed and presented at the Allied Academies International Conference in Maui, Hawaii (October, 1997). The name of the case in which the U.S. Supreme Court took up the issue of same-sex sexual harassment is *Oncale v. Sundowner Offshore Services, Incorporated et al* (1998) 118 S. Ct. 998. As an additional point of interest, the Supreme Court's ruling in *Oncale* turned out to be consistent with the position urged by the authors of this article.

WEB PAGES: LEGAL ISSUES FOR DEVELOPMENT AND MAINTENANCE

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ABSTRACT

The opportunities associated with web page use are enormous. But these opportunities must be accompanied by responsible actions. The legal issues surrounding the development and use of web pages are currently being addressed at both the legislative and judicial levels. Web page operators and developers need to be aware of the current status and potential legal and ethical considerations of web page use.

INTRODUCTION

The emergence of the World Wide Web (WWW) and the use of web pages have created new legal issues. The issues include intellectual property rights, in particular copyright and trademark infringement actions. Courts have used current legislation to resolve these infringement conflicts as they have arisen. So far the Supreme Court has not specifically addressed new issues that have been initiated by the advancement of digital technology. These issues are not just centered on domestic conflicts but involve global interactions. This paper will address the potential legal issues associated with the development and use of web pages. The topic is appropriate for both web page developers and operators as well as managers.

Web sites are developed for a variety of purposes but in general they are used to display information. According to Kuester and Nieves in 1997 there were 1,269,800 web sites, many containing multiple web pages. They assumed what they believe is a conservative average of three web pages per web site for a total of 3,809,400 web pages. (Kuester and Nieves, 1998)

Web page(s) developed within a web site can contain information about a business's products or services. Often businesses will display advertisements as a means of promoting goods and services. They may even use web sites for electronic commerce. Individuals who operate a web site usually create web pages for pleasure, education, and/or entertainment. These web pages are usually centered on general information that the developer finds interesting. Governments and non-profit organizations also maintain web sites where their web pages are intended to provide information about their services. It is common for web pages to contain links to other web sites. These links are normally a means of expanding upon the information being displayed or promoted from the host site.

Web page developers who use, without permission, any material other than original works and/or personally registered marks may be subject to state and federal legislation. When a web site visitor exercises the option to follow a hyperlink to another web site they will be exposed to new material that is not under the direct control of the host web operator. It is possible that some of these new materials being displayed are in violation of current laws. This is where the confusion or uncertainty of legal responsibility becomes arguable. Is the host site responsible for material to which its site links? Due to the recent nature of these disputes the courts lack clear precedence to support decisions or provide guidance.

COPYRIGHT

Copyright laws provide the creator of the work the exclusive right to authorize reproduction, distribution, and display of such works. There are two important limitations to these laws; they are compulsory licenses and fair use. Compulsory license allows for limited usage of the material in exchange for royalties or a fee. The doctrine of fair use (2) permits reproduction under certain circumstances. (Smith et al., 1985) These two limitations are important for the web operator. A web site operator can use or provide access to non-original works with proper permission and recognition.

The other important area is the doctrine of fair use. Do chat room discussions, individual expression (criticism/comment), and similar general conversation or expressions always fall under this doctrine? To what extent will these doctrines be used to shield the true intent of the legislation? Our court systems will be challenged to provide interpretation and definition as guidelines to free expression.

The WWW has the capability to and was intended to branch out and interact at will with high volumes of information. The desired concept was to expand the opportunity to share information and enhance creativity and innovation. With the ability to easily branch out from the original web site to an unlimited number of other sites through technology, such as hyperlinks, the question

becomes where does the originating web site operator's responsibility, to ensure that an author of an original work receives proper and legal recognition, end?

TRADEMARKS

Trademark issues may become even more complicated than copyright issues. There are many qualifiers used to determine infringement. One is whether the use of a mark that is similar to a registered mark causes confusion. Another is whether the mark is used for the pursuit of financial rewards. Did such actions cause damage? There are legal decisions that address some of these situations but one of the problems with establishing adequate legal precedence has to do with the financial position of web site operators. Without the courts issuing a ruling or decision it limits the clear definition (interpretation) of the legislation.

Web site operators should be aware that both copyright and trademark legislation carry remedies that can be levied if one is found in violation of these laws. The courts can order that the infringing activities are halted, monetary judgments are assigned, and in severe cases imprisonment be imposed. The law allows for both civil and criminal penalties.

ON-LINE SERVICE PROVIDERS

One question that will be addressed in the near future will be the responsibility of the on-line service provider (OSP). Many OSPs are promoting that subscribers develop their own web sites. Does the OSP have an obligation to inform potential web site operators as to what legal issues they may encounter when establishing a web site? Does the OSP have an obligation to monitor web site development by its subscribers? The definition of responsibilities by both the OSP and the web site operator will be a challenge for the courts. The issue of knowledge, after an OSP or web operator is informed of a potential infringement, may place a reaction response on the web site owner. To what degree and upon whom are issues to be resolved through legislation and/or court decisions?

These are only a few of the questions and issues that will be addressed over the next few years. The important point is that OSP and web site operators will need to become more aware of the legal requirements they may encounter. Knowing how to develop a web site may become the easy part of being a web site operator. There are some precautions a web site operator can take. Will these become part of legislation and/or criteria used by the courts to determine liability and degree of liability? There must be a balance

between being responsible and having to be an attorney to be a web site operator or it is likely that small web site operations will diminish.

WEB SITE/PAGE DEVELOPMENT

The web site is normally established through access provided by an OSP. The operator, normally the web site originator, will request a domain name for the web site. Once approved, the domain name has a Uniform (Universal) Resource Locator (URL) assigned to it. This is the site address. Domain names are used because of simplicity; the URL is normally difficult to memorize. Once the web site is established the operator can begin creating the web page(s).

A web site is the location where the web page(s) resides. An individual, group, or business will have a collection of information they desire to share with the general Internet population. The first page in the web site is commonly referred to as the home page. This normally is where a visitor will enter the web site. Web sites are frequently developed using meta-tags, hyperlinks, and frames.

META-TAGS

A web page is created using HyperText Markup Language, HTML. Spiders at the request of the web browser read these codes when a request or search is submitted to the browser. A meta-tag is code that contains information about the information that makes up the web page. Within the meta-tag the creator can store key words that a search engine would use to determine if the web site contains relevant information pertaining to the search engines current request. The use of the key words contained in the meta-tag has led to disputes of trademark infringements. Some acts were intentional while others have been due to a lack of knowledge on this subject.

Some creators of web sites desire to entice hits just to run up the site visitor count. The use of highly visible words will normally increase the likelihood of a search engine listing your site as a possible solution to a search request. The use of particular words may cause an infringement dispute. Often the site operator will remove the offending words to end the dispute and avoid judicial action. Other web site operators use this method to distract or confuse customers about a business's product or service. This would be an intentional act and would most likely be subject to judicial recourse. (Loundy, 1997)

HYPERLINKS

The intent of the WWW is to have an active sharing of information through open communication channels. The use of hyperlinks enhances the sharing of information. A hyperlink is a HTML tag (code) that provides an avenue to jump to another web site (location) in cyberspace. Hyperlinks can be in the form of a specific word or image with a URL, site address, embedded so that once clicked on it sends the viewer to that site. The use of hyperlinks is very common on many web pages. A web page can contain multiple hyperlinks if the site developer desires.

The use of hyperlinks has heightened concerns for persons who have placed original works on the Internet. The concern mainly centers on copyright infringement issues. Once a work is placed within the branching power of the Internet, it is subject to viewing by the general Internet population. The originator of this work retains all rights to the work except for limitations allowed by legislation. The legal questions are centered mainly around the definition of responsibility levied on the web site operator and/or the OSP. Legislation and the courts will have to determine if the web site operator and/or the OSP are responsible to the visitor for the type of information contained on the sites their hyperlink is hooked to and how far down the hyperlink chain these liabilities follow. Are the web site operator and/or OSP liable for copyright infringement if a hyperlink site, or a site in a hyperlink chain, contains the actual violating works?

Does one need permission prior to establishing a hyperlink? The Internet is an open channel of communication containing information that is normally intended to be shared. It is optional to place information on a web site. The answer may be as simple as ensuring that all hyperlinks and non-original works have a credit line as part of its identifier. There are several incidents to be discussed later that indicate hyperlinks will probably keep the courts busy for years to come.

FRAMING

A tool used in conjunction with hyperlinking is called framing or using frames. This tool allows the designer or web site operator to divide a window into sections. Within these section(s) the text, image, or other visual content of a hyperlink site can be displayed. The major concern is that the image seen can be altered when displayed within a framed window. One issue is the question of advertising money. The frame may hide or alter the advertisement associated with the originating web site. Court cases concerning this issue will be addressed later in this paper.

These issues will be at the heart of future responsibilities of the web site operator and/or the OSP. Legislation and court ruling will establish the precedence for remedies of actions that range from unintentional (lack of knowledge) to the obviously intentional who are seeking to do damage with their actions. It is desirable not to enact such requirements or limitations that may severely restrict individuals and/or small businesses from using the features of a web site. Such actions would severely limit the exposure of creators of

original works who display for reaction and/or enjoyment. It should not be the intent of legislation or court rulings to minimize the free flow of communications and expression that have come to have a significant influence on global interaction.

COURT RULINGS

The use of hyperlinks, frames, and meta-tags has begun to bring many cyberspace issues to the legal forum. Not all disputes end up in court. Often these disputes can be resolved informally. (Post, 1997) This usually occurs after the offended party has retained an attorney who initiates communications with the offending party. In particular, small web site operators are likely to cooperate because they do not have or desire to spend the financial resources required to pursue a court decision.

COURT RULINGS - HYPERLINKS

Web operators can unintentionally link to a site that may be portraying or linking to other sites that portray offensive material. Post discusses a situation where a mother placed a picture, in memory of her deceased daughter, on her web page. Another site linked to this page and the link was titled "Babes on the Net". (Post, 1997) Should a web operator who links to the site hosting this link be responsible for all the sites that this chain of links can take you to? The courts have not implemented rulings to this degree as yet, but will likely do so in the future. The legislation before congress that is intended to support implementation of the World Intellectual Property Organization (WIPO) Treaty does provide some guidance for the courts on this type of issue.

COURT RULINGS - FRAMES

In a case that was settled in June the issue of using frames technology was exposed to the judicial system. Publishers of several news organizations brought suit against the publishers of the Total News web site. Their complaint included interference with their advertising contracts. Again the main issue centers on monetary gain or loss from advertisement. (Van Slyke, 1997)

Total News is a web site that contains links to other news web sites. Total News used frame technology that prevents the viewer from seeing the entire contents to which the site was linked. The frame normally contains advertisement that Total News has contracted for and essentially hides the advertisement of the linked site. (Van Slyke, 1997)

The court found in favor of the plaintiffs. The remedy prevents Total News from using frame technology. It does allow Total News to link to the other news web sites but it cannot hide or alter the names and advertisement of the linked site. The plaintiffs have the right to revoke linking permission with a fifteen-day notice. (Van Slyke, 1997)

COURT RULINGS - DOMAIN NAME

A domain name is the name of a web site that contains the site address. Domain names are registered with Network Solution Inc. (NSI). NSI does a search for the presence of a duplicate domain name before an application is approved. This does not, however, release an organization from infringement liability. (Retsky, 1998)

It is very possible, and often occurs, that web sites in different locations have the same domain name. This can be frustrating to the user who is searching for a particular site but the search engine returns a different site with the same name. Even though this may be frustrating to the requestor, the Second Circuit U.S. Court of Appeals has ruled that this alone is not reason enough to file a lawsuit. The case centers on a New York City jazz club wanting to stop a Missouri jazz club from using the same domain name. This was the first decision by a federal appellate court in a case such as this. (Computer & Online Industry Litigation Reporter, 1997)

COURT RULINGS - JURISDICTION

Jurisdiction over a case is a hot topic for the judicial system. One reason this is important is that the parties are more likely to come to resolution outside of court because of the cost to pursue or defend a case that is not heard reasonably locally. The party that must incur the burden of travel expenses may decide to accept the other party's position in order to avoid these costs. This by no means implies that the decision of the courts would have resolved the dispute in the manner it was ended.

There are several cases where the courts have ruled on the question of jurisdiction. As discussed in the Software Law Bulletin the court's ruling is normally based on the intentional actions of the parties involved. In the case of Cybersell, Inc. (Cybersell AZ) versus Cybersell, Inc. (Cybersell FL) the courts determined that the Arizona plaintiff did not have jurisdiction. The ruling was based on the following facts. Cybersell of Florida did not perform business in Arizona, in terms of sales, contacts, phone messages, earned income, or any Internet messages from Arizona. Even though Cybersell's Florida web site could be accessed from Arizona, the company performed no actions with the intent of trying to obtain customers from Arizona. ("Web Pages Alone No Basis for Jurisdiction," 1998) There have been similar cases in both New York and California that were ruled in the same manner. (Elacqua, 1998)

In contrast to the above discussion is the case of Resuscitation Technologies Inc. versus Continental Health Care Corporation. The defendant was based in New York and the plaintiff in Indiana. The defendant engaged in active communications, including several e-mails, with customers in Indiana. (Elacqua, 1998) The court ruled that the contacts were extensive enough to place jurisdiction in Indiana. In the case of Heroes, Inc., Washington, D.C., versus Heroes Foundation, New York, the courts found in favor of the plaintiff because the defendant encouraged activity and initiated contact through e-mail and a toll-free phone number. (Elacqua, 1998)

In the case of Zippo Mfg. Co. versus Zippo Dot COM Inc. the courts ruled in favor of the plaintiff. The plaintiff is from Pennsylvania and the defendant is located in California. The defendant was an OSP and provided on-line application to sign up for service. It had approximately three thousand Pennsylvania customers and contracted with seven Internet access providers in Pennsylvania. The courts determined that the defendant was actively and purposefully seeking income from Pennsylvania by providing on-line applications and its interaction with the Pennsylvania Internet access providers. (Elacqua, 1998)

It appears from these rulings that the courts look at the intent of the OSP's and/or web site operator's actions to determine the lawsuit's jurisdiction. This is very important since the Internet is not location specific. The ability, whether intentional or not, to interact in such large geographical locations, world wide, expands the possibility that companies with similar names or protected marks will appear to infringe upon each other. The courts appear to be taking a path of logical reasoning. Web operators cannot have total control, nor do they desire, over who accesses their site. They do have control over how they promote their products or services that they display on these sites.

Both state and federal courts are using existing trademark and copyright legislation on which to base their decisions. This legislation will probably be adjusted or amended as the courts are forced to apply current case law to cases involving uniqueness of the cyberspace environment. As of now the decisions appear to be fair and relevant. The key for a web operator is to base web design criteria on how a reasonable person would interpret the intent of material displayed or accessible via that site. Web operators do have an obligation to observe the doctrine of fair use and other long established legal standards. It appears that the courts will not allow get rich quick schemes aimed at robbing or deceiving customers about the products or services for which the customer is searching.

FUTURE COURT RULINGS

The courts, both state and federal, will be asked to address issues concerning disputes that may establish precedence for future litigation. The important point for web operators is that these decisions could provide guidelines for web operators to follow when developing web pages. The use of meta-tags and hyperlinking are at the core of the cases to be discussed in this section. These are two

of the main tools that have helped the Internet to grow and become not only popular but also a valuable asset to students, researchers, businesses, news, and the curious.

FUTURE COURT RULINGS - META-TAGS

Remember that meta-tags are information about the information contained on the web page. Designers often put key words in this code so that the spider sent out by the search engines will identify the site as a relevant hit. This increases the likelihood that the search requester will select the site to visit.

The first case, Oppedahl & Larson versus Advanced Concepts centers on the use of meta-tags. According to Loundy (1997) the defendant used meta-tags so that searches for the plaintiff's web site would include a hit within the search results. The defendant used the words "Oppedahl" and "Larson" in their meta-tag. These words were used several times to enhance the relevance of the words so as to heighten the relevancy percentage the search engine would assign to the various hits. (Loundy, 1997)

Oppedahl and Larson contend that the meta-tag usage is intended to cause confusion or to deceive the search engine. This confusion or deception is transferred to the search requestor by placement on the list of relevant hits. The defendants argue that the law prevents confusion or deception of a customer not a search engine, therefore they are not violating the law. They also state that even though the search engine may be fooled the requester is not necessarily placed in the same state. The defendant is using its web site to promote its business objectives and as a means to secure new business. (Loundy, 1997)

Web sites can be a relatively inexpensive means of advertising that potentially can reach millions of customers. The use of keywords placed in this type code, meta-tag, is the main way to enhance the reach of the advertising. If this case is not settled outside of the courts the ruling will become a precedent for similar future cases. This ruling, and ones of similar nature in the future, shall create the guidelines a web operator will have to face if they desire not to encounter allegations of trademark and unfair competition infringement.

FUTURE COURT RULINGS - HYPERLINK

A Scottish court is involved with a case between two web based news providers. This case involves hyperlinking but instead of linking to a home page the link takes the viewer to a subsidiary page that contains the story. At issue here is the advertising. The host site is not being recognized and it can give the impression that the originating site is the host. (Van Slyke, 1997) The question here is should a link be required to identify the actual host site?

In the United States there are two similar cases. One was settled before the court ruled and the other was just initiated in April 1997. The open case is Ticketmaster Corp. versus Microsoft Corp. This case centers on the monetary value of advertising. Microsoft Corp. the operator of web site seattle.sidewalk.com has a link to the Ticketmaster web site with the purpose of allowing the user to purchase tickets. (Van Slyke, 1997)

Ticketmaster claims that the link bypasses its home page and other preliminary pages that identify the site and overlooks advertisement that a user would pass through if the user had entered through the home page. Ticketmaster is not disputing the right to link to its web site but is arguing against entering at a point other than its home page. This particular link may give the user the impression that Microsoft has the ability to sell the tickets when in reality they have no connection to the actual transaction. Microsoft has proposed six different lines of defense to this action. (Van Slyke, 1997) This case may find its way to the Supreme Court before final resolution due to the fact that both parties have the financial resources to pursue this course of action.

These cases will have a major impact on the use of the tools that are very important in designing an effective web site. These tools provide open and easy navigation through the Internet. Even though these cases represent large web sites, the outcome of these cases will impact all web sites, regardless of size. These court rulings and future legislation are critical to maintain and foster the intent of the creators of the Internet.

FUTURE COURT RULINGS - DOMAIN NAME

One case involves a domain name in a trademark dispute. A twelve-year-old has a site called pokey.org. Prema Toys, Inc. has the trademark rights to toys called Gumby and Pokey. Prima Toys, Inc. has filed suit and has requested that this site be shut down for a three-month period while the dispute is resolved. (Flaherty, 1998)

In this case the web operator of pokey.org will not relinquish the domain name nor will the operator voluntarily shut the site down. Flaherty's article identifies that trademark law provides exemption to use of a protected mark if done so for non-commercial purpose and it does not cause confusion for those who see the name. In this case the web operator is using this name because it is a nickname and the site is strictly personal usage, non-commercial. G. Gervaise Davis III, an intellectual property attorney that Flaherty spoke with, believes that current legislation will favor the web operator in this case. (Flaherty, 1998)

FEDERAL LEGISLATION

There are several bills being considered by the United States Congress that may provide legislation that is directly tied to the digital environment, in particular the Internet. There have been several hearings in which prominent industry representatives have testified. All parties recognize the importance of protecting intellectual property rights, especially copyright and trademark protections. The arguments mainly center on liability and liability limitation clauses. One reason why current legislation is such a hot topic is the desire to implement two treaties that were adopted in Geneva, but await ratification.

