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John Yeargain, Co-Editor
Southeastern Louisiana University

Evelyn Hume, Co-Editor
Friends University

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TABLE OF CONTENTS

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John Yeargain
Southeastern Louisiana University

Evelyn Hume
Friends University

THE POWER OF RELIGION, UPBRINGING, CERTIFICATION, AND PROFESSION TO PREDICT MORAL CHOICE

Reginald L. Bell, Prairie View A&M University
Wally Guyot, Fort Hays State University
Philip H. Martin, Fort Hays State University
Robert J. Meier, Fort Hays State University

ABSTRACT

College students rated 13 likert-type moral choice items on a scale ranging from strongly disagree to strongly agree. Those items were hypothetical business decisions written in a manner as to approximate the various schools of thought on moral choice rooted in western philosophical thinking on ethical conduct. One hundred forty-seven midwestern university students from a college of business with an enrollment of 872, via core business courses, participated in the survey. Stepwise regression analyses revealed religion, upbringing, certification, and profession to be highly predictive of students' perceptions of their own moral choices (with $p< .01$ in several of the regression models).

INTRODUCTION

A drunk driver killed a surgeon's beloved family of three. Ironically, two years later that very driver lies on the surgeon's emergency room operating table in desperate need of medical assistance. How should the surgeon respond? A Catholic schoolgirl, pregnant and abandoned by her beloved, contemplates an abortion. What part will ethics and upbringing play in her ultimate decision? These dilemmas serve to illustrate situations where personal history and social traditions become part of an individual's philosophical and behavioral responses.

Landesman (1985) describes the Socratic imperative as that of self-examination whose creed is "An unexamined life is not worth living." There are three main branches of philosophy, ethics, epistemology, and metaphysics. Of those branches, the central argument of the domain of ethics is not so much for what is but for what ought to be. Although no ethics definition will be universally appealing, there is agreement on how moral choice develops in young people.

Children receive many lessons from their parents before they are able to mature into independent thinking adults. Furthermore, before children can develop unique philosophical ethics of their own and make moral choices they can live by, most of the right and wrong decisions children make can be linked directly to parental teachings. Landesman (1985) calls this type of conscious reflection leading to a heightened awareness "philosophical ethics." As a result, a child's ethical precepts provide a reflexive approach to deal with and resolve everyday ethical dilemmas efficiently and effectively.

In *The Social Construction of Reality*, Berger and Luckmann (1966) argue social knowledge shapes the child's first world view. A good summary of Berger and Luckmann's explanation of this world view can be found on a website called SocioSite:

> *For the children, especially in the early phase of their socialization into it, it becomes the world. For the parents, it loses its playful quality and becomes "serious." For the children, the parentally transmitted world is not fully transparent. Since they had no part in shaping it, it confronts them as a given reality that, like nature, is opaque in places at least. (par. 12)*

Landesman (1985) argues habitual morality is sufficient as long as the mundane ethical dilemmas people encounter in everyday life can be resolved without any conscious reflection. Fortunately, most problems can be resolved habitually.

What becomes problematic is when an unanticipated ethical dilemma cannot be easily resolved by these precepts or habits of moral choice. A conscious reflection is then required. Young adults often resolve (in a routine and unconscious effort) their issues of right and wrong choices by what philosophers refer to as habitual morality. Furthermore, even when parents have instilled the first world view into their children, these beliefs of right and wrong conduct may not suffice in situations where precepts cannot resolve the dilemma; therefore, a conscious reflection on what we think we know to be correct conduct is required. Business students of yesterday are now today's business leaders. The choices they make can be costly and adversely affect millions.

The popular press has broad coverage on some of the most outrageous examples of moral turpitude. Unethical decision making and behavior within organizations has received increasing attention over the last decade. In the cover letter to the *2008 Report to the President: Corporate Fraud Task Force*, Mark Filip made the following statement:

> *Since July 2002, the Department of Justice has obtained nearly 1,300 corporate fraud convictions. These figures include convictions of more than 200 chief executive officers and corporate presidents, more than 120 corporate vice presidents, and more than 50 chief financial officers. (p. iii)*

Recent examples of questionable business ethics include corporate scandals surrounding Bristol-Myers, Enron, Tyco International, World Com, Xerox, Bernard Madoff, Samuel Waksal, Martha Stewart, and ImClone Systems. A few CEOs of the aforementioned corporations are now serving lengthy prison sentences for their corruption and contributions to erosion in public trust (www.forbes.com/2002/07/25/accountingtracker.html; www. businessweek.com/ap/financialnews/D97F6V8O1.htm; www.usdoj.gov/dag/cftf/corporate-fraud 2008.pdf).

