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LETTER FROM THE EDITOR

Welcome to the third 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.

We are introducing a new Editor for this Edition as well. We wish her well in her endeavors and look forward to a good working relationship.

JoAnn and Jim Carland
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Articles

MORAL DEVELOPMENT AND JUSTIFICATION IN AN ACCOUNTING ETHICS CONTEXT

Aileen Smith, Stephen F. Austin State University
Violet Rogers, Stephen F. Austin State University

ABSTRACT

This research uses vignette-based accounting topic ethical judgments and related justification statements to explore links associated with the Defining Issues Test (DIT) P-score, U-score and age variable. The study is designed so that the vignettes elicit decisions concerning how ethical or unethical the subjects judge the actions taken to be. The specific justification statements reflect the accountants' usage of statements related to the ethical decisions. The expectation is that the DIT U-score will indicate a link to the usage of justification statements and ethical decisions for the accounting professional subjects (n=137).

Results indicated that Generation X-ers responded differently than the other age group regarding statements justifying typically unethical behavior when the justification implied that "trade-offs are an integral part of life" or when "long-term commitment" was involved.

The U-score and age groupings add considerable explanatory power to the popularized P-score by illustrating that the justification statements chosen by the subjects often tend to go along with the ethical/unethical action choices. Results of the analysis indicate that characteristics of the accountants' age

groupings show that their justification choices tend to drive the advocacy of a particular course of action.

INTRODUCTION

The DIT instrument was developed by Rest (1979) and is based on the six-stage moral reasoning model proposed by Kohlberg (1962). The P-score is usually considered to be the most important DIT score and is the DIT score most used in published research. It is also of interest to the current study. The P-score is described as the priorities attached to "principled moral considerations" (Rest, 1987, 13). The practical interpretation of the P-score is the percent of the subject's moral reasoning that uses equity and equality in the decision process (i.e., Kohlberg's Stage 5 and Stage 6 processes).

Is the usage of justification statements in making accounting environment ethical decisions related to the U-score measured by the Defining Issues Test (DIT)? The U-score is one of four scores resulting from the analysis of the DIT instrument. The U-score denotes what is referred to as the "utilizer" score, which represents "the degree to which a subject uses concepts of justice in making moral judgments" (Rest, 1993, Sec. 2, 13). A part of the U-score assumption is that concepts of justice are appropriately meaningful to the moral reasoning decision process.

As such, justification usage has implications for the study of ethical decisions (Thoma et al., 1991).

The interest in differences between "Baby Boomers" and "Generation X-ers" is also a focus of the study. If life experiences, expectations, and resulting values of these two age groups have varied, will that factor be expected to have an impact on the usage of justification statements related to the ethical decisions?

LITERATURE REVIEW

Several researchers have examined ethical decisions and moral development of accounting professionals using the DIT (and the popular P-score), with interesting and varied outcomes. Armstrong (1987) compared P-scores of CPAs and accounting university students. Results indicated that the CPAs' mean score was lower than the university students and lower than scores of adults in general. Armstrong points out that while this may be a result of self-selection, it may also be related to the structured training and environment of the accounting discipline. This structure may, in some way, restrict the development of moral reasoning during the training and on-the-job adaptation of accountants.

Ponemon and Glazer (1990) compared accounting alumni and students from two universities. Results indicated that the P-scores of the accountants and the senior accounting majors were higher than freshmen scores. This would tend to dispute Armstrong's earlier proposal that the accounting training may be hindering usual moral development.

Lampe and Finn (1992) used ethical vignettes to examine the ethical decision processes of auditors and accounting students. This survey combined the three-story version of the Defining Issues Test (DIT), required a judgment, and required subjects to rank order reasons for each ethical vignette decisions. The results of the study indicated that the auditors' ability to recognize alternative actions in an ethical decision context are influenced by moral development levels (i.e., the P-score measure). Lampe and Finn also found evidence suggesting that the structured training and work environment of the profession can have an effect on the measured moral development of accountants. Shaub (1994) analyzed P-scores and demographic variables of auditors and accounting students. The results indicated higher moral reasoning scores for individuals with higher GPAs.

Jones (1991) has criticized existing theoretical models of individual ethical decision making. He believes that the DIT model and P-score ignores issue-contingent factors. He points out that consequence magnitude, effect probability, temporal immediacy, and effect concentration are also related to moral judgments. Generally, he posits that people make better decisions when the moral issue is deemed important to them.

The current study uses the three-story Defining Issues Test (DIT), four accounting related ethical vignettes, and justification statements. The justification statements in the current study are designed to partially address this proposal of Jones (1991). They also are designed to partially explore links between judgments and justification statements chosen by different age groups. The theory is that differences in choices of justification statements might help explain how different age groups and individuals with different concepts of justice rationalize judgment.

The primary research related to the DIT U-score was conducted by Thoma et al. (1991). Reanalyzing data from five previous moral judgment and action studies, they found that moral judgment scores and action intensified as the U-score increased. The results of their analysis indicated that the U-score effect was relatively stable across age and educational levels.

Smith et al. (1998) reports that Matures were those individuals born between the years of 1909 and 1945. Boomers are born between 1946 and 1964; and Xer's were born between 1965 and the present. Matures can be labeled as thrifty, money-saving, and distrustful of investment opportunities, partly due to surviving the Great Depression. Boomers can be labeled as rejecting conformity and focusing on self-fulfillment. X-ers have grown up in the information age where over-stimulation has been the rule. As a result, they may fear long-term commitment, see trade-offs as a part of life, and be resistant to change. It is possible that these varying age groups may have different

concepts of justice and may attach varying importance levels to different justification statements.

METHODOLOGY

Data for the analysis were collected with a self-report questionnaire mailed to accountants working in public accounting and in industry. The questionnaires were sent to firms, which were selected to represent all of the regional areas of the United States. Public accounting firms were selected from *Emerson's Directory of Leading Accounting Firms Worldwide*; Fortune 500 firms were selected from the *Million Dollar Directory*.

The questionnaire contains four parts and was pilot tested with accounting professionals and students. The first part was the three-story DIT survey instrument. This part provided the data for the provision of the P-scores and the U-scores. The second part presented four separate accounting environment vignettes. After reading each of the vignettes, the accountants were requested to answer the following question: In your opinion, how unethical/ethical was the individual's actions? (using a Likert scale of 1 = very ethical to 6 = very unethical). The third part of the questionnaire provided 7 to 8 justification statements for the consideration of the accountant subjects. The justification statements represent vignette-specific considerations that the subjects might potentially use in making their ethical decisions. The accountants were requested to indicate the importance of each of the justification statements in making their decisions as to whether the actions taken were ethical or unethical. The scale used for this part of the questionnaire was great, much, some, little, or no importance. The last part requested demographic information, which is shown in Table 1.



Table 1 - Respondent Demographic Information		
<i>Firm Employment</i>	<i>n^a</i>	<i>Percent</i>
CPA firm	86	63.2
Industry	<u>50</u>	<u>36.8</u>
Total	136	100.0
<i>Gender</i>		
Male	83	61.0
Female	<u>53</u>	<u>39.0</u>
Total	136	100.0
<i>Age Code^b</i>		
Generation X-er	65	47.4
Baby Boomers & Matures	<u>72</u>	<u>52.6</u>
Total	137	100.0
<i>Geographical Region</i>		
Northeast	22	16.1
Southeast	34	24.8
Midwest	40	29.2
Southwest	28	20.4
Northwest	<u>13</u>	<u>9.4</u>
Total	137	100.0
<p>^a Not all totals equal 137; all respondents did not answer demographic items.</p> <p>^b Age Code = Generation X-er, born between 1965 and the present; Baby Boomer, born between 1946 and 1964. Since there were only nine respondents in the Matures category, born between 1909 and 1945, they were combined with Baby Boomers for analysis.</p>		

The four vignettes used in the questionnaire describe accounting situations with varying degrees of decision guidance. Vignettes 1 and 4 describe situations where the profession has specific guidance for judging the ethical nature of the situations;

vignettes 2 and 3 describe more ambiguous situations and contain extenuating factors that might be considered in the judgment call the accountants are asked to make. Since the vignettes describe both the situations and the actions specifically taken by the actor in the vignette, the ethical nature of the actors' decisions were also varied. Vignettes 1 and 2 describe ethical actions; vignettes 3 and 4 describe unethical actions.

In order to test whether the gender of the vignette action has an effect on the decision being made by the accountants, two forms of the questionnaire were used. Version A used a male action for Vignette 1; female, for Vignette 2; male, for Vignette 3; female, for Vignette 4. For Version B of the questionnaire, the names were switched (i.e., female - Vignette 1; male - Vignette 2; female - Vignette 3; male - Vignette 4). A brief statement of the potential situations examined in the four vignettes is given below.

Table 2 - Four Vignette Topics/Actions Taken		
Vignette #	Vignette Topic	Action Taken
1	Filing an accurate/inaccurate CPE report to State Board; filed an accurate report	ethical
2	Reporting suspicion of potential inventory manipulation; reported suspicion to audit manager	ethical
3	Questionable credit extension; grants credit	unethical
4	Manipulation of accounting records to meet earnings forecast; "cooks the books"	unethical

Vignette 1 reports on the ethical action taken by a staff member, working for a large CPA firm. Because of a busy schedule and illness, the staff member had not completed all CPE requirements for the filing period about to end. The accountant is faced with the decision of filing an accurate report or intentionally filing an inaccurate report with his/her name and firm name being reported. An ethical decision is taken; an accurate report is filed.

Vignette 2 introduces some ambiguity into the decision and describes a staff auditor who is concerned about possible inventory manipulation. The auditor meets with his/her audit manager and discusses the situation, indicating an ethical decision.

Vignette 3 describes a situation with more ambiguity when an assistant controller must make a questionable decision concerning the extension of credit. He/she makes an unethical decision by extending credit to an old friend in order to make a new sale, pacify a friend, meet budget, and attain bonus level.

Vignette 4 describes a situation where pressure from the company CEO is being put on an industry controller to make a decision to manipulate the accounting records in order to meet budget. The controller takes an unethical action.

Vignettes 1 and 2 were adapted from Vignettes A and B of DeZoort and Lord (1994). Vignettes 3 and 4 were adapted from Flory et al. (1992). Since vignettes 1 and 4 describe situations with professional guidance, differences in the accountants' responses were not expected. However, because vignettes 2 and 3 describe situations with greater ambiguity, there were expected to be differences in the responses. The differences were expected to be linked to the moral development (i.e., the P-score), the use of justice in making the decisions (i.e., the U-score), and the age grouping (i.e., X-er, Boomers, and others).

ANALYSIS AND RESULTS

The SAS statistical procedures were used for the analysis of differences in the responses based on the P-score, U-score, and Age Code variables. Before the primary analyses were accomplished, two potential confounding variables were examined. The accountants for the research were drawn from 10 different states, representing all major regions of the United States. The first analysis indicated there were no significant differences in the ethical decisions by the state variable. In addition, the analysis indicated there was no significant difference based on the survey version considered by the accountants (i.e., version A or B).

The GLM analysis was used on the Part 1 ethical/unethical decisions. Only one of the four vignette decisions indicated significance. The first decision, which described a staff accountant making an ethical decision concerning reporting CPE hours, indicated significant ($F = 2.19$; $p \leq .04$) on the P-score. Student-Newman-Keuls pair-wise comparisons indicate that the highest quartile P-score subjects responded significantly more ethically than the lower P-score subjects on this decision.

The main focus of this study was not the ethical/unethical decisions on the four vignettes. It was the justification statements relating to those four decisions. Analysis of the justification statements showed that 14 statements indicated significant differences ($\alpha \leq .05$) on the 29 justification statements on the survey. The Age Code results were significant on eight of the justification items; the U-score, on six items; and the P-score, on four items. Table 3 gives the significant justification statement results.

Table 3 - Significant Justification Statement Results (GLM) ($\alpha \leq .05$)				
No. ^a	Justification Statement	Model F-value	p-value	Significant Variable
1.1	CPA firm may be embarrassed if name is printed in the State Board report.	2.09	.040	U-score
2.2	Approaching the client about the situation might anger them.	3.03	.006	Age Code U-score
2.3	This is an important new client.	2.61	.015	Age Code
2.4		2.96	.007	Age Code
2.5	To avoid controversy, the auditor could always count different items.	2.35	.028	U-score Age Code
2.6	What effect would stopping the accountant have on the ability to keep the client happy? What is the likelihood that they will falsify records?	2.38	.026	Age Code

3.1	Paul/Anne needs the bonus.	2.41	.024	Age Code
3.4		2.47	.021	Age Code
3.5	Company trusts Paul's/Anne's decisions or they would not have put him/her in charge.	2.42	.023	U-score U-score
3.6	Paul/Anne consulted the general manager who indicated support. Family financial responsibilities are not a part of business decisions.	2.56	.017	P-score
4.1	Paul/Anne must be loyal to his/her company. If his/her spouse has good advice, he/she should listen. Everyone tells "little while lies." Is there any way that Paul/Anne could be caught?	4.55	.001	P-score
4.2		2.17	.042	U-score
4.7		2.62	.015	P-score
4.8		2.08	.050	Age Code P-score
^a No. = first number is the ethical vignette; second number is the justification statement number for that vignette decision.				

Age Code Results

A major focus of this research is whether there are differences in the responses of those accountants described as "Generation X-ers." The X-ers used justification statements

differently in many instances than the Boomers and Matures. They tended to respond along two dimensions: (1) “trade-offs are to be expected,” and (2) “commitment is frightening.” Along the “trade-offs are to be expected” dimension, they responded by considering the following justification statements to be more important than Matures and Boomers:

To avoid controversy, the auditor could always count different items. (Vig. 2)
What is the likelihood that the firm’s accountant was following you in order to falsify records? (Vig. 2)
Paul needs the bonus. (Vig. 3)
Is there any way that Anne/Paul could be caught? (Vig. 4)

Along the “commitment is frightening” dimension, they responded by using the following justification statements more readily than the Boomers and Matures:

Approaching the client about the situation might anger them. (Vig. 2)
This is an important new client. (Vig. 2)
What effect would stopping the accountant from following you have on the ability to keep the client happy? (Vig. 2)
The company obviously trusts Paul’s/Anne’s decision making capabilities or they would not have put him/her in charge. (Vig. 3)

U-score Results

As far as concepts of justice and the DIT U-Score are concerned, the following observations were statistically significant. Those with the lowest U-scores (i.e., that may be

using concepts of justice least in their decisions) used the following statements significantly more than others:

Firm might be embarrassed if the name is printed in the State Board report. (Fig.1)
Approaching the client about the situation might anger them. (Fig. 2)
To avoid controversy, the auditor could always count different items. (Fig. 2)

Since these last two statements were also significant on the Age Code variable, this adds a possible third dimension to the responses of some X-ers: “Lack of need for justification” or “Avoidance of controversy.” Additionally, participants with medium range U-scores tended to place importance on “listening to authority or valued others” rather than using internalized concepts of justice. They used the following items more often than those with high U-scores:

Paul/Anne did consult with the general manager who indicated support. (Fig. 3)
If his/her spouse has good advice, Paul/Anne should listen to him/her. (Fig. 4)

When observing unethical decision vignettes (i.e., decisions 3 & 4), the results from the U-score analysis of the justification statements were mixed. Perhaps it was harder to determine what to use when evaluating a vignette describing someone who has made an unethical decision? Evaluation of justification statements seem to be pondered more often in these situations.

P-score Results

Those participants with high P-scores used justification statements less than others. The P-score variable was only

significant on decisions 3 and 4, the decisions describing an unethical action taken by the vignette actor. As was noted in the U-score discussion, when subjects observed unethical decision vignettes, those with higher moral development scores (i.e., higher P-scores) used the additional information significantly less. Perhaps ethical decisions are considered with an internal sense of justice, while unethical decisions are not. Participants with low P-scores rated as more important items of a more “personal or interrelationship” basis. They used the following items more often than those with high P-scores:

Family financial responsibilities are not a part of business decisions.

(Fig. 3)

Paul/Anne must be loyal to his/her company. (Fig. 4)

Everyone tells “little white lies.” (Fig. 4)

DISCUSSION

This research examined the link between ethical decisions in an accounting context and the DIT P-score, U-score, and age descriptors. Although most ethical research targets decision processes, the focus of this research was the importance placed on justification statements related to the evaluation of the ethical vignettes.