The World Intellectual Property Organization (WIPO) held the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions in Geneva. In 1996, WIPO adopted the WIPO Performances and Phonograms Treaty and the WIPO Copyright Treaty. There were representatives from over one hundred countries present. The treaties require thirty countries to deposit instruments of ratification or accession with the Director General of WIPO identifying legislation that has been enacted in their country before the treaties can be ratified. (Coble, 1998b)

The intent, as far as copyright laws are concerned, of the WIPO treaties is to strengthen the rights of the creators of original works. It covers computer programs, databases, works in digital, electronic environment, and transmissions over the Internet. The delegates entertained discussions on liability but did not make this issue a formal part of the treaties. They did put an agreed to statement into the record that relieved the communication facilities, such as phone lines and modems, from being an act of communications. These are just pass-through mechanisms that make communications possible. (Coble, 1998b)

These treaties are of high significance to the United States because they formally create recognition of digital property ownership on a global basis. Piracy is a major problem, particularly in the international arena. Ken Wasch testified before House Committee on the Judiciary that the software industry incurs piracy with estimated losses of twelve billion dollars per year. These losses significantly impact industry and creators of original works that reside in the U.S. Most of the parties testifying before congress support legislation strictly geared toward implementation of the treaties. They differ on other legislation that is intended to clarify liability. The consensus is to not slow down treaty ratification measures because of the signals that will be sent to the international community. (Wasch, 1997)

H.R. 2281

H.R. 2281, The WIPO Copyright Treaties Implementation Act, amends the current U.S. Copyright Act. This amendment incorporates four major changes required by the WIPO treaties. First, it prohibits the circumvention of technical copyright protection measures. Common measures currently used include passwords, user I.D., encryption, and other electronic measures. Second, it protects copyright management information. This means that the originator's name, manufacturer's name and trademark(s), or other

identifying information must be identifiable with the product. Third, civil remedies for violation of one and two are provided. Last, criminal remedies for one and two are provided. The remedies for repeat offenders are enhanced from the remedies for original offenses. (Coble, 1998b)

H.R. 2180

H.R. 2180, On-Line Copyright Liability Limitation Act, is not a complimentary bill with H.R 2281, but is being reviewed in conjunction with it. This act does not hold an OSP or ISP liable for material that passes through their systems. They are liable for offensive material that they post. The thought against this limited liability is that OSPs and ISPs have no incentive to help isolate and prevent illegal activity. This act puts identification and the burden of proof on the shoulders of the content owners. Another issue is of direct financial benefit. Should an OSP or ISP be liable for illegal activity that occurs in cyberspace just because they lease space to the offender? This act says no. (Schrader, 1998) These are not new issues. They have been debated for several years with no agreed to acceptable resolution in sight.

The issue of the concept of "notice" and "take down" are part of this debate. (Schrader 1998) If a content owner notifies an OSP or ISP of offensive material should it require action to take down this material? Probably not, judicial intercession is most likely necessary. What penalty may an OSP or ISP face for taking down material that the courts later rule is not offensive? On the other hand, the content owner may suffer financial hardship if the material is left open to the public. Regardless of the legislation enacted the courts will probably have to establish guidelines based on their rulings.

H.R. 3209

H.R.3209, On-Line Copyright Infringement Liability Limitation Act, was introduced as an effort to resolve issues with H.R. 2180. The bill addresses direct infringement and secondary liability. This bill enacts similar language to the "notice" and "take down" discussion. It also provides relief for an innocent act of take down provided the OSP or ISP was supplied with false or incorrect information. It appears this bill offers compromises to H.R. 2180 and should provide for more interesting discussion as the year passes. (Coble, 1998a)

What does this mean to the web site operator? This legislation will define the guidelines on which the judicial system will base its rulings. These rulings along with the legislation will create a list of do's and don'ts that a web operator can use to minimize the risk of violating intellectual property rights. It will play a major role in identifying legal responsibilities when using tools such as

hyperlinking, frames, and meta-tags. It will begin to establish the breadth and depth the operator must go to insure users are not offended when they hyperlink through cyberspace.

It appears that H.R. 2180 and H.R. 3209 will have no negative impact on web operators. These bills should support the growth of the Internet as well as provide protection for content owners. The remedies that these bills provide should deter the casual offender. Those who make a substantial profit from violating the rights of others will probably not be deterred by these laws.

PROTECTION ASSISTANCE

As can be seen from the previous discussion, creation and operation carries responsibilities for web site operators. Most small, individual, web site operators are probably not familiar with the possible legal ramifications that can be placed upon them. Most midsize to large corporations probably have legal resources advising them on the potential liability a web site brings with its operation. There are several tools available to assist web site operators to mitigate potential legal disputes.

Thompson identifies issues that an owner, designer, and third party can do to minimize legal disputes. These involve creation of a legal document(s) that spells out who owns what, obligations of the parties, and who is responsible for assuming compliance with judicial standards. The site owner needs to protect the domain name, site contents including graphics and text, code, logo(s), and other incidentals. The designer wants any programs, graphics, logo(s), and other tools created prior to design of this site to remain usable and under his/her control. The owner and designer both want to ensure that third party rights are not infringed. These documents will provide guidance for the judicial community in the case of a dispute by any of the parties. (Thompson, 1998)

The Computer Law Strategist discusses the issue of hyperlinking and potential infringement of copyright and trademark protections. The courts and current legislation are not clear on whether or not permission is required to link to another web site. This linking process is extremely popular for both web sites operating for profit (advertising or selling) and pleasure. As discussed earlier, how far through a linking chain can a web site operator be held liable? The use of agreements signed by both the host site and the link-originating site may minimize liability for both parties. The OSP can place clauses into the web site agreement to heighten awareness of potential issues, suggest ways the site operator can minimize liability, and spell out allowable activity within the confines of the OSP's environment. ("Clause of the Month Linking Provisions In On-Line Agreements," 1997)

Halpern proposes a process to help avoid infringement and mitigate liability. The concept is to define and document policies for the following seven areas: (1) general contents issues (accuracy, disclaimers, defamation, confidential information), (2) copyrights and trademarks, (3) linking and framing, (4) regulatory issues, (5) gaming restrictions, (6) on-line sales and account information, and

(7) privacy. (Halpern, 1997) Not all areas may apply to each web site. An attorney or a person with knowledge of both state and federal judicial statutes should review these policies.

Halpern further states that periodic audits of the web site(s) should be performed. These audits will ensure that the site operates within policy. (Halpern, 1997) Small and individual web site operators can use the same or similar process to minimize and mitigate liability. This process not only promotes legal and moral standards but also provides developers with a discipline that may prevent embarrassment. As an example, say a church web site has established links to other web sites of interest. If one of these sites drastically changes content which includes terrorist propaganda or links to such, this would probably be an undesirable link for the church. With periodic audits the church can identify such actions and remove the offending link from its web site.

Web site operators can use many if not all of the above methods. Judicial rulings may still find a web site operator to be in violation of current legislation but the operator can portray a more viable defense by using some or all of these techniques. The penalties for contributory infringement are usually less than full infringement. If a potential violation is discovered and remedies are implemented quickly the potential is reduced that the offended party will pursue legal remedies.

CONCLUSION

The Internet is not only an intriguing adventure but also a means of education. The Internet is expanding at a rapid pace. User growth is tremendous. Technology growth that permits access is also great. The task of creating a web site is not only exciting it also is exposing many people to the world of computer programming. As our world becomes more complex the understanding of computer technology becomes more important. This means of communication has begun to draw together the thoughts, ideas, and knowledge of a global community.

Legislation and judicial rulings, on a global basis, will play a major role in the future of web site operations. Let's hope that the future of the individual and small business web site operators are not stalled by an over burden of legal liability. There probably are a large number of web site operators who have never dreamed of the potential liability that a hyperlink, frame, or meta-tag, could place upon them. The legal boundaries remain unclear. Web site operators should act in a reasonable manner that protects the rights of other users. It is important for web site operators to understand and stay current on legal issues. Legal advice on web page development and maintenance is essential.

Taking advantage of the business potential of the Internet through web pages is an extraordinary opportunity. But the web page advantage must be accompanied by legal and ethical considerations. This is to assure, as much as possible in a world of unclear cyberspace rules, that an organization is utilizing web pages responsibly.

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A MULTICULTURAL PERSPECTIVE FOR LEGAL STUDIES EDUCATION: THE CHALLENGE OF A NEW MILLENNIUM

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ABSTRACT

The American ideology promotes the belief that all citizens of the United States are entitled to equal educational opportunities. Hence, colleges and universities must consider the extent to which such goals are being met. Questions pertaining to how minority students attain access to postsecondary education, and the academic and social experiences these students encounter while in college, are fundamental to the goals of achieving equal educational opportunities for all students (Henriksen, 1995).

INTRODUCTION

I do not believe that we can solve the persistent problems surrounding race and ethnicity in American life simply by stating that we live, or ought to live, in a society where those characteristics have ceased to be significant. Our hope lies in finding effective ways to narrow – and bridge – the gaps that continue to exist among many people of different races and ethnic backgrounds. One of the most significant ways we have begun to achieve that goal is through education. To change course now would be to retreat from decades of steady hope and progress, to follow pathways far less bright and far less full of promise.

--Neil L. Rudenstine, 1996
President, Harvard University

Few issues have aroused more debate in recent years than those surrounding diversity and university admissions. Out of the controversy, several proposals have emerged to eliminate factors such as race, ethnicity, and gender from consideration in the admissions process. The University of California system, at the direction of its Board of Regents, has implemented such changes. This is also true of North Carolina and other states. In *Hopwood v. State of Texas* (1996), the United States Court of Appeals for the Fifth Circuit ruled that the University of Texas may not consider race as a factor in its law-school admissions, despite the university's assertion of a compelling interest in fostering student diversity (Rudenstine, 1996). The impact of this case has been far reaching.

Probative evidence need not consist of statistical data, but we need to show concretely how affirmative action advances the educational experience. Just how do diverse classrooms and dormitories make students more tolerant of people different from themselves? How do the tensions that occur in a diverse collegiate environment prepare students for citizenship and the workplace? How does diversity facilitate learning what institutions believe must be learned? In what ways is a diverse faculty a better instrument for education than an all-white faculty (Michaelson, 1996)?

This article will address these and related issues in an attempt to show the importance of multiculturalism and a multicultural approach to education. The focus will be on the traditional minority and underrepresented groups in the United States. For purposes of this article, we have defined the adult learner as one who has attained the age of 17 years.

ANATOMY OF A MINORITY: AN HISTORICAL PERSPECTIVE

Random House Webster's College Dictionary defines "minority group" as: a group differing, esp. in race, religion, or ethnic background, from the majority of the population. In several leading United States Supreme Court cases, minority group members were defined as "citizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts" (*City of Richmond v. J. A. Croson Company*, 1989).

Clearly, no racial or ethnic group is monolithic, and few would suggest that race or ethnicity alone is responsible for defining an individual's experiences and points of view. Nonetheless, race historically has been, and still remains a powerful distinguishing feature in our society. For instance, we can speak meaningfully of African-American cultural traditions and communities – while fully acknowledging their disparate elements – in ways that we could not do if we focused upon a group of men and women whose common feature was O-negative blood (Rudenstine, 1996). Our current situation is the product of centuries of history. Circumstances may well change in the future, but they are unlikely to do so quickly or without conscious and sustained effort. Race remains a factor that significantly influences the process of growing up and living in the United States – one that clearly plays a role in shaping the outlooks and experiences of millions of Americans (Rudenstine, 1996).

As Americans, we are raised to believe that social mobility, equal access to education, and a job for everyone is the cornerstone upon which our nation was built. The reality is, however, that our American society is, indeed, stratified. Children and young adults living at or below poverty levels do not receive the same academic or vocational training as do people within higher socioeconomic levels. In addition, underrepresented groups are often kept from achieving the educational goals they seek (Henriksen, 1995).

Some historical context can be helpful in our understanding of the present situation. The conscious effort to achieve greater student diversity on our college and university campuses did not begin in the 1960s, as is often believed. It did not originate with the institution of formal affirmative action programs. According to Rudenstine (1996), it reaches back at least a century earlier, to a time when issues of racial, ethnic, and other forms of diversity were no less volatile in American life than they are today. Diversity as an important concept in education, according to Rudenstine (1996), was discussed as early as the mid-19th century. At Harvard, the coming of the Civil War prompted some of the earliest comments on the subject. On the eve of the war, Harvard President Cornelius C. Felton saw an urgent need for universities to reach out more consciously to students from different parts of the country. Gathering some students, he wrote, “must tend powerfully to remove prejudices, by bringing them into friendly relations.” Felton, according to Rudenstine (1996), did not suggest that there was any link between geographical background and individual academic achievement or promise; his rationale was quite different. He understood that students from different parts of the nation, from different states and regions, possessed a variety of cultural, political, and social attitudes born of their own experiences. By bringing such students together in a residential community dedicated to learning, he reasoned, according to Rudenstine (1996), a university could not only offer a challenging education, but also could help “to remove prejudices” and foster greater mutual understanding (Rudenstine, 1996).

After the Civil War, Charles W. Eliot, president of Harvard from 1869 to 1909, expanded the conception of diversity, which he saw as a defining feature of American democratic society. He wanted students from a variety of “nations, states, schools, families, sects, and conditions of life” at Harvard, so that they could experience “the wholesome influence that comes from observation of and contact with” people different from themselves. He wanted students who were children of the “rich and poor” and of the “educated and uneducated,” students “from North and South, from East and West,” students belonging to “every religious communion, from the Roman Catholic to the Jew and Japanese Buddhist”(Rudenstine, 1996).

Minority and working class students, according to Dougherty (1994), are more unsure about higher education—they want to succeed but are afraid of failing, and are reluctant to achieve academically if it means they must assimilate to the cultural norms inherent in their school. These institutional barriers to the attainment of academic goals have a deleterious effect on minority students (Henriksen, 1995).

Some recent data point to the difficulties minority students face in attaining a baccalaureate degree. The progress of ethnic minority students is slower than the progress of White students at all levels of schooling. The same holds true for minority students

who wish to transfer out of community colleges and into four-year institutions. The Center for the Study of Community Colleges 1995 Transfer Assembly Study reported that only 12 percent of Hispanic and Black students transferred to a four-year college or university, compared to 23 percent of White students. The transfer rates for Hispanic and Black students were consistently lower than for White students at all community colleges, including colleges known for higher transfer rates for all students (Henriksen, 1995).

Much has been written on the expectations families place upon their children in terms of educational goals. In many inner city and working class communities, becoming an “adult” is often linked to gaining employment and earning money after high school, rather than continuing education after the twelfth grade (Richardson, 1990).

Other studies address the influence of institutional barriers to academic attainment. Kanter (1990) evaluated academic testing and placement as a tool to segment students of color into low-level educational paths. Kanter found that minority students were placed in classes at the pre-college (remedial) or associate degree level more often. White students, however, were more likely to be placed in transfer-level courses.

Blacks, Hispanics and American Indians remain less likely to graduate from college than other Americans. This national failure undermines the foundations of a free society, interferes with efforts to build a competitive work force, and raise doubts about our educational system’s capacity to respond to oncoming demographic changes (Richardson, 1990).

TRACING HISTORY: ONE CLASSROOM APPROACH

Institutions of higher learning in the United States have been dealing with issues of diversity and multiculturalism for quite some time. Some institutions now believe that to maintain the status quo that ignores the reality and dynamics of a diverse society is no longer a tenable option. According to Lawrence (1977), “a college curriculum that fails to teach how diverse elements of the population have interrelated to contribute to the nation’s achievements and its cultural fabric is incomplete and ultimately untruthful.” (Lawrence, 1977, p. 49).

The most intractable problem faced by our diverse and multicultural society is that of race, particularly the unresolved issues that have arisen out of the long and stormy relationship between African Americans and Americans of European extraction. In order to better appreciate the plight of this particular minority group, it would be helpful to provide some historical perspective designed to expose all students to a broader base of understanding. The goal is to provide students with information that will help them better understand how this particular ethnic group got to where is today.

One approach used by Lawrence (1977) was to develop a course that starts with an examination of the institution of slavery in the United States and concludes with an analysis of current statutory and case law. Students are able to examine how American law

has evolved. She shows how that evolution differed regionally; and how this evolution resulted from conflict, accommodation, need to control, and consensus. Students are able to read sections of the United States Constitution that impact on the issue of race. Students are able to analyze current laws that prohibit and permit discrimination in business environments. They explore the Civil Rights Acts as they relate to business, employment, and housing. Students also review cases that raise the issue of affirmative action, diversity, and reverse discrimination (Lawrence, 1977). While Lawrence's course prototype puts a strong emphasis on federal, state, and local statutes, and case law that deal with the issue of race in the acquisition, possession, and ownership of real property, yours could be tailored to your individual needs and requirements.

Wilson and Swan (1991) used a similar approach. Their approach was to use a chronological sequence of judicial opinions to alert students to the dynamic interplay of various legal authorities, i.e. the equal protection component of the Due Process Clause of the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, Title VII of the Civil Rights Act of 1964, Executive Order 11246 of 1965, and the Taxing and Spending Clause of Article I. Wilson and Swan indicated a desire to teach students as citizens that "there is no one minority set-aside/affirmative action law, but numerous laws." (Wilson & Swan, 1991, p. 58).

IMPLICATIONS FOR TEACHING: IMPROVING THE MULTICULTURAL ENVIRONMENT

Changing demographics is a reality that will undoubtedly reshape the provision of teaching and learning in America. For the first time in our history, adults outnumber youth. There are more older adults. That population is generally better educated than ever before, and there is more cultural and ethnic diversity (Merriam & Caffarella, 1991). The shift from a youth-oriented to an adult-oriented society is solidified by the increasing numbers of older adults in the population (Merriam & Caffarella, 1991).

Because the student population in postsecondary education has become increasingly and undeniably diverse, the concept of "multiculturalism has shifted from a trendy buzzword to a wave of indelible influence on education. There is now the belief among many scholars and a growing number of citizens from the public sector that higher education has a moral obligation to accommodate diversity, to transform itself as the society it serves is being transformed by the vast array of cultures that compose it (Wlodkowski & Ginsberg, 1995). It is increasingly important that institutions providing adult education recognize the importance of providing an enticing learning environment to all students. If people do not feel safe, connected, and respected, they are not likely to be motivated to learn. This may mean raising questions about discrimination or scrutinizing one's own power, even if that power stems merely from being in the majority (Wlodkowski & Ginsberg, 1995). It may simply mean showing some sensitivity by resisting the

temptation to tell ethnic jokes. The first prerequisite to becoming a better practitioner in a multicultural classroom is having the attitudinal openness to improving your classroom practices. This and other measures must be part of an overall institutional commitment to multiculturalism.

The absence of “role models” also may make the path to higher education difficult for minority students. Williams’ 1990 study found that African American students indicated the absence of a role model as a reason for not pursuing higher education. Another factor is a lack of a genuine cultural understanding of students on the parts of professors (Rendon & Valadez, 1993). Faculty in community colleges and universities are primarily Caucasian, whereas the student population is becoming increasingly diverse. Professors often have difficulty understanding the academic encouragement and directions that minority students seek, thus feeling as though they are simply “lowering standards” in order to account for a multicultural campus. A lack of cultural understanding, on the part of the faculty, may make the students skeptical of remaining enrolled in a community college or university (Rendon & Valadez, 1993).

Fortunately, educational planners recognize the importance of programs that encourage the enrollment of a widely diverse student population. Some colleges have started programs to actively recruit students to math, science and engineering programs (Jones, 1992). Other colleges in larger cities have implemented programs to assist minority students while they are still enrolled in high school (California Community Colleges, 1993). Still others invite minority students to serve as peer mentors to high school seniors (Stolar & Cowles, 1992).