Moreover, a study by Elias (2004) shows corporate behavior is corollary to business students' perceptions on moral choice. Elias examined the effect of high-profile corporate bankruptcies on perception of corporate social responsibility. Undergraduate and graduate students rated the importance of corporate social responsibility on profitability, long-term success and short-term success, before and after high-profile bankruptcies. The results indicated that students, in general, perceived corporate social responsibility to be more important to profitability and long-term success of the firm and less important to short-term success after media publicity of corporate scandals. College students are often faced with localized ethical dilemmas they cannot habitually resolve; thus, they must reflect consciously on their precepts to make these moral choices.

Given the ethical and legal lapses that occurred in this decade in the United States, it is increasingly important to know what types of variables are predictive of the moral choices these future business leaders perceive to be positively associated with ethical business decisions. If moral choice can be predicted by precepts that form the first world view, then a more concentrated form of training in these areas of philosophical ethics can be the focus of business ethics curricula. There are already dozens of studies that outline the questionable moral choices of college of business students; one in particular examines a propensity for cheating.

THIS STUDY'S PURPOSE

Premeaux (2005) surveyed students in Association to Advance Collegiate Schools of Business-International (AACSB) accredited Tier 1 and Tier 2 schools to assess attitudes about cheating. Tier 1 schools offer undergraduate, masters, and doctoral programs; Tier 2 schools offer undergraduate and masters programs. While cheating is fairly commonplace at Tier 1 and Tier 2 AACSB accredited business schools, some differences existed between Tier 1 and 2 students and their attitudes about cheating. Juniors and seniors were somewhat less likely to cheat than lower classmen. Business majors at Tier 2 schools were more likely to cheat than other majors. And, resident members of fraternities and sororities and those who drink alcohol frequently were more likely to cheat.

It might be fair to surmise cheating on a college exam is similar in moral philosophy to cheating on an IRS tax return or lying on a mortgage application. Therefore, our purpose was to test some of these precept variables to determine of they are predictive of some of the basic problems of philosophy. We wanted to know if precepts could be used to predict moral choice among a group of college students. There is a great deal of theory to support our research purpose.

UNDERLYING THEORY

Numerous studies have examined the relationship between gender and business ethics. However, these studies reported conflicting results as to whether or not men and women differ with regards to business ethics. One study (McCabe, Ingram, & Conway, 2006) found that when a multidimensional approach to gender was applied, results showed that expressive traits and egalitarian gender-role attitudes contributed to both men’s and women’s propensity to perceive questionable workplace behaviors as unethical. Emotions also play a role in perceptions of ethical conduct.

Connelly, Helton-Fauth, and Mumford (2004) reported that positive and negative emotions classified as active emotions were more strongly related to interpersonally-directed ethical choices than to organizationally-directed choices; they also determined that passive emotions were less related to ethical choices than active emotions.

Recent initiatives in business curricula have included emphases on global business and ethics. A study of Australian and Canadian students (Fisher, Woodbine, & Fullerton, 2003) found that students in both countries generally held high expectations for the behavior of business people and consumers.

In a study of marketing goods on the Web by Sama and Shoaf (2002), four traditional ethical rationales that guide organizational decision making – utilitarianism, moral rights of man, distributive justice, and relativism – were applied to four moral dilemmas attributed to the proliferation of dot.com companies as they relate to consumer welfare. They found that ethical rationale in the New Media (e-commerce) is largely non-existent; and when it does exist, it is generally reactive and driven by utilitarian or relativistic reasoning. Students’ perceptions are broad ranging as can be seen in the literature.

Abdolmohammadi and Baker (2007) investigated the relationship between moral reasoning and plagiarism and found evidence of an inverse relationship between test scores measuring moral reasoning and levels of plagiarism. The authors found more plagiarism at the beginning of a semester than at the end and another inverse relationship between plagiarism and grade point average.