Analysis of the P-score and U-score based on Age groupings presents interesting results. Generation X has been a hard group to describe. Their complexity and lack of common focus is apparent in this study. However, there are trends in the data. The only significant ethical decision from the four vignettes indicates that those individuals with higher moral reasoning (higher P-score) supplied the most ethical response. The P-score also indicated significant results on four of the justification statements. In all significant cases, lower P-score individuals considered the statements more important to their

decisions, and the differences were only when considering unethical decision vignettes.

The U-score results were quite consistent as long as ethical decision vignettes were being considered. On all three items indicating significance on the ethical vignettes, the lower U-score respondents considered the statements more important. The results were more complex and varied on the unethical decision vignettes. These responses appeared to be more related to reliance on “valued others” rather than reliance on internalized concepts of justice.

The Age classification variable shows the most discrimination on the justification statements and the most consistent differences. On all eight significant items, the Generation X-ers considered the statements more important than the Boomers and Matures.

The use of vignettes provides a rich means for the study of ethics. Researching justification statements illustrates that, as the ethical decision becomes more complex, introduces family members’ opinions or personal finances, etc., decisions and the use of justification statements become increasingly interesting. The use of justification statements for ethical versus unethical decisions also produced fertile results. The results of the Generation X data are particularly notable because they have been described as having such varied characteristics and have been billed as “committed to nothing” as a common goal. Therefore, it is also interesting to note whenever they think alike on the use of justification statements.

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THE ACADEMIC ETHICS OF BUSINESS STUDENTS MAJORING IN FINANCE

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ABSTRACT

This paper reports the results of a survey of the academic ethics of a group of finance majors. The findings reveal that students have multiple levels of ethical behavior from simply sharing information to outright copying. These results imply that the classroom instructor must understand that students operate on several ethical planes simultaneously and that class-related work must be designed to recognize these different ethical levels.

INTRODUCTION

College faculty and administrators have had concerns about the academic ethics, or academic misconduct, of students ever since there have been students and teachers. It is easy to assume that each student in the class will behave ethically, but the definition of ethical behavior can vary significantly between individuals, especially those in the different roles of student and teacher. In order for the instructor to be able to teach as well as possible, it is necessary to understand the students and their behavior as well as the subject material. This study examines the ethical dimensions of a specific group of students, all finance majors, and reports ethical characteristics that could affect classroom teaching.

LITERATURE REVIEW

Much of the research on academic ethics has consisted of surveys of students to determine which unethical academic practices they engage in, the extent of their participation in the practices, how they rate the ethical level of the practices, and how unethical academic behavior is related to student characteristics. Students from many academic majors have been surveyed, including business administration.

Participation in unethical academic behavior by business students has been reported at alarmingly high levels. Tom and Borin (1988) found that 49% of undergraduate students taking a marketing course had engaged in at least 1 of 23 dishonest behaviors. Sims (1993) found 91% of undergraduate business majors reported dishonest behavior. Brown (1995) reported 81% of graduate business students had engaged in at least 1 of 15 unethical behaviors more than infrequently while in graduate school.

Rates of participation of business students have also been found to be high relative to other majors. Bowers (1966) found that 66% of business majors had engaged in dishonest behavior, the highest rate among nine majors. Other rates ranged from 58% for engineering majors to 37% for language majors. Baird (1980), though he did not report actual rates, found business majors more likely to cheat than liberal arts and education majors.

Meade (1992) reported a study by McCabe at 31 top-ranked schools. Business majors showed a higher rate of dishonest behavior (87%) than engineering (74%), science (67%), or humanities majors (63%). Roig and Ballew (1994) found that business and economics majors showed more tolerant attitudes toward dishonest behavior than did social science students.

The relationship between unethical academic behavior and characteristics of students in various majors has been investigated. Several studies found males more likely to participate in unethical activities than females (Baird, 1980;

Davis & Ludvigson, 1995; Genereux & McLeod, 1995; Karlins, Michaels, Freilinger & Walker, 1989; Sierles et al., 1980). However, other studies reported no difference (Brown, 1995; Stern & Havlicek, 1986). McCabe and Trevino (1996) found equal rates for males and females, but the rate among females had increased from a decade earlier while the rate for males had stayed about the same. A study by Graham, Monday, O'Brien, and Steffen (1994) found rates of participation higher among females. A more consistent finding has been that cheating behavior varies inversely with GPA (Baird, 1980; Genereux & McLeod, 1995; Graham et al. 1994; Haines & Diekhoff, 1986; Singhal, 1982).

Three additional points about unethical academic behavior are apparent from the literature. First, students are more likely to engage in practices they view as less unethical (Brown, 1995; Graham, et al., 1994; Greene & Saxe, 1992; Newstrom & Ruch, 1976; Nuss, 1984; Stevens, 1984; Tom & Borin, 1988). Second, students tend to see themselves as more ethical than their peers (Greene & Saxe, 1992; Newstrom & Ruch, 1976; Stevens, 1984). Third, the wish to obtain a high grade and the lack of adequate study time dominate the reasons cited for participating in unethical behavior (Baird, 1980; Brown, 1995; Davis & Ludvigson, 1995; Graham, et al., 1994; Meade, 1992; Nuss, 1984).

Dishonest academic behavior has consequences on the campus and beyond. Chisholm (1992) enumerated the damages dishonest behavior does to an institution of higher learning. The reputation of the institution is diminished in the academic community and with the general public. Students lose faith in the institution and become alienated. The grades of honest students may suffer to the extent grading is done "on a curve." Dishonest behavior that is unchecked gives the impression it is acceptable, encouraging further participation in such activities. Correlations have been found between dishonest academic behavior and behavior on the job. Sierles, Hendrickx, and Circle

(1980) found students who cheated in academic classes in medical school were more likely to falsify patient records in a clinical setting. Sims (1993) found significant correlations between the number and severity of dishonest acts respondents engaged in as students and as employees. Crown and Spiller (1998) cite theoretical evidence that unethical behavior tends not to be limited to a specific situation. They found in their review of theories of organizational ethical decision making that most theories do not pose different models for different types of behaviors.

Studies of business students have not generally indicated the functional area of business in which the students were majoring. In our review of the literature we found no studies that specifically identified finance majors as subjects. This study makes a contribution toward filling that apparent gap in the academic ethics literature.

METHODOLOGY

The questionnaire that was administered was a slightly modified version of the one used by Brown (1994, 1995) in two studies of graduate students. It was given to finance majors at an eastern state university during the Spring term of the 1998-99 academic year. The questionnaire contained 16 academic practices that were selected from the literature and that might be considered unethical. Respondents were asked to indicate how often they had engaged in each activity while a university student.

A six point scale was utilized with a range of one (frequently) to five (infrequently) and six (never) for those who had not participated in the activity. Respondents were then asked to rate the ethical level of each practice from one (very unethical) to five (not at all unethical).

Eleven reasons why students might engage in unethical academic behavior were selected from the literature. Respondents were asked to rate on a 5-point scale from one (not

at all likely) to five (very likely) the chance that each would be a reason why students would participate in unethical academic behavior. Demographics asked were class level, grade point average (GPA), hours worked on a job per week, semester hours of course work carried, gender, and year of birth.

Questionnaires were administered during regularly scheduled class meetings. Respondents were assured anonymity and were provided a plain envelope in which to seal their completed questionnaires before returning them to the instructor. Thirty-three completed questionnaires were returned by finance majors.

RESULTS

Table 1 presents the general characteristics of the respondents. Most were male seniors under 25 years of age. The vast majority worked more than 20 hours per week and carried more than 12 semester hours worth of classes. This commitment of large blocks of time to both school and work might explain why slightly over half the sample reported a grade point average of less than 3.0 (a "B" on the grading scale used at this institution).

Table 2 presents information concerning overall participation in specific practices and whether or not the respondents felt those practices were ethical. This exhibit reveals some of the underlying attitudes held by the students. The sixteen practices fall into four distinct groups based on the nature of the practices and the students' evaluation of the ethical level of the practices. The groups consist of practices ranked 1-4, 5-9, 10-13, and 14-16.

Table 1 Respondent Characteristics	
Characteristic	Percent
Class rank:	
Junior	24.2
Senior	75.8
GPA:	
Less than 3.0	54.5
3.0 and above	45.5
Hours of employment per week:	
Fewer than 20	27.3
20 hours or more	72.7
Semester hour course load:	
1 to 12	15.2
More than 12	84.8
Gender:	
Female	18.2
Male	78.8
Age:	
Under 25	87.9
25 and older	12.1
Sample size = 33	

Table 2 Participation In and Ethical Level of Practices					
Practice	Participation			Ethical Level	
	Pct. ¹	Mean ²	Rank ³	Mean ⁴	Rank ⁵
Having someone check over a paper before turning it in	90.9	2.53	1	4.42	1
Giving information about the content of an exam to someone who has not yet taken it	90.6	3.52	2	3.12	3
Working with others on an individual project	87.9	3.83	3	3.00	4
Asking about the content of exam from someone who has taken it	84.8	3.18	4	3.18	2
Padding a bibliography	69.7	4.26	5	2.48	6
Plagiarism	63.6	4.48	6	2.30	7
Taking credit for full participation in a group project without doing a fair share of the work	60.6	4.75	7	2.15	8
Before taking an exam, looking at a copy that was not supposed to be available to students	57.6	4.11	8	2.00	9
Visiting a professor to influence grade	45.5	3.47	9	2.85	5
Using exam crib notes	42.4	4.64	10	1.61	12
Allowing another to see exam answers	36.4	4.42	11-13	1.39	13
Using a false excuse to delay an	36.4	4.83	11-13	1.94	10

Practice	Participation			Ethical Level	
	Pct. ¹	Mean ²	Rank ³	Mean ⁴	Rank ⁵
exam or paper					
Having information programmed into a calculator during an exam	36.4	4.83	11-13	1.82	11
Copying off another student's exam	24.2	4.75	14	1.12	15
Passing answers during an exam	21.2	5.00	15	1.24	14
Turning in work done by someone else as one's own	18.2	5.00	16	1.09	16
Overall percent admitting participation	100.0				
¹ Percent admitting participation ² Scale: 1 = frequently, 5 = infrequently ³ Ranked from highest to lowest rate of participation ⁴ Scale: 1 = very unethical, 5 = not at all unethical ⁵ Ranked from least unethical to most unethical					

These groupings show that the ethical values of students operate on several different levels. The first group, practices 1-4, deals with cooperative behavior such as having someone else check a paper before submitting it, sharing information concerning examinations, and working with others on individual projects. Approximately 85% to 91% of students admit engaging in these practices, but all four of these practices are on the “not unethical” side of the ethical level scale. The ratings on the frequency scale also show that the students participate in these practices frequently. These practices can be considered “victimless crimes.” While they might push against the envelope

of “ethical” behavior, students do not consider them to be true violations of an ethical code. Students are trained to work in groups in many classes, and the concept of synergy is a part of many courses. It is not surprising that these activities, which may be considered an extension of other learned behaviors, are not considered particularly unethical and are practiced by most students.

The second group, practices 5-9, identifies a set of activities that a large number of students engage in yet regard as unethical. These activities involve plagiarism, padding bibliographies, taking full credit for participation in a group without doing a fair share of the work, and looking at an “illegal” copy of an exam before taking it. The ethical rankings are now on the “unethical” side of the scale and show that students do regard these as less than ethical practices, but 46% to 70% of the students also admit that they have engaged in these activities. These appear to be “arms length” violations of ethical codes. The individual knows that he or she is behaving less than ethically, but this type of behavior does not seem as personal as other ethical violations, like copying from a crib sheet. It is interesting to note that by rank students identify “visiting a professor to influence a grade” as the fifth most ethical practice yet the ninth ranked in participation. This could indicate that the prospect of individual interaction for which the individual can be held responsible can deter students from what they believe to be unethical practices.

The third group, practices 10-13, involves behavior during tests. These behaviors are more “personal” than other ethical violations in that they deal with examinations and papers, measures of individual achievement. These practices include using a false excuse to delay an exam, using crib notes, and programming answers into a calculator. In this group is “allowing another to see exam answers,” which is a more passive personal ethical violation since the student does not receive direct advantage from the act from an outside source. These behaviors

are clearly considered to be less than ethical as indicated by the low ratings on the ethical scale, but over a third of the students surveyed responded that they engaged in each of these activities.

The fourth group, practices 14-16, includes copying off another student's exam, passing answers, and turning in someone else's work as one's own. These behaviors are considered to be unethical, yet approximately one fifth of the students surveyed admit to participating in these behaviors. These are the true "crimes" that involve claiming someone else's work as one's own. Students are very clear in their identification of this level of unethical behavior, yet a relatively large number engage in such practices. This could be one of the areas in which students who feel at a loss for time to study feel justified in taking advantage of any situation available.

Another telling statistic is the overall percentage of participation value. All students admit to undertaking at least one of these practices. It should be remembered that the first ranking group involved "victimless crimes" which were not considered to be particularly unethical by the students. This could indicate that today's younger students do not share the same ethical values as their older instructors thus creating an "ethical generation gap." Instructors should be aware of this in designing courses and assignments that require significant individual work. There is a high probability that assignments outside the classroom will involve some level of group effort. When individual effort is an important differentiating variable, assignments must be designed to reflect only individual work.

Table 3 presents the reasons given for unethical behavior.

Students are evidently under severe pressure to maintain grades even though they spend a lot of time outside the classroom working, possibly to pay their way through college. This appears to be a major source of unethical behavior. Students need to maintain a respectable grade point, possibly to qualify for financial aid, and yet they are forced to work long hours outside class, again to be able to afford college. It is quite possible that

the cost of college has in and of itself led to some of the “unethical” behaviors that students self-report.

Table 3 also reveals an interesting aspect of student behavior. The third most frequent reason for engaging in unethical behavior is given as “Does not have time to study.” This reason would be consistent with students who work to pay their way through school. The second most frequent reason, however, was “Has the time but does not study.” The data indicate that students engage in unethical practices in courses that they perceive as difficult, but they do not want to put out the effort needed to earn the grade. This might be more of an “MTV ethic” than a “work ethic.” Educators are going to have to design courses that somehow stimulate the students to want to do the work. If given their own way, it seems that most students will simply choose not to do the assigned work.

CONCLUSION

The results of this study indicate that behaviors that instructors proscribe are commonly practiced, and quite possibly for the reason of being able to continue in higher education. Students do seem to recognize different levels of “ethics” ranging from extended cooperation to outright cheating. Faculty members must also learn to recognize these differences if they are to design and administer courses that teach more than professional material. Instructors must become more aware of opportunities for unethical behavior and tailor assignments to limit or prevent its occurrence. This examination of the ethical characteristics of finance majors indicates that these individuals operate on several different ethical levels. While some behaviors seem to be extensions of group learning, other activities clearly make students uncomfortable, but all students admit to participating in at least one of the surveyed activities. The ethical behavior of students is in some way the responsibility of

the faculty, and understanding the complexities of this behavior is critical to understanding today's students and tomorrow's leaders.

Table 3 Reasons for Unethical Behavior	
Reason	Mean ¹
To get a high grade	4.42
Has the time but does not study	4.12
Does not have time to study	3.91
Difficulty of material	3.85
Feels no one is hurt by behavior	3.82
Low risk of getting caught	3.39
Instructor is poor or indifferent	3.24
Everyone does it	3.15
Feels work is irrelevant	3.12
Was a challenge or thrill	2.21
Peer pressure to do it	2.12
¹ Scale: 1 = not at all likely, 5 = very likely.	

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ETHICAL FRAMEWORKS AND ETHICAL BEHAVIOR: A COMPARISON OF BUSINESS AND NON-BUSINESS STUDENTS

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ABSTRACT

This study investigated the value of teaching ethics to business students by collecting data on the ethical frameworks and ethical behaviors of business and non-business students enrolled at one university. Results indicated that business students espoused less ethical behavior than their non-business cohorts. Results also indicated there were no significant differences between business and non-business students in terms of the ethical frameworks that influenced their decisions. Further analysis indicated that the ethical frameworks of Utilitarianism and Self-Interest were positively associated with ethical behavior while the ethical frameworks of Categorical Imperative, Legality and Light of Day were negatively associated with ethical behavior.