The involvement of faculty and staff has not been overlooked. Many states, including Texas, are recruiting minority faculty and administrators with the goal of improving the multicultural climate on campus (Laurel, et al., 1991). These programs are only a few of many plans destined to bolster a positive multicultural community (Henriksen, 1995).

Some suggest that cross-cultural education should be added to all curricula to assist assimilation of minorities into the mainstream of society. Others argue that teaching methods employed and the attitudes held by instructors toward multicultural students can influence the students perspective of their worth to society and that a more humanistic approach is required to educate minority students in the culture of American classrooms. Educational ethnocentrism could be decreased by increased recruitment of representatives from diverse cultures to the education profession and by training professionals to recognize cultural differences, to appreciate the complexity of working with people from diverse cultures, and to identify commonalities that can be used to develop better strategies for audiences with varying backgrounds.

In choosing from among a pool of qualified student candidates larger than the number of available places, we also consciously consider the “mix” of the class as a whole, because we recognize how much our students’ variety – along many dimensions – contributes to their education. Indeed, Justice Lewis F. Powell, in his pivotal opinion in the Supreme Court’s *Regents of the*

University of California v. Bakke (1978) case, recognized that universities have a compelling interest in the educational benefits of a diverse student body (Rudenstine, 1996). In *Hopwood v. State of Texas* (1996), however, two members of the three-judge appeals court rejected Justice Powell's reasoning, as well as the decision of a majority of the Supreme Court in *Bakke* that race may be considered as one factor among many in university admissions. The *Hopwood* opinion asserts that the consideration of race as a factor in the admission process "simply achieves a student body that looks different" and thus "is no more rational on its own terms" than considering "the physical size or blood type of applicants." (Rudenstine, 1996).

Institutions that deliver adult education must "focus on practices and programs that address access, retention, and academic success of historically underrepresented students and also on more comprehensive efforts to alter the ethos of institutions to better educate a diverse cohort of students for a complex global society" (Appel, Cartwright, Smith, & Wolf, 1996). It is true that some students may lack the academic ability to pursue the intellectual paths of their choice. In this case, the community college plays an important role in helping students achieve realistic academic and occupational ends. Student who have unrealistic personal or occupational goals must be made aware of their limitations, and with the help of a counselor, can reconsider a career or educational path more suited to their talents. Students can be filtered into educational programs commensurate with their academic abilities (Henriksen, 1995).

This persistent and serious problem is solvable if concerned institutions use a comprehensive approach. One proposal was offered by Richardson (1990). According to Richardson (1990), implementing only one or two of the following principles will not suffice. To successfully remove race and ethnicity as factors in college completion, institutions must attempt all ten. The principles below are supported by a three-year national study of ten predominately white colleges and universities that have achieved success in graduating minority students over ten or more years. The success stories related here are from that study, undertaken by the National Center for Postsecondary Governance and Finance and funded by the Office of Educational Research and Improvement (OERI) of the U.S. Department of Education. The principles are:

1. ANNOUNCE YOUR PRIORITIES

College and universities that publicly announce their goal of eliminating racial and ethnic disparities in degree achievement will make clear their firm commitment to educational opportunity.

Success story: Improved participation and graduation rates for blacks is a top priority at Florida State University. This was publicized in the annual President's Report to the faculty and demonstrated by appointment of affirmative action supporters to strategic posts.

Annual plans and progress reports on minority student admissions, employment opportunities, and support programs and publicized by each academic unit as well.

2. BACK TO PRIORITIES

Spending an institution's discretionary dollars to recruit, retain, and graduate minority students will communicate seriousness.

Success story: The University of California at Los Angeles (UCLA) has integrated federal programs and state equal opportunity equivalents into its undergraduate admissions program and into its academic advancement program. University discretionary dollars for these efforts exceed state and federal contributions.

3. EMPLOY MINORITY LEADERS

Employing minorities in senior leadership positions sends a clear message about the value of cultural diversity among professional staff.

Success story: In the past decade, the University of Texas at El Paso (UTEP) has doubled in enrollment of Hispanics, who are now a slight majority of the student body. Community support and fiscal commitment to UTEP has also increased due in part to strong minority leadership. UTEP's dean of students, its dean of the College of Science, and its directors of financial aid and admissions are all minority leaders.

4. TRACK YOUR PROGRESS

Focused strategies to increase minority opportunity are most likely devised by institutions that collect detailed information on minority and non-minority undergraduate achievement patterns.

Success story: Florida International University (FIU) in Miami has collected information on enrollment and retention by race, ethnicity, and transfer status for over ten years of rapid change. By analyzing student performance, FIU can focus resources where most needed and obtain high graduation rates for its urban, largely commuting population.

5. PROVIDE COMPREHENSIVE SUPPORT SERVICES

Institutions committed to equality will provide integrated and comprehensive support services and will take a proactive role in providing financial aid.

Success story: California State University at Dominguez Hills serves a diverse student population. Students in the affirmative action and equal opportunity programs now show retention and graduation rates that compare favorably with the general student body. Cal State intensified its support staff's efforts while increasing faculty responsibility for advising, recruiting, admitting, and referring students.

6. EMPHASIZE QUALITY

Educational quality has too often been defined as a function of those excluded, while selective institutions have too often excluded minorities disproportionately. A quality education must include diversity—but not at the expense of rigor and excellence. Minority students need high-quality educations.

Success story: A 1986 Time article described Brooklyn College as “fast rising and ambitious . . . providing a first class education at fourth class prices.” Brooklyn College's student body, almost one-third black and Hispanic, graduates students proportionately. All students must complete ten rigorous core courses aimed at “cultivating the intellect and imagination and at developing general mental rather than vocational skill.”

7. REACH OUT TO COMMUNITY SCHOOLS, AGENCIES, AND BUSINESSES?

A community-wide effort can raise minority students' aspirations and academic preparation. Elementary and high school students need role models, demystifying campus contacts, and adequate financial aid information. Community colleges and four-year programs should ensure maximum transfer of credits. Influential churches and businesses in minority communities should offer motivation and economic support.

Success story: Temple University's "Temple Mile" program includes high school, grade schools, community groups, and nonprofit agencies within a one-mile radius of the campus. Thanks in part to this program, Temple has seen a dramatic rise in enrollment of black students in many fields not traditionally selected by minority youths.

8. BRIDGE THE EDUCATIONAL GAPS

Bridge programs include extended classes covering required materials, tutoring, learning laboratories, collaborative study groups, and intrusive advising. They should be afforded to underprepared students -- the most vulnerable to academic failure.

Success story: Wayne State University (WSU) offers an outreach program for students ineligible for regular admission. After completing twenty-four to thirty university credits in special-format classes, these students may transfer to other colleges within the university. WSU also admits 350 marginally prepared students yearly and supports them for three years with summer bridge programs, skills instruction, and tutoring. Their graduation rate exceeds that of many regularly admitted groups of students at WSU and other urban universities.

9. REWARD GOOD TEACHING AND DIVERSIFY YOUR FACULTY

Effective institutions cultivate minority professors by mentoring graduate students or junior faculty members and by supporting them in additional graduate training. Rewards, tenure, and promotions should be awarded for good teaching—characterized by caring, mentoring, sensitivity to cultural differences, and high expectations for all students.

Success story: Memphis State University (MSU) has a significant gap between its proportion of black students and its few black faculty. MSU thus creates a position for any department recruiting a qualified black candidate. MSU's recruiting program pays moving expenses, gives released time from teaching, and pays a salary differential. Exceptional black doctoral candidates at MSU are offered support, providing they accept faculty appointments at the university.

10. CONSTRUCT A NONTHREATENING SOCIAL ENVIRONMENT

Incidents of racism can hamper the progress of minority students, even in those who are best-prepared academically. Discrimination, harassment, and low expectations for minorities must be eliminated. Proportional representation is essential in helping minority groups retain their sense of cultural identity and avoid isolation. If needed, proportional representation should be supplemented by special programs, services, and facilities.

Success story: Hispanic and American Indian graduates at The University of New Mexico (UNM) describe campus friendships as a function of location or discipline rather than race or ethnicity. Minorities comprise forty percent of UNM's enrollment. UNM successfully educates and graduates minority students who are respected and well-accepted within a multicultural state and community (Richardson, 1990).

CONCLUSION

It is unfortunate that courts have repeatedly rejected what should be a very strong argument for affirmative action, namely that deliberate inclusiveness advances larger societal interests (for example, that the nation's economic health depends on graduating minority students in much larger numbers). Now we must make arguments that rest on why institutions cannot be healthy unless they are inclusive. Segregation in higher education was bad not only because of the invidious intent behind some of it, but also because it cheated all students. Now the public and the courts need to be told how students were cheated (Michaelson, 1996).

The end of racial preferences is here, but the door to a college education is not closed for minority-group students. With some ingenuity and creativity, America's campuses can continue to represent the wide variety that is America. But it's going to take some effort (Williams, 1996). And there is nothing in the Supreme Court's 1978 decision in *Bakke*, or in any other case, that would proscribe setting aside admission slots or financial-aid dollars on the basis of non-racial criteria (Williams, 1996).

It seems clear that creative institutions will be able to maintain racially diverse student bodies (Williams, 1996). In a debate so often framed in terms of the competing interests of different groups, it is all the more important that we continue to stress the most fundamental rationale for student diversity in higher education: its educational value. Students benefit in countless ways from the opportunity to live and learn among peers whose perspectives and experiences differ from their own (Rudenstine, 1996). A diverse educational environment challenges them to explore ideas and arguments at a deeper level – to see issues from various sides, to rethink their own premises, to achieve the kind of understanding that comes only from testing their own hypotheses against those of people with other views. Such an environment also creates opportunities for people from different backgrounds, with different life

experiences, to come to know one another as more than passing acquaintances, and to develop forms of tolerance and mutual respect on which the health of our civic life depends (Rudenstine, 1996). We must reaffirm the crucial role that students with different backgrounds, perspectives, and experiences play in educating one another (Rudenstine, 1996). We should not romanticize diversity as we assess its value. We know that close association among people from different backgrounds can lead to episodes of tension, and that common understandings often emerge only slowly and with considerable effort, if at all. Yet we need to remember the words of Rudenstine (1996), who wrote "the character of American society, from its very beginnings, has been shaped by our collective willingness to carry forward an unprecedented experiment in diversity, the benefits of which have seldom come without friction and strain."

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CHILDREN AT RISK: ETHICAL AND PUBLIC POLICY IMPLICATIONS OF TOBACCO ACCESS AND USE

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ABSTRACT

Recent studies are converging on the conclusion that cigarette smoking begun early in life is harmful and addictive. The purpose of this paper is to report on a study of cigarette use by the youth of Northeastern Pennsylvania. The paper will (1) present data gathered on the prevalence of cigarette use, (2) present data on where children acquire cigarettes, (3) offer an examination of ethical considerations on the manufacture and advertising of a product with known harms and with deliberate addictive design, and (4) offer some suggestions for community, educational and public policy responses to lessen the risk for children.

To inaugurate the study, a letter was sent to several school superintendents in Northeastern Pennsylvania requesting permission to survey all students in grades four through twelve. Six school districts, representing 15,297 students, agreed to allow the survey to be completed in their respective school districts. A questionnaire was developed and given to the cooperating school districts for administration. The 14,523 questionnaires returned represent 94.9 percent of the sample surveyed. Preliminary results reveal that 37.3 percent of the children surveyed have experimented with cigarettes and that 54 percent of those who have tried cigarettes continue to smoke today. This represents over 20 percent of the children grades four through twelve in Northeastern Pennsylvania who are currently smoking cigarettes. Cigarette use begins by some children as early as age 5 with the mean age of beginner smokers being 11.6. The majority of the very young children are acquiring their cigarettes from vending machines or from other individuals and that most children find little difficulty purchasing tobacco products from convenience stores in Northeastern Pennsylvania. Proof of age is very rarely required, even for the very young children surveyed.

INTRODUCTION

The Centers for Disease Control and Prevention (CDC) (1994) reports that 3,000 young people become regular smokers in this country every day and if that rate continues over 5,000,000 of these children alive today will die from tobacco related illnesses. According to the Institute of Medicine (1994), cigarette smoking remains by far the largest single preventable cause of premature mortality in this country. The Institute of Medicine (1994) reports that over 80 percent of these young tobacco users began their addictive habit before they were 18 years old and are addicted to nicotine before they are able to understand the consequences of this high-risk health behavior.

The Surgeon General's report (1994) confirmed that one of the major long-term effects is found in increased and continued smoking as the child grows older. The sooner a child starts smoking the more likely he or she is to become strongly addicted to nicotine. The majority of young people who smoke on a daily basis confirm that they are unable to quit. The Institute of Medicine (1994) reported that nicotine in tobacco causes and sustains addiction and that manufacturers deliberately design the product to provide the consumer with a pharmacologically addictive dose of nicotine to continue the consumer's need for the product.

The Surgeon General's 1994 report concluded that most tobacco use begins before high school graduation. Therefore, if we can keep the young tobacco free until graduation we have a chance at winning this major public health challenge. The CDC believes that smoking is one of the first high-risk behaviors practiced by young children and that tobacco is a "gateway drug," therefore, reduction in tobacco use may reduce the start of other drugs.

The CDC (1996) reported that the most common source of cigarettes for those under 18 years of age is retail stores. In 1991, an estimated 255 million packs were sold illegally to minors in this country. It would be helpful to discover when cigarette use begins in the community and where the young child gets the cigarettes before we attempt to develop policies to curb the access and use problem.

According to the Office of Smoking and Health (1995) all states have made the purchase of cigarettes illegal to children under the age of 18, but the penalties to store owners who sell to minors range from \$10 to \$50 in 11 states and \$1,000 or more in only 4 states. Stronger regulations and enforcement are mandatory if there is to be a serious effort at reducing children smoking.

Developing community intervention plans to stop children from smoking will fail if the community problem has not been studied and properly defined. This study was undertaken to answer the following questions:

STUDY QUESTION ONE

What is the prevalence of cigarette use by children aged 10 to 18 in Northeastern Pennsylvania?

STUDY QUESTION TWO

Where do children aged 10 to 18 acquire cigarettes in Northeastern Pennsylvania,
and what can be done to prevent this illegal access?

STUDY QUESTION THREE

What are the ethical considerations of the manufacture and advertising of a product with known harms and with a deliberate addictive design?

STUDY QUESTION FOUR

What should be the response of the community, educational institutions and the public to the addiction to nicotine of the children of the community?

METHODS

STUDY POPULATION

The sample chosen for this study included six school districts in Northeastern Pennsylvania that included urban and rural students, and public and private schools. A letter was sent to fifteen randomly chosen school superintendents requesting permission to survey all students in grades four through twelve. Six school districts accepted the invitation to participate in the study. To protect their privacy students were allowed to complete the survey anonymously, but their participation was mandatory. Cummings, Vito and Gabrel (1992) found that students are willing to respond honestly to questions concerning drug use behavior if the information is collected anonymously. The questionnaire was administered by homeroom teachers during the last class period.

INSTRUMENT

The instrument used in this study was a two-page questionnaire consisting of nineteen questions about tobacco use, alcohol use and the use of marijuana. A review of the literature was utilized to establish face validity of the instrument. The questionnaire was then evaluated by three health experts to assess content validity of the instrument. The questionnaire was field-tested on several students from grades four through twelve in a school district not being utilized in this study.

RESULTS

The final response for this study was 14,523 returned questionnaires which represented 94.9% of the sample surveyed.. There were responses from all six school districts representing three counties in Northeastern Pennsylvania. These questionnaires were then evaluated for accuracy and entered into a computer and utilizing a statistical software program provided by the CDC. There were 774 questionnaires containing unrealistic responses that were not entered into the computer. In summary, this study found that in Northeastern Pennsylvania first experimentation with cigarettes begins as early as age 5 (1.3 percent), with the highest number of students (19.8 percent) having their first cigarette at age 12. The incidence of new smoking drops off dramatically as children enter the later years of adolescence. By age 16 cigarette experimentation has dropped off in a very dramatic way (Table 1).

In the six school districts surveyed the frequency of experimentation with smoking cigarettes ranged from a low of 31.5 percent to a high of 41.4 percent, with an average of 37.3 percent of Northeastern Pennsylvania children having tried cigarettes. The numbers of children who smoke today in the six school districts ranged from 38.7 percent to 67.2 percent with the average being 54 percent. Over 50 percent of them have no desire to quit smoking. There are 5,411 children who have tried cigarettes and 54 percent of them (2,962) are still smoking today in Northeastern Pennsylvania. In the fourth grade, 8.1 percent of the students have tried cigarettes, and 36.5 percent of those fourth graders who have tried smoking cigarettes are still smoking today. The number of individuals who try smoking cigarettes increases each year until it reaches 63.9 percent in the twelfth grade, and the number of those who try cigarettes and continue to smoke also increases each and until it peaks at 60.8 percent in the last year of high school. This experimentation occurs less frequently for girls in the lower grades and more frequently for girls in the later years of high school. The mean age for first-time cigarette use in Northeastern Pennsylvania is 11.6. (Table 2).

Table 1		
Age of First Attempt at Using Cigarettes Among Children Grades 4 to 12		
(N = 5,411; 2,661 Males, Mean Age 11.2; 2,750 Females, Mean Age 11.9)		
Age	Males	Females

5	(41)	1.8%	(19)	0.7%
6	(58)	3.7%	(32)	1.9%
7	(106)	7.7%	(43)	3.4%
8	(178)	14.4%	(107)	7.3%
9	(217)	22.6%	(176)	13.8%
10	(369)	36.5%	(270)	23.6%
11	(344)	49.4%	(358)	36.7%
12	(500)	68.2%	(568)	57.4%
13	(386)	82.8%	(530)	76.7%
14	(239)	91.8%	(329)	88.7%
15	(132)	96.7%	(187)	95.5%
16	(60)	99.0%	(94)	99.0%
17	(23)	99.8%	(24)	99.9%
18	(4)	100.0%	(4)	100.0%

Table 2
Number of Children by Grade Level That Experiment with Cigarettes
and Number of Children by Grade Level That Continue to Smoke Today
(N = 14,523)

Grade	Population	Tried Cigarettes		% That Tried Cigarettes That Still Smoke Today		% of Current Smokers Who Want to Quit	
		Number	Percent	Smoke	Percent	Grade	Percent
4	1,561	126	8.1%	46	36.5%	4	51.1%
5	1,666	190	11.4%	84	44.2	5	42.9
6	1,829	301	16.5%	103	34.3	6	46.1

7	1,796	566	30.5%	266	47.0	7	41.7
8	1,783	764	42.8%	412	54.0	8	46.7
9	1,634	887	54.3%	544	61.1	9	46.0
10	1,511	848	56.1%	489	57.7	10	41.6
11	1,411	878	62.2%	501	57.1	11	40.0
12	1,332	851	63.9%	517	60.8	12	50.3
Number That Tried Cigarettes (37%) 5,411 Number That Continue to Smoke Today (54%) 2,962							

The number of cigarettes smoked each day rose from 2.0 for males in fourth grade to 8.0 in 12th grade and from 1.1 for females in fourth grade to 7.0 in 12th grade (Table 3).

Grade	Male	Female
4	2.0	1.1
5	1.5	1.0
6	2.5	2.1
7	3.4	3.3
8	3.7	3.7
9	6.1	4.9
10	6.2	6.0
11	8.0	6.1
12	8.0	7.0

Almost half of the survey respondents who smoke are consuming 1 to 5 cigarettes each day, and another 25 percent are consuming 6 to 10 cigarettes each day (Table 4).