While the use of the Internet has led to improved efficiency and effectiveness in teaching, it has also created an explosion in student plagiarism (Fialkoff & St. Lifer, 2002; Rimer, 2003). Given the proliferation of student plagiarism involving the Internet, Granitz and Loewy (2007) conducted a study to determine which theory students invoked when defending the act of plagiarism. The results indicated that students predominately invoked deontology, situational ethics, and Machiavellianism.

Mason (2006) conducted an exploratory study at one university to examine students' inclination to commit questionable academic behaviors. He found that students perceive academic dishonesty to be commonplace; in fact, slightly more than three-fifths of the respondents believed that other students engage in dishonest behaviors on a frequent or very frequent basis. Sixty percent of the respondents considered the dishonest behavior to be a "minor problem" or "not a problem." A third of the sampled students had witnessed academic dishonesty, but they chose not to inform the teacher; this statistic does not bode well for believing these future business people will actively pursue any type of whistle-blowing activity when they observe dishonest behavior on the job.

A study by Albaum and Peterson (2006) reported on a survey of undergraduate business students regarding certain general ethics-related attitudes and the degree of ethicality these students possessed. The findings revealed that female survey participants were slightly but significantly more ethically inclined than male survey participants. Survey participants who reported being very religious were slightly but significantly more ethically inclined than survey participants who were less religious.

To examine the determinants of and difference between the ethical beliefs of two groups of Japanese students in religious and secular universities, a study was conducted by Rawwas, Swaidan, and Al-Khatib (2006). The analysis revealed that students of the Japanese religious university perceived that young, male, relativistic, and opportunist students tended to behave less ethically than did older, female, and idealistic students. Students of the Japanese secular university perceived that male, achievement-oriented, and opportunistic students tended to behave less ethically than did female and experience-oriented students. Opportunism was found to be one of the most important determinants in explaining misconduct. In addition, students of the Japanese secular university were somewhat more sensitive to academic dishonesty practices than were students of the Japanese religious university. The literature suggests common practices tend to be contradictory.

In a longitudinal study by Andersson, Giacalone, and Jurkiewicz (2007), employees with a stronger sense of hope and gratitude were found to have greater sense of responsibility toward employee and societal issues. However, employee hope and gratitude did not affect a sense of responsibility toward economic, safety, and quality issues.

Researchers Emerson, Conroy, and Stanley (2007) surveyed accounting practitioners and college students to determine how each group perceived a series of ethically charged vignettes. The researchers found no significance difference between the two groups. Accounting practitioners were, however, more accepting of vignettes involving physical harm to individuals and situations that were legal but ethically questionable.

Even with all the publicity of ethical problems in American organizations, a study by Velthouse and Kandogan (2007) found that ethics is still considered one of the least important skill sets by managers. A more positive outlook, however, indicates that business students are less accepting of ethically questionable activities (Emerson & Conroy, 2004).

While accounting students are well aware of the accounting scandals, they seemed to know considerably less about the accounting profession and its subfields (Comunale, Sexton, & Gara, 2006). In addition, these accounting students lowered their opinions of corporate management more than that of accountants. Communale, Sexton and Gara (2006) write, “These accounting students shifted the blame away from their own profession onto others” (p. 645). Interestingly, students who scored higher on the idealism scale tended to lower their opinions of accountants more than that of corporate managers. They also found that student gender was insignificant in predicting student opinions of accountants and corporate managers (Comunale, Sexton, & Gara, 2006).

Although there is widespread agreement on the importance of ethics instruction in business education, there is no agreement on the best approach or timing of instruction. A study by Weber (2006) acknowledged the paucity of attention regarding the development of ethics programs within an academic environment and described in a case study how the Duquesne University School of Business attempted to introduce, integrate and promote its own ethics program. The paper traced the business school’s attention to mission statements, curriculum development, ethics policy, program oversight, and outcome assessment. Six lessons learned were offered as suggestions for others seeking to develop and implement an ethics program in their school.

Tyler and Tyler (2006) used J. O. Prochaska and DiClemente’s transtheoretical model of change as the basis to develop a model of student readiness for learning about ethics. By focusing on student development, the Tyler and Tyler model suggested how to best sequence educational activities in ethics instruction. Extensive ideas for practical educational activities were presented for each of the four stages of student change. The four changes are precontemplation, contemplation, action, and maintenance.