INTRODUCTION

A history of insider trading on Wall Street, influence peddling in the Department of Defense, and scandals on Capital Hill have focused attention on the issue of ethics. In response, the International Association for Management Education

(formerly American Assembly of Collegiate Schools of Business) endorsed teaching ethics in the business curricula. Integrating ethics into the curricula through existing course work has been the preferred approach of a majority of business school deans (George, 1988). This approach, however, has been challenged on the grounds that faculty lack professional training in ethics and that faculty have infrequent exposure to business situations involving ethical dilemmas, alternatives or choices (Bok, 1978). Furthermore, the efficacy of any attempt to raise moral awareness among students has been questioned. Government and business leaders have expressed their belief that business schools are wasting their time teaching ethics in the first place (Murry, 1987).

Therefore, the purpose of this study is to see if we are, in fact, wasting our time teaching ethics to our business students. This will be accomplished through a study conducted to assess the similarities and differences in ethical frameworks and ethical behaviors of business and non-business students.

BACKGROUND

Ethics is the study of moral principals involving the distinction between right and wrong. Business ethics further narrows the frame of reference to proprietary organizations (Paston, 1984). Empirical research has indicated that unethical business behavior is pervasive and precipitated by pressure from above. A survey of business executives reported an overwhelming belief that people are often or occasionally unethical in business (Schellhart, 1988). Pressure from above to overlook wrong doing, sign false documents and support spurious decisions may understandably lead to unethical behavior (Brenner & Molander, 1977).

To encourage ethical conduct within the organization, several approaches have been advanced. The first approach is focused on the individual and encourages the development of a personal code of ethics to understand and guide decision making

(Hearten, 1986). Another approach focuses on the organization's top decision makers and proposes including an ethical advocate on the board of directors to serve as a social conscience (Parcel, 1976). By questioning managements decisions, the ethical advocate can reduce the threat of group think and blind conformity. Finally, formal codes of ethics are intended to guide the actions and decisions of all organizational members. Although not a cure-all, an organizational code of ethics is considered a step in the right direction (Chatov, 1980).

Business schools normally approach the moral development of future executives at the individual level. Students are exposed to, and involved with, several different ethical frameworks to help them understand and cope with ethical dilemmas. While it is presumed that the frameworks will be useful, and that the students will develop a personal code of ethics, research on the topic is scant. Dahl, Mandell and Barton (1988) initiated research efforts to address the issue. Dahl, et al.(1988) explored the influence of ethical frameworks on the resolution of an ethical dilemma by students. Based on Pagano's (1987) initial work, five ethical frameworks or tests were assessed relative to levels of ethical behavior. The five ethical frameworks are as follows:

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| <ol style="list-style-type: none">1. <i>Utilitarianism</i>: The greatest good for the greatest number.2. <i>Self-Interest</i>: Maximizing the benefits to the individual.3. <i>Categorical Imperative</i>: Universal principals of morality.4. <i>Legality</i>: Rules, laws, etc..5. <i>Light of Day</i>: Possibility of one's actions being discovered. |
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Results from the study indicated that Categorical Imperative, Self-Interest, and Legality most strongly influenced ethical decisions.

Dahl, et al. (1988) provided interesting initial findings and indicated the usefulness of this research stream. Their work

also prompted further inquiry by Watts and Ormsby (1994) who investigated the efficacy of collegiate attempts to help students cope with ethical dilemmas. Data from 674 business students on their ethical frameworks and ethical behaviors found modest support for the relationship between the frameworks used for decision making and the choices made when confronted with an ethical dilemma. Furthermore, it was found that ethical frameworks were generally resistant to change over time while behavioral choices did change over time. Interestingly enough, they found that the level of ethical behavior increased from freshmen to juniors, but decreased for seniors.

One common thread running through this research stream is the use of business students as subjects. While appropriate for the research questions posed, this presents the potential for an error of attribution. With only business students surveyed, a characteristic of the total student population could be wrongly attributed to the business students. This is similar to the debate in the entrepreneurship literature over tolerance for risk. Despite indications that tolerance for risk is a characteristic of entrepreneurs, the findings have not been entirely consistent. Low and MacMillan (1988) explain that after surveying a more inclusive population, the overall evidence is that entrepreneurs, managers and even the general population are all moderate risk-takers. Therefore, it is useful to assess the ethical frameworks and ethical behaviors of business and non-business students before making any sweeping attributions. Stated in the null form, the following hypotheses have been developed for testing:



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| H1: | There is no difference between the ethical behavior of business students and non-business students. |
| H2: | There is no difference between the ethical frameworks used by business students and non-business students. |

METHOD

Research Setting

This investigation was conducted as a field study at a small state-supported institution located in the southwest. The university is a four year degree granting public sector institution at which teaching is the primary emphasis. Predominately serving traditional undergraduate students, instruction is organized by academic discipline. Of the seven colleges on campus, the College of Business is the largest with approximately 2,900 of the university's 10,000 undergraduate students.

Samples and Measures

The subject group for this study were 98 junior and senior level students. The students were enrolled in either a principles of management or principles of marketing course. The students averaged 22.65 years of age and were composed of 46 females and 52 males. The 45 juniors and 53 seniors were comprised of 68 business majors and 30 non-business majors.

The questionnaire (see Appendix A) was developed from the work of Dahl, et al. (1988) and was used to collect information on each respondent's ethical behavior and ethical framework. To measure the students' ethical behavior the first question presented a hypothetical situation that posed an ethical dilemma and then asked the student what they would do. The

decision choices were to copy the entire paper, copy parts of it, read it but don't copy it, talk about it but don't read it, and have nothing to do with it. This approach to measurement focuses on a specific act and is consistent with the generally accepted proposition that behavioral intentions are the most consistent predictors of behavioral acts (Fishbein, 1967; Fishbein & Ajzen, 1975).

The questions used to measure the five ethical frameworks were: Utilitarianism (Q2-2, 6, 11, 14, 17), Self-interest (Q2-4, 7, 18, 22, 23), Categorical Imperative (Q2-1, 3, 8, 16, 21), Legality (Q2-9, 13, 15, 19, 24), and Light of Day (Q2-5, 10, 12, 20, 25). The questionnaire also collected demographic information on the respondent's age, sex, class standing, major field of study, years of work experience, and religious involvement.

Questionnaires were presented to the subjects during their regularly scheduled class period. Prior to administering the questionnaire subjects were informed that participation was voluntary, that their responses were completely confidential and that the information would be used for research purposes only.

ANALYSIS AND RESULTS

The t-test was used to assess the difference between means for ethical behavior and ethical frameworks. As shown in Table 1, there was a significant difference between business and non-business student means for ethical behavior. Business students were less ethical in their espoused behavior, leaning toward copying parts of the paper. While more ethical in their espoused behavior, non-business students would still read the paper but not copy it. Therefore, the null hypothesis of no difference between the ethical behavior of business students and non-business students was rejected. Also shown in Table 1, there were no significant differences between business and non-business student means for the ethical frameworks of

Utilitarianism, Self-interest, Categorical Imperative, Legality, or Light of Day. Therefore, the null hypothesis of no difference between the ethical frameworks of business and non-business students was accepted.

Variable	Business (N=68)		Non-Business (N=30)		t	P-value
	Mean	SD	Mean	SD		
Ethical Behavior	2.6764	0.6094	3.1333	0.8995	-2.6967	0.004
Utilitarianism	3.4115	0.9892	3.5066	1.0355	-0.4245	0.336
Self-Interest	2.4485	0.6873	2.5333	0.7188	-0.5038	0.308
Categorical Imperative	2.7070	0.9377	2.8000	1.2034	-0.5554	0.290
Legality	3.1971	0.8741	3.3866	0.7700	-1.0794	0.142
Light Of Day	3.1739	1.1082	3.3600	1.0858	-0.7787	0.219

Further inspection of the data via correlation analysis yielded interesting results. As shown in Table 2, there were appreciable relationships between ethical behavior and ethical frameworks for the total sample. The frameworks of Utilitarianism and Self-Interest were positively related to behavior. That is, the more the frameworks were considered and influenced the decision the more ethical the espoused behavior. The frameworks of Categorical Imperative, Legality, and Light of Day however were negatively related to behavior. The more the frameworks were considered and influenced the decision the less ethical the espoused behavior.

Variable	Mean	SD	EB	UTIL	SI	CI	LEG	LoD
Ethical Behavior	2.816	0.737	1					
Utilitarianism	3.440	0.999	0.120	1				
Self-Interest	2.478	0.696	0.179	0.100	1			
Categorical Imperative	2.707	0.937	-0.09	0.323	0.121	1		
Legality	3.254	0.844	-0.07	0.659	0.101	0.397	1	
Light of Day	3.230	1.099	-0.08	0.645	0.151	0.452	0.613	1

SUMMARY AND CONCLUSION

The purpose of this study was to investigate the virtue of teaching ethics to our business students. To this end, data were collected on the ethical frameworks and ethical behaviors of 98 business and non-business students enrolled at one university. Results indicated that business students espoused less ethical behavior than their non-business cohorts. Results also indicated there were no significant differences between business and non-business students in terms of the ethical frameworks that influenced their decisions. Further analysis indicated that the ethical frameworks of Utilitarianism and Self-Interest were positively and robustly associated with ethical behavior while the ethical frameworks of Categorical Imperative, Legality and Light of Day were negatively associated with ethical behavior.

The implications of this research indicate that the ethical frameworks used by business students are the same frameworks used by the student population at large. Therefore, we may in fact be wasting our time teaching ethical frameworks to our business students. Students bring to campus ethical frameworks

developed from the long term and sustained influence of family, religion, and work experience. It would seem that our efforts in collegiate schools of business to raise moral awareness among our students is overshadowed by societal influences at large and are less than efficacious.

The results of this study and Watts and Ormsby (1994) would suggest shifting the pedagogic focus from attempting to change ethical frameworks (attitudes, values and beliefs) to teaching ethical behavior. We can help our business students cope with ethical dilemmas by educating them on, and informing them of, the rules of conduct for their profession. Virtually every business discipline is represented by a professional society with an articulated code of ethics. These codes can form the basis for instructing students on what is, and what is not, acceptable professional behavior. This approach furthermore draws on the strength of faculty, mastery of professional content, and renders moot the criticism that faculty lack professional training in ethics.

While ethical behavior can be taught to our business students in the classroom, their resolve will be challenged on the job. Faced with pressure from above, platitudinous ethical codes, spotty enforcement, and no discernible link to the reward system many will revert to expedience. From Steven Kerr's (1975) classic article, "On the Folly of Rewarding A, While Hoping for B," the admonition for business is clear "If the reward system is so designed that it is irrational to be moral, this does not necessarily mean that immorality will result. But is it not asking for trouble?" (p. 770)

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APPENDIX A	
Ethical Framework Questionnaire	
Q-1	<p>You are faced with the following hypothetical situation:</p> <p>A written assignment is due in one of your classes tomorrow and you have not yet had time to do it. In talking with a very close friend, you mention the fact that you have this assignment due. Your friend has taken the class and is very sympathetic to the amount of work involved in writing up the assignment. During the conversation you discover that your friend has not only written up the same assignment before, but received an "A" on it. Your friend has offered to give you a copy of the "A" paper they wrote.</p> <p>What would you actually do in this situation?</p> <p style="text-align: center;">(PLEASE CIRCLE ONE RESPONSE)</p> <p style="text-align: center;">1 COPY ENTIRE PAPER 2 COPY PART(S) OF IT 3 READ IT BUT DON'T COPY IT 4 TALK ABOUT IT BUT DON'T READ IT 5 HAVE NOTHING TO DO WITH IT</p>
Q-2	<p>Recalling what you decided to do with the friend's paper, what influenced your decision? Using the following scale, please indicate to what extent the items influenced your decision.</p> <p style="text-align: center;">1 = CONSIDERED AND STRONGLY INFLUENCED 2 = CONSIDERED AND INFLUENCED 3 = CONSIDERED BUT LITTLE INFLUENCE 4 = CONSIDERED BUT NO INFLUENCE 5 = DIDN'T CONSIDER</p>
Q-3	What is your present age? ____ YEARS
Q-4	What is your sex? ____ FEMALE ____ MALE
Q-5	What is your class standing? ____ JUNIOR ____ SENIOR
Q-6	What is your Grade Point Average? ____ GPA
Q-7	What is your major (or intended major)? _____
Q-8	How many years of work experience do you have? ____ YEARS
Q-9	<p>How involved are you with religious activities?</p> <p style="text-align: center;">1 EXTREMELY INVOLVED 2 INVOLVED 3 SOMEWHAT INVOLVED 4 UNINVOLVED 5 EXTREMELY UNINVOLVED</p>

(PLEASE CIRCLE THE APPROPRIATE RESPONSE)						
1	Whether a student should ever copy a paper.....	1	2	3	4	5
2	Would it be worth it to use someone else's work if it damages the school's reputation.....	1	2	3	4	5
3	Whether using another person's ideas as my own was right or not.....	1	2	3	4	5
4	The amount of time I had available to devote to the assignment.....	1	2	3	4	5
5	Whether my friend with the "A" paper would tell others what I'd done.....	1	2	3	4	5
6	What would happen to the class if the professor found out people had turned in papers that weren't their own work	1	2	3	4	5
7	What effect this case had on my grade for the course.....	1	2	3	4	5
8	Whether people should only turn in work they've done themselves.....	1	2	3	4	5
9	University policies on plagiarism.....	1	2	3	4	5
10	The reaction I'd get from my family if they knew what I had done.....	1	2	3	4	5
11	What would happen to the value of friendships if everyone thought it was all right to use friends' work to get better grades.....	1	2	3	4	5
12	Whether I would feel embarrassed if people found out what I did.....	1	2	3	4	5
13	Since it is so common, using another's paper for homework doesn't really break the rules.....	1	2	3	4	5
14	What would grades be worth if everyone in the community thought the grades didn't represent the students' own work..	1	2	3	4	5
15	The school regulations regarding copying papers.....	1	2	3	4	5
16	Whether students should always be honest in turning in homework.....	1	2	3	4	5
17	The difficulties that copying one paper causes for everybody, such as stricter testing procedures imposed by faculty.....	1	2	3	4	5
18	That it might do to my grade point average if I didn't turn in a good paper.....	1	2	3	4	5
19	Whether any use of another's paper is breaking the rules.....	1	2	3	4	5
20	Whether I'd feel comfortable telling others what my decision was regarding the paper.....	1	2	3	4	5
21	Whether it's important to do your own work.....	1	2	3	4	5
22	Since its only a homework assignment, it might pay for me to risk copying someone else's work.....	1	2	3	4	5
23	Whether I'd need to do the paper myself to be able to do well in the rest of the class.....	1	2	3	4	5
24	Since it would be using the paper with permission, the rules					

on plagiarism wouldn't apply..	1	2	3	4	5
25 How I would feel if the other students in the class found about it.....	1	2	3	4	5

Thank you for completing this survey. Your help is appreciated and will further the understanding of student attitudes.

COURT DECISIONS AND ADMINISTRATIVE DECISION MAKING IN ACADEMIA

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ABSTRACT

The legal system in the US is entertaining more and more higher education cases and ruling in favor of plaintiffs. This paper examines what appropriate administrative personnel can do to reduce the legal exposure and liability of their post secondary institutions to first amendment lawsuits filed against them in the areas of faculty promotions and terminations. We suggest six matters to consider to reduce legal exposure and liability: involvement of institutional awareness, standardized policy manuals, legal specialists, normative cost analysis, accounting solution, and the judicial method.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress (42 United States Code, Section 1983, as discussed in Kaplin & Lee, 1995, p. 118)

INTRODUCTION

Court decisions involving primarily public post secondary institutions in the United States are affecting promotion and termination actions. Both the state and federal judicial systems, and post secondary institutions are no strangers. Faculty challenge institutional decisions in court regarding promotion, tenure, termination, hiring practices, negligence and contractual obligations. These lawsuits can range from common tort suits, to those filed under first amendment rights.