Number of Cigarettes	Percentage of Respondents
1-5	47.4%
6-10	25.1%
11-15	10.3%
16-20	12.3%
21-30	2.7%
31-40	1.3%
>40	0.9%

The most common sources of access to cigarettes in Northeastern Pennsylvania are other individuals, convenience stores and vending machines in grades four, five and six. In middle school years, other individuals, vending machines and convenience stores are important access areas. In high school, convenience stores, vending machines and other individuals increase in importance as the major sources of cigarette purchase. The use of vending machine by children to access cigarettes rises from 7.2 percent in fourth grade to 38 percent by children in twelfth grade. The percent of children acquiring cigarettes from grocery stores rises from 5.6 percent in fourth grade to 53.9 percent in twelfth grade. Children as early as fourth grade (9.6 percent) are purchasing cigarettes in convenience stores and this figure rises to 68.8 percent by twelfth grade. In Northeastern Pennsylvania 23.6 percent of the children are acquiring cigarettes from someone else in fourth grade and that figure rises to 40.2 percent by seventh grade and drops to 18.1 percent by their final year in high school. According to this survey, requests for proof of age from local grocery and convenience store clerks occurs only 20 percent of the time when children attempt to purchase cigarettes even at the age of ten (Table 5).

Table 5

Sources for Cigarettes in Northeastern Pennsylvania										
Grade	4	5	6	7	8	9	10	11	12	Total
Number Students	1,561	1,666	1,829	1,796	1,783	1,634	1,511	1,411	1,332	14,523
Percent Smokers	8.1%	11.4%	16.5%	31.5%	42.8%	54.3%	56.1%	62.2%	63.7%	37.3%
Number Smokers	126	190	301	566	764	887	848	878	851	5,411
Vending Machines	7.2%	7.4%	15.7%	20.1%	25.4%	34.8%	38.2%	38.1%	38.0%	31.3%
Grocery Stores	5.6%	6.3%	9.0%	14.9%	22.8%	27.2% ⁵	31.4%	43.1%	53.9%	30.6%
Convenience Stores	9.6%	13.2%	16.1%	21.4%	33.0%	43.2%	47.1%	58.0%	68.8%	43.1%
Someone Else Buys	23.6%	31.6%	31.4%	40.2%	39.0%	33.4%	32.1%	24.3%	18.1%	30.4%
No Answer	54.0%	41.5%	27.8%	3.4%	0%	0%	0%	0%	0%	14.5%
Proof of Age Required	22.1%	24.7%	26.4%	23.9%	20.7%	22.3%	20.9%	18.5%	21.5%	21.9%

DISCUSSION

The results of this study demonstrate that a significant percentage of children (37.3 percent) in Northeastern Pennsylvania begin using cigarettes at a very early age and that of these children that experiment with cigarettes (54%) continue to smoke as they grow older. This represents over twenty percent of the children grades four through twelve in this large sample who are currently smoking cigarettes. The majority of the smokers use more cigarettes each year, and according to this study the majority do not want to quit smoking. The other serious problem uncovered by this study is that even very young children in Northeastern Pennsylvania can access cigarettes quite easily and are very rarely asked for proof of age when they purchase cigarettes.

Although the survey results indicate that a significant number of children smoke, the community's perception of this fact seems distorted. A paradox seems to have developed around certain high-risk health behaviors practiced by children: community leaders and parents are probably aware of the problems associated with alcohol and drug use among children, but not of those associated with smoking, which may explain why, according the CDC (1990), the illegal sale of cigarettes to children is many times greater than the sale of alcohol or drugs to children. Retailers, parents and the general public either are unaware of the dangers of cigarettes or do not believe the mounting scientific evidence.

The paradox is reinforced by public policy that treats cigarette access and alcohol access by minors differently. In most states buying alcohol for someone under twenty-one is a felony, while buying cigarettes for a minor is only a misdemeanor. The fine for a first offense in selling cigarettes to a minor in Pennsylvania is \$25, and the second offense is \$100, but the law is rarely enforced. The fine for selling alcohol to someone under twenty-one is \$1,000 for the first offense and \$2,500 for the second. The disparity in these laws sends the wrong message to children, retailers and the community about the seriousness of tobacco use by children.

Cigarette smoking presents a set of problems for ethical and public policy considerations. Among them are the physical harm done to smokers, the psychological harm of an addiction, emotional and economic losses to the families, and the burdens on the health care system. On a superficial level the claim may be made that the mature adult is at liberty to weigh harms and benefits and make choices, even those choices others might consider harmful. The status of adulthood confers such rights as autonomy and informed consent. Public policy that interferes with choice is considered an invasion of the right to privacy; contrary ethical assessments are considered intrusive.

Smoking on the part of children does not allow for such libertarian analysis. Children, especially adolescents, represent a particular high risk population. Children and adolescents have neither the knowledge nor the rectitude to make good decisions. Children and adolescents are, by virtue of their immaturity, vulnerable and dependent. This vulnerability requires that they be protected from harm including the harm of cigarette smoking. Hence, paternalism on the part of those responsible for children and adolescents is the appropriate ethical perspective to serve and direct the good of children. Those responsible for the good of children are in the first instance their parents and following their parents, educators and public policy makers.

The exercise of paternalism in regard to the problem of smoking by children is appropriate in five distinct areas: (1) the use of cigarettes by children, (2) the access to cigarettes by children, (3) the manufacture of a product harmful to children, (4) the advertising of cigarettes, and (5) the addition of addictive agents to cigarettes. Areas (1) and (2) focus on children and those responsible for the good of children. Areas (3), (4), and (5) focus on the manufacturers of cigarettes and their obligations to children. The following analysis will locate some of the ethical principles which are operative in each of those areas. While the central ethical principles are respect for human dignity and care owed to vulnerable populations there are more specific principles which are operative in each.

In regard to the first, the use of cigarettes by children, the most significant ethical principle that appears to be violated is the principle of non maleficence, namely, do no harm. Cigarette smoking poses potential harm for children in several ways. The first harm, which has been adequately scientifically substantiated, is cigarette smoking is harmful to their physical health. The risks of cancer and disease of the circulatory system are real. Children, and more especially adolescents because of their tendency to risk taking, are not appropriately situated to make informed judgments about cigarette smoking. They do not and cannot have sufficient scientific knowledge about the connection between cigarettes and disease. Their assessment of themselves as invulnerable, only other people and older people become sick and die, biases their judgment. Furthermore, they do not have the tools to appropriately process the information even when that information is in their possession that in have not yet integrated their rational capacities with their desires which appear to press for immediate gratification. The second potential harm for children lies in the addictive effect of cigarette smoking. There is a substantial body of evidence to support the claim that there is an addictive agent deliberately added to cigarettes that "hooks" children. The third potential harm to children is the possibility that the use of cigarettes as a first high risk behavior disposes them toward other high risks behaviors such as inappropriate alcohol consumption, inappropriate sexual behavior,

and inappropriate drug use. The ethical imperative that arises here is that parents, educators, and public policy makers ought to use whatever means are appropriate to their station to prevent smoking on the part of children. The fact that children have easy access to cigarettes is also problematic from an ethical perspective. This easy access is provided by adults who should be protective of the vulnerability of children. To allow the continuance of ease of access to cigarettes by children is to violate the fiduciary obligation, an ordinary obligation, that the mature members of the community owe to those who are dependent.

The activities engaged in by cigarette manufacturers, namely, (3) the manufacture of a potentially lethal product, (4) seductive advertising of the product, and (5) the addition of an addictive agent to the product should also be subject to careful ethical scrutiny. In assessing these activities a distinction must be made between wrongdoing and culpability. The presence of wrongdoing does not imply culpability. And it is culpability that needs to be fixed before guilt, in the ethical sense, can be assessed. The distinction between wrongdoing and culpability is appropriate and useful. An action is wrong if someone is hurt by an action. One is culpable for an action that is wrong if one is blameworthy for that action. One is blameworthy if ethical principles, rules of professional conduct, or governmental policies are violated (ACHRE, 208-212). Rules of professional conduct and governmental policies are specific and concrete. While the principles of ethics are not as specific and concrete, there are certain ethical principles that have universal acceptance at least as general principles. Some that are applicable here are (1) do good, (2) do no harm, (3) tell the truth, (4) do not deceive, (5) be just, and (6) treat persons as ends. This last recognizes the intrinsic worth of human beings which requires that (a) autonomy be respected and (b) informed consent be required. Culpability can be mitigated for a variety of reasons. Among them are (1) factual ignorance, (2) lack of evidence, (3) presence of conflicting obligations, (4) culturally induced moral ignorance, (5) an evolution in the delineation of moral principles, and (6) indeterminacy in an organization's division of labor and assignment of responsibility (ACHRE, 214221).

In the past, it may have possible for cigarette manufacturers to excuse themselves from culpability in regard to the harm of cigarette smoking and the danger of addiction to cigarettes with a claim of factual ignorance and lack of evidence. Conflicting obligations such as maintaining an important local and national industry might have, in the past, offered, some relief from blameworthiness. This is not the case in the present. Cigarette manufactures must now assume the blame for manufacturing and distributing a potentially harmful and addictive product and, in the case of children, of advertising it in such a way as to draw children into its use. The general ethical principles, (1) do good, (2) do no harm, (3) tell the truth, (4) do not deceive, (5) be just, and (6) treat persons as ends, which have universal acceptance are all violated in the advertisement and distribution of cigarettes to children.

Federal law enacted in 1992 (the Synar Amendment) makes it mandatory for states that receive federal funds for prevention and treatment of substance abuse to have and enforce laws which prohibit the sale of cigarettes to children under 18 years of age. The sale of cigarettes to minors is illegal in every state in this country, yet the CDC estimates that minors purchase over one billion packs of cigarettes each year.

On August 23, 1996, President Clinton announced the Nation's new program to protect children from nicotine addiction. The first provision of this new initiative was a rule being enforced by the Food and Drug Administration making 18 the age for the purchase of tobacco products nationwide and requiring a photo ID for anyone under 27 attempting to purchase cigarettes. Stronger regulations are critical in stopping children from gaining access to tobacco products. Education geared toward the prevention of

smoking is crucial, but it is necessary immediately to curb children's access to cigarettes. According to CDC (1996) the reduction of cigarette sales to children is the most effective measure for reducing the prevalence of tobacco use.

The CDC (1989) found that the public supports strict laws to prevent children's access to tobacco products. It was found by Cummings and Coogan (1992) that if laws governing the access of minors to tobacco are enforced there will be a dramatic decrease in the number of young children beginning the smoking habit. Therefore, in the long-term, repetitive educational programs about the dangers of cigarette smoking need to become the norm in all school districts. Short-term strategies need to include changes in public policy to reduce children's access to cigarettes.

According to Cummings, Coppola and Pechacek (1995), publicity and penalties, coupled with visible enforcement efforts, can be components in reducing children's access to tobacco products. An example of strong public enforcement of anti-smoking legislation is found in a new law in California. On September 28, 1994 California passed the Stop Tobacco Access to Kids (STAKE ACT). The penalties of selling cigarettes to minors were increased to \$200 to \$6,000 depending on the number of offenses in a five-year period. As of December 1996, fines totaling \$65,550 have been collected, and the percentage of retailers asking for age identification has increased dramatically in California. This law demonstrates that strong public policy aimed at preventing access to cigarettes by children does work.

In order to reduce cigarette use by society we must concentrate on preventing cigarette experimentation by the young. Because both short- and long-term strategies are necessary to reduce both the use and access to cigarettes by children there needs to be education and policy aimed at the prevention of this high-risk health behavior. The following recommendations should be considered:

SHORT - TERM STRATEGIES

1. There needs to be a licensing system which requires merchants who wish to sell tobacco products to obtain a State license to sell these products. One of the requirements to obtain this license would be attendance at an educational program concerning the dangers of nicotine and the nicotine addiction process in children. The licensing fee could be used to fund additional community educational programs.
2. Pennsylvania needs to treat the purchase of cigarettes by minors and sale of cigarettes to minors the same as purchase or sale of alcohol and to make purchase and sale criminal offenses. Pennsylvania needs to follow the lead of the STAKE amendment passed in the state of California. License retailer, require mandatory education about the danger of children smoking and emphasize the penalty associated with the sale of cigarettes to minors. Fines and age requirements for the sale of tobacco and alcohol should be identical.

3. Other communities need to survey their children in order to determine the extent of tobacco use in their communities. The results can then be used to unite the community in a concerted effort to prevent the problem of access by children.

4. Vending machine sales and self-service displays of cigarettes need to be banned.

LONG-TERM STRATEGIES

1. Public education campaigns about the dangers of nicotine addiction need to be expanded to counteract the advertising campaign that is being run by tobacco companies. Parents need to express strong disapproval of tobacco to their children, especially during the pre-adolescent phase of their development. These tobacco prevention programs need to become part of established drug prevention programs in school districts but must begin in the elementary grades. The school, parent and media must be part of this multiple intervention campaign.

2. Schools need to expand their educational campaigns about the dangers of using tobacco products.

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BROKEN PROMISES: WHEN SHOULD AN INDIVIDUAL BE ABLE TO DECLARE BANKRUPTCY?

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ABSTRACT

When should an individual be able to declare bankruptcy? Congress, through its creation of the National Bankruptcy Review Commission and subsequent bills pending has decided to reexamine that issue. Bankruptcy filings are at an all time high. According to the American Bankruptcy Institute, bankruptcy filings for calendar year 1997 increased by 19.1 percent to a record high of 1,404,145 filings, compared to 1,178,555 in 1996.¹ With a robust economy and low unemployment and interest rates, why are record numbers of Americans choosing bankruptcy? Should limits be placed on who can file bankruptcy and what is disturbing about this information? Or is the furor over the record number of bankruptcies an overreaction--a claim that "the sky is falling?" after an acorn fell on the chicken's head?

INTRODUCTION

A Midwest town council was in session during an earthquake one year. When the shock hit, everyone rushed out of the building. According to an item in Party Line, publication of the Republican State Central Committee, the clerk later wrote in the minutes: On motion of the city hall, the council adjourned.²

In 1994, Congress created the National Bankruptcy Review Commission to review the bankruptcy laws to address the concerns that bankruptcy filings were increasing too significantly. No additional action by Congress occurred until the Commission submitted its report in October 1997³. The House rejected the Commission's report as too consumer oriented and a House version has passed which adopted a needs-based test for consumer bankruptcy petition. The House was concerned that the bankruptcy petitions filed in

1997 resulted in erasure of an estimated \$40 billion in consumer debt and that the losses passed on to every consumer were \$400 for every American household.⁴ The House members were concerned that consumers in the United States used to have a sense of responsibility for repayment of debts and that now individuals do not feel a sense of responsibility or incur no disgrace or embarrassment at filing bankruptcy. Creditors were eventually paid one way or another. According to Representative Gerkas:

Harry S. Truman. . .spent the better part of the 1920s in debt due to the collapse of his clothing business in 1922. Truman was both a man and a President of the highest moral character with a tremendous sense of responsibility, which was reflected in the motto that sat on his desk in the Oval office-- 'The buck stops here.' Truman eventually paid off all of his creditors by working out deals and payment schedules, thereby keeping himself out of bankruptcy court and ensuring that he lived up to bills he amassed.⁵ The members of the House who spoke in support of the bill echoed the sentiments presented by Representative Gerkas. The concern is that United States consumers have a decreased sense of responsibility for their debts and feel no obligation to repay debts they have incurred.

Representative Gerkas illustrated his point by pointing to examples of bankruptcy filings by individuals who would not be considered to be destitute. Representative Gerkas noted that bankruptcy became viewed more as a financial planning tool, government debt forgiveness program, and a first choice, rather than a last resort. Representative Gerkas stated that "bankruptcy has even become fashionable" and that Willie Nelson, Burt Reynolds, Kim Basinger, M.C. Hammer, former Baseball Commissioner Bowie Kuhn, Arizona Governor Fife Symington, former Philadelphia Eagles owner and Pennsylvania trucking magnate Leonard Tose and Grammy Award winning singer Toni Braxton have declared bankruptcy.

The House version made nondischargeable any credit card bill incurred within 90 days of a bankruptcy filing, putting creditors in competition with child support and alimony payments which have been nondischargeable for most of this century. The House bill created a needs-based test based on the income of the debtor filing bankruptcy. An individual whose income is below the median family income would be permitted to file a Chapter 7 without question. An individual whose income was above the median would have to file a Chapter 13 or 7, depending on other expenses. Under the House version, an individual would be required to file a Chapter 13 petition if certain conditions were met. If the individual had more than \$50 per month after taking monthly gross income and subtracting secured credit payments, child support and living expenses as calculated by the IRS and could still pay 20% of the unsecured debt within five years, then the individual must file a Chapter 13. The purpose of the proposed bill, as noted by various Representatives, was to hold individuals responsible for repaying their debts and to reduce the cost of bankruptcy borne by those individuals who do pay their debts.

The House bill contained other provisions designed to make it more difficult to commit fraud when filing bankruptcy. The Bill proposed random audits of bankruptcy schedules submitted by debtors and claims filed by creditors. The bill proposed a study of bankruptcy petitions to obtain clearer statistical information on the profile of the individuals filing bankruptcy. However, the key provisions of the legislation would make it harder to seek bankruptcy protection from creditors, particularly for those who appear able to pay their debts.

Opponents claim the legislation would unfairly oppress many people lured into burdensome debt. This point of view was represented by the Senate's actions. The Senate debate focussed on the role of credit card companies in the burgeoning debt. The Senate thus rejected the key provision of the House bill and proposed that the decision to file a Chapter 13 instead of Chapter 7 rest with the judge in individual cases, not mandated by Congress. Senator Feinstein noted that the typical family filing bankruptcy in 1997 owed more than 150% of its annual income in short-term, high interest debt.⁶ Senator Feinstein said that various studies linked the rise of personal bankruptcies directly to the rise in consumer debt. According to Senator Feinstein, there are over a billion credit cards in circulate and that three quarters of all households have at least one credit card and carry credit card debt from month to month.

She also noted that credit card usage among lower income families has almost doubled. Senator Feinstein indicated that total credit card profitability has risen at the same time the number of bankruptcies has increased. For example, in the third quarter of 1997, credit card banks showed a 2.59% return on assets compared to a 1.22% return on assets reported by all commercial banks. Further, credit card issuers earned approximately 75% of their revenues from the interest paid by borrowers who do not pay in full each month.

The Senate's conclusion as demonstrated by its rejection of the needs-based bankruptcy test was that the credit card issuers engaged in practices which resulted in the increase bankruptcy filings and that discharge decisions should be left to the discretion of bankruptcy judges.

The National Bankruptcy Review Commission appointed by Congress studied current law and practice for two years. Five of its nine members found no major abuses of the bankruptcy system and only two recommended proposals like those being considered by the House.⁷ Credit-industry- supported studies suggest last year that \$4 billion in discharged debts could have been repaid and estimated that all bankruptcies cost the economy \$44 billion. Further studies estimate that debtors who pay their debts pay an additional \$400 per year because of the bankruptcies. Those studies do not discuss any positive economic aspects of the bankruptcy system, such as moving property into more productive hands and providing a rational way for those with unmanageable debt to seek relief without becoming destitute or wards of the state.

“Who is ‘at fault’ for the rise in consumer bankruptcies?”⁸ The National Bankruptcy Review Commission could not decide. The Commission concluded that there is a correlation between consumer debt and consumer bankruptcy but could not determine why. Interestingly, however, the Commission concluded that the profile of consumers who file bankruptcy today is similar to the profile of

those who filed earlier. The Commission noted that the average bankruptcy family in 1981 had short-term, non-mortgage debt that was twice their total yearly income. Studies of average bankrupt families in 1997 reveal a similar proportion of debt to income.⁹ The Commission referred to several media and finance industry analyses of the factors that affect bankruptcy filings. These analyses referred to state garnishment laws, gambling, loss of medical insurance, rate of divorce, whether the legal system encourages or discourages bankruptcy, reduced stigma toward filing bankruptcy, changing credit practices, and the changing debt picture of consumers as contributing to the increase in bankruptcy filings.¹⁰

PROMISE-KEEPING

A key principle underlying creditor-debtor relationships is promise keeping. The House debate demonstrated concern that individual consumers who borrowed money based on promises to repay the debt were not keeping those promises. The reference to President Truman showed that the obligation to keep promises was an important quality which, the House believed, was not followed by those consumers who declare bankruptcy but who could repay at least twenty percent of their debt. Promise keeping has been analyzed here from a Kantian, utilitarian and justice perspective.