Comer and Vega (2006) presented a role-playing exercise to make the topic of whistle-blowing personally salient to undergraduates. In this exercise, students identify with the prospective whistle-blower, whose decision affects several stakeholders. The protagonist merely suspects her manager of stealing, until she hears concrete evidence of his thefts from her assistant manager, who does not want to take action. The exercise helps prepare students to decide how to act if they observe workplace wrongdoing, demonstrates that different ethical frameworks may point to different decisions, promotes examination of possible consequences of whistle-blowing, and highlights how organizational factors affect employees’ behavior and the outcomes of their behavior. The ethical frameworks defined in the study are deontology and/or formulation, utilitarianism and/or teleology, and axiology and/or relationships.

Libby, A. Agnello, and V. Agnello (2005) conducted a study to determine if an ethics course or courses help business students make better ethical decisions. They compared students who had taken an ethics course with students who had not taken an ethics course. Each group of students responded to a series of ethical dilemmas. Interestingly, male students who had taken an ethics course made fewer ethical decisions than those who had not taken an ethics course; similar results have been found in other studies.

A study by Luthar and Karri (2005) focused on the effects of individual characteristics and exposure to ethics education on perceptions of the linkage between organization ethical practices and business outcomes. They found that exposure to ethics in the curriculum had a significant impact on student perceptions of what should be the ideal linkages between organization ethical practices and business outcomes. Gender based differences were found with female students having a higher expectation regarding what should be the "ethics practices and business outcomes" link. Exposure to ethics in the curriculum had a positive moderating influence on the gender-based effects on perceptions of ideal ethical climate.

In 1976 Maccoby developed an ethics profile instrument in which he categorized two general values for ethics as (1) heart values, which reflect the feeling aspects or qualities related to consciousness and (2) head values, which reflect the thinking aspects or qualities related to conceptualizations. Maccoby's instrumental value profile for managers was operationalized in a recent study of college students by Allen, Bacdayan, Kowalski and Roy (2005). The authors examined the impact of ethics training on business students. They found that college seniors were influenced less in their perceptions of the importance of instrumental values in comparison to freshmen. No significant difference was found between men and women in both the importance and reinforcement of the instrumental values examined in the study. The results of the study also do not support the idea that additional emphasis on ethics in textbooks and courses has had a significant effect.

Another study of students at two major universities by Singhapakdi (2004) analyzed the relative influences of perceived ethical problems, perceived importance of ethics, idealism, relativism, and gender on ethical intention of students. The potential impacts of grade point average and education level of students were also investigated. The results revealed that perceived ethical problems and perceived importance of ethics had positive impacts on ethical intentions of students. There was an inverse relationship between relativism and ethical intention; however, there was no relationship between idealism and ethical intentions. Male students tended to be less ethical in their intention than female students. The findings also indicated that grade point average and educational level were not determinants of ethical intentions for students. Important implications for marketing education and for management ethics training programs were discussed.

Therefore, our research purpose was to determine if a study of Midwestern University business students would result in findings that could help direct the focus of business ethics instruction. The two formal hypotheses are stated as follows:

Hypothesis 1: None of the world view social variables of rural college students are predictive of the four factors representing their perceptions (moral choices) of ethical business decisions.

Hypothesis 2: There is no statistical difference among the means of rural college students' demographic variables (gender, age, major, and grade level) and any of the four factors representing their perceptions (moral choices) of ethical business decisions.

METHODOLOGY

Survey, Sample and Descriptive Statistics

All policies regarding ethics on conducting human subjects research were followed. After requesting and receiving institutional permission to conduct this study, the survey asked rural university students to rate 13 scenario statements, from 1 to 5. Statements, means, and standard deviations consistent with western philosophical thinking (means-end, greater good, religious, etc.) are presented in Table 1.

The survey was conducted at a rural Midwestern university from a population of 872 business students. There were 147 students sampled from the rural university business student population. Students responded to 13 survey items (on a five-point Likert-type scale). These items were written to be consistent with several schools of thought on ethical conduct, including the following: teleological and deontological ethics; hedonism and utilitarianism; Kant's "categorical imperative"; and Bentham's "felicific calculus." Students were also asked to report demographic information.