Tort lawsuits generally result out of negligence that may be intentional or unintentional. This type of litigation allows for most any type of suit to be filed. Most tort cases are settled at the state level filed as civil suits (Young, 1981). At the federal level, there are a growing number of lawsuits filed against post secondary institutions that are presented under the protections of the Constitution, particularly the first amendment. In an increasingly common action by faculty, they are relying on the guarantee of freedom of speech under the first amendment to challenge post secondary decisions made by administrators that did not favor tenure or other employment concerns of faculty (Young, 1980). Administrators are considered as college and university presidents, vice presidents, provosts, deans, and other personnel who make decisions regarding faculty promotion, tenure, termination, hiring practices, negligence, and contractual obligations.

Both state and federal lawsuits should concern the decision making process of administrators in post secondary institutions. Unfortunately, tortuous situations are so liberally interpreted and commonly filed by plaintiffs, it appears not much can be done to prevent them. The larger issue and the one that is the focus of this paper is the reduction of legal exposure to first amendment lawsuits filed by faculty. With institutions facing a rising number of cases filed against them, they will have to develop clear policy as it relates to promotion and termination

issues governed by first amendment court cases involving higher education. Kaplin (1990) stated, "Courts have become more willing to entertain suits on their merits and to offer relief from certain institutional actions" (p. 5). These suits, potentially, change the decision making process in which post secondary administrators make decisions regarding faculty promotion, tenure, termination, hiring practices, negligence, and contractual obligations.

ADMINISTRATIVE BACKGROUND

Institutions are highly challenged to consider their decision regarding faculty promotion, tenure, termination, hiring practices, negligence, and contractual obligations by legal phenomenon, which was previously unknown to them. What should they do? How should they respond? If there is a sense of administrative apprehension to examine more in depth the legal implications of their faculty, it is certainly understandable. Many, if not most administrators do not have formal administration training or experience. They have an academic background in some discipline, such as history, or management, or literature, or engineering, or computer science, or human communication, and the list is seemingly *ad infinitum*. As administrators, they often lack the technical training and the professional expertise as human resource specialists to deal with complicated personnel issues. To complicate the matter further, there are few, if any resources available, such as in-service training or policy manuals, or seminars to orient these administrators in laws governing affirmative action, equal employment opportunity, due process, and other critical legal matters. As a result, they, and often their departments and institutional committees, make decisions regarding faculty promotion, tenure, termination, hiring practices, negligence, and contractual obligations that will result in a lawsuit filed under first amendment protections.

LEGAL BACKGROUND

First amendment lawsuits include alleged violations in several areas. For example, first, in *Eichman v. Indiana State University Board of Trustees*, Eichman was in his fourth year as an assistant professor of German. Eichman was informed that he would not be reappointed the next year. He filed suit stating his constitutional rights were violated since, as he claimed, his non-renewal was based on a series of interdepartmental memorandums in which he criticized the university's curriculum and scheduling. The district court ruled in favor of the university stating that the memos are private and not protected under the first amendment. The appellate court overturned the decision based on the *Givhan vs. Western Line Consolidated School District* case. The Supreme Court in the Givhan case did not draw a distinction between private and public speech, so, both were subject to first amendment protection (Young, 1980).

A second example involves *Lieberman vs. Gant*. Lieberman was hired as a part-time professor of English. During her first year, a full-time tenure track position opened. She was appointed to the full-time position on a temporary basis. After two years of searching for a full-time professor, she was appointed to the tenure track position by the department head against the recommendation of the department's promotion and tenure committee as well as the executive committee. When her tenure review came up six years later, the joint executive and department committees voted and did not award her tenure or associate professor status from votes. It also voted to deny tenure and associate professor status, but they recommended a terminal appointment. The file was forwarded to central administration of the acting president, the provost, the associate provost, and the vice-president for academic affairs. She was awarded a terminal position. However, she chose to leave. She filed suit against the university claiming that her treatment was

retaliation against her “efforts to improve the status of women at the University” (Young, 1980, pp. 70-71). The district court found that aside from her actions, especially in equal employment opportunity activities, the institution would arrive at the same decision. According to Young (1980):

This case is one of the most remarkable cases of the year, not only because it involved the efforts of 12 sets of attorneys, 52 days of court time, 10,000 pages of transcripts, and 400 exhibits, but also because of the issues involved and the clarity of treatment of the issues by the judge in rendering a decision adverse to plaintiff on all issues. (pp. 69-70)

Courts are not only entertaining more suits from higher education, they are ruling in favor of plaintiffs more often. If they do not rule in favor of the plaintiffs, the cost of litigating the cases is high. Win or lose, post secondary institutions are finding the cost of being involved to be attention getting, at the least. In a May 2000 case decided in the US District court for Eastern Virginia (*Saleh vs. Moore*, 2000), which involved issues of faculty rights of free speech under the First Amendment, damages were awarded to two individuals in the aggregate amount of \$347,000. More importantly, the officials of the university that lost the case were further ordered to pay more than \$107 thousand in costs and \$1.2 million in fees to the plaintiffs’ attorneys. This, of course does not consider the costs incurred by the defense.

Legal matters surrounding post secondary institutions with administrators making decisions regarding faculty promotion, tenure, termination, hiring practices, negligence, and contractual obligations are not decreasing. Therefore, a legal

orientation program must be developed for deans, department heads, directors, or coordinators etc. in order to help curb the number lawsuits filed against post secondary institutions under the first amendment.

ADMINISTRATIVE ISSUE

The first amendment to the US Constitution considers the following rights: (1) establishment of a religion, (2) free exercise of religion, (3) freedom of speech, (4) freedom of the press, (5) right of the people to assemble, and (6) redress of grievances to the government. Post secondary institutions have to defend a growing number of lawsuits filed against them pursuant to those rights. The administrative issue surrounding this phenomenon is this: *How can the appropriate administrative personnel reduce the legal exposure and liability of their post secondary institutions to first amendment lawsuits filed against them in the areas of faculty promotions and terminations?* The remainder of this paper will focus on five areas for post secondary institutions, in particular administrators, to consider before they make decisions regarding faculty promotion, tenure, termination, hiring practices, negligence, and contractual obligations.

ADMINISTRATIVE DECISION MAKING CONSIDERATIONS

There are six matters for administrators to consider that will help curb the potential of expensive litigation of first amendment lawsuits: (1) an institutional awareness of first amendment rights, (2) revised, clearly enumerated, and standardized policy manuals of first amendment rights regarding faculty promotion, tenure, termination, hiring practices, negligence, and contractual obligations, (3) institutional legal specialists, other than attorneys, to provide legal guidance, (4) a normative cost analysis of litigation, (5) an accounting solution to

estimate litigation, and (6) judicial methods to account for litigation costs.

The parameters of any legal reduction agenda, as suggested above, are found within the context of its environment.

Since the majority of decisions about promotion, tenure, termination, hiring practices, negligence, and contractual obligations are made at administrative and committee levels, the major concern is with the expertise of those administrators in human resource issues. Many administrators and committee representatives may not have direct access to college and university attorneys for consultation on faculty matters. Yet, in light of growing human resource issues with legal ramifications that face them, they clearly need some sort of legal representation or expert knowledge. Though we know that “preventive law has not been a general practice of post secondary institutions in the past,” we know also, as Kaplin wrote, that: “Today it may fairly be said that preventive law is as indispensable as treatment law and provides the more constructive posture from which to conduct institutional legal affairs”(1990, p. 32).

INSTITUTIONAL AWARENESS

Leap (1995) stated:

Beginning in the 1970s, promotions and tenure became more difficult to achieve almost everywhere. The escalation of negative decisions, many of which involved female faculty members, led to an increased number of internal grievances and charges of illegal discrimination against colleges and universities.
(p. 8)

First amendment litigation at public institutions will be centered on the six elements of the amendment: (1) establishment of a religion, (2) free exercise of religion, (3) freedom of speech, (4) freedom of the press, (5) right of the people to assemble, and (6) redress of grievances to the government, with the spotlight on freedom of speech. To address the first amendment scholars can develop a history base line. A historical benchmark must be selected to begin the history of first amendment cases. There are no general guidelines available for selecting a date. Therefore, 1971 can be selected because, by executive order, affirmative action was instituted in that year. This is an important historical marker. "Between 1978 and 1987 nine major cases involving affirmative action were decided by the Supreme Court" (Wilson, 1989, p. 536). Affirmative action with its equality foundation provides a legal framework for first amendment cases.

Utilizing 1971 as a basis, higher education scholars can begin to educate administrators on the important developments of first amendment violations. First, reports in higher education law books can be accessed. Several law texts provide historical information. Some texts include the following: *Tenure, Discrimination, and the Courts* (Leap, 1995); *The Law of Higher Education: A Comprehensive Guide to Legal Implications of Administrative Decision Making, 2nd Edition* (Kaplin, 1990); *The Law and Higher Education: Cases and Materials on Colleges in Court* (Olivas, 1989); *Kirp & Yudof's Educational Policy and the Law: Cases and Materials* (Yudof, Kirp, van Geel, & Levin, 1982); *The Yearbook of Higher Education* (Young, 1981); and *College and University Law* (Alexander & Solomon, 1972). Guidance can be gained for more modern cases from reports in *The Chronicle of Higher Education* as well as cases from a variety of other legal sources including the Internet. Furthermore, these texts divide cases into categories under various headings. Additionally, a taxonomy for first amendment cases can be developed under establishment of a religion, free exercise of religion, freedom of speech, freedom of

the press, right of the people to assemble, and redress of grievances to the government.

Second, since court cases are public information, unless court records are sealed, transcripts can be obtained from various cases by higher education scholars. Transcripts can be requested from the federal courts. These records will provide further insight into the development and ruling of each case. These books, texts, and records can provide a foundation for developing a history of first amendment cases.

Third, interviews can be conducted. College and university officials who participated in the court cases can be interviewed to get a perspective of how these cases began to develop and then escalated into a lawsuit. When possible, court officials, particularly the judges in these cases, can be contacted and interviewed.

Even a cursory overview of the historical development of first amendment lawsuits can provide administrators insights for institutional awareness. However, an in depth analysis of first amendment lawsuits can provide administrators with extraordinary information about what gives rise to litigation. Hopefully, the information can serve a pre-emptive purpose: for appropriate administrative personnel to reduce the legal exposure and liability of their post secondary institutions to first amendment lawsuits filed against them in the areas of faculty promotions and terminations.

STANDARDIZED POLICY MANUALS

Collection of information that addresses first amendment issues can be useful. The information becomes even more valuable if post secondary institutions can develop standardized policy manuals for pragmatic use in colleges and universities. Institutions may be able to get prized information for a policy manual from institutions that have undergone costly litigation.

Institutions involved in landmark and prominent cases should have had internal responses to their cases. Their policy materials should be obtained by written request. Policy materials should include two types. First, there should be internal policy manuals that reflect promotion, tenure, termination, hiring practices, negligence, and contractual obligation procedures *before* the lawsuit. Second, there should be policy manuals that reflect the promotion, tenure, termination, hiring practices, negligence, and contractual obligation procedures *after* the lawsuit. They may maintain the same policy. Whatever the instance, information can be gathered regarding decision making processes before, during, and after the case. This will help set the framework for the initial work on a general policy manual regarding first amendment court cases by which post secondary institutions can benefit.

Unfortunately, a “primary difficulty in dealing with wrongful discharge or employment discrimination cases in academia is that such cases almost always hinge on personal attributes that must be evaluated subjectively”(Leap, 1995, p. 62).

Therefore, the manual is not so much an individualized systematic prescriptive text for each institution as it is a guide that should provide “red-flag” issues under the six first amendment headings. Red-flag issues could contain a summary of steps institutions did that landed them in a law suit, the number of cases settled each year, the range of costs of cases under each first amendment category, and suggestions that might help reduce legal exposure/liability of postsecondary institutions to first amendment law suits filed against them in the areas of faculty promotion, tenure, termination, hiring practices, negligence, and contractual obligations.

With a historical understanding of first amendment cases for institutional understanding, and a standardized policy manual, post secondary institutions may want to employ legal specialists, apart from attorneys, to aid them with their litigation and potential litigation issues. Legal specialists may be able to help

administrators navigate through an often turbulent sea of litigious activity.

LEGAL SPECIALISTS

Many for-profit organizations employ legal specialists to review contracts, policies, and employment issues to reduce the costs of attorney advisement. In a growing litigious society academia may choose to employ legal specialists to aid in the reduction of legal exposure and liability of their post secondary institutions to first amendment lawsuits filed against them in the areas of faculty promotions and terminations. The benefits extend beyond legal maneuvering through first amendment issues. Specialists can provide guidance on array of legal issues facing higher education.

With a growing number of lawsuits being filed against post secondary institutions and the courts ruling against them, legal representation is necessary. Institutions are finding themselves seeking legal counsel more frequently. It is becoming a routine part of doing business. There are also numerous other lawsuits that involve issues such as students and torts, and the *Sherman Act* with its antitrust “trade or commerce” between faculty and student or institutions and patents or courses and students. Administrators are finding themselves seeking legal counsel for accurate policy development on these issues and others, such the *Family Medical Leave Act*, student grade change issues, as well as faculty promotion and termination before the institutions develop policy. This is done to protect themselves from potential lawsuits. Nevertheless, administrators at colleges and universities have to consider how they will utilize legal counsel. Employing legal specialists may help reduce attorney fees and reduce the legal exposure and liability of their post secondary institutions to first amendment lawsuits filed against them in the areas of faculty promotions and terminations.

Hiring legal specialists may not be a viable option for institutions. If hiring legal specialist is not an option, then, as

Kaplin (1990) suggested, preventive law can be exercised by public institutions being served by a state's attorney general's office. This is increasingly more popular. Attorneys general are becoming more familiar with post secondary law cases.

Post secondary institutions can practice preventative law by providing institutional awareness of first amendment lawsuits, developing standardized policy manuals, and hiring legal specialists apart from attorneys. Although institutions may have a law firm on retainer, guidance from legal specialist can reduce the number of issues presented to attorneys as well as reduce retainer fees. Invariably, post secondary institutions will face litigation. Before they decide how far to proceed with the issue, administrators may consider costing the case before seeking extensive legal counsel.

Administrators and others interested in controlling the cost of first amendment litigation against post secondary institutions have no clear directions for developing a quantitative analysis tool to project such costs. Several alternative methods for developing such tools may be proposed and are explored in the next three sections of the paper.

<i>Normative cost analysis:</i>	Develop taxonomy of reported first amendment cases based on the various protections enumerated to evaluate the relative costs of litigation in each category.
<i>Accounting solution:</i>	Based on the rule of generally accepted accounting principles, enunciate a rational and systematic procedural method for estimating the costs of impending litigation, regardless of its subject matter.
<i>Judicial method:</i>	Look to instructions from the courts themselves for guidance as to the justification and calculation of legal fees payable in connection with actual first amendment litigation.

Normative Cost Analysis

Normative cost analysis of the financial damages surrounding a lawsuit, according to a taxonomy related to the protections of the first amendment, will deal with the damages awarded, *per force*. For this purpose, damages must include the cost of any settlement, attorney fees, court fees, faculty and administrative salaries paid that usually would not be thought of as a part of litigious activity, any resources purchased, leased, or rented, and other services employed, such as consultants, or associations, or information clearing houses. This cost analysis would be completed through normative economics (Byrns & Stone, 1989) centered on value judgments.

These value judgments will be made according to the following criteria:

- Number of cases under each of the six first amendment headings,
- Cost of settlement to faculty under each of the six first amendment headings,
- Amount of legal fees, including attorneys, witnesses, and court costs paid by institutions under each of the six first amendment headings,
- Amount of administrative salaries dedicated to refute the case under each of the six first amendment headings,
- Other resources and services needed to refute the case under each of the six first amendment headings.

This information will be developed from results of a survey of affected institutions. A questionnaire can be sent to a selected stratified sample of colleges and universities intended to represent a cross section of institutions categorized in a systematic fashion (perhaps under the Carnegie Classification of

Academic Institutions). While the final form of a questionnaire is undetermined at this time, it can be structured according to the five areas listed above. Data gathered from the instrument can be analyzed for a variety of results.