Immanuel Kant's key moral principle is the concept of a good will.¹¹ The good will exists beyond intelligence, power, wealth, and happiness. Although intelligence, power, wealth and happiness can be evidence of a good will, these qualities are not intrinsically good will because they can be perverted. The good will is pure and incorruptible. It is the good "character" which helps determine whether someone's actions are moral or not. Duty is the objective manifestation of good will and an action is moral if it is done because of this duty, regardless of the consequences. Kant's analysis then includes a determination that when an individual acts from principle that individual is acting because of a duty and has thus acted morally regardless of the consequences of that action. The ultimate good is the individual's decision to act consistently with the principles that help to obtain the ultimate goal, a good will, which is valuable in and of itself. This analysis leads to one of the key maxims of Kant's philosophy--the categorical imperative. The categorical imperative is that "I must act in such a way that I can at the same time will that my maxim should become a universal law."¹² It is here that Kant analyzes the principle of promise keeping and determines that it is immoral to make a promise one has no intention of keeping. To do so would render an individual's promises meaningless--no one would believe that the individual was trustworthy and as a universal law, society could not function were everyone to make promises he or she had no intention of keeping. Instead, one's duty, in order to have a good will, is to keep promises made, regardless of the consequences in an individual situation.

Based on this brief summary of Kant's philosophy, a follower of Kant would determine that failure of a creditor or a debtor to honor the promises made as part of the credit agreement would be immoral conduct. The refusal to honor such promises would be

immoral conduct under the categorical imperative. Under the categorical imperative the question would be whether **refusing** to honor promises made as part of a credit agreement should have the force of universal law applying to everyone. So a Kantian would determine whether society could function efficiently if every individual who made a promise could refuse to honor it. Under Kant's reasoning, the answer would be no, because the effect would be to have a society where individuals would not be able to rely on promises because promises would be meaningless.

If refusing to honor one's promises were a universal principle, business transactions would be impossible without requiring collateral for every transaction. Even then, there could be a problem if the collateral was not delivered as promised. Further, even if the collateral were not delivered as promised or if the arrangement to transfer the collateral were reneged upon, then that would be acceptable in this society where promises were made to be broken. Similarly, the individual seeking the loan could not rely on the promise of the creditor that upon delivery of the collateral, the loan would be made on the terms specified. Now, to some extent, if a creditor continued to refuse to honor promises, there could be some repercussions in society that might discourage the creditor from continuing that practice. For example, other prospective borrowers might not seek obtain loans from that creditor and that creditor's business might eventually fail. However, the basic problem, under this Kantian analysis, is that a society filled with individuals making meaningless promises for personal and business transactions would not be an effective or efficient society. Thus the principle of refusing to honor promises made could not be universalized. False promise making cannot be a principle of universal law and the creditor and debtor must honor their promises. Honoring one's promises because one has a duty to do so and not for any other reason would be considered moral conduct.

Utilitarian philosophy requires analyzing an action or a principle to determine whether that action maximizes the good for society. Jeremy Bentham and his student John Stuart Mill, defined the principle of utility as relating to the issue of maximizing the pleasure or good for the individual and thus for society.¹³ The principle of utility focuses on determining whether an action is moral or right based on the consequences in terms of the maximization of good. As Bentham noted, "By utility is meant that property in any object, whereby it tends to produce benefit, advantage, pleasure, good or happiness . . . or . . . to prevent the happening of mischief, pain, evil or unhappiness to the party whose interest is considered: if that party be the community in general, then the happiness of the community; if a particular individual, then the happiness of that individual."¹⁴ Bentham defines the community as the sum of the interests of the individuals who make up the community. Thus, it is the interest of the individual that becomes the key to determining whether an action is morally right or not. Under this philosophy, actions or concepts that will bring pleasure may be instrumentally good, i.e. because they help to accomplish the ultimate good--pleasure. There are no true intrinsic goods except the maximization of happiness.

This philosophy has frequently been incorporated as part of the study of business ethics, where the morality of an action is to be determined by whether it accomplishes the best interests of the corporation (individual) or the society. One key difference between this philosophy and Kantian philosophy is that the focus in utilitarian philosophy is upon consequences of each action whereas the focus in Kantian philosophy is upon the good will or duty despite the consequences of an individual action.¹⁵ There is no universal law or principle that must be followed. Each law or principle must be evaluated to determine whether it results in maximization of good. Thus, the issue of promise keeping arises. Generally, as noted in the discussion of Kant's philosophy, promise keeping serves to permit society to function in that there is trust and integrity of individuals and entities. In the context of this paper, the question is whether the greatest good is accomplished by adopting a rule that permits individuals to declare bankruptcy and thus break their promises.

Under a utilitarian analysis, the question would be which of several actions would result in the most net good. The task here is to identify the good and bad consequences of each of the alternative, figure out the net good of each and select the alternative which results in the most net good (or least net bad) for society. To simplify this analysis, two alternatives will be examined: (1) promises made in a creditor-debtor relationship cannot be broken and (2) promises made in a creditor-debtor relationship may be broken if the debtor is unable to pay the debt.¹⁶

What are the good consequences of adopting a principle that promises made in a creditor-debtor relationship cannot be broken?

One apparent good consequence is that a debtor (or creditor) may depend on the promises of the other because of the binding nature of those promises. A creditor who extends credit can be assured (in as much as is possible) that the debtor will repay the loan as agreed. Theoretically, therefore, the creditor can be assured that he or she will have use of that money as it is repaid and can plan affairs based on the assurance of repayment. A debtor who has repaid as agreed can also be sure that this creditor or others will be likely to make credit available to that debtor as the debtor wants or needs (assuming that the debtor and/or creditor make a realistic assessment of his or her ability). The House debate reflected the concern that one consequence of repaying debts is that an individual will be viewed as honorable and moral. Further, individuals who have repaid their debts on time will not be obligated to bear the costs (noted as \$400 per households) of those who default.

On a societal level, extension of credit helps the economy in that individuals who do not have the funds to make immediate purchases can obtain credit to make those purchases.¹⁷ For example, because of credit availability, consumers may buy cars and durable goods and invest in education. Production of those goods and services then provides jobs and keeps the economy growing. It permits individuals to improve their lifestyles and provide more for themselves, their families and friends than they might otherwise be able to if there was no credit available. Creditors would also be obligated to continue extending credit to those individuals who had paid according to the terms of the credit agreement. Debtors who paid their balances in full could not be removed from the credit

roles, unless, of course, the agreement so provided. A blanket rule would prohibit consumer bankruptcy filings and thus reduce judicial and legislative involvement in this private transaction between a creditor and debtor. Individuals bent on trying to obtain credit with no intention of attempting to repay would be obligated to pay the debt. Thus the likelihood of successfully defrauding of a creditor would be reduced.

What are the bad consequences of adopting a principle that promises made in a creditor-debtor relationship cannot be broken? One negative consequence is that individuals who had honestly incurred debts but who, due to circumstances beyond their control, could not pay the debt would continue to be forever obligated to pay the debt. An individual who had obtained credit, then subsequently became ill and could not work would continue to be obligated to pay the debt. Similarly, an individual who incurred uninsured medical expenses for himself or a family member would continue to be forever obligated to pay. Another negative consequence is that an unscrupulous creditor would have no disincentive to discourage debtors from “getting in over their heads.” Although there is an issue here of individual responsibility which will be addressed later, the creditor who could “trick” a consumer into entering into a credit arrangement would be able to hold the debtor liable (unless there was an exception made for fraud). At this point, a utilitarian would have to weigh the good and bad consequences of obligating the parties to the promises made in the creditor-debtor relationship and arrive at a “net good” amount for this alternative. This analysis as applied to the House bill must be tempered by the definition of who would actually be able to declare bankruptcy. Under the House version, those who were at poverty level would continue to be able to declare bankruptcy. Only those who were above poverty level, or whose median income had reached a certain level, would have to repay a portion of the debts rather than filing a Chapter 7.

A similar analysis of the second alternative must occur in order to perform a valid utilitarian analysis. This second alternative is that promises made in a creditor-debtor relationship may be broken if the debtor is unable to pay the debt. In reviewing this alternative the key issue is defining when a debtor is unable to pay a debt. The bankruptcy laws evidence a public policy determination of what constitutes an inability to pay. The Bankruptcy Commission concluded that inability to pay is not determined by whether the consumer has future income with which to pay the debt but whether the debtor is so “troubled” that bankruptcy is the only alternative.¹⁸ Whether the debtor is so troubled is determined by a bankruptcy judge’s determination based on the individual debtor’s circumstances. Defining inability to pay using a “means” test of examining whether the debtor has sufficient future income to pay the debts is the test advocated by the banking industry and embodied in the bill passed by the house. As noted earlier, the House proposed a means test that is determined by the debtor’s median income and amount of disposable income left after payment of secured debts and child support. The House debate reflected a concern that to the extent that the debt is due to choices made by a debtor to “live beyond his or her means, “ or to “keep up with the Joneses” the obligation to fulfill the promises made to the creditor should continue. To prevent disregard of the creditor’s interests, inability to pay should include some analysis of whether the debtor

has additional means by which to pay the debt. To prevent disregard of the debtor's interests, there should be some consideration of the causes of the debt. To the extent that the debt is due to circumstances beyond the debtor's control (illness, medical expenses and divorce) then the obligation to keep the promise could be abrogated. Assuming that this alternative applies to the situation where the debtor is unable to pay, what would be the good and bad consequences of such an alternative?

There are several good consequences of a rule permitting debtors to break promises when they are unable to pay debts due to circumstances beyond their control. Debtors who make promises are, on the whole, obligated to pay their debts. The good consequences outlined in the first alternative, i.e. a debtor (or creditor) may depend on the promises of the other; a creditor who extends credit can be assured that the debtor will repay the loan and that the creditor would have use of that money would apply. A debtor who has repaid as agreed could be sure that credit could be obtained, the economy would be helped, production of goods and services would continue, and most individuals could improve their lifestyles. In addition, those who experienced serious changes in their circumstances could discharge their debt and not unduly burden society. If they could not discharge that debt, they might be a burden to society while they tried to repay the debt.

Part of determining the extent to which a non-promise-keeping debtor would be a burden to society is whether the debtor would be allowed to keep any property or assets. If the debtor was allowed to exclude all life insurance (and could thus convert all his or her assets to life insurance policies) then the debtor may not be a burden to society. This is because the debtor could either obtain a loan or cash in the policy once the bankruptcy proceeding was completed. If the debtor were allowed to keep the tools of the trade, then similarly, the debtor would be less of a burden to society. If, on the other hand, the debtor were stripped of all assets, then the debtor would probably be more of a burden to society, especially if substantially all the debtor's future income was also committed to pay the creditors.

The Bankruptcy Review Commission recommendations include several points that relate to determining what the debtor should be able to retain in order to qualify as being "unable to pay debts." The debtor would be able to exempt equity in a residence between \$20,000 and \$100,000 depending on the state or \$20,000 in any form plus \$15,000 if the debtor had no residence. The debtor may exempt medical devices and health aids, certain benefits (e.g. social security) and crime victim's reparations and personal injury reparations.¹⁹ The proposed policy reflects an effort to reduce the likelihood that an individual who has declared bankruptcy would be unable to provide for him or her. In addition, the commission tried to address the "fairness" issue of different exemptions depending on location by recommending blanket exemptions with the exception of providing flexibility for states to determine the value of the homestead exemption.²⁰

What are some negative consequences of permitting debtors to break their promises to repay debts because of an inability to pay? One negative consequence might be the reduction of credit availability for that individual and possibly for others similarly

situated. Another would be that the creditor couldn't be completely assured that a debt would be paid as agreed. This in turn might negatively impact the economy because consumers might not be able to make purchases. Debtors who had not defaulted would have to pay the debts for those who had defaulted. That was a point brought up several times during the House debate. Some debtors who began experiencing problems might defraud creditors by "loading up" their credit card and other debt prior to declaring bankruptcy. The House bill addressed this by declaring nondischargeable all credit card debt incurred within 90 days of filing the bankruptcy petition. The debtors might also attempt to defraud creditors by hiding assets or converting assets to exempt form.²¹ The Commission addressed this issue by requiring attorney certification of the accuracy of the petition and imposing penalties for filing false claims. Both the House and Senate bills proposals seek to discourage such filings using similar methods.

To fully evaluate the negative and positive consequences of this perspective, defining "inability to pay" is critical. The majority of the members of the Bankruptcy Commission had determined that there were not significant numbers of individuals abusing the bankruptcy laws. Members of the house disagreed. For example, Senator McInnis (R. Co.) referred to a study by Ernst & Young that showed that 15 percent of those who filed for a discharge of their debts under Chapter 7 could have repaid 64 percent of their unsecured debts. At the same time, Senator McInnis noted that those who ran into unintended consequences should have a chance to declare bankruptcy. To do a more complete utilitarian analysis, there should be more data about the causes of bankruptcy and the profile of those who file bankruptcy.

One difficulty with the utilitarian analysis is measuring the value of each net good and bad consequence. While some are measurable in dollars (e.g. the amount of money non-bankrupt debtors must pay for those who declare bankruptcy), others are not quantifiable. But in order to apply utilitarian philosophy properly, some unit of measurement must be devised and applied to each consequence to determine which alternative results in the most net good or the least net bad. Public policy supports the second alternative that of permitting promises to be broken because of an inability to pay. To that extent, then, public policy is consistent with utilitarian philosophy. However, the disagreement is in what circumstances the debtor is unable to pay. The House as a body determined that there should be a means test for determining whether a debtor is able to pay.

FREEDOM OF CHOICE AND FAIRNESS—WHERE DOES THE BUCK STOP?

If only bankers didn't send the solicitations for pre-approved credit cards to consumers. That's the cause of the rise in the number of bankruptcy filings. If only consumers would refuse to apply for credit cards if they are getting in over their heads. Consumers should assess whether they have enough money to pay off additional credit card debt and if they don't, they shouldn't incur

that debt. This is unfair to the consumers who do pay their debt, because the cost of defaults is borne by the consumers who do pay. So what is fair?

Simply put, distributive justice theory involves determining whether the burdens and benefits of society are distributed equitably. What are the benefits of a financial system that permits easy access to credit cards? Some of those benefits have been noted earlier, in the section on utilitarian analysis. Easier access to credit permits consumers to purchase now based on future buying power. And the more purchases that are made, the more jobs are made available to produce those products or services.

The Bankruptcy Commission concluded that there were only a relatively few individuals using the bankruptcy system in a way that was fraudulent. The Commission reviewed the profiles of individuals who have filed bankruptcy and noted that studies indicated that those individuals were in similar financial straits as those who filed in 1980. Senator McNinnis focussed on fairness or justice in arguing that the House version of bankruptcy reform should be adopted.²² In the House debate on its bankruptcy bill, Senator McNinnis argued that there was a need for reform of the bankruptcy laws because of “bankruptcies of convenience.” The Senator noted the increase in the number of bankruptcy filings and stated that a new bankruptcy policy was needed to prevent people who are financial capable of paying their debts from discharging those debts in bankruptcy. He noted that the costs of bankruptcy include higher prices, increased credit card rates and interest rate increases. He noted that it was unfair that “people who do pay their bills have to carry the load for those who do not pay their bills.”

Both debtors and the credit card industry bear a measure of responsibility in this debate. Restrictions on the industry and its massive mailings coupled with limits on bankruptcy filings are required to restore fairness to the system. Certainly if companies issue credit without verifying income, without verifying whether other credit liabilities are too high and without verifying whether the applicant has any income, then those companies should bear the risk of those practices. Similarly, if these companies find such practices so profitable that they can afford to pass along the losses to consumers, then they should continue to bear the costs (as they bear the benefits) of the increased extensions of credit. At a minimum, companies should verify the income of the applicants and clearly and conspicuously disclose all the terms of the credit cards they are issuing.

When Congress reconvenes in January 1999, it will work on reconciling the differences between the House and Senate bills. The compromise should reflect responsibilities of the debtor and the creditor.

ENDNOTES

- 1 American Bankruptcy Institute, “Bankruptcies Increased by 19 Percent in 1997 to a Record High of 1.4 Million Filings” ABI Press Release Mar 2, 1998 <http://www.abiworld.org/stats/4thqtr97pr.html>.
- 2 Reader's Digest, THE READER'S DIGEST TREASURY OF AMERICAN HUMOR, (Reader's Digest Press 1972) p. 223
- 3 See, e.g. “Recommendations from the National Bankruptcy Review Commission Final Report” ABI, Legislative Bulletin NOV 4, 1997, vol. VI, No. 2, <http://www.abiworld.org/legis/bulletins/97nov4.html>; “House Passes Chamber-Backed Bankruptcy Reform Bill, US. Chamber of Commerce News, 6/11/98, <http://www.uschamber.org/media/press%20releases/June/061198.htm>.
- 4 See Honorable House Representative George W. Gerkas, February 4, 1998, Introduction of H.R. 3150 Congressional Record at E87 <http://thomas.loc.gov/cgi-bin>
- 5 Id at E88.
- 6 consumer Bankruptcy Reform Act of 1998, September 23, 1998, Introduction of S.R. 1301 Congressional Record S10744 et. seq.
- 7 Consumer Bankruptcy Reform Act of 1998, September 23, 1998, Introduction of S.R. 1301 Congressional Record S10744 et. seq.
- 8 National Bankruptcy Review Commission Report at 82
- 9 Id at 83
- 10 Id at 86-94
- 11 Gordon H. Clark & T.V. Smith (ed.), READINGS IN ETHICS (2d ed. 1931) 253-260
- 12 Id. at 261
- 13 Actually, Bentham focused upon the issues of pain and pleasure, and determined that by measuring units of pain and pleasure an individual could and should maximize the pleasure and minimize the pain. The need to maximize pleasure is a basic principle of *utility*. Mill sought to redefine pleasure

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- more explicitly (and explain the quality of pleasure) and to focus upon “universal” rather than individual pleasure as the defining character of pleasure. *Id.* at 291-310
- 14 *Id.* at 292
- 15 There is a distinction between rule utilitarianism which focuses on an analysis of the net good based on a specific principle which might be applied and act utilitarianism which focuses upon a specific act and determine how the most net good may be accomplished in a given situation. The reasoning applied in rule utilitarianism is arguably similar to that applied by Kant in determining whether a rule can be universalized or not. One distinction between rule utilitarianism and Kantian philosophy is that under Kantian philosophy once the analysis has been done, then the rule must be followed without exception and fulfilling that rule then is evidence of good will which is the ultimate moral conduct. Under rule utilitarianism, the analysis is on the consequences of adopting such a rule and the ultimate goal is to maximize good.
- 16 Note that the first alternative is reminiscent of the universal law concept of Kant. Many have a difficult time here distinguishing between the universal law principles of Kant and this analysis of an alternative. The key difference is that Kant uses his analysis of how society would function if such a principle becomes a universal law, and once his analysis is complete, there is no further analysis of whether the principle should be followed or not. If the principle can become a universal law, then Kant adopts that principle and from then on, one’s duty is to follow that principle. If it is rejected as a universal law, then one’s duty is to reject that principle in all situations. A utilitarian, might, however, do an analysis of this principle each time there is a situation where promise keeping is an issue, and might decide in some cases that a rule of promise keeping results in the most net bad consequences when compared to another alternative.
- 17 According to the report of the National Bankruptcy Review Commission, Americans who filed for bankruptcy have non-mortgage debt of slightly more than twice their annual income. National Bankruptcy Commission Report at 83-86
- 18 National Bankruptcy Review Commission Report at 86-94
- 19 National Bankruptcy Review Commission Report at 4, 125-142
- 20 The Report refers to several studies of the different effects of bankruptcy depending on the jurisdiction within which the bankruptcy petition was filed. Under current bankruptcy law, states had the option of opting out of the federal scheme of exemptions and setting their own exemptions. National Bankruptcy Review Commission Report at 122
- 21 The Commission also discussed the issue of “pre bankruptcy planning” as engaged in by some consumers. This involves consumers who try to shield their assets from creditors while filing bankruptcy. The Commission’s conclusion was that elimination of categories of assets and placing a maximum on the value of exempt assets minimized this type of planning. National Bankruptcy Review Commission Report at 144
- 22 House Debate, H.R. 3150 at H4343
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BMW OF NORTH AMERICA, INC. v. GORE: ETHICS GO FOR A RIDE

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ABSTRACT

On the 20th day of May, 1996, the Supreme Court of the United States dealt a blow to the professors who teach ethics as an integral part of their Business Law courses. By a five (5) to four (4) vote, the Supreme Court curtailed jury awards aimed at punishing or deterring misconduct when it struck down as 'grossly excessive' a two million dollar punitive damage award to an Alabama oncologist. Dr. Gore's suit was based upon undisclosed pre-delivery damage and repair to his BMW sports sedan. At first blush, what seems to be a punitive damage case can be used in the classroom as a case study for ethical considerations in business.