The sample size of 147 was deemed large enough to approach a normal distribution. "The larger the sample size, the smaller the standard deviation of the sampling distribution" (Henry, 1990, p. 39). A 13 item instrument with a Likert-type scale (1 = strongly disagree, 5 = strongly agree) was used to assess rural students' perceptions of those items representing ethical decisions in business. The statistical analyses presented in this study were based on those 147 observations, which were assumed to be normally distributed. Since Albaum and Peterson (2006) and Rawwas, Swaidan, and Al-Khatib (2006) recently found significant differences on ethics between genders, testing this demographic variable was also of interest to us. A summary of demographic variables appears in Table 2.

Table 1 – Moral Choice Statements with Means and Standard Deviations*	
Item(#) Thirteen Moral Choice Scenarios on Moral Choice	**Mean (SD)**
All managers should feel confident they are right before making a decision that could hurt a subordinate employee. (#1)	4.28 (.999)
All managers should feel confident they are right prior to making a decision that could help a colleague. (#2)	4.24 (.790)
All managers should feel confident they are right prior to making a decision that could hurt a colleague. (#7)	4.19 (.902)
All managers should feel confident they are right prior to making a decision that could help a subordinate employee. (#10)	4.09 (.776)
Ethical managers know right from wrong. (#8)	4.02 (.947)
Business ethics requires managers to consider harm to others prior to actions they take. (#4)	3.99 (1.014)
The most ethical way to terminate a person's employment is to show facts, be direct and confrontational with that person. (#3)	3.85 (1.113)
A firm should have proper procedures to protect its whistle-blowers. (#13)	3.62 (1.016)
As part of the team, I will whistle-blow on others' wrong doings. (#11)	3.28 (1.071)
If necessary, an ethical manager could terminate 20 percent of their workforce if it means saving the company. (#6)	3.11 (1.014)
A whistle-blower should be rewarded for revealing unethical acts. (#12)	2.94 (1.061)
The most ethical way to terminate a person is to use a neutral party, such as human resources, to show facts and confront the person. (#5)	2.88 (1.202)
The most ethical managers have some church or religious affiliation. (#9)	2.85 (1.071)
*denotes 1 = strongly disagree to 5 = strongly agree.	

World View Variables

Since ethics might be defined as "what is and what ought to be," the social attributes that help shape students' world views along the philosophical lines of right and wrong choices can be construed to have some influence on the moral choices students might make in business; thus, social world view variables should be predictive of moral choice. Eleven world view variables were included on the survey instrument to help determine if these variables would be predictive of students' perceptions of their own moral choices on the hypothetical business decision scenarios they rated on a Likert-type scale. The survey included the following question to ascertain students' opinions as to the relationship of each of the independent social variables being positively associated with ethics:

Please indicate by checking any of the categories below that you view as positively associated with ethics:

__Age; __Income; __Gender; __Race; __ Education; __ Profession; __ College Major; __ Professional Licensure; __Religious Affiliation; __ Upbringing; __ and/or Certificate

Table 3 shows the frequencies and percentages of the responses to these independent social variables. The 11items in Table 3 were then coded “1” if checked by a student and “0” if not checked by a student. Students could check any item that applied to moral choices they associated positively with ethics. These 11 items were naturally dummy coded, and were used in four stepwise multiple regression models as predictor variables. Prior to that, reliability of the scale was ascertained and deemed adequate.

Table 2 – Summary of Demographic Variables

N= 147	*Demographics*	*N*	*%*
Gender	Female	76	52
	Male	71	48
	Total	147	100
Age	<20	0	0
	20-25	28	19.0
	26-30	110	74.8
	31-35	7	4.8
	36-40	2	1.4
	≥ 40	0	0
	Total	147	100
Grade Level	Freshman	8	5.4
	Sophomore	36	24.5
	Junior	70	47.6
	Senior	30	20.4
	Graduate	3	2.0
	Total	147	100
Majors	Accounting	39	26.5
	Management	29	19.7
	Finance	13	8.8
	MIS	5	3.4
	Marketing	6	4.1
	Others	49	33.3
	Business Comm.	6	4.1
Total		147	100