As this survey information is accumulated, the historical and financial information in a database can be developed for further stages of analysis. For instance, at minimum, determinations of the statistical significance of the differences in the magnitude of the average cost of defending against attacks based on the various six protections of the first amendment may be possible. It would be important to note any differences between litigating a case and preventative measures. Further analysis may reveal out of court settlements are less costly. However, that may be a short-term solution whereas other litigants may emerge expecting similar settlements. All in all, administrators will have to determine if the cost of going to court to win a case is better than the cost of settling out of court.

How can the appropriate administrative personnel reduce the legal exposure and liability of their post secondary institutions to first amendment lawsuits filed against them in the areas of faculty promotions and terminations? Colleges and universities can provide institutional awareness, standardized policy manuals, legal specialists, normative cost analysis, and an accounting solution.

Accounting Solution

While few would assert that the rules of accounting in the United States control the ability of post secondary administrators to respond to and defend against attacks based on alleged violations of first amendment guarantees, generally accepted accounting principles promulgated by the Financial Accounting Standards Board (FASB Statement 5, 1975) provide a structure which can affect the decisions of administrators and others, by drawing their attention to the estimated dollar magnitude of a

possible loss in the court room, or of a settlement to avoid such loss. The following pages provide general rules for administrators to use as an accounting decision making guide. Since the liability of first amendment lawsuits are conditioned on so many factors, the accounting rules are applied to the concept of contingent liability.

To be recorded a contingent liability (loss) it must have the following: (1) probable of occurrence, and (2) reasonably estimable (FASB Statement 5, 1975). However, a liability, which has not fully matured, may yet be serious enough to require disclosure to interested readers, even though it is not recorded in the financial statements. To disclose a liability (as opposed to recording the liability), whether reasonably estimable or not, the standard for whether the supposed problem will be confirmed by future events is less than that required to actually record the liability. In such a case, the standard is only that the future occurrence of the event, which confirms the liability, is reasonably possible.

The two-part procedures contemplated by FAS 5 are independent of one another. The probability of occurrence is unrelated to the magnitude of the contingent loss being considered. The size of the possible loss is not a consideration in determining the likelihood of its occurrence.

Then, with regard to pending or threatened litigation, accounting rules require an estimate of the likelihood of occurrence be made. To assess this probability, accountants rely on a *triage* approach which classifies the chance of a loss being confirmed by future events in three ranges of probability, noted as remote, reasonably possible, and probable. In practical language the term probable means likely to occur, while the term remote means not likely to occur, and reasonably possible includes all chances in between remote and probable (Williams, 1997, p. 7.05)

The accounting treatment for loss contingencies flows logically from the three ranges of probability (Williams, 1997, p.

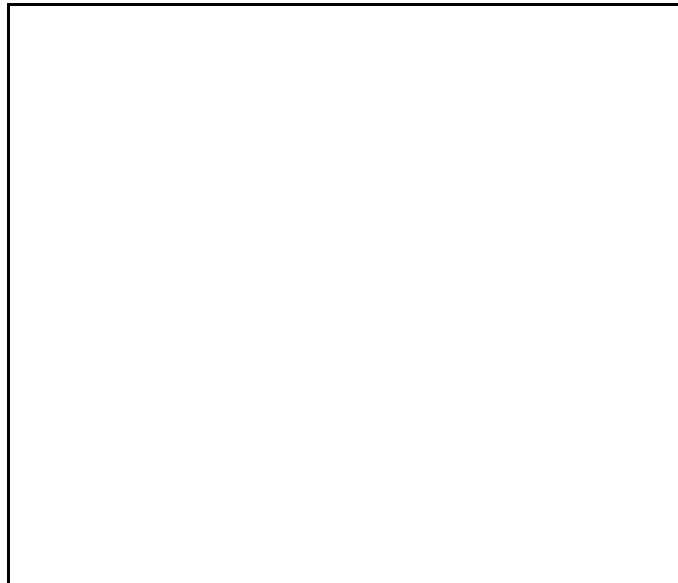
7.05). The administrator's estimate of the probability of loss is not *per se* the same as the accounting estimate, but to the extent both reflect the best estimate available, at least convergence of the two may occur. For purposes of identifying the level of risk, administrators will want to be educated with the possible outcomes and will want to become intimately familiar with the elements and facts of the case, with the applicable law, and with the experience of others in similar circumstances.

Once the likelihood of occurrence of a loss due to pending or threatened litigation is established, the accounting rules then require that, in order actually to record the contingency, the amount of the expected loss must also be reasonably estimable (FASB Statement 5, 1975). For example, if administrators expect a loss of \$1.5 million due to administrator, staff, faculty, legal, and damages, the contingency cost can be calculated based on issues as a protracted length of time in the court room, appeals, reimbursement fees of opposing counsel, and so on. Here again, there is no such requirement as to the reasonableness of the estimate placed on administrators faced with making decisions about how to proceed in mounting a defense against an assault from disgruntled faculty under the first amendment, but the exercise in making the estimate for the one should at least be instructive for the other.

Remembering that the accounting loss contingency is to be recorded when both of the tines of the two pronged test are satisfied (both probable of occurrence and reasonably estimable), the careful reader will observe that the estimate of the amount of any reasonably estimable loss is calculated and disclosed in accounting, when the probability that future events will confirm the loss only reaches the level of reasonably possible. Such losses can arise from pending litigation or from merely threatened litigation. This in itself may be instructive to the affected administrators, in that forcing one to make these estimates when litigation is only threatened, the time for contemplating the magnitude of damages, and costs that may be incurred is

advanced, and by forcing an early quantification of the problem, it is given stature. In other words, when an administrator takes pen in hand and actually makes a calculation of the amount of possible fees to defend a first amendment case, the result may be attention getting for better informed decision making at a potentially lesser cost than consulting with attorneys who are in the business of litigation. Since proper accounting requires the exercise at an early date, the exercise itself may lead, appropriately, to increased attention to the conduct of the defense.

Diagram 1 provides a flow for an accounting solution. It describes accrual for an estimated loss from an event with a contingent outcome, if it is probable that the loss has occurred and the amount can be reasonably estimated.



A word of caution may be in order at this point. Administrators and others who become involved in defending first amendment litigation may believe that they are not involved in estimating the amount of any contingent loss to be recorded in the financial statements of their institution, if any. Feeling that they have no input to the calculation, they may well keep their own notes or other records of their informal estimates of the expected amount of loss. These informal, out of the process notes, however, can unexpectedly become the very evidence that, upon audit, may cause the institution to record or increase an estimate that was otherwise thought not reasonably estimable.

Given the necessity to make an estimate of possible loss, it is relatively easy to envision a structured approach. An important point toward comprehending this discussion is an understanding the structure of the cost. Generally, it will contain three major elements. First, there are fees to be paid to counsel for the defense. This includes a sub-set of attorneys' costs and expenses that are to be reimbursed, such as costs of making copies, telephone calls, faxes, and mailings. Especially with cases involving constitutional issues, the first major cost to be estimated is the cost of defense. Second, when an institution is actually sued, the pleadings will pray for remedy, and that part of the anticipated cost can be easily guessed, given that the institution believes the probability of losing or settling to be high.

Third, the threatened institution, where the probability of losing or settling seems to be high, must consider estimating the fees of the plaintiff's lawyers. This category of cost also contains the sub-set category of costs to be reimbursed.

Categories two and three, the cost of the judgment or settlement and the cost of legal fees to be paid to the prevailing plaintiff's attorneys, are generally estimated to be zero in cases in which the defendant institution believes the defense will prevail. The irony of recording an estimate of judgment and fee losses, together with an estimate of the cost of defense, all based on the chance that these reasonably estimable losses will occur having

been considered probable of occurrence, while at the same time filing motions in court denying liability and asserting that the plaintiff's case is totally without merit, is clear. Such conflicting signals may well give encouragement to the plaintiff, who will see such latent admissions of liability tantamount to admission of culpability. Of course, the defendant, in seeing the possibility of losing as an outcome that is probable, may only be recognizing the unpredictable nature of juries or the fame of the plaintiff's attorneys, or the historical pattern of their particular institution in such cases.

The cost to defend litigation is a knowable, and to some extent, controllable quantity. "Particularly for administrators, sound understanding of the litigation process is predicate to both constructive litigation planning and constructive preventive planning" (Kaplin & Lee, 1995, p. 22). Law firms, generally, consist of attorneys and staff, each with different qualifications and experience, and each falling in a different place in the relative pecking order of hourly rates. Typically, the affected institutions should have written engagement letters with each such firm of lawyers, either placing them on retainer (a fee paid to engage them for a set amount of work each period) or to engage their services on a case-by-case basis. In either event, the engagement letter should detail the hourly rate(s) to be charged for each worker on a particular case, according to their particular qualifications and experience. These details may either specify particular people at certain rates, or particular classifications of worker at certain rates or at some range of hourly rates.

At the onset of a case, counsel should be pressed to develop, with the help of the defendant institution, a plan of defense. If for no other purpose, this plan can be used as a framework for calculating the time to be spent by each of the various players. Regardless of the nature of the case, some general observations about the process of a lawsuit will apply. For example, an original petition or other document that initiates the suit will have been filed. This will require reading by the

defendant and by top-level people in the defendant's law firm. Some answer to the original petition will have to be prepared and filed. This will involve some top-level lawyers, and some of the lower level personnel: staff attorneys to draft language, clerical or paralegal personnel mechanically prepare and reproduce documents, etc. Consultations will occur between the defendant and counsel in the form of fact-finding sessions: Counsel (top level) will have to spend enough time with the defendants, interviewing, talking and assessing the situation and circumstances to develop a theory of what actually happened that led to the lawsuit. Both sides will file motions for discovery of documents, and these motions will require answers. This will entail time spent by staff attorneys for the defense as well as by the defendant's administrative staff. The major players (i.e., in a wrongful termination case based on the freedom of speech guarantees of the first amendment, the person fired and the person who did the firing, for instance) will be either subpoenaed or made available, and will be deposed by top-level attorneys from both sides.

These steps, or other similar or alternative steps, to be outlined by counsel in their plan for the defense, are the frameworks for calculating the possible fees. With this plan, and the billing rates for the various people involved from the engagement letters, administrators can then prepare a stratified budget of the estimated hours for each activity. Table 1 is a simplified example of such a budget.

It should also be noted that there are instances in which engagement letters are not in use, or where, for other reasons or no reason, the expected billing rates are not known (for instance, the various hourly rates of the lawyers in the plaintiff's law firm may not be known.). Let it suffice to say that the resourceful administrator or dean can make reference to the paid bills files related to other litigation, other experience with the particular law firms and other supplemental or alternative sources of information to make an informed guess as to expected rates.

Activity	Staff	Rate per hour	Estimated hours	Extension
Read initial pleadings	Partner	300	4.00	1,200
Dictate response	Partner	300	1.75	525
Type response	Secretary	25	1.25	31
Proof read response	Paralegal	75	0.50	38
Interview client, develop	Partner	300	6.00	1,800
Research related cases &	Staff	500	11.00	5,500
Confer with partners to	Partner	300	3.00	900
Other partners in meeting	Partner	300	3.00	900
Meet with opposing	Senior	150	2.00	300
Prepare for deposition	Staff	125	17.00	2,125
Etc.	Etc.		Etc.	
Subtotal				13,319

These estimated hours vary from case to case as do the activities listed and the rates shown as merely an example of the types of issues involved for decision making to reduce legal exposure. Additionally, this budget is the start of a first page of calculation, which could run certainly a multitude of pages depending on the facts and circumstances.

Most law firms are experienced at planning their own internal budgets. In an exercise similar to that espoused here, they make annual plans, client by client, as to the amount of time they anticipate each member of their staff will spend during the ensuing year. They plan the rates for each staff level, based on their desired level of profitability and their own particular internal costs of operation. They plan for new business from existing

clients and new business from new clients, all without knowing specifically what the nature of the work will be. They can provide experienced guidance in the definition of activities, in the delineation of the billing rates, and in estimating the hours to be spent on each activity. They will be cautious, and will may go to what seem extraordinary lengths to be sure that the client understands that such information consists of estimates only. Where legal counsel is reticent, academic deans and other administrators can seek help from their institution's controller's office. Failing that, interested stakeholders may find faculty in the accounting discipline helpful.

Reducing legal exposure is neither an easy task nor inexpensive one with the involvement of institutional awareness, standardized policy manuals, legal specialists, normative cost analysis, and accounting solution. Nevertheless, it could be easier and less costly than the judicial method, which may be tantamount to rolling the dice.

Judicial Method

When the defendant institution is successful in its defense, the procedures described above will be adequate to provide an estimate of the costs of that defense. When the possibility is considered that the defendant institution may lose, the picture is not quite so clear. In many instances the victorious plaintiffs will pray to the court for an award of their fees and costs in addition to any compensatory, punitive or exemplary damages awarded.

In *Saleh, et al. vs. Moore, et al.*, (2000) the court concisely set out the logical and legal framework of law under which the prevailing party in Constitutional First Amendment litigation is entitled to payment of its legal fees and costs. In short, the Congress in 42 U.S.C. statutorily enabled the prevailing party, at the discretion of the court, to recover reasonable attorney's fees as a part of the costs. Where there are multiple

first amendment claims and a plaintiff does not win on all claims, the court will adjust the fees to disallow time spent on matters upon which the side did not prevail. Also, the court may reduce the fees prayed for by an arbitrary amount or an amount based on consideration of the amount of time and the rates that are deemed reasonable as to the matters upon which a plaintiff prevailed. In so doing, the court will depend on settled law as it did in *Johnson v. Georgia Highway Express Co., Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974) to consider the following points (Saleh vs. Moore, 2000):

- the time and labor required,
- the novelty and difficulty of the questions,
- the level of skill required to perform the legal service properly,
- the preclusion of employment by the attorney due to acceptance of the case,
- the customary fee,
- whether the fees is fixed or contingent,
- the time limitations imposed by the client or the circumstances,
- the amount involved and the results obtained,
- the experience, reputation, and ability of the attorneys,
- the “undesirability” of the case,
- the nature and length of the professional relationship with the client,
- awards in similar cases.

Generally the losing side will have the opportunity to contest the fees of the prevailing side, under each of the categories. In the *Saleh, et al. vs. Moore, et al.* case, costs included awards to two individuals in the aggregate amount of \$347,000. More importantly, the officials of the university, which lost the case, were further ordered to pay more than \$107

thousand in costs and \$1.2 million in fees to the plaintiffs' attorneys (2000). This does not consider the cost incurred by the defense, as stated previously.

Estimation of fees, where the probability of losing is such that the defendant institution may have to pay the plaintiff's fees and costs, then becomes largely a matter of conjecture, modified by the systematic utilization of a scheme of estimation similar to that used to estimate the cost of the defense. Nonetheless, deans, university presidents, administrators, and other interested parties attempting to balance the principles of the institution, the rightness or wrongness of the institution's position against the probability of success in defending the question will want to consider the consequences of losing in terms of the monumental costs that can be awarded in addition to the damages compensatory, punitive and exemplary, and in addition to the fees and costs of the defense.

CONCLUSION

Lawsuits against post secondary institutions are on the increase especially as they pertain to the first amendment. The question governing this paper to provide administrators recourse was this: How can the appropriate administrative personnel reduce the legal exposure and liability of their post secondary institutions to first amendment lawsuits filed against them in the areas of faculty promotions and termination? We suggested six matters to consider: involvement of institutional awareness, standardized policy manuals, legal specialists, normative cost analysis, accounting solution, and the judicial method.

These are important considerations, because: "Since the mid-twentieth century, events and changing circumstances have worked a revolution in the relationship between academia and the law" (Kaplin, 1990, p. 5). Courts are getting involved in academia increasingly. Presidents, chancellors, and their executive committees are involved in litigation whether they

choose it or not. As a result, they are forced to make a decision to reduce legal exposure/liability of their institutions to first amendment lawsuits filed against them in areas of faculty promotions and terminations. Do they hire more attorneys and litigate based on principle? Do they take a pre-emptive approach? These are choices that cannot be ignored.