INTRODUCTION

This paper will discuss the majority opinion of the Supreme Court as well as the individual concurring and dissenting opinions. Irrespective of the reported decision, there exist numerous facts and issues that were presented and went unanswered in the record, briefs and oral argument before the Court. By sensationalizing this case, the popular press reported the case with 'sound bite' headlines. These headlines may have been read/heard by today's college students, thus flavoring and/or desensitizing the ethical issues that should be addressed by all college students prior to entering the business world of tomorrow. The case of BMW of North America, Inc. v. Gore case may be used as a means to highlight the overlapping legal/ethical considerations in a framework that is understandable, realistic and relevant to the class. This case can promote an interactive exchange of ideas on many of the unreported facts and issues that are supported by legal and ethical considerations. These discussions will prompt the class to form its own opinion on the legal and ethical issues, and to decide whether or not they are in agreement with the decision of the Supreme Court.

CASE STUDY

In January, 1990, Dr. Ira Gore, Jr. purchased a new BMW 535i sports sedan for the sum of \$40,750,88. Bayerische Motoren Werke, A.G. (BMW AG) manufactures automobiles in Germany. BMW of North America purchases newly manufactured vehicles from BMW AG, imports the cars into the United States, and prepares them for distribution and sale throughout the United States (BMW of North America, Inc. v. Ira Gore, Jr., R. 471, 530-531, 538-539). BMW of North America, Inc. is wholly-owned and directed by BMWAG. The automobile which is the subject matter of this litigation, was purchased from an authorized BMW dealer in Birmingham, Alabama (BMW of North America, Inc. v. Ira Gore, Jr., R. 278-80). When the newly manufactured vehicles arrive in the United States, the first stop is one of BMW's vehicle preparation centers (VPC). These centers are staffed by technicians that have been trained to factory standards and are stocked with the same equipment found in BMW, A.G. factories in Germany (BMW of North America, Inc. v. Ira Gore, Jr., R. 482, 483, 600-700, 735-737, 784). At the VPC, the automobiles are prepared for delivery to dealers and inspected for any transportation damage as well as any imperfections that may have been overlooked by BMW, A.G. (BMW of North America, Inc. v. Ira Gore, Jr., R. 472-474, 476, 500-531, 538-539, 646, 650-651). If the vehicle was damaged or is otherwise flawed, repair is made at the VPC (BMW of North America, Inc. v. Ira Gore, Jr., R. 474, 477, 479, 529-530, 651-653, 677, 743-744).

The damage that may be suffered by the vehicles could be dents or scratches that occur during the transatlantic voyage or by environmental conditions such as acid rain (BMW of North America, Inc. v. Ira Gore, Jr., R. 473, 474, 478-481). Refinishing takes place in a specially designed paint booth in which the paint is applied and baked until hard. The paint booth provides constant air filtration to minimize the presence of dust in the painting area. The booth contains controls for regulation of heat and humidity levels (BMW of North America, Inc. v. Ira Gore, Jr., R. 652-653, 675-676, 732-734). Numerous steps are involved in the refinishing process including a sanding process to remove imperfections in the surface of the paint without damaging the undercoating that was applied at the factory. BMW did not merely repaint the areas that had sustained damage. Entire panels that sustained damage or noticeable imperfections were painted (BMW of North America, Inc. v. Ira Gore, Jr., R. 652-653, 676-677, 719-726, 739-742, 762-763). On cross examination, the witnesses for BMW related that the factory in Germany is different from a VPC in that it is atmospherically controlled and the paint is electrostatically applied at higher temperatures. The German factory paint and the repair paint will weather differently (BMW of North America, Inc. v. Ira Gore, Jr., R. 681, 762-763).

With respect to Dr. Gore's automobile, the roof, hood, trunk and quarter panels were repainted and refinished. Nine months after purchase, the doctor learned from an auto detailing expert, Slick Finish, that BMW had repainted these areas because of acid rain (BMW of North America, Inc. v. Ira Gore, Jr., R. 356-357, 373, 526, 554). At the time of trial, Dr. Gore testified that when he went to the authorized dealer, he explained to them that he was looking for a new car, and he had seen the advertisements of BMW which claim "flawless body panels" that retain "their original luster" even after many miles of wear (BMW of North America, Inc. v. Ira Gore, Jr., R. 353-355, 360). No one at the dealership had told Dr. Gore that the motor vehicle had any paint damage, and Dr. Gore testified that he would not have bought the automobile at any price if he had known it was repainted (BMW of North America, Inc. v. Ira Gore, Jr., R. 352, 657-659, 745-746, 786-790).

Dr. Gore never contacted BMW to register a complaint about the repainting or to ask any type of compensation. The doctor immediately filed suit in the Alabama state court for fraud, suppression and breach of contract (BMW of North America, Inc. v. Ira Gore, Jr., R. 357, 375-376)

In 1983, the executive board of BMW adopted a written nationwide policy concerning cars that became damaged in the course of manufacturing or transportation. If the damage could be repaired for less than three (3%) percent of the manufacturers' suggested retail price (MSRP), the car would be sold to the dealer without disclosure of the repairs. If the damage and repair were more than 3%, the vehicle would be sold as used without any disclosure that before it was driven, it had been damaged and repaired. The various states have addressed disclosure thresholds. Twenty-two states have adopted thresholds that call for disclosure for repairs consisting of more than three (3%) percent of the Manufacturers' Suggested Retail Price. Three states require disclosure of refinishing costs less than 3% of MSRP. The remaining twenty-five states and the District of Columbia do not seem to have addressed this subject by statute and/or regulation.

Testimony elicited on behalf of Dr. Gore by the BMW Dealer that owned the dealership where the doctor purchased his car, stated that the repainting and refinishing reduced the automobile's market value by about ten (10%)percent (BMW of North America, Inc. v. Ira Gore, Jr., R. 278-280, 337). Likewise, the evidence deduced at trial identified 983 repainted cars from BMW at a cost of at least \$300 each. Alabama consumers were the purchasers of fourteen of these vehicles. In the closing argument at the time of trial, counsel for Dr. Gore requested the compensatory damages of \$4,000 which represented ten percent of the approximately \$40,000 purchase price together with punitive damages for the approximately 1000 cars BMW had repainted and/or refinished at a cost of at least \$300 and sold in the United States over a ten year period (R. 812-813). The jury awarded Dr. Gore the \$4,000 in compensatory damages and \$4-million in punitive damages.

After the verdict, BMW filed a combined Motion for Judgment Notwithstanding the Verdict, New Trial and Remittur. The trial court (Circuit Court of Jefferson County) denied all post-trial Motions. On the appeal of BMW, the Alabama Supreme Court affirmed the Judgment against BMW conditioned upon a Remittur of the punitive damages to \$2-million (BMW of North America, Inc. v. Ira Gore, Jr.). The Court reasoned that the verdict violated BMW's due process rights by punishing BMW for sales that took place entirely outside of Alabama. Dr. Gore subsequently accepted the Remittur amount in the sum of \$2-million; however, BMW then Petitioned the Supreme Court of the United States for a Writ of Certiorari.

DECISION OF THE UNITED STATES SUPREME COURT

Reasoning And Focus

Justice Stevens delivered the majority opinion of the Court and was joined by Justices O'Connor, Kennedy, Souter and Breyer. The ultimate reasoning of the Court set forth in the majority opinion as to why this matter warranted review was simply stated as follows -- "it would help to illuminate the character of the standard that will identify constitutionally excessive awards of punitive damages" (BMW of North American v. Gore, 1595). Since 1991, the Supreme Court of the United States has reviewed and

addressed cases regarding punitive damages. The Court has previously failed to set forth a consistent pattern of assessing punitive damages (TXO Production Corp. V. Alliance Resources Corp., 366). By the language of Justice Stevens, the Court, in its majority opinion is attempting to set forth a standard so as to identify constitutionally excessive awards for punitive damages.

There is no doubt whatsoever that a state, to further its legitimate interest in punishing unlawful conduct for the purpose of deterring its repetition, may properly impose punitive damages (BMW of North America, Inc. v. Gore, 1595). However, if the award is “grossly excessive” in relation to the legitimate interest of the state, then said award enters a zone of arbitrariness that is violative of the Due Process clause of the Fourteenth Amendment (BMW of North America, Inc. v. Gore, 1595). Before a Court can reach any aspect of punitive damage awards, a defendant must have fair notice and warning of the conduct that will subject one to punishment as well as the severity of the penalty that a state will permit to be imposed (BMW of North America, Inc. v. Gore, 1598).

Within this concept of fair notice, Justice Stevens sets forth three “guideposts”. Ultimately, the majority concluded that BMW did not receive adequate notice of the magnitude of the sanction that Alabama imposed for the conduct that was demonstrated by BMW. The three “guideposts” are:

1.	The Degree of Reprehensibility of the Non-Disclosure
2.	Ratio/Disparity between the harm or potential harm suffered by the individual and the punitive damages award
3.	Sanctions for Comparable Misconduct - difference between the remedy and the civil penalties authorized or imposed in comparable cases (<u>BMW of North America, Inc. v. Gore</u> , 1598)

With regard to the first guidepost, namely, the degree of reprehensibility, the majority of the Court found that no aggravating factors were present. The harm that was suffered by the plaintiff, Dr. Gore, was purely economic in nature (BMW of North America, Inc. v. Gore, 1599). According to the Court there was no effect upon the performance, safety features, or, for at least nine months, any appearance characteristics. Justice Stevens noted that in reviewing the text of various state statutes regarding the disclosure of repairs, the Court was persuaded that a corporate executive could reasonably interpret the disclosure requirements as establishing a “safe harbor”. As a result of this safe harbor (BMW of North America, Inc. v. Gore, 1600), the Court believed that the conduct of BMW contained no evidence of the reprehensible conduct so as to justify the multi-million dollar award for punitive damages. The majority of the Court found there existed no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of an improper motive. Likewise, the Court found there refinishing work performed. The dealer is required to inform the customer of any refinishing done at the VPC. This may seem like a lot of trouble for a minor dent. However, for BMW and the BMW customer, the highest quality repair was a good faith basis for believing that there existed no duty to disclose on behalf of BMW (BMW of North America, Inc. v. Gore, 1601).

With regard to the second guidepost, the “Ratio” to the actual harm inflicted on the Plaintiff, the Court believed that the award by the Alabama Supreme Court to Dr. Gore would be five hundred times the amount of actual harm (BMW of North America, Inc. v. Gore, 1602). The Court acknowledged that higher ratios could be justified if the injury is difficult to detect, or if a monetary value of non-economic harm would be difficult to determine. Likewise, a low award of compensatory damages could support a higher ratio if the conduct was for a particularly egregious act which resulted in a small amount of economic damages. If the ratio was five hundred-to-one the Court considered this amount to be “breath taking” and must surely “raise a suspicious judicial eyebrow” (BMW of North America, Inc. v. Gore, 1603).

With regard to the third guidepost, sanctions for comparable misconduct, the court reasoned that the maximum civil penalty authorized by the Alabama legislature for a violation of its Deceptive Trade Practices Act is the sum of \$2,000 (BMW of North America, Inc. v. Gore, 1603). Since the sanction was considered to be modest, the Court reasoned that the conduct of BMW was not sufficiently egregious to justify the punitive sanction. The language selected by the Court likens the award of the jury to be tantamount to a severe criminal penalty.

As a result of the violation of the majority opinion’s three guideposts, the Court was convinced that a grossly excessive award was imposed and transcended the constitutional limit. Notably, however, the Court did not decide the appropriate remedy in this case. The Supreme Court remanded the matter back to the Supreme Court of Alabama to determine if a new trial or an independent review of the award by the Supreme Court as to vindicate the Alabama consumers’ economic interest that were affected in this matter (BMW of North America, Inc. v. Gore, 1604).

**CONCURRING OPINION OF JUSTICE BREYER;
JOINED BY JUSTICES O’CONNOR AND SOUTER**

The concurring Opinion is also premised on the theory that the award was “grossly excessive” in relation to legitimate punitive damages objectives, and hints an arbitrary deprivation of life, liberty or property in violation of the Due Process Clause. The Court likens phrases and legal standards such as “reasonable care”, “due diligence” and “best interest of the child” as necessitating standards which protect against arbitrary results (BMW of North America, Inc. v. Gore, 1605). Justice Breyer deemed that the Alabama Supreme Court’s decision was arbitrary in its result in that:

(1) The Alabama statute that permits punitive damages does not itself contain a standard that readily distinguishes between conduct warranting very small, and conduct warranting very large punitive damages awards. The concurring Opinion relies on the fact that the statute which permits punitive damages awards is found in cases of “oppression, fraud, wantonness or malice”. Justice Breyer likens these phrases by an example: “tricking the elderly out of their savings.” Since the case that was presented before the Court was for much less serious conduct, that is, the failure to disclose repainting a car, the statute became too broad (BMW of North America, Inc. v. Gore, 1605-06).

- (2) Justice Breyer made specific reference to the seven factors as set forth in Green Oil Co. v. Hornsby (Green Oil Company v. Hornsby) as to when a jury award would be considered grossly excessive; however, the seven factors according to Justice Breyer, imposed little actual constraint and therefore, would permit arbitrary behavior on the part of a jury.
- (3) The Alabama Supreme Court, when determining an allowable award, should have been able to apply an “economic” theory that could explain the \$2 million recovery. The economic theory is a standard that would deter illegal activity causing solely economic harm through the use of punitive damages awards that, as a whole, would take from the wrongdoer that total cost of the harm caused.
- (4) There was no historic practice which would provide a background for the imposition of the award.
- (5) There were no other legislative enactment’s that would classify the award such as limiting the award to the greater of double damages or a fixed or certain maximum amount (BMW of North America, Inc. v. Gore, 1606-07).

In summary, the award in the case was the product of a system that did not significantly constrain a Court, and by definition, the jury’s discretion in making that award was grossly excessive in light of the state’s legitimate punitive damages objectives. Justice Breyer recognized that it is often difficult to determine just when a punitive damage award exceeds an amount reasonably related to a state’s legitimate interest, or is in excess so as to create a constitutional concern. However, even though it may be difficult, there must be a sense of proportionality between the size of the award and the underlying objective in the state’s legitimate interest (BMW of North America, Inc. v. Gore, 1609).

**DISSENTING OPINION OF JUSTICE SCALIA;
JOINED BY JUSTICE THOMAS**

Justice Scalia is highly critical of the Opinion of the Court. He sees the majority of the Court returning to the “substantive due process” cases of the past (BMW of North America, Inc. v. Gore, 1611). He sees that the Supreme Court now becomes the voice of the community and holds itself above the judgment of a state Court and jury. He senses that the Court may be eager to enter the field of substantive due process, however, there is virtually no guidance to either the state or federal courts as to what might be a “constitutionally proper” level of punitive damages (BMW of North America, Inc. v. Gore, 1612). Justice Scalia believes that majority opinion was a concoction of rationalizations in the terms of guideposts. These guideposts are nothing more than a mark on the “road to nowhere” and provides no real guidance at all (BMW of North

America, Inc. v. Gore, 1613). Justice Scalia indicates that the majority of the Court attempts to distinguish prior cases such as Haslip and TXO on the ground of deliberate false statements, acts of affirmative misconduct, concealment of evidence or improper motive; however, according to the dissenting Opinion, the majority of the Court completely missed the boat by seemingly rejecting the findings that were made by the jury that BMW had committed a fraud which was gross, oppressive or malicious (BMW of North America, Inc. v. Gore, 1614).

If taken to its logical end, Justice Scalia cautions that the sufficiency and/or adequacy of all damages in civil cases becomes an open question of constitutionality which now becomes subject to review by the Supreme Court (BMW of North America, Inc. v. Gore, 1614).

**DISSENTING OPINION OF JUSTICE GINSBURG;
JOINED BY CHIEF JUSTICE REHNQUIST**

Justice Ginsburg is convinced that the majority of the Court is unnecessarily and unwisely venturing into territory which has traditionally been within the domain of the individual states BMW of North America, Inc. v. Gore, 1614). She recognizes that Dr. Gore's experiences are not that uncommon, vis a vis other customers that buy automobiles (BMW of North America, Inc. v. Gore, 1615). The jury is more than capable based on the evidence presented, to determine a dollar amount of a punitive damages award. Justice Ginsburg senses that the Gore case is not likely to occur again since the misapplied national multiplier calculations came from counsel for Dr. Gore during the summation and not as a part of the admissible evidence in the case in chief. According to Justice Ginsberg, "In brief, Gore's case is idiosyncratic. The jury's improper multiplication tardily featured by petitioner is unlikely to recur in Alabama and does not call for error correction by this Court." (BMW of North America, Inc. v. Gore, 1616). Similarly, Justice Ginsberg senses the Court violated its own internal rules, that is Supreme Court Rule 10 (BMW of North America, Inc. v. Gore, 1617).

According to Rule 10, a Petition for Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Thus, the dissenting Justice believes that they are being propelled into territory that is traditionally within the purview of the state's domain, and that the Supreme Court is not well equipped to even be in this arena (BMW of North America, Inc. v. Gore, 1617). In order to substantiate this belief, Justice Ginsberg attached to the Opinion an appendix attempting to delineate the numerous and various state legislative activity regarding punitive damages (BMW of North America, Inc. v. Gore, 1618-20). The measures that have been categorized in order to address punitive damages by state legislatures are and have been (1) total prohibition, unless explicitly provided by statute; (2) caps on awards; (3) provisions for payment of sums to state agencies rather than to plaintiffs; and (4) mandatory bifurcated trials with separate proceedings for punitive damages determinations (BMW of North America, Inc. v. Gore, 1618-20). It is not the wish or intention of Justice Ginsberg to have the Supreme Court of the United States be the only court policing the area of punitive damages.