Table 3 -- Summary of Yes Responses to Variables being Positively Associated with Ethics by Gender							
Social Variable	SUM	Yes, Positive Association with Ethics	%	Male Frequency	%	Female Frequency	%
Age	147	66	44.9	29	43.9	37	56.1
Income	147	27	18.4	15	55.6	12	44.4
Gender	147	33	22.4	17	51.5	16	48.5
Race	147	31	21.1	18	58.1	13	41.9
Education	147	78	53.1	38	48.7	40	51.3
Profession	147	84	57.1	42	50.0	42	50.0
College Major	147	36	24.5	20	55.6	16	44.4
Prof. License	147	52	35.4	24	46.2	28	53.8
Religious Affiliation	147	60	40.8	33	55.0	27	45.0
Upbringing	147	93	63.3	45	48.4	48	51.6
Certification	147	19	12.9	7	36.8	12	63.2

Reliability Test

Students' moral choices were measured with a 13 items Likert-type scale subsequently tested for reliability in SPSS 15.0 using a Cronbach's (1984) alpha. The initial scale reliability was .69. Item five was eliminated because if deleted the scale improved to 0.72, which exceeds the Nunnally (1978) criteria of 0.70 for an acceptable alpha. Item five reads as follows: "The most ethical way to terminate a person is to use a neutral party, such as human resources, to show facts and confront the person." The reliability improved when Item five was deleted; therefore, 12 items were used for further data analyses.

In a recent study, Lance, Butts, and Michels (2006, p. 206) wrote: "Thus, our second point is that .80, and not .70 as has been attributed, appears to be Nunnally's recommended reliability standard for the majority of purposes cited in the organizational literature." Devellis (1991) says an alpha "between .70 and .80" is respectable (p. 85). Given the differences in the literature on an acceptable alpha, we moved forward with the data analysis based on the .72 alpha we obtained. A factor analysis was conducted after testing and accepting the 12 items instrument's alpha reliability.

FACTOR ANALYSIS

Principal Component Analysis was used with Varimax Rotation to extract the four factors, as shown in Table 4. One hundred forty-seven students' responses to the 12 items measuring moral choice with the Likert-type scale were subjected to an un-rotated principal component analysis (in SPSS 15.0). Four factors explain 60.96% of variance after Rotation Sums of Squared Loadings (Factor 1 = 24.17%, Factor 2 = 17.24%, Factor 3 = 10.38%, and Factor 4 = 9.17%, respectively). A variable was said to load on a factor if it had a component loading of .40 or higher on that factor and less than .40 on any other factors (Devellis, 1991; Hatcher, 1994; Kachigan, 1991).

Comparability between sample and population patterns could be a limitation concerning the adequacy of this study's sample size. Given the small sample size of 147, even with the 100% response rate from the sample of 872 students, evidence was found to support the use of factor analysis in this case. Guadagnoli and Velicer (1988) dealt directly with the relation of sample size to the stability of component patterns. The authors used a Monte Carlo procedure to vary sample size, number of variables, number of components, and component saturation in order to examine systematically the condition under which a sample component pattern becomes stable relative to the population. They determined that factor loadings of .60 or higher with at least four variable loadings per factor permit stability of the factor pattern regardless of sample size.

Furthermore, in SPSS 15.0, the Kaiser-Meyer-Olkin (KMO) measure of sampling adequacy was .784, far exceeding the most conservative cutoff of .60. Currently found on Statnotes, a website dedicated to multivariate statistical analyses instruction, a write up on "sampling adequacy" for factor analysis was posted there:

> "What is "sampling adequacy" and what is it used for? Measured by the Kaiser-Meyer-Olkin (KMO) statistics, sampling adequacy predicts if data are likely to factor well, based on correlation and partial correlation. In the old days of manual factor analysis, this was extremely useful. KMO can still be used, however, to assess which variables to drop from the model because they are too multicollinear. There is a KMO statistic for each individual variable, and their sum is the KMO overall statistic. KMO varies from 0 to 1.0 and KMO overall should be .60 or higher to proceed with factor analysis. If it is not, drop the indicator variables with the lowest individual KMO statistic values, until KMO overall rises above .60. (Some researchers use a more lenient .50 cut-off)."
> [http://faculty.chass.ncsu.edu/garson/PA765/factor.htm#kmo]