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**THE FEASIBILITY OF OFFERING
AN AMERICAN BAR ASSOCIATION
APPROVED LEGAL ASSISTANT
PROGRAM IN THE
COLLEGIATE CURRICULUM**

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ABSTRACT

Originally, attorneys hired and trained legal assistants to assist them; however, today they are requiring their legal assistants to have more education, in some instances a four-year degree. Even with the slight decline in growth potential as a result of the increased educational requirements, the U.S. Department of Labor Statistics predicts that by 2005, the legal assistant profession will rank 8th among more than 500 occupational categories.

Using the course offerings of a mid-sized regional institution accredited by AACSB, this study discusses legal assistant programs of two-year, proprietary, correspondence, four-year degree, and post-graduate legal assistant programs. Using the course offerings of a mid-sized regional institution accredited by AACSB, this study outlines the number of courses in place which meet the American Bar Association (ABA) requirements. Additionally, the study shows which courses would need to be revamped or added to meet ABA requirements.

INTRODUCTION

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According to the American Bar Association (ABA),

a legal assistant is a person qualified through education, training, or work experience, who is employed or retained by a lawyer, law office, governmental agency or other party in a capacity or function which involves the performance, under the ultimate direction and supervision of an attorney of specifically delegated substantive legal work which work, for the most part, requires a sufficient knowledge of legal concepts that, absent such assistant, the attorney would perform the task.

The emergence of the legal assistant profession can be traced to the early 1960's during the "War on Poverty" when lay persons were trained and hired to assist attorneys (National Federation of Paralegal Associations, 1996). The legal assistant profession is one of the fastest growing occupations in the job market. In 1989, it was ranked first as the occupation with the most growth potential (Hightower, 1995). Today its growth rate has slowed somewhat due to employers insisting on more education, and in some instances a four-year degree. However, even with this slight decline, the U.S. Department of Labor Statistics predicts that by 2005, the legal assistant profession will rank 8th among more than 500 occupational categories. The U.S. Department of Labor estimates that there are currently between 80,000 and 120,000 people employed as legal assistants. Predictions indicate that by the end of the century another 20,000 to 50,000 will be added to these estimates (Curriden, 1995).

With more employers placing greater emphasis on the educational background, prospective employees need highly

marketable credentials resulting from specialized formal educational programs. Even though ABA approval of legal assistant training programs is voluntary, legal firms are seeking graduates of these programs. Students participating in an ABA-approved program can be assured of high quality training which will enhance employment opportunities.

To date, in the state of Texas, six legal assistant programs are ABA approved. Lee College in Baytown and El Centro College, both two-year community colleges; Southwestern Paralegal Institute in Houston and Southeastern Paralegal Institute in Dallas, and Center for Advanced Legal Studies in Houston, privately owned institutions; and Southwest Texas University in Sam Marcos, a four year university.

The Problem And Purpose

The objectives of this study are (1) to evaluate legal assistant training programs in Texas and (2) to determine the feasibility of offering a legal assistant program in the collegiate curriculum. The trend in hiring legal assistants is focusing on applicants with a strong educational background, in many cases, a four-year degree. The purpose of this study is to research legal assistant programs and determine options for offering a legal assistant program in four-year institutions.

Sources, Scope, And Limits

Secondary data were collected from the American Bar Association, the Texas Bar Association, Houston Legal Assistants Association, the American Association for Paralegal Education, National Association for Legal Assistants, and National Federation of Paralegal Association. Course outlines were obtained for three ABA-approved programs as well as information on correspondence schools offering a legal assistant certificate.

Only legal assistant programs in Texas were researched. Presented in the report are course outlines from three schools: Lee College, an ABA-approved program; University of Houston/Clear Lake, a four-year non-approved ABA program; and Blackstone School of Law, a correspondence program.

Comparisons are made of legal assistant program requirements and curriculum offerings of Sam Houston State University (SHSU), a traditional four-year institution accredited by both AACSB and Southern Association of Colleges and Schools (a regional accrediting agency). The curriculum offerings at Sam Houston State University were considered representative of regional public institutions.

LEGAL ASSISTANT EDUCATIONAL PROGRAMS

Today, over 650 programs offer legal assistant training with approximately 200 programs approved by the ABA (Evans, 1996). The job demand for legal assistants has far exceeded the educational preparation available. Historically, the legal assistant profession had little direction or guidelines until 1968 when the first paralegal course was offered. Prior to 1968, legal assistants were trained on the job (National Association of Legal Assistants {NALA}, 1996). In 1974, the National Federation of Paralegal Association (one of two national associations) was formed for the purpose of unifying the different aims and philosophies of the legal assistant profession (Fin, 1990). No state or national regulatory authority for the profession exists and legal assistants are not required to be licensed (Fin, 1990). However, if the profession continues to grow at the present rate, some regulatory sanctions will be a necessity.

In 1993, Texas became the first state to administer a voluntary speciality certification program for legal assistants (Hightower, 1995). Certification is designed to offer recognition for training received in a particular area of law. There is a distinction between being certified and certificated. To obtain a

certificate, an individual must have completed formal legal assistant training; to become certified, the student must pass the Certified Legal Assistant Examination administered through the NALA in addition to completing a formal legal assistant program.

In 1994 the American Association for Paralegal Education (AAPE) organized a Task Force to develop core competencies for legal assistant education programs. The Task Force released its findings in a report published in December 1994. The report established that quality programs for legal assistant training should cultivate these specific skills:

- Critical thinking skills to develop the students' ability to identify problems and logically formulate solutions
- Organizational skills to develop students' abilities to categorize, prioritize, and present information
- Communication skills to develop students' listening, writing, and conversing abilities
- Interpersonal skills to develop students' rapport with business associates, clients, and court personnel
- Computer skills that teach students to utilize computer research programs such as Lexis and Westlaw and basic features of word processing or database programs.

While the depth of instructional coverage may vary according to the structure and length of the program, the basic curriculum for ABA-approved legal assistant programs originally included a course/s on the legal profession; litigation and civil procedure; legal research and writing; legal ethics; and specialized courses in real estate, wills, trusts, family law,

business and corporate law, contracts, and torts. When the educational program is leading to a degree, general education courses are incorporated into the curriculum.

The ABA issued amended guidelines in August 1996, for the approval of legal assistant education programs. The following are basic stipulations of the guidelines:

- 1 Legal assistant education programs will be considered for approval if they are offered by law schools, four-year colleges and universities, two-year colleges, comprehensive technical institutes or vocational schools.
- 2 A legal assistant education program will be considered for approval when it has been fully operational for two years and has graduated students.
- 3 The education program for legal assistants shall be:
 - a at the post secondary level of instruction,
 - b at least sixty semester hours, or equivalent which must include general education and legal specialty courses, and
 - c offered by an accredited educational institution.
4. The legal assistant education program, including programs offered by law schools, shall have an advisory committee including practicing lawyers and legal assistants from the public and private sectors.



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5. The program director and instructors must possess education, knowledge and experience in the legal assistant profession.
 6. The institution shall provide the resources necessary to accomplish the objectives of its legal assistant education program and the program shall be organized and administered to utilize fully those resources.
 7. Student services of the program shall provide for:
 - a a well-organized plan for counseling, and advising students, and assisting graduates in securing suitable employment, and
 - b student participation in areas of curriculum review and development.
 8. The institution shall have a library adequate for its program of education of legal assistants.
 9. The physical facilities of the institution shall permit the accommodation of varying teaching methods and learning activities. There shall be adequate space, equipment, and other instructional aids sufficient for the number of students enrolled in the program.

Even though legal assistant training is not standardized, educational programs typically fall into one of the following categories: two-year community college programs, four-year baccalaureate programs, proprietary institution programs, and post-baccalaureate programs.

According to a 1997 survey report by the NALA, 70% of 2700 legal assistants had completed post-secondary educational programs. The data from the 1997 NALA survey indicate the most significant growth has been in the associate degree legal assistant programs, while the number of legal

assistants having no formal training is decreasing. The following findings show data collected from four bi-annual survey reports conducted by NALA:

TABLE 1 1997 NATIONAL UTILIZATION AND COMPENSATION SURVEY REPORT PERCENTAGE %				
	1991	1993	1995	1997
Undergraduate certificate	21	19	19	19
Post baccalaureate certificate	14	15	16	16
Associate degree paralegal program	21	26	29	30
Bachelor's degree paralegal program	6	6	6	6
Other	15	10	11	7
None	25	23	21	22
Source: <i>National Association of Legal Assistants, Inc., 1997.</i>				

The following sections outline legal assistant degree requirements of Lee College, an ABA-approved two year program; the University of Houston Clear Lake, a four-year but not approved program; Blackstone School of Law, a correspondence school; and Southwest Texas State University, a post baccalaureate program.

Two Year (Associate Degree) Programs

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The two-year legal assistant program is generally offered at community colleges that award an associate degree after the completion of sixty semester hours. The curriculum is based on basic education course work and fifteen to thirty semester hours of legal assistant courses. Lee College, one of two community colleges in the state of Texas offering an ABA-approved legal assistant program, requires completion of sixty-eight semester hours of basic education course work and legal assistant studies for an Associate Degree of Applied Science-Tech Prep. The curriculum is outlined in Table 2.

Four - Year Baccalaureate Programs

A four-year baccalaureate program is offered at the University of Houston/Clear Lake. Although ABA approval has not been granted, the program has been active since 1981. Comprised of general education and elective courses with eighteen to forty-five semester hours in the major field, the 129-hour degree program (outlined in Table 3) is administered through the School of Business and Public Administration. Students earn a Bachelor of Science in Legal Studies with a concentration in American Jurisprudence upon successful completion.

<p>TABLE 2 ASSOCIATE DEGREE OF APPLIED SCIENCE</p>
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TECH. PREP.			
First Semester			
English Comp.	3	Legal Research & Writing	3
Word Processing	4	Legal Specialty Elective	3
TX Legal System	3		
Total Hours	16		
Second Semester			
Humanities/Fine Arts	3	Legal Specialty Elective	4
English Comp.II or Technical Writing	3	Real Property Law	3
Wills, Trusts, Probate	3	Intro. to Microcomputers	3
Total Hours	19		
Third Semester			
American Government	3	Principles of Domestic Relations	3
Torts & Insurance Law	3	Public Speaking	3
Personal Property, Sales, and Credit	3	Non-major elective	3
Total Hours	18		
Fourth Semester			
Accounting Principles I	4	Litigation Techniques	3
Legal Ethics	3	Legal Document Prep.	3
Natural Science/Mathematics	3-4		
Total Hours	16-17		
Total Semester Hours 68-69			
Source: <i>Lee College Catalog, 1998</i>			

Proprietary Institution Programs

While the length and curriculum of proprietary profit-making programs varies, generally these programs may be completed in three to eighteen months. There are three ABA-approved proprietary programs in the state of Texas: Southeastern Paralegal Institute in Dallas, Southwestern Paralegal Institute in Houston, and the Center of Advanced Legal Studies in Houston. The legal assistant program at the Southwestern Institute requires forty-two semester hours of college prior to admission, a college degree is preferred, and successful completion of an entrance exam. The program at the Southwestern Institute focuses on generalized rather than specialized legal assistant training. The curriculum is designed to offer courses that provide students with basic knowledge in five areas of law: litigation, real estate, corporate law, probate, and family law. Students are introduced to the legal profession and legal responsibilities in addition to being instructed in basic computers, accounting, document production, legal research and writing, and interviewing techniques

TABLE 3 BACHELOR OF SCIENCE IN LEGAL STUDIES AMERICAN JURISPRUDENCE			
Lower Level	Hours		Hours
Accounting Principles	6	Business Law	3
Computer Skills	3	English	6
Economic Principles	6	Government	6
History	6	Fine Arts	3
Math	6	Natural Sciences	6
Social Sciences	6	Speech	3
Total lower level hours = 60			
Upper Level Required	Hours		Hours
Logic	3	Federal Taxation	3
Torts	3	Civil Procedure	3
American Legal System	3	Consumer Law	3
Criminal Law	3	Intro to Law	3
Estate Planning	3	Legal Writing	3
Property Transactions	3	Electives	30
Upper Level Required = 39 Upper Level Electives = 30 Total Upper Level = 69 Total Program Hours = 129			

Source: *University of Houston Clear Lake Catalog, 1998*

Post-Baccalaureate Programs

Post-graduate programs are usually offered through a college extension or continuing education division. A certificate is awarded after successful completion of eight to twenty-four semester hours. To date, Southwest Texas State University in San Marcos, offering the Lawyer's Assistant Program at the post-graduate level, is the only institution authorized by the Texas Higher Education Coordinating Board to award a post-graduate level college credit for the education of legal assistants. This 24 - hour degree program was approved by the American Bar Association in August, 1997. Students completing the legal assistant program through Southwest Texas earn a professional certificate not a master's degree. The curriculum requirements are: Legal Research/Computer Research Lab-Westlaw, Litigation, Legal Theories and Analysis, Legal Drafting, and Internship. The student may select three electives from the following: Administrative Law, Corporations, Criminal Law, Family Law, Law Office Management, Real Estate, Social Legislation, or Wills and Estates.

Correspondence Programs

Institutions offering legal assistant correspondence programs promote their programs by emphasizing convenience, afford ability, and the flexibility of a self-paced curriculum. NALA's 1997 survey report suggests that enrollment in correspondence programs is declining. Correspondence and mail-study programs are included in the "other" category in the survey report. The Blackstone School of Law in Carrollton, Texas, offers a home-study program that leads to a certificate upon completion of a two-year course by mail. With each

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course, a student receives ten volumes of standard textbooks with study guides, legal forms, a law dictionary, and Legal Research Manual by Wren. Table 4 outlines the correspondence curriculum requirements for the Blackstone School of Law.

TABLE 4 BLACKSTONE SCHOOL OF LAW CORRESPONDENCE CURRICULUM	
Volume I.	Law - Its Origin, Nature and Development; Contracts
Volume II.	Torts
Volume III.	Criminal Law
Volume IV.	Real Property - Part I
Volume V.	Real Property - Part II
Volume VI.	Civil Actions and Criminal Procedures
Volume VII.	Wills and Trusts
Volume VIII.	Partnerships and Corporations
Volume IX.	Constitutional Law - Part I
Volume X.	Constitutional Law - Part II
Source: <i>Blackstone School of Law 1996 Catalog</i>	

IMPLEMENTING A LEGAL ASSISTANT PROGRAM AT A FOUR YEAR INSTITUTION

The purpose of the research project was to evaluate existing legal assistant programs in order to determine whether

four year institutions currently offer courses that meet the requirements of an ABA-approved legal assistant program. A comparison was made of Sam Houston State University's curriculum to ABA requirements for a legal assistant program. Review of the curriculum requirements for the two year program offered at Lee College and the four year degree program offered at University of Houston Clear Lake, and ABA requirements lead to the hypothesis that a number of courses are currently offered at most accredited four-year institutions as well as Sam Houston State University. Incorporating a curriculum for a Bachelor of Science with a major in Legal Studies would enable Sam Houston State University as well as other universities to meet the market demand for legal assistants. While Sam Houston State University was selected for comparison purposes, other schools may elect to evaluate their course offerings and the job demand in their area to determine whether it would be feasible to add to or adapt courses to meet ABA requirements.