ETHICAL IMPLICATIONS

The evidence, case law and ultimate decision reached in this case may have been portrayed as being favorable to business; however, the same cannot be said as to the ethical implications that are presented to today's college and university students. This case cannot be rationalized on merely the conservative/liberal dichotomy of the present makeup of the Supreme Court (Wall Street Journal, 1B). Justice Stevens, probably the most liberal member of the Court, wrote the majority opinion and was joined by two other liberal-leaning justices, Steven Breyer and David Souter, as well as two moderate conservatives, Anthony Kennedy and Sandra Day O'Connor (Wall Street Journal, 1B). In retrospect, the case has been viewed under the theory that if it is not legislated by statute it is not illegal, and by definition, if it's not illegal by statute, then it is not unethical.

At the time of the oral argument, counsel for BMW, Andrew L. Frey, in his opening remarks lulled the Court to believe that a great deal of cars are repaired prior to delivery. The Supreme Court accepted and swallowed the bait, -- hook, line and sinker. According to Mr. Frey in his first statement to the Court:

"When an automobile comes off an assembly line, it has to be transported to the location where it is distributed. In the course of that happening, it sometimes suffers some damage and BMW, like other manufacturers, has a means at hand to restore the car to factory condition as best they can using the same techniques that would be used in the factory if the same incident happened in the factory parking lot." (*BMW of North America, Inc. v. Gore*, 3).

Thereafter, Mr. Frey asked a rhetorical question:

"The question arises, when this happens, whether or under what circumstances there might be an obligation or it might be good business practice to inform the dealers and prospective purchasers of the automobile that there has been work done on a repair or refinishing work." (*BMW of North America, Inc. v. Gore*, 3).

Directly after these initial statements, Mr. Frey led the Court to believe that BMW looked to the "state laws" that were on the books to address the issue. By complying with the strictest legislative pronouncements, it was BMW's position that it abided by the law and therefore, should be exonerated from accountability that would permit the imposition of punitive damages. BMW utilized a concept that is well understood by first year law students, teaching professors, and hopefully business management students, namely, *Malum prohibitum v. Malum in se* (*BMW of North America, Inc. v. Gore*, 5). Thus, when discussing acts that are bad in and of themselves v. those acts deemed bad because we have legislated them as so being, today's student seem to have a tendency to view unethical behavior as being violations of a written legislative conduct.

The majority decision of Justice Stevens emphasizes the *Malum prohibitum* suggestion of BMW that "a corporate executive could reasonably interpret the disclosure requirements as establishing a safe harbor for non-disclosure (*BMW of North America, Inc. v. Gore*, 1600). The Court has eroded the necessity of the business professional viewing ethical behavior in the market place based upon the notion of something being bad in itself (*malum in se*). If the Court's reasoning is taken to its logical conclusion,

one would merely look to the legislative pronouncements as a guide for good business practice. Then, by definition, if an act it is not expressly prohibited by law, it cannot be bad.

What seems to be a greater disappointment in the Court's majority opinion is the casual dismissal of Dr. Gore's argument that full disclosure of every pre-sale repair to a car, no matter how trivial, and regardless of its actual impact to the value of the car, is obligatory to the consumer. As Dr. Gore testified, "BMW through its marketing techniques had portrayed the motor vehicle as the ultimate driving machine with 'flawless body panels' that retain 'there original luster even after miles of wear'. This marketing strategy and language prompted Dr. Gore to allege, as one of the causes of action, that BMW was liable under the traditional common law of fraud. Generally, a party in a commercial transaction with superior bargaining power and superior knowledge is under a duty to disclose material aspects of a transaction which a buyer cannot easily discover, especially when the silence of the seller creates a wrong impression in the buyer's mind. Although not legislatively pronounced, the common law concepts of fraud and deceit could mandate an absolute total disclosure mandate. The notions contained within the common law framework of fraud and deceit would create a higher moral standard for the emerging business leaders of tomorrow.

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**LABOR FORCE FLEXIBILITY
AND THE CONTINGENT WORKER:
LEGAL AND POLICY ISSUES FOR
THE JUST IN TIME WORKPLACE**

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ABSTRACT

Flexibility and efficiency have been two very popular concepts driving strategic human resource management decision making over the last ten years. Responding to the complex dynamics of the competitive environment that many firms are facing, firms are using contingent/alternative workers to achieve the flexibility and cost savings necessary to survive in today's just in time environment. However, the consistent rise in the use of contingent/alternative workers over the last decade has come with a price. While using contingent workers offer advantages for employers, legal issues and employee relations questions have arisen. This paper will examine the rationale behind the use of contingent workers and review the legal issues and employee relations questions that employers have had to address.

INTRODUCTION

Contingency management theory is based upon the premise that correct management practices depend upon the situation. In the past decade, the situation for business has been quite complex and dynamic as firms compete globally. Appropriate management practices must provide both flexibility and efficiency. Effective strategic human resource management techniques necessary to survive in today's environment must be adept at responding to frequent change. The use of

contingent/alternative workers converts the workforce into a variable resource rather than a fixed resource. Therefore, the workforce is flexible and capable of responding to change. Just in time inventory techniques resulted in reduced costs for holding raw materials in the production process. Similarly, the use of contingent workers provides the same cost advantages in the human resource management function. Since the number of workers in the workforce can vary, more efficient staffing decisions can be made.

Estimates of the utilization of contingent workers varies widely. The Bureau of Labor Statistics (BLS) estimates that five percent of the total United States workforce are contingent. Private studies estimate that contingent workers comprise 25 to 30 percent of the total workforce. According to the *BLS*, the number of workers employed by temporary and leasing agencies doubled in the last decade and quintupled since 1982. In fact, the largest employer in the United States is Manpower Inc., a temporary help firm. Other surveys report that an increasing number of companies are currently using contingent workers and even more plan to use them in the future. One study projected that by the year 2000, 35 percent of all firms will staff at least ten percent of their work units with contingent workers (Grossman, 1998).

The consistent increase in the use of contingent workers has come with a price. While using contingent workers offer advantages for employers, legal issues and employee relations questions have arisen. Proper classification of workers as independent contractors or regular employees, responsibility for taxes, benefits, labor relations, and compliance with anti-discrimination legislation are among the legal issues that have surfaced. The use and mis-use of the independent contractor status has become troublesome for employers. The Internal Revenue Service (IRS) seeks to do a better job of collecting the estimated \$1.5 billion lost annually in withholding taxes due to the misclassification of workers. Employee relations concerns include the lack of commitment, turnover, and the impact on training and on morale of both the contingent worker and the permanent staff.

This paper will examine the rationale behind the use of contingent workers and review the numerous legal issues and employee relations questions that employers have had to address. Is the increased use of the just in time workforce the latest in a long line of "management fads," or is it an integral step in the movement toward the "virtual workplace" of the future? In addition, policy and practice suggestions for effective legal use of contingent workers will be suggested.

CONTINGENT/ALTERNATIVE WORKERS

The Bureau of Labor Statistics broadly defines contingent workers as workers "who have no explicit or implicit contract and expect their jobs to last no more than a year." In 1997, the *BLS* estimated 5.6 million workers fit this category. Included in the "alternative workers" are independent contractors, on-call workers, and workers employed by temporary help agencies or contract firms. Independent contractors include consultants, freelance workers, and contractors who can be self-employed or wage and salary workers. In 1997, the *BLS* estimated that there were 8.5 million independent contractors, 2 million on-call workers, 1.3 million employed by temporary help agencies, and 800,000 employed by contract firms. The *BLS* estimated that the number of individuals hired by temporary and leasing firms doubled in the last ten years. While there is a debate on the proper definition of contingent/alternative workers, there is little disagreement that the increased use of these employment arrangements will continue as firms pursue lean and flexible staffing (BLS, 1997).

Popular current management literature includes buzz phrases like the "just in time workforce," "virtual workplace," and "virtual company." In light of current global economic conditions, the competitive pressures that firms are facing with respect to efficiency and flexibility do not appear to be decreasing. Surveys report that more firms are planning to use contingent/alternative work arrangements as part of their strategic human resource management response to continuous change and uncertainty. However, it may be too soon to tell if the increased use of alternative work arrangements represents a fundamental shift in how organizations will be staffed.

WHY FIRMS USE CONTINGENT/ALTERNATIVE WORK ARRANGEMENTS?

Employers claim that contingent/alternative workers provide certain competitive advantages. Staffing flexibility and availability are two prominent advantages for firms facing fluctuations in demand or operating in highly dynamic technological and competitive environments. Using contingent/alternative workers enables firms to respond more quickly than more conventional staffing options. The "just in time" approach to managing resources has spread and includes more than just raw material inventory. Moreover, when technological change is a priority, contingent/alternative workers provide skills not available in house.

Lower overall staffing costs are another reason cited for using contingent/alternative work arrangements. Contingent/alternative workers usually do not receive benefits including severance packages. In addition, the employer is not responsible in most cases for withholding taxes. When outside vendors conduct employment screening, the task may be more efficiently provided. Using contingent/workers allows firms to "hedge their bets" with respect to adding permanent staff. Workers can be tried on for size in a trial period to assess the employee relations fit. If the worker does not fit or the need for permanent staff fades, the relationship with the contingent/alternative worker can be severed with limited complications. After all, as many firms view the situation, "they are just a temp" (Blake, 1998). In other words, the decision to discharge temporary staff is not viewed with the same seriousness as discharging permanent staff.

DISADVANTAGES OF CONTINGENT/ALTERNATIVE WORKERS

Utilizing alternative work arrangements can erode many of the benefits if firms are not careful. For example, as firms approach staffing as a variable cost as opposed to a fixed cost, contingent workers may be used in core business functions rather than limited to fringe or support areas. When this occurs, the risks associated with their use increases. Problems may arise when a firm uses contingent workers who lack training and experience. To prepare these workers to perform their jobs, training budgets and costs are driven up. Moreover one study reported increased accident rates in safety sensitive positions (Grossman, 1998).

On the employee relations side of the equation, studies report that contingent workers demonstrate lack of commitment, high turnover rates, negative impact on morale of full time employees, and security problems for the firm. Legal issues in this area include proper classification of workers, labor relations issues, and compliance with anti-discrimination legislation (Micco, 1998).

PROPER CLASSIFICATION OF WORKERS

The use of independent contractor status to respond to the competitive pressures can be especially problematic. The long running legal battle between Microsoft and the federal government highlight the difficulties associated with properly classifying workers (*Vizcaino v. Microsoft*, 1998). In the late 1980s, Microsoft hired as many as 5,000 workers to perform various services. The workers were considered to be independent contractors to Microsoft. According to court documents, the individuals performed those services over a continuous period, often exceeding two years. They were hired to work on specific projects and performed a number of different functions, such as production editing, proofreading, formatting, indexing, and testing. These workers were fully integrated into the workforce, often working on teams along with regular employees, sharing the same supervisors, performing identical functions, and working the same core hours as the regular employees. Microsoft required that they work on site, and they received admittance card keys, office equipment, and supplies from the company. However, the workers were not paid for their services through the payroll department but rather submitted invoices to and were paid through the accounts payable department. Microsoft did not withhold either income or Federal Insurance Contribution Act taxes from the workers' wages and did not pay the employer's share of the FICA taxes. What is most important to Microsoft's current legal problem is that workers were not allowed to participate in the Employee Stock Purchase Plan (Thurm, 1998).

In 1990, the Internal Revenue Service (IRS) determined that many of Microsoft's 5,000 contingent workers involved were in fact employees rather than independent contractors. Therefore, Microsoft should have been withholding income and FICA taxes and paying the employer's matching share of FICA taxes. Microsoft and the employees went to the federal court system, and in *Vizcaino v. Microsoft*, the IRS and the affected employees have to date been successful in advancing their claim that the workers were employees not independent contractors. The U.S. Supreme Court declined to hear a Ninth Circuit U.S. Court of Appeals decision that said the affected workers were essentially Microsoft employees and thus entitled to all other benefits of regular employees including the pension and stock-purchase benefits. Left to be decided by the District court is the appropriate remedy for workers who missed out on the opportunity to purchase stock eight years ago (Click, 1998). As Microsoft's dominance in the software industry mushroomed during this period, employees who participated in the stock purchase benefit have become immensely wealthy.

In October, 1998, Time Warner Inc. learned it was facing similar complaints. The U.S. Department of Labor filed suit accusing Time Warner of improperly denying full time employees pensions and health benefits by classifying employees as temporary workers or independent contractors. Of course, the government's intent is obvious (Shapiro, 1998). The IRS seeks to collect the \$1.5 billion in withholding taxes that is lost annually due to misuse of the independent contractor status.

INDEPENDENT CONTRACTOR OR EMPLOYEE?

Lower overall cost is the primary benefit to the employer of classifying a worker as an independent contractor. Labor costs are contained since workers are used and paid only as needed. Moreover, the employer's tax obligation is lower since the employer does not have to pay the independent contractor's Federal Insurance Contribution Act (FICA) or Federal Unemployment Tax (FUTA) taxes. Administrative costs of complying with the tax laws are further reduced because the employer is not required by law to provide employee benefits (vacation pay, sick leave, health insurance, pension contributions, stock ownership plans) to an independent contractor.

The problems for employers occur from what some observers call contradictory and vague common law views as to how a worker should be classified. Further complications result from different sections of the IRS code providing definitions of the term "statutory employee" and "statutory independent contractor." Section 3121(d) defines statutory employee for FICA tax purposes and section 3508 defines a statutory independent contractor. Under the common law classification, the degree of control an employer exerts over a worker generally dictates whether the individual is a common law employee. The right to control a worker has generally been considered the most important element in court decisions on the classification of workers as employees or independent contractors (Robbins, 1997).

The IRS issued Revenue Ruling 87-41 to facilitate interpretation of Treasury Regulation. This ruling lists twenty factors the IRS uses in determining if an employee is an independent contractor or a statutory employee. All of the factors must be used in conjunction with each other to assess whether sufficient control is present to establish an employee-employer relationship. No single factor can determine a worker's status. These twenty factors are as follows:

TWENTY FACTOR TEST

1. *Instructions:* If the person for whom the services are rendered has the right to instruct the worker on how, when, and where to work, then the worker is ordinarily an employee. This control factor is present if the employer retains the right to require compliance with the instructions, irrespective of whether the employer actually exerts the right to control.
2. *Training:* An employer trains workers by requiring them to work with experienced employees, holding training meetings, corresponding with them, or any of several other methods. By training a worker, the employer explicitly or implicitly states that the services to be rendered must be performed in a particular manner. The employer demonstrates a right to control by teaching the worker to achieve the desired result.
3. *Integration:* If a worker's services are integrated into the business operations, then the worker is generally subject to direction and control.

4. *Services Rendered Personally:* The requirement that services must be rendered personally by the worker indicates that the employer is interested in the methods used to accomplish the work as well as in the result.
5. *Hiring, Supervising, and Paying Assistants:* If the employer hires, supervises, and pays a worker's assistants, then the employer has control over those assistants and the worker should be considered an employee.
6. *Continuing Relationship:* Continuous interaction between the worker and employer indicates an employee relationship.
7. *Set Hours of Work:* Establishing certain hours in which a worker is to perform a job indicates an employer's control.
8. *Full Time Required:* If a worker must devote full time to the employer's business, the employer has control over the amount of time the individual actually spends working and, by implication, restricts the worker from performing other gainful work.
9. *Doing Work on Employer's Premises:* Workers required to perform their services on the employer's premises when the work could be performed elsewhere are under the employer's control, which is beyond that which would ordinarily be exerted over an independent contractor.
10. *Order or Sequence Set:* If an employer has the right to indicate the order or sequence in which work is to be performed, then the worker is probably an employee, particularly if the same results can be achieved in a different order or sequence.
11. *Oral or Written Reports:* The requirement that a worker submit regular reports to the employer can indicate a degree of control.
12. *Payment by the Hour, Week, or Month:* When a worker is paid by the hour, week, or month and such payment is guaranteed, whether or not certain results are achieved, the worker is generally an employee.
13. *Payment of Business and/or Traveling Expenses:* The IRS is of the view that when an employer pays a worker's business or traveling expenses, the worker is ordinarily an employee.

14. *Furnishing Tools and Materials:* If the employer furnishes tools, materials, and other equipment for a job, this indicates that the worker is an employee.
15. *Significant Investment:* A significant investment by a worker in the facilities used in performing services for another is a factor that often establishes an independent contractor relationship. Conversely, the lack of investment in facilities indicates a dependence on the employer for the facilities, which means an employee relationship exists.
16. *Realization of Profit or Loss:* A worker who stands the risk of suffering a financial loss or realizing financial gain as a result of providing services to the employer is generally an independent contractor.
17. *Working for More than One Firm:* If a worker performs services for more than one unrelated person or firm at the same time, it generally indicates that the worker is an independent contractor.
18. *Making Services Available to the Public:* Workers who make their services available to the general public on a regular and consistent basis are usually independent contractors.
19. *Right to Discharge:* Employers generally possess the right to discharge only an employee. The threat of dismissal demonstrates a degree of control over workers.
20. *Right to Terminate:* If the worker providing the services can terminate the relationship with the employer at any time without incurring liability, an employee relationship usually exists.

(Robbins, 1997).

Revenue Rulings 72-203 and 66-274 state that other factors should also be considered when control is not the dominant issue. This situation often occurs when classifying professionals such as physicians and lawyers. When determining the employment status

of professionals, employers should consider the skill required for the task, the intent of the parties involved in the relationship, and the custom in the industry.

AVOIDING IRS PROBLEMS

The employer or individual that seeks to avoid IRS complications can ask the IRS for a determination of the worker's employment status. Filing IRS form SS-8 with the agency can minimize the risk associated with misclassification of a worker's status since the IRS will make the determination. Employers may also minimize concerns by drafting a written contract between the employer and the individual incorporating the applicable common law factors supporting an independent contractor status. Clear intent to establish an independent contractor relationship must be indicated in the contract. The contract should also require the employer to file IRS Form 1099 for the contractor and not violate any of the twenty control factors in Ruling 87-41 (Robbins, 1997).

COMPLICATIONS

Numerous other laws also complicate the determination of the employee-employer relationship and independent contractor status. Those complications include the following:

Fair Labor Standards Act (FLSA): Defines the term employee broadly as - *any individual employed by an employer*. The verb *employ* is defined under the FLSA to mean *to suffer or permit to work*. The United States Department of Labor, enforces the FLSA and relies on the Economic Realities Test from the US Supreme Court decision *Rutherford Food Corp. v. McComb* (1947).

Employee Retirement Income Security Act (ERISA): Uses the common law test as held in US Supreme Court case *Nationwide Mutual Insurance Co. v. Darden* (1992).

Occupational Safety and Health Act (OSHA): Maintains that an employment relationship is based on economic realities rather than legal definitions.

National Labor Relations Act (NLRA): Applies a common law right to control test in determining whether a worker is an employee or an independent contractor. If a temporary worker is sent into a unionized company, the temporary worker is prohibited from joining that company's bargaining unit without first getting consent from both the company and the temporary agency that sent them.

Employment Discrimination: The Age Discrimination in Employment Act (ADEA) and Title VII of the 1964 Civil Rights Act: Under the ADEA, the courts have primarily used the common law test to determine if someone is an independent contractor *Frankel v. Bally, Inc., 1993*. In *Hayden v. La-Z-Boy Chair Co., 1994*, the US Seventh Circuit Court of Appeals emphasized the employer's control over the worker in determining if the worker was an employee. Under Title VII, the emphasis seems to be on the use of the right to control test as the means for determining an employee's status. In December, 1997, the Equal Employment Opportunity Commission (EEOC) issued guidelines designed to clarify if workers were classified as employees and the type of protection they had under Title VII. Temporary workers of all types with the exception of independent contractors, qualify as employees and are protected under federal anti-discrimination laws (Mendelson, 1997).