Table 4 -- Principal Component Factor Analysis of Ethical Business Decisions *					
	Scenario Statements Representing Moral Choices				
Items	**FACTOR 1: Above All, Do No Harm**	**F1**	**F2**	**F3**	**F4**
S7	All managers should feel confident they are right prior to making a decision that could hurt a colleague.	**.821**	.060	.200	-.042
S10	All managers should feel confident they are right prior to making a decision that could help a subordinate employee.	**.817**	.163	.002	-.021
S2	All managers should feel confident they are right prior to making a decision that could help a colleague.	**.755**	-.001	-.052	-.040
S1	All managers should feel confident they are right before making a decision that could hurt a subordinate employee.	**.724**	-.015	.345	.037
S4	Business ethics requires managers to consider harm to others prior to actions they take.	**.543**	.045	-.127	.347
	FACTOR 2: David vs. Goliath				
S13	A firm should have proper procedures to protect its whistle-blowers.	.106	**.836**	.041	-.077
S11	As part of the team, I will whistle-blow on others' wrong doings.	.051	**.814**	.089	-.029
S12	A whistle-blower should be rewarded for revealing unethical acts.	.006	**.795**	.010	.143
	FACTOR 3: The Greater Good				
S6	If necessary, an ethical manager could terminate 20 percent of their workforce if it means saving the company.	-.025	.072	**.829**	-.136
S8	Ethical managers know right from wrong.	.218	.058	**.549**	.370
	FACTOR 4: Self-Righteousness				
S3	The most ethical way to terminate a person's employment is to show facts, be direct and confrontational with that person.	.238	.114	.138	-.756
S9	The most ethical managers have some church or religious affiliation.	.227	.148	.225	**.469**
*Extraction Method: Principal Component Factoring. Rotation Method: Varimax with Kaiser Normalization; a Rotation converged in 5 iterations.					

The derived factors were indicative of the construct being measured. Therefore, each of the four derived factors represents one dimension of the construct—student perceptions of right and wrong business decisions, or, their moral choices.

Factors 1, 2, 3, and 4 were subsequently labeled according to the nature of the language contained in components loading on each factor: Factor (1) Above All, Do No Harm, Factor (2) David vs. Goliath, Factor (3) The Greater Good and Factor (4) Self-Righteousness. To test null hypothesis 1 [world view predictor variables of college students are not predictive of any of the factors representing their perceptions of ethical business decisions.], we ran the data in four separate regression models. Three regression analyses were significant with three factors.

Stepwise Regression Models for Analyses

Stepwise multiple regression analyses on the four factors (entered as criterion/dependent variable one at a time) were run since they accounted for 60.96 % of the variance explained. Moral choice categories in the regression equations are as follows: 1) age; 2) income; 3) gender; 4) race; 5) educational level; 6) profession; 7) college major; 8) professional licensure; 9) religious affiliation; 10) upbringing; and 11) certification variables were used (all dummy coded) as predictor (predictor variables) on tests. In each of the four regression tests, there were 11 predictor variables; three of the regression tests were significant between at least one of the factors and at least one of the 11 predictor variables.

Multicollinearity was not a problem for the data in this study in any of the four regression models. No condition index exceeded 15. In SPSS 15.0, Collinearity Diagnostic tests of the data revealed no predictor variable with a condition index above 4.0; in addition, no two variables shared variance proportions above .50. A condition index of 15 indicates possible collinearity problems and an index over 30 suggests serious collinearity problems (Belsley, Kuh, & Welsch, 1980).

None of the 11 predictor (world view) variables had tolerances below .20. Furthermore, the sample size of 147 for this study was considered to be within a "good prediction level." Based on a recommendation table developed by Knofczynski and Mundfrom (2008, p. 438), the table shows "the relationship between the minimum sample size and the number of predictor variables and also the relationship between the minimum sample size and the squared multiple correlation coefficient."

Therefore, null hypothesis 1 was rejected on Factor 1, because two world view variables "upbringing" and "profession" are predictive of rural students' perceptions of the moral choices made in the business environment concerning Above All, Do No Harm. The collinearity diagnostic for predictor variables upbringing and profession shows Tolerances of .981 and .981 and Condition Indexes of 2.671 and 3.706 respectively. The variables predictive of Factor 1 are shown in Table 5, including F Change, a required test when using all dummy coded predictor variables in a regression model.