A comparison of the SHSU's course title and course description with ABA requirements resulted in the following list of core and elective courses in the current SHSU undergraduate catalog that could be used to meet core requirements and electives for a major in legal assistant studies:

- | | |
|----|--|
| 1. | POL 334-Judicial Systems - An orientation course for pre-law students and others interested in the legal aspects of government. |
| 2. | POL 379-Research and Writing in Political Science - A survey of the basic concepts and methods of research in political science. Attention is given to library usage, professional journals, primary source materials, and writing techniques. |

3.	GBA 281-Business Legal-This course covers legal environment in which individuals and businesses operate. The specific subjects are Source of Law, Court Systems, Constitutions, Business Entities, Torts, Administrative Agencies, and Consumer Law.
4.	GBA 362-Business Law-The focus of this course is on areas of modern commercial law faced by businesses and business related professions. Specific subjects covered include Contracts, Sales, Commercial Paper, Real Property, Personal Property, Bankruptcy, Wills, and Secured Transactions.
5.	GBA 470-Legal Topics-An in-depth look at various areas in the law that are of special interest to students. Could be offered as Litigation and Criminal Procedure.
6.	GBA 385-Real Estate Law-This course covers the legal aspects of real estate including the legal principles and legal instruments used in real estate transactions.
7.	ACC 383-Income Tax Accounting-The Internal Revenue Code, the various income tax acts, and problems of the preparation of tax returns are studied as they relate to the individual. Emphasis is placed on the determination of income and statutory deductions in order to arrive at the net taxable income.
8.	ACC 487-Estate Planning-Emphasis is family financial planning for minimization of taxes paid by the family unit. Areas of concentration covered include choice of entity, income taxation of estates and trusts, use of various trusts, and estate and gift

	taxation planning.
9.	CJ 268-Criminal Investigation-Survey of scientific crime detection methods; identification and preservation of evidence; instrumentation, and report writing.
10.	CJ 264-Fundamentals of Criminal Law-A course in substantive criminal law which includes definition of law, definition of crime, general principles of criminal responsibility, elements of the major crimes, punishments, conditions or circumstances which may excuse from criminal responsibility or mitigate punishment, the court system of Texas and the United States, basic concepts of criminal law with emphasis on the penal system of the state of Texas.
11.	CJ 294-Courts and Criminal Procedure-Examines procedural requirements for judicial processing of criminal offenders. Examines concepts of evidence sufficiency, standards of proof, due process, and constitutional safeguards.
12.	CJ 430-Law and Society-The nature, functions, limitations and objectives of law, civil procedure, civil law and selected social problems, the civil courts, the grand jury and petit jury, torts, civil liability for police and correctional officers, and family law.
13.	GBA 465-International Business- This course examines the implication of international laws on foreign investment, intellectual property, sales contracts, money and banking, financing of enterprises, labor regulation and hiring, taxation, and dispute settlement.

<i>Possible Electives</i>	
14.	GBA 363-Human Resources Law - An overview of employment laws, regulations, and cases. Specific topics include the laws related to hiring, employee rights, promotion, safety of the workplace, right to organize, collective bargaining, and termination.
15.	GBA 466-Administrative Law-A study of federal, state, and local judicial regulatory systems, the regulation of business from a non-price viewpoint, and the effect of administrative actions on business.
16.	PAL 362-Introduction to Logic-Introduces the student to the principles of ordered thought and to the terminology and rules of symbolic logic.
17.	PAL 262-Critical Thinking-Designed to improve the students' ability to think critically. The student is taught the fundamentals of deductive reasoning, the identification of common fallacies, and an introduction to inductive reasoning, as well as giving insight to some of the ways information is distorted.
18.	PAL 363-Contemporary Moral Issues-A study of major moral issues in contemporary society. Topics include abortion, censorship, euthanasia, capital punishment, and other issues that confront today's society.
19.	SCM 282-Speech for Business and Professions-This course examines theory and research in interpersonal principles, leadership strategies, listening, and

	nonverbal communication. Students are taught ways to develop communication skills in settings such as interviewing, group decision-making, speech preparation, and presentation.
20.	SCM 284-Argumentation and Debate-A study of argumentation as a type of discourse and an instrument of critical decision making, instruction and practice research in analysis, organization, use of evidence, refutation, and delivery.
21.	CJ 261-Introduction to the Criminal Justice System-An introductory course designed to familiarize students with the facets of the criminal justice system, the sub-systems and how they interrelate, processing of offenders, punishment and its alternatives, and the future of the criminal justice system.
22.	LS 130-Information Access Strategies-This course will introduce students to the fundamental principles of information search, access, retrieval and transfer. Emphasis will be placed upon the basic tools and skills of traditional library research as well as the more innovative technologies which facilitate research and learning.

Table 5 outlines a proposed curriculum for an undergraduate degree leading to a Bachelor of Science in Legal Studies.

TABLE 5
A PROPOSED CURRICULUM FOR A

BACHELOR OF SCIENCE IN LEGAL STUDIES FOR SAM HOUSTON STATE UNIVERSITY	
Course	Semester Hours
Major	36
Minor	18
English	12
History	6
Math	6
Science	16
Kinesiology	3
Political Science 261	3
Political Science Elective	3
Art, Dance, Music, or Theater	3
Philosophy 363	3
Electives Criterion VI	6
Math or Lab Science Electives	8
Electives	6
Total 130 Semester Hours	

In addition to the curriculum requirements, the American Bar Association requires that students have access to an adequate

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library. The Newton Gresham Library at Sam Houston State University has a very comprehensive law collection. The following table lists the holdings for books required by the American Bar Association:

TABLE 6 LIST OF HOLDINGS AT THE NEWTON GRESHAM LIBRARY THAT SATISFY AMERICAN BAR ASSOCIATION REQUIREMENTS FOR A LEGAL ASSISTANT PROGRAM		
	Initial Findings 1980s	Current Findings 1997
Decedents Estates	3	8
Trusts	45	139
Real Property	126	304
Corporations	623	1209
Civil Procedure	6	39
Criminal Law	127	335
Torts	13	37
Taxation	153	473
Professional Ethics	0	25
Legal Research	26	52
Law (Office) Management	30	46
Role of the Legal Assistant	6	12

Library holdings listed below fulfill the ABA's requirements in the specified content areas:

- | | |
|----|---|
| 1. | State Code - Vernon's Texas Statutes, Vernon's Civil Statutes, West's Texas Statutes and Codes, U.S. Statutes, and various federal codes including the Uniform Commercial Code forms |
| 2. | Reporter or Regional Digest - the Federal Reporter and Federal Supplement, the Southwestern Reporter, the Atlantic Reporter, the Northeastern Reporter, the Northwestern Reporter, the Southeastern Reporter, the Pacific Reporter, and the Southern Reporter |
| 3. | State Digest or Regional Digest - the Texas Digest |
| 4. | Shepard's Citations - U.S. Statutes Citations, U.S. Case Citations, the Federal Tax Locator, the Texas Law Locator, and citations for all the previously listed Reporters |
| 5. | Law Dictionaries - Black's Law Dictionary, the Modern Dictionary for the Legal Profession, and others |
| 6. | Law Encyclopedias - Corpus Juris Secundum and Texas Jurisprudence |
| 7. | State Bar Journals - Texas Bar Journal |

Sam Houston State University has access to Westlaw/Lexis research methods. However at this time, its use is limited to library staff only. Like most major universities, SHSU has access to the Internet, which is gaining popularity among legal professionals for research purposes.

DISCUSSION

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Even though Sam Houston State University currently offers the elements of a legal studies major or a legal studies concentration leading to a certified legal assistant credential, other aspects of a legal assistant training program deserve clarification—both for Sam Houston State University and similar institutions considering offering this program. While a comparison of the course requirements for the traditional business student and the legal studies student shows a match, differences exist—both in content coverage and focus of the information. There are three major differences between the needs of the traditional business student and a legal studies student.

First, the teaching pedagogy for business students and legal studies. When presenting law courses to business students, most professors orient the course toward preventive law, emphasizing the development of student sensitivity for the legal aspects of business and personal transactions. In contrast, the legal assistant's tasks are more procedurally oriented, working with legal briefs, depositions, transcripts, motions, and other forms of legal documentation. Simply recognizing legal principles is not enough for the legal assistant who needs to be familiar with the mechanics of a law firm's trade. This is a major difference in learning objectives. Legal studies students need to develop skills in trial litigation documentation that would give them the opportunity to work with depositions, interrogatories, petitions, etc. involved in different types of cases.

Second, a difference exists in the focus of research methods and material covered; material for business students need a broad interpretation while the legal studies courses are more substantive and procedural in nature. While business students need to develop an ability to find broad interpretations of laws, legal studies students need to research very specific issues both substantive and procedural which may well involve researching such legal issues as the admission of certain types of

evidence. The legal studies curriculum should include 'hands-on' experience in electronic research.

The third consideration for institutions considering implementing a legal studies program is in the area of management information systems courses or computer science courses. While there is considerable overlap in word processing, web page authoring programs, and accounting packages, differences do exist in the need of the legal studies students and the business student. Large law firms engaged in complex litigation require sophisticated document management and tracking software, which may require legal assistants to correlate testimony recorded in thousands of pages of depositions. Therefore, a third area of study would be law office automation.

Current courses may be adapted or new courses may be developed in these three areas. The end result would be a very competitive graduate—a legal assistant with a college education, high proficiency on computers and law related software, excellent research abilities and a broad understanding of the legal process.

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AFFIRMATIVE ACTION TODAY

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ABSTRACT

Affirmative action remains an important and controversial legal and political issue. Unfortunately this issue is populated with misconceptions and lack of understanding. The public debate is often partisan and unhelpful. Nevertheless business executives, educational administrators and others must make important policy decisions in this area. The purpose of this article is to present a coherent non-partisan, non-ideological examination of affirmative action law and policy for decision makers and others. The history of affirmative action will be reviewed, and then its legal framework will be presented. Leading cases in the areas of employment, education, and contracting will be discussed. Policy alternatives, some new, will be presented. Finally, some useful conclusions for policy makers will be drawn.

INTRODUCTION

Affirmative action was introduced in the 1960s and expanded during the 70s, 80s and early 1990s. However, recent U.S. Supreme Court and Circuit Court decisions have backed away from earlier activism. In 1996, the California Board of Regents banned affirmative action programs in that state's education system. Later that year California went one step further and passed Initiative 209, amending the state constitution to prohibit affirmative action by all state agencies. In 1998, the State of Washington took similar action when it passed Initiative 200.

More recently, in December 2000, the University of Michigan is litigating whether its minority preference admission program is constitutional. And on November 30, 2000, the California Supreme Court struck down a county ordinance mandating a minority preference in awarding government contracts.

What Is Affirmative Action?

A problem with affirmative action is the term itself. It is often confused with non-discrimination. Nondiscrimination refers to a colorblind policy where discrimination is outlawed and punished. Affirmative action goes beyond colorblind to provide a preference to minorities. The controversy revolves around the propriety and legality of such preference policies, which are often based on race.

Affirmative action creates very different images to different parties. To liberals, it depicts a positive effort to overcome past and continuing discrimination and injury and to assure equal opportunity in the future. Liberals may even see opponents of affirmative action as closet bigots who would like to turn the clock back to the days of open and legal discrimination - days that were not so long ago. On the other hand conservatives see affirmative action as a negative image of racial quotas, reverse discrimination, preferences that penalize innocent non-minorities, and an unjustifiable departure from our constitutional commitment to equal treatment of all citizens before the law. Conservatives may even see affirmative action advocates as left leaning social engineers who would violate fundamental constitutional rights in order to place unqualified minorities in positions they do not deserve and are unqualified to fill. Given this wide gulf in perspectives, it is easy to understand why constructive discourse is so difficult.

ORIGINS

The term "affirmative action" was first used in 1961, by President Kennedy in executive order 10925¹ which established the President's Commission on Equal Employment Opportunity. That Order required those who contract with the federal government "to take affirmative action to ensure that applicants are employed without regard to race, creed, color, or national origin." In 1967 gender was added to the list. President Nixon, although a conservative, substantially advanced affirmative action policy by introducing goals and timetables as mechanisms of affirmative action. He distinguished these from "mindless quotas" and employed them in his "Philadelphia Plan" to combat widespread discrimination in the Philadelphia construction industry. In 1974 in California Governor Ronald Reagan adopted affirmative action goal setting when he gave the State Personnel Board responsibility for evaluating progress toward "a state work force with each ethnic group and women represented by occupation, responsibility and salary level in proportion to its representation in the labor market."²

RULING STATUTORY LAW

The Civil Rights Act of 1964 is the statutory basis of affirmative action. Title VII of the Act prohibits discrimination in employment. The Act declares:

It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,

because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin."³

Controversy has ensued over whether the above language allows the preferences inherent in affirmative action. Professor Nelson Lund argues forcefully⁴ that the 1964 Act was intended to bring about a colorblind workplace and that *all* discrimination, including the remedial reverse discrimination of affirmative action should be prohibited by it. He points to the following provision of the Act as evidence that no preferences of any kind were intended:

Nothing contained in [Title VII] shall be interpreted to *require* any employer...to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion sex, or national origin in any community, state, section, or other area, or in the available work force in any community, state, section, or other area.⁵
(emphasis added)

However, we should note that the operative word "require" is used in the first line of this provision. While Title VII does not *require* preferences it does not expressly *prohibit* them either. Therefore if a private employer voluntarily chose to adopt an affirmative action program that included preferences, the plain language of Title VII is would not be violated. This interpretation was adopted by the Supreme Court in the *Weber*⁶ case, discussed below.

RULING CASE LAW

Minority Hiring Preference:

United Steelworkers of America v. Weber⁷

In the 1979 Weber case the U.S. Supreme Court was tasked with the job of determining whether a minority hiring preference violated Title VII and the constitution's guarantee of equal protection of the law contained in the 14th Amendment. Kaiser Aluminum and Chemical Corporation had a plant where fewer than 2% of the craft workers were black, even though 39% of the labor force was black. There was evidence that the white skilled-trades unions had discriminated against black applicants. The United Steelworkers, representing unskilled workers, negotiated a labor contract in which the company agreed to establish a training program that would prepare unskilled workers for skilled trades. A quota of 50% was set aside for black applicants to this training program. Mr. Weber was a white applicant who was denied entry to this program; he challenged the program as a violation of Title VII.

The District Court and Court of Appeals agreed with Mr. Weber, holding that Title VII prohibited *all* discrimination, even that contained in an affirmative action plan voluntarily adopted by a private company.⁸ However, the U.S. Supreme Court reversed. Citing the language of Sec. 2000e-2(j), quoted above,

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Justice Brennan noted that while Title VII did not *require* preferential treatment, it did not *forbid* voluntary action by an employer. Mindful of the precedent value of the case, the Court also set guidelines for prospective application of affirmative action preferences that were permitted by Title VII. There were three requirements: First, there must be evidence of past discrimination and the preference must address the present effects of that past discrimination. Second, it must not unduly harm non-minority employees. Third, it must be temporary, and must be eliminated once the effect of past discrimination is gone.⁹

Weber met those tests, in the Court's opinion. There was evidence of past discrimination by white skilled-trades unions, and with only 2% of craft workers being black, present residue of that past discrimination existed. The Court felt that white workers were not unduly harmed because no white workers lost their jobs and 50% of the training positions were open to whites. Finally, the plan called for elimination of the preference once the imbalance in the work force was eliminated.

Weber is significant because it was the first case to hold that reverse discrimination in the name of affirmative action was acceptable, within certain guidelines, under Title VII and under the equal protection clause.

**Preference In University Admissions:
*Regents of the Univ. of California v. Bakke*¹⁰**

The *Bakke* case, decided in 1978, is perhaps the most famous of all affirmative action cases. Many universities had adopted policies of promoting diversity of their student bodies. In order to attract more minority students these universities had either lowered admission standards for minorities or set aside a certain number of places for minorities. Mr. Bakke was a non-minority who had been rejected by U.C. Davis Medical School even though he presented better qualifications than many

minorities who were admitted. He challenged the admissions policy, claiming a denial of equal protection.

U.C. Davis Medical School had set aside 16 places for minority applicants. Justice Powell, writing for a divided court, described this as a rigid quota and found it unconstitutional. However, Powell's majority opinion also held that a university could give a preference to minorities in admissions if it used minority status as a "plus factor".¹¹ This case is important in that it established that universities could give minorities a preference under certain circumstances. However, in order to meet the constitutional requirement of equal protection, the preference policy must meet the demanding test of "strict scrutiny"¹² which requires that (1) the program must serve a compelling state interest, and (2) the program must be narrowly tailored to serve that interest.

It had been unclear whether diversity of the student body was a compelling state interest. The university argued that minority viewpoints were necessary to promote a "robust exchange of ideas"¹³ and to dispel racial stereotypes. Justice Powell's controlling opinion accepted that argument, but the concept remains controversial.

The second requirement, narrow tailoring, requires that race neutral alternatives be used before race conscious ones, that the program be as unintrusive as possible, that it not last longer than necessary, and that race must be only one of several factors used to determine who gets the preference.