While the various definitions utilized to determine if someone is an "employee" are confusing at best, the ramifications of misclassifying a contractor as an employee are not. The IRS may require the employer to cover any taxes owed including penalties for failure to withhold. Overtime pay, eligibility for benefits previously denied, and liability for compensatory and punitive damages associated with violation of anti-discrimination regulations may also be forthcoming. The element that shows up repeatedly in court decisions and regulatory agency guidelines in proper classification of employees is how much control does the employer have over the person. Common sense and knowledge of basic common law principles should guide the analysis of the relationship and the decision making.

EMPLOYEE RELATIONS QUESTIONS

While legal issues tend to dominate the downside of utilizing contingent/alternative workers, there are a number of negative employee relations consequences. A 1995 study found that contingent workers can often increase costs because they may require more training and suffer from higher turnover (Grossman, 1998).

One recent study identified the primary disadvantage as the lack of commitment of many contingent workers. According to the *BLS*, up to 40 percent of contingent workers prefer the temporary nature of their work. They are not looking for a long term commitment and may not buy into the core values of an organization. This fact coupled with the attitude of supervisors treating contingent workers as "disposable" only reinforces the issue. Still other studies depict the difficulty of integrating contingent workers into the full time work force and the potential negative impact on the morale of full time workers (BLS, 1997).

POLICY AND PRACTICE SUGGESTIONS

Dealing with the legal issues associated with contingent workers can appear frightening. There are some practical policy and practice suggestions for coping. First of all, the use of written contracts between the employer and the worker incorporating the applicable common law factors supporting common law status or independent contractor status can minimize the potential legal pitfalls. One reliable way for alleviating the independent contractor classification dilemma is to let the IRS do it for you.

The employee relations issues are not so easily solved. Platitudes such as treating contingent/alternative workers like part of the team ring hollow with employees if not backed up by policy and practice support. For example, when dealing with temporary employees, apply progressive discipline to all workers not just full time regular employees. Too often, supervisors who become disenchanted with a temporary simply call the agency and ask for a replacement. While this fits nicely with the "disposable people" concept that some temporary agencies are selling, it is difficult to see how this is conducive to creating a healthy productive work environment (Blake, 1998).

It is still too early to conclude whether the virtual workplace of the future will be staffed by independent contractors and temporary employees. The lure of more cost effective strategies for one of the big cost centers in most organizations is very enticing. Correct management practices depend upon the situation. The current business environment is turbulent, and there are no predictions of movement toward a static environment. The use of contingent/alternative workers provides a flexible and efficient strategic human resource management technique capable of responding to a turbulent environment. There are obvious advantages and benefits in terms of short run cost savings. What remains to be determined is whether the short run benefits exceed the long run costs to organizations. Is the use of contingent workers the appropriate management practice over the long run?

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PREDICTORS OF CIGARETTE USE BY THE CHILDREN OF NORTHEASTERN PENNSYLVANIA

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ABSTRACT

This study was undertaken to determine the prevalence of cigarette use by the youth and family members of Northeastern Pennsylvania. Over 14,000 questionnaires have been returned, and results reveal that the prevalence of cigarette use by adults and children is higher than the rest of the State and Nation. This study also uses the data collected from the questionnaires to examine the relationship between modeling behavior and the onset of smoking in children and adolescents through the use of the concepts of observational learning and self-efficacy. Results indicated that the smoking behavior of one's friends was shown to have a strong relationship to whether or not one has ever tried cigarettes as well as whether or not one smokes today. Moreover, the smoking behavior of one's mother was shown to have a significant relationship to how many cigarettes one smokes today.

INTRODUCTION

Cigarette smoking remains by far the largest single preventable cause of premature mortality in this country. According to the Office of Applied Studies (U.S. Department of Health and Human Services, 1994), one million young people become regular smokers each year and for the vast majority the smoking habit begins before they leave high school. The Institute of Medicine (U.S. Department of Health and Human Services, 1994) has stated that smoking experimentation begins very early in childhood and addiction to nicotine occurs after approximately two years of using tobacco. The Department of Health and Human Services has called teen smoking a national public health crisis and contends that the crisis is worsening. Over 80 percent of these young tobacco users began their addictive habit before they were 18 years old. Dr. David Kessler, (Russell, 1990) former commissioner of the Food and Drug Administration, has labeled addiction to nicotine from cigarettes a "pediatric disease."

One of the major long-term effects is found in increased and continued smoking as a child grows older. The sooner a child starts smoking the more likely he or she is to become strongly addicted to nicotine. The majority of young people who smoke on a daily basis confirm that they are unable to quit. Nicotine in tobacco causes and sustains addiction. Manufacturers deliberately design the product to provide the consumer with a pharmacologically addictive dose of nicotine to continue the consumer's need for the product (U.S. Dept of Health and Human Services, 1994).

The reduction in the number of children smoking seems to be the most effective way to reduce the nation's leading cause of preventable death in older Americans and perhaps to reduce the development of other high-risk health behaviors. The Center for Disease Control (CDC) (U.S. Department of Health and Human Services, 1994) reports that adolescents began cigarette smoking as a result of social influences, promotional efforts by tobacco producers, social pressure and curiosity. Once the habit is established it becomes the norm.

Despite many studies, society still underestimates the dangers presented by adolescent smoking. About half of all smokers die in their middle ages, resulting in at least 20 to 25 years of potential life lost. It is well documented in the literature that nicotine addiction begins very early in life and most likely has occurred prior to high school graduation for most individuals who use tobacco. Health problems associated with smoking are a function of duration (years) and intensity (amount). Most people could be prevented from becoming addicted if they could be kept tobacco-free during the childhood years. (CDC Surveillance Summaries, 1994:43)

The Institute of Medicine (U.S. Department of Health and Human Services, 1994) believes that tobacco use is a learned behavior which has a preparatory stage during which the child forms attitudes and beliefs about the benefits of smoking cigarettes. The CDC does not believe that parental tobacco use to be as great a risk factor as peer use but non-smoking parents can have a tremendous influence on their young remaining non-smokers. Yet, access to cigarettes by the very young child for experimentation purposes obviously becomes easier if a family member smokes. The publication "Growing Up Tobacco Free: Preventing Nicotine Addiction In Children and Youth" (U.S. Department of Health and Human Services, 1994) reports contradictory results regarding parental influence on cigarette use. The same report argues that peer influence was strong in the circumstances of cigarette experimentation but was unclear about the role of peer influence in the decision making process about cigarette smoking. Williams and Covington (1997) found that it is useful to consider the addictive and interactive affects of multiple variables in predicting complex behaviors. According to their research two of the useful predictors of smoking cigarettes are having friends and family members that smoke.

The Surgeon General's (U.S. Department of Health and Human Services, 1994) report believes that children's use of tobacco progresses in five stages: development of a positive attitude about smoking, trying tobacco, more experimentation, regular use of tobacco and finally addiction. Unhealthy behaviors are often ingrained in the lifestyle and culture of a society and are, therefore, very difficult to change. Most psychologists believe that behavior is a function of environment and learning. The environment around the child consists of family, friends and community behaviors and attitudes that the child may model. Learning theorist Albert Bandura (1977) found that observation plays a role in the learning process. This process consists of attention, retention, reproduction and motivation. Therefore, a positive attitude about smoking cigarettes may be a process that is learned from not only tobacco promotion but also from friends and parents that smoke. The more people in the community and family that smoke the greater the risk that the child develops a positive attitude regarding the high-risk behavior and then continues the steps in the addiction process.

This study was undertaken to describe the use of tobacco by adults and children in Northeastern Pennsylvania and to develop a hypothesis as to why these very dangerous behaviors begin. In order to accomplish these goals the following study questions were developed and answered by this study.

Study Questions

Study Question One:

At what age does the greatest increase in cigarette experimentation occur in Northeastern Pennsylvania?

Study Question Two:

Do the children that smoke cigarettes in Northeastern Pennsylvania have a higher prevalence of family members and/or friends using cigarettes than non-smoking children?

Study Question Three:

Who has the greatest influence on children's smoking: mother, father or friend?

METHOD

Study Population

The sample chosen for this study included six school districts in Northeastern Pennsylvania that included urban and rural students, and public and private schools. A letter was sent to fifteen randomly chosen school superintendents requesting permission to survey all students in grades four through twelve. To protect their privacy students were allowed to complete the survey anonymously, but their participation was mandatory. The questionnaire was administered by homeroom teachers during the last class period.

The final response for this study was 15,297 returned questionnaires. There were responses from all six school districts representing private, public and rural school districts in Northeastern Pennsylvania. These questionnaires were then evaluated for accuracy and entered into a computer utilizing a statistical software program provided by the CDC. There were 774 questionnaires containing unrealistic responses that were not entered into the computer. Therefore, the total number of questionnaires analyzed was 14,523.

Instrument

The instrument used in this study was a two-page questionnaire consisting of nineteen questions about tobacco use, alcohol use and the use of marijuana. A review of the literature was utilized to establish face validity of the instrument. The questionnaire was then evaluated by three health experts to assess content validity of the instrument. The questionnaire was field-tested on several students from grades four through twelve in a school district not being utilized in this study.

Data Analysis

To address the first and second study questions, descriptive statistics (means, percentages) were calculated by age and grade. To answer the third study question, a series of multiple regression analyses were performed. Three dependent variables were used for these analyses. They are: (1) "Have you ever smoked cigarettes?"; (2) "Do you smoke cigarettes today?"; and (3) "Approximately how many cigarettes do you smoke each day?". The three independent variables that were regressed of each of these dependent variables were whether or not your (1) mother, (2) father, and/or (3) friend smokes? Using a stepwise approach, the independent variable that accounts for the most unique variance in the dependent variable was entered first into the regression equation. Other independent variables are added if they can account for a significant amount ($p < .05$) of unique variance over and above the first independent variable.

RESULTS

Regarding study question #1, this study found that in Northeastern Pennsylvania first experimentation with cigarettes begins as early as age 5 (1.3 percent), with the highest number of students (19.8 percent) having their first cigarette at age 12. The incidence of new smoking drops off dramatically as children enter the later years of adolescence. By age 16 cigarette experimentation has dropped off in a very dramatic way (Table 1).

Age	Males	Females
5	(41) 1.8%	(19) 0.7%

6	(58) 3.7%	(32) 1.9%
7	(106) 7.7%	(43) 3.4%
8	(178) 14.4%	(107) 7.3%
9	(217) 22.6%	(176) 13.8%
10	(369) 36.5%	(270) 23.6%
11	(344) 49.4%	(358) 36.7%
12	(500) 68.2%	(568) 57.4%
13	(386) 82.8%	(530) 76.7%
14	(239) 91.8%	(329) 88.7%
15	(132) 96.7%	(187) 95.5%
16	(60) 99.0%	(94) 99.0%
17	(23) 99.8%	(24) 99.9%
18	(4) 100%	(4) 100%
N = 5,411; Mean Age Male 11.2; Mean Age Female 11.9		

The number of cigarettes smoked each day rose from 2.0 for males in fourth grade to 8.0 in twelfth grade and from 1.1 for females in the fourth grade to 7.0 in twelfth grade (Table 2).

Grade	Male	Female
4	2.0	1.1
5	1.5	1.0
6	2.5	2.1
7	3.4	3.3
8	3.7	3.7

9	6.1	4.9
10	6.2	6.0
11	8.0	6.1
12	8.0	7.0

A number of students (8.1 percent) experiment with cigarettes in the fourth grade, and experimentation rapidly escalates between grades six and seven (16.5 percent to 30.5 percent) and from grades seven to eight (30.5 percent to 42.8 percent) and grades eight to nine (42.8 percent to 54.3 percent) (Table 3). This experimentation occurs less frequently for girls in the lower grades and more frequently for girls in the later years of high school. The mean age for first-time cigarette use in Northeastern Pennsylvania is 11.6.

Grade	Smoke Cigarettes				Do Not Smoke Cigarettes			
	Cumulative Percent Children That Have Tried Cigarettes	Percent of Mothers That Smoke	Percent of Fathers That Smoke	Percent of Friends That Smoke	Cumulative Percent of Children That Have Not Tried Cigarettes	Percent of Mothers That Smoke	Percent of Fathers That Smoke	Percent of Friends That Smoke
4	8.1%	63.5%	59.2%	63.2%	91.9%	56.9%	45.9%	19.3%
5	11.4%	64.7%	60.0%	80.0%	88.6%	42.9%	42.2%	22.2%
6	16.5%	58.7%	52.2%	84.3%	83.5%	37.4%	41.3%	26.1%
7	30.5%	55.0%	54.3%	90.6%	69.5%	35.7%	38.7%	40.3%
8	42.8%	50.6%	48.5%	91.5%	57.2%	31.0%	34.1%	48.0%
9	54.3%	43.8%	45.6%	92.4%	45.7%	30.7%	31.4%	59.1%
10	56.1%	43.8%	45.1%	91.4%	53.9%	29.9%	33.8%	60.5%
11	62.2%	38.0%	38.8%	91.2%	37.8%	29.2%	31.1%	68.3%

12	63.9%	38.8%	42.1%	93.8%	36.1%	31.1%	36.4%	69.3%
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Regarding study question #2, children who smoke have a much higher percentage of mothers (47.8 percent), fathers (47.6 percent) and friends who smoke (89.2 percent) than children who do not smoke. For children who do not smoke, 36.5 percent of their mothers, 38.8 percent of their fathers and 38.7 percent of their friends smoke (Table 3).

Dependent Variable	Multiple R	p-value
Have you ever smoked?		
Friend	.497	.000
Mother	.499	.000
Father	.499	.070
Do you smoke today?		
Friend	.200	.000
Mother	.232	.000
Father	.236	.001
How many cigarettes per day?		
Mother	.143	.000
Friend	.182	.000
Father	.189	.000

Regarding study question #3, the regression results revealed that one’s friends and one’s mother have the greatest relationship to one’s smoking. Table 4 indicates that friends were the most critical predictor of trying cigarettes as well as whether or not one smokes today, whereas one’s mother was the most critical predictor of how many cigarettes one smokes.

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Dependent Variable	Males		Females	
Have you ever smoked?				
Friend	.488	(.000)	.505	(.000)
Mother	.489	(.008)	.508	(.000)
Father	.489	(.294)	.509	(.122)
Do you smoke today?				
Friend	.178	(.000)	.223	(.000)
Mother	.218	(.000)	.249	(.000)
Father	.225	(.006)	.251	(.046)
How many cigarettes per day?				
Mother	.163	(.000)	.134 -Friend	(.000)
Friend	.197	(.000)	.177 -Mother	(.000)
Father	.203	(.008)	.184	(.010)
Note: <i>p</i> -values are in the parentheses. Male (n=7,053) Female (n=7,252)				

When this is broken down by sex (Table 5), similar results occur for males. For females, friends were the most critical predictors for all three dependent variables. When this is broken down by grade (Table 6), friends was consistently the best predictor of trying smoking. One's mother was consistently the best predictor of how many cigarettes per day one smokes. Mother and friend alternate as the most critical predictor of whether or not one smokes today.

Grade	Have you ever smoked?	Do you smoke today?	How many cigarettes per day?
4	Friend (.27) (.28)	Mother (.19) (.22)	Mother (.18) (.18)
5	Friend (.40) (.41)	Friend (.17) (.19)	Friend (.16) (.26)

6	Friend (.45) (.45)	Friend (.08) (.08)	Mother (.08) (.08)
7	Friend (.46) (.47)	Friend (.18) (.20)	Mother (.10) (.10)
8	Friend (.44) (.46)	Friend (.18) (.23)	Mother (.16) (.18)
9	Friend (.38) (.39)	Friend (.24) (.29)	Mother (.17) (.21)
10	Friend (.36) (.37)	Friend (.22) (.25)	Mother (.18) (.23)
11	Friend (.27) (.29)	Mother (.23) (.31)	Mother (.20) (.25)
12	Friend (.32) (.33)	Mother (.21) (.27)	Mother (.24) (.28)
<p><u>Note:</u> The independent variable that accounted for the most unique variance for each dependent variable by grade is provided in the table. The value in the first parentheses equates to the multiple R with only this independent variable in the regression equation. The value in the second set of parentheses equates to the multiple R with all three independent variables in the regression equation.</p>			

DISCUSSION

The CDC (U.S. Department of Health and Human Services, 1994) recognizes that duration and intensity of tobacco use are important causes of early mortality and years of potential life lost among the users of these products. The results of this study demonstrate that children in Northeastern Pennsylvania begin using cigarettes at a very early age and that a majority continue to smoke as they grow older. This study revealed that the majority of the smokers use more cigarettes each year, and 80 percent of those surveyed who smoke do not want to quit smoking. This is a serious problem because research has discovered that individuals who smoke more than three cigarettes each day have a high probability of becoming a regular smoker (Russell 1990).

The CDC reports that the prevalence of smoking cigarettes in the United States for adults was 27.7 percent for men and 22.5 percent for women in 1994 (Centers for Disease Control and Prevention, 1994). The prevalence for smoking for children under age 18 was 29.8 percent for men and 31 percent for women in that same year. The CDC (Centers for Disease Control and Prevention, 1994) also reports that the prevalence of smoking cigarettes for men and women in Pennsylvania to be 24 percent for each gender. The prevalence for children grades nine to twelve was 31 percent for boys and 32 percent for girls in 1994. Very little information is available on a national level regarding the prevalence of smoking among elementary and middle-school children.

In Northeastern Pennsylvania the prevalence for adults smoking is 42.1 percent for men and 40.7 percent for women. The children who smoke have a higher percent of fathers who smoke (47.6 percent) and mothers who smoke (47.8 percent) and friends who smoke (89.2 percent). The children who do not smoke have mothers who smoke (36.5 percent), fathers who smoke (38.8 percent) and friends who smoke (38.7 percent). (Table 3).

The results of this study, as shown in Table 3, demonstrate that children are indeed at a higher risk of experimenting with cigarettes if they have a friend or parent who smokes. This finding presents an example of observational learning, a key concept in the social cognitive view of behavior formulated by learning theorist and psychologist, Albert Bandura. Bandura (1977) explains the learning process in four steps which can be shown to apply to the onset of smoking in children:

Steps in the Learning Process	
ATTENTION	
	The individual notices something in the environment.
	<i>The child notices a friend or parent smoking cigarettes.</i>
RETENTION	
	The individual remembers what was noticed.
	<i>The child remembers that his or her parent or friend smokes cigarettes.</i>
REPRODUCTION	
	The individual produces an action that is a copy of what was noticed.
	<i>The child smokes cigarettes for the first time.</i>
MOTIVATION	

The environment delivers a consequence that changes the probability that this behavior will be emitted again.

Unless a child witnesses someone being punished for smoking, it is likely that he or she will continue to smoke.

Another important concept in Bandura's social cognitive theory that of self-efficacy and more specifically, resistance self-efficacy. Self efficacy refers to an individual's belief that he or she can perform a given behavior. Resistance self-efficacy is an individual's belief that he or she can resist performing a given behavior (Conner and Norman, 1995). It has been consistently found that the combination of peer pressure and low resistance self-efficacy predicts the onset of smoking in adolescents (Conrad, Flay, and Hall, 1992). Adolescents high in resistance self-efficacy, by contrast are less vulnerable to interpersonal power, or peer pressure (Conner and Norman, 1995). The results of this study indicate that exposure to a friend or parent who smokes may in fact lower an individual's resistance self-efficacy.

Based on the results of this study the following recommendations are made:

Recommendations

1. Educational programs that are developed to reduce cigarette experimentation by children need to begin in the elementary grades and parents of these children who are current smokers must become involved.
2. Parents who wish to keep their children tobacco free need to keep their children away from other children who use tobacco. If the parent smokes they need to keep their habit and their cigarettes away from their children. This will change the cigarette culture, thereby increasing their children's resistance self-efficacy.
3. The association between child smoking and having a friend that smokes cigarettes should be emphasized to pressure school districts to strongly enforce no smoking policies within the school district.

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