Justice Powell's opinion held that the U.C. Medical School's affirmative action plan met the compelling state interest requirement in that diversity of the student body was accepted as a compelling state interest. But the plan failed the tailoring requirement because the 16 seats set aside for minorities was a quota and not merely a plus factor to be considered among other factors. Thus while the court ruled for Mr. Bakke, the *Bakke* case established that a proper preference plan could withstand constitutional attack. The case continues to be relied upon as the

legal basis for university admissions preference programs intended to increase diversity of the student body.

Bakke Reconsidered: Hopwood v. Texas¹⁴

In *Hopwood* the 5th Circuit Court of Appeals was asked to review the University of Texas Law School's affirmative action plan. The case had been brought by four non-minority students who had been denied admission to University of Texas Law School. UT's admissions procedure was similar to that of many universities. Applicants were divided into three pools based on a combination of GPA and LSAT scores: clearly admit, clearly deny, and a middle group of discretionary candidates. What was unusual was that there was one set of standards for white applicants, and another, lower set of standards for applicants who were black or Hispanic. No other minorities received a preference. The increment was significant, because a white applicant in the middle group, who might be rejected, could have higher scores than a black/Hispanic applicant who was accepted.

The four rejected applicants claimed the admissions process was unconstitutional, because it violated the Equal Protection Clause of the Fourteenth Amendment. *Bakke* was clearly precedent, and Judge Smith, writing for the 5th Circuit, followed *Bakke*. He applied the strict scrutiny test to the university's admission process, as required by *Bakke*. As noted above, strict scrutiny was deemed to be the appropriate constitutional test when racial preferences were involved. Strict scrutiny is a demanding test that requires proof of both compelling state interest and narrow tailoring.

The university argued that compelling state interest existed and consisted of remedying the present effect of past discrimination and also because of the diversity of the student body objective. Under *Bakke* these were both held to be compelling state interests. However Judge Smith held that there

was not sufficient evidence of past discrimination in the UT case.

So the compelling state interest of remedying present effects did not apply in this case. Turning to the second allegation of compelling state interest, diversity of the student body, Judge Smith surprised the legal community by asserting that it was not in fact a compelling state interest.

This gives an impression of a lower court, the 5th Circuit, overruling a higher court, the U.S. Supreme Court. Everyone knows this is the inverse of how it works. Judge Smith supported this unusual position with the following argument: Justice Powell, writing for the Supreme Court in *Bakke*, had indeed accepted diversity of the student body as a compelling state interest. However, *Bakke* was a split decision, and while Justice Powell wrote the controlling opinion, no other Justice joined him in holding that diversity of the student body was a compelling state interest. Judge Smith stated:

Justice Powell's view in <i>Bakke</i> is not binding precedent ... [because it] garnered only [Powell's] own vote and has never represented the view of a majority of the Court in <i>Bakke</i> or any other case. ¹⁵
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Judge Smith also asserted policy reasons for rejecting diversity as a compelling state interest. Among these were that preferences based on diversity encourage racial hostility generally and feelings of inferiority in minorities. He also argued that the Fourteenth Amendment guaranteed individual rights, not group rights.

Turning to the issue of narrow tailoring, the second requirement of strict scrutiny, Judge Smith found that the UT plan was not narrowly tailored. This flaw alone would have been enough to cause it to be unconstitutional. Thus the UT plan failed the strict scrutiny test, it was declared void.

Hopwood is a conventional case in that it followed *Bakke*'s holding requiring strict scrutiny in preference cases involving race. It is also conventional in striking down an affirmative action plan that was not narrowly tailored. *Hopwood* is unusual in that it challenged what had been an accepted part of the *Bakke* decision, namely that diversity of the student body was a compelling state interest. It should be noted that *Hopwood* is binding as precedent only within the 5th Circuit, and that other federal circuits have not followed its lead with regard to diversity of the student body. Until the U.S. Supreme Court rules on the subject, the *Bakke* case, with its presumption that diversity of the student body is a compelling state interest, remains ruling case law.

Preference In Job Retention:

*Taxman v. Board of Education of the Township of Poscataway*¹⁶

In *Taxman*, a 1996 case, the U. S. Court of Appeals for the Third Circuit was faced with the issue of whether a preference can be granted to a minority teacher in an retention/termination decision. A school district faced with budget constraints decided it had to dismiss one teacher. The choice narrowed to two individuals, both female. The district determined that the two candidates for termination had *exactly* equal qualifications. One was white and the other black. The district noted that the black was the only black in her department. The district felt that its diversity program would benefit from retaining the black teacher, so it used race as a "tie breaker"¹⁷ and terminated the white teacher, who then sued the school district.

The legal question presented was whether diversity of faculty could satisfy the compelling state interest component of strict scrutiny. As noted above, *Bakke* is generally understood to hold that diversity of the student body is a compelling state interest. But this case involved diversity of faculty, not students,

and in employment cases the Supreme Court has never recognized diversity as a compelling state interest. In *Taxman* the 3rd Circuit chose to treat the case as an employment case, and held that diversity did not satisfy the compelling state interest requirement of strict scrutiny:

Our disposition of this matter, however, rests squarely on the foundation of Title VII. Although we applaud the goal of racial diversity, we cannot agree that Title VII permits an employer to advance that goal through non-remedial discriminatory measures.¹⁸

It may be noted that in *Taxman*, as in *Hopwood*, the court also found that the equally important narrow tailoring requirement of strict scrutiny had not been met. Narrow tailoring requires that harm to non-minorities be minimized, and that the program be temporary. In *Taxman* the district did not have any goals or standards or limited duration guidelines for using race as a tie breaker. Once again an affirmative action plan that did not afford due consideration to non-minorities was struck down.

**Preference in Government Contracting:
*Adarand Constructors, Inc. v. Pena*¹⁹**

In *Adarand* the U.S. Supreme Court was faced with the issue of whether to apply the more rigorous constitutional standard of strict scrutiny, or the less rigorous standard of intermediate scrutiny to a preference program for minority contractors. As noted above, strict scrutiny requires a showing of two elements: compelling state interest and narrow tailoring. Intermediate scrutiny requires the less stringent standard of "important governmental objective"²⁰.

The U.S. Department of Transportation (DOT) had an affirmative action program to encourage hiring of minority subcontractors. If the prime contractor would hire a "disadvantaged" subcontractor, the prime contractor would be paid additional compensation. Certain racial and ethnic groups enjoyed a rebuttable presumption of disadvantage. In *Adarand* a non-minority firm submitted the low bid and was awarded a contract. That prime contractor then awarded a subcontract to a minority subcontractor and received additional compensation under the affirmative action program.

A non-minority subcontractor that had been denied the subcontract then sued the DOT claiming it was the victim of reverse discrimination in violation of the equal protection component of the Fifth Amendment's Due Process Clause. The DOT moved for summary judgment which was granted by the District Court and affirmed by the Court of Appeals for the Tenth Circuit.

The Supreme Court reversed the summary judgment and remanded for trial. The basis for remand was that the lower courts had used the wrong standard in testing whether the affirmative action program violated constitutionally required equal protection. The lower courts had used the less demanding standard of "intermediate scrutiny". Under intermediate scrutiny, the government need not show that there is a *compelling* state interest; it need only show that there is an "important governmental objective"²¹. This softer standard was used earlier in *Metro Broadcasting, Inc. v. FCC*²². The rationale for using this softer standard is that in *Metro* and *Adarand* the affirmative action plan had been created by Congress, and the Supreme Court felt that it should defer somewhat to Congress' exercise of its legislative power. However, in 1995 when the Supreme Court considered *Adarand*, a majority led by Justice O'Connor held that the same strict scrutiny standard should be applied to all affirmative action plans, regardless of whether they originated in

Congress, the states, or privately. *Adarand* overruled *Metro* in that regard.

Since the Supreme Court was ruling on a summary judgment motion and not on an appealed case, it did not resolve the larger issue of whether the DOT's affirmative action plan was constitutional. However, the case is significant in that it raised the bar on affirmative action plans created by Congress, and was one more step away from the more liberal application of affirmative action that had characterized the early days of this remedy.

SUMMARY OF RULING LAW

Affirmative action in employment is governed by the Civil Rights Act of 1964, Title VII. That Act does not require preferences for minorities, but the Supreme Court in the *Weber* case ruled that they are permissible under certain circumstances. Those circumstances are: (1) present discrimination or present effects of past discrimination, (2) no undue harm to non-minorities, and (3) the preferences must be temporary. However the *Taxman* case held that diversity alone could not justify giving a minority employee a retention preference, where there was no evidence of present or past discrimination.

Affirmative action in education has focused on whether a university admission preference for minorities is constitutional. The U.S. Supreme Court in the *Bakke* case established the rule that quotas are unconstitutional, but awarding a preference to minority applicants in the form of a "plus factor" is permitted. The more recent 5th Circuit *Hopwood* case questions whether diversity of the student body provides constitutional justification for minority preference in university admissions. However, that decision is idiosyncratic and has not been followed by other courts.

Affirmative action in contracting was held by the *Adarand* case to be judged by a strict scrutiny standard. This

requires proof of either present discrimination or the present effects of past discrimination. The very recent (November 30, 2000) California Supreme Court case of *City of San Jose* goes even further, affirming California's constitutional provision banning all minority preferences in connection with government contracts.

In all areas of affirmative action, one overriding principle is clear: *any* minority preference plan must be "narrowly tailored". This requires that the minority preference must be designed to impose the least harm on non-minorities, and the preference must be temporary. Those wishing to increase diversity must afford due consideration to non-minorities. Otherwise their diversity plan will be struck down as an unconstitutional violation of the Constitution's guarantee of equal protection.

POLICY ALTERNATIVES

This section of the article will review some of the policy alternatives that have been proposed or that are being proposed here for the first time.

Should Affirmative Action Be Class Based Or Race Based?

There is growing support for shifting the target beneficiaries of affirmative action from racial and ethnic groups to the economically disadvantaged²³. This would have the great advantage, from a legal standpoint, of sidestepping completely the constitutional objection of equal protection. No longer would a strict scrutiny test be applied. Programs would have greater options and flexibility; for example, quotas and set asides, prohibited under race based affirmative action would be permitted under class based programs. The uncertainty over legal acceptability of present programs would disappear.

From a policy perspective, using class instead of race would have advantages as well. The animosity attendant to race based programs would disappear. The stigma that some minorities complain of, described movingly by Justice Thomas²⁴ and others, would also vanish. Instead of the focus being group based, it would be individual based. It would also avoid some of the glaring injustices that occasionally result, and that give affirmative action a bad name. For example, when an extremely wealthy hispanic deplanes from Guatemala where his family is one of the 12 wealthiest families in the country, and he is immediately given a preference over a native born white who is raised in poverty.

On the other hand, if achieving a diverse student body is a worthwhile goal, then a program based on class is less likely to bring about the racial and ethnic diversity that is desired. If a police force decides that more minority police officers are needed to work in minority neighborhoods, its affirmative action program will have to target those minorities.

Should Affirmative Action Be Early Or Late?

Affirmative action preferences can be made early or later in life. An example of late affirmative action is giving a preference to a minority applicant to graduate school. Early action consists of such things as providing prenatal care, infant medical care, and provision of adequate nutrition in the early years²⁵. Additional resources could be made available in the early grades and perhaps through high school.

Early intervention has the advantage that it benefits all minority students, not just those who go on to college or graduate school. It allows them to be adequately and equally prepared so that they will need no preferences later on. Thus the stigma of inferiority associated with current programs would be eliminated.

With early programs, there is no danger that unqualified persons will become physicians or air traffic controllers.

Early intervention has much to recommend it. However, it does not answer the question of what to do with the current crop of students or job applicants who did not have the benefit of early intervention. Are we prepared to write off a whole generation? Perhaps we can phase out late intervention while phasing in early intervention.

Can The Free Market Take Care Of The Problem?

The free market argument is that companies that discriminate will be punished by the market for hiring less qualified whites over more qualified minorities²⁶. Those companies will make less profit and might even be driven out of business. Rational businesses will not act in this way.

There are some problems with this argument. Some discrimination is rational and will reward a business. For example, a logging company might feel that work force cohesiveness would be enhanced by having work units composed of members of the same ethnic background, and exclude others. At the turn of the century it was not uncommon for some logging companies in the Northwest to hire only Swedes. They spoke the same language, had the same customs and could get along with each other better than a heterogeneous unit. So it was rational to discriminate in favor of Swedes for those jobs. Another problem has been described as "statistical discrimination". If an employer discovers that the members of a certain group are 5% more likely, on average, to be dishonest, the employer may decide that it costs too much to investigate each individual, and may rationally decide not to hire any employees from that group. This would be particularly the case where low paying jobs with high turnover are involved.

Another problem is that people tend to choose associates like themselves. This has been labeled "homosocial reproduction"²⁷. Evidence exists that non-minority job interviewers subconsciously react to minority job interviewees in

a less open manner, and this makes the minority interviewees perform less well in the interview²⁸.

The free market argument is a powerful one, but it works best where the market is perfect, with perfect information. Unfortunately, qualifications can not be measured with perfect precision. The human element, with all its insight and shortcomings, will probably always play an important part.

Does Affirmative Action Do More Harm Than Good?

As noted above, some complain that affirmative action stigmatizes women and minorities because it implies they can not compete on an equal basis. Under affirmative action non-minorities lose opportunities to less qualified minorities. *Bakke* and *Hopwood* are examples of this, and there are many others. This causes deep resentment and exacerbates social friction. Sometimes the friction is between competing minorities, driving a wedge between them. And focusing on differences in race and ethnicity emphasizes what separates us, not what we share in common.

Undoubtedly, affirmative action exacts a heavy price. Whether that price is justified depends on an individual's view as to how level the playing field is.

Should Affirmative Action Be Based On A Concept Of General Disadvantage?

The concept of general disadvantage is a new concept being presented by this author. General disadvantage consists of economic disadvantage plus any other disadvantage present. Other disadvantage includes belonging to a group that is suffering discrimination; physical disability; coming from a household where neither parent is a college graduate; or coming from an area where the quality of public schools is low. If general disadvantage rose to a certain level it might qualify an individual

for preferential treatment. This concept shares with class based affirmative action the advantage of not being race based. General disadvantage preferences do not violate the Constitution's equal protection clause, so tests like strict scrutiny or intermediate scrutiny would not have to be met. The concept recognizes that disadvantage comes in many forms, and that members of every group are present. If the object is to level the playing field for all, then perhaps general disadvantage is a concept worth considering.

CONCLUSIONS

Affirmative action goes beyond colorblind non-discrimination and provides a preference to minorities. Because it favors one group over another, it remains controversial. Liberals tend to view affirmative action as a positive effort to overcome past and present discrimination, while conservatives tend to view it as a negative effort to give unjustified preferences to less qualified minorities, in violation of the equal protection of the law. As we have seen, both sides are partially correct. Affirmative action does represent a departure from our Constitution's mandate of equal treatment for all persons before the law, contained in the 14th. And, preferences that penalize innocent non-minorities are sometimes unavoidable.

But it is also true that evidence exists that discrimination still exists²⁹ and that the present effects of past discrimination still exist. The "playing field" is still not level. The attractive option of adopting a colorblind jurisprudence now would perpetuate these harms or cause their remediation to take a prohibitively long time to correct.

Three conclusions may be drawn. First, it is clear that anyone designing an affirmative action program should first make certain that it is narrowly tailored. This is the U.S. Supreme Court's requirement that any affirmative action program have a minimal negative effect on non-minorities, and that it must be

temporary. Narrow tailoring is *always* demanded by the courts. It is a reasonable requirement inasmuch as minority preferences are a drastic remedy. Even when narrowly tailored, preferences may cause harm to non-minorities, and they encourage an anti-diversity backlash.

Second, an affirmative action plan designer should consider the validity of objections to the plan and should attempt to meet reasonable objections. For example, a reasonable objection may be raised if wealthy minorities are given a preference over impoverished non-minorities. This objection can be met by including a means test and by using minority status merely as a plus factor.

Third, new policy alternatives such as early affirmative action or preference based on general disadvantage or class should be considered. These alternatives tend not to create an anti-diversity backlash and they assist a broader cohort of those in need.

As noted above, both sides in the affirmative action debate have legitimate concerns. Those legitimate concerns can be met by wise policies that balance the interests of both groups: help for the disadvantaged while preserving the principle of equal protection for all persons before the law.

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