Null hypothesis 1 was not rejected on Factor 2, because none of the 11 moral choices are predictive of rural students' perceptions of choices made in the business environment concerning David vs. Goliath.

Table 5 -- Stepwise Multiple Regression Model – Moral Choices on Factor 1					
Samples: N=147	***Stepwise Multiple Regression of Moral choices on Factor 1***				
Factor 1: Above All, Do No Harm	*F Change*	*Sig. F Change*	*t*	*Beta*	*Sig.*
(Constant)			-1.602		.111
Upbringing (Adj. R Square=.091)	15.662	.000***	4.281	.336	.000***
Profession (Adj. R Square = .115)	4.961	.027*	-2.227	-.175	.027*
*denotes p< .05; and ***denotes p<.001; the stepwise regression table shows cumulative data.					

Null hypothesis 1 was rejected on Factor 3, because the world view variable "certification" is predictive of rural students' perceptions of the moral choices made in the business environment concerning The Greater Good. The collinearity diagnostic for predictor variable certification shows Tolerance of 1.000 and a Condition Index of 1.457. The variable predictive of Factor 3 is shown in Table 6, including F Change, a required test when using all dummy coded predictor variables in a regression model.

Table 6 -- Stepwise Multiple Regression Model – Moral Choices on Factor 3					
Samples: N=147	***Stepwise Multiple Regression of Moral choices on Factor 3***				
Factor 3: The Greater Good	*F Change*	*Sig. F Change*	*t*	*Beta*	*Sig.*
(Constant)			-.733		.465
Certification (Adj. R Square = .021)	4.161	.043*	2.040	.167	.043*
*denotes p< .05					

Null hypothesis 1 was rejected on Factor 4, because the world view variable religious affiliation is predictive of rural students' perceptions of the moral choices made in the business environment concerning Self-Righteousness. The collinearity diagnostic for the predictor variable religious affiliation shows a Tolerance of 1.00 and a Condition Index of 2.130. The variable predictive of Factor 4 is shown in Table 7, including F Change, a required test when using all dummy coded variables in a regression model.

Table 7 -- Stepwise Multiple Regression Model – Moral Choices on Factor 4					
Samples: N=147	***Stepwise Multiple Regression of Moral choices on Factor 4***				
Factor 4: Self-Righteousness	*F Change*	*Sig. F Change*	*t*	*Beta*	*Sig.*
(Constant)			-1.700		.091
Religious Affiliation (Adj. R Square = .040)	7.083	.009**	2.661	.216	.009**
**denotes p< .01.					

One-Way ANOVA Tests

None of the assumptions required for ANOVA were violated. Gender, age, grade level, and major were compared (using One-Way ANOVAs) against college of business students' perceptions on the scenario statements to determine if significant differences existed.

Null hypothesis 2 was rejected because there are statistically significant differences among the means of rural students' demographic variables and their perceptions of business decision scenario statements they responded to on the survey. Significant differences among the means for rural students and their perceptions of the four factors representing four dimensions of their perceptions of moral choice relating to the ethical business decisions scenarios were revealed; therefore, null hypothesis 2 was rejected for grade level and gender, but not for college major and age.

A significant difference was found to exist among the means of grade level with a $p = .035$. The means for grade level on Factor 2 (David vs. Goliath) were -.44 and .17 for sophomores and juniors respectively. A Tukey's post-hoc test in SPSS 15.0 showed a significant difference between 36 sophomores and 70 juniors revealing an inverse perception of that factor. Sophomores are less likely than juniors to perceive a David vs. Goliath business decision to be an ethical one. It is less likely a sophomore rural student would blow the whistle on a perceived wrong doing. Results are shown in Table 8 for significant findings on the grade level and gender ANOVA test.

Table 8 -- One-Way ANOVA Tests for Demographic Variables on Factors 2 and 3

Source	***Sum of Squares***	***df***	***Mean Square***	***F***	***Sig.***
David vs. Goliath Factor 2 **Grade Level**	Between 10.170 Within 135.830 Total 146.000	4 142 146	 2.543 .957	 2.658	 **.035***
The Greater Good Factor 3 **Gender**	Between 4.249 Within 141.751 Total 146.000	1 145 146	 4.249 .978	 4.346	 **.039***
* Denotes p<.05.					

A One-Way ANOVA test between genders revealed a significant difference on Factor 3 (The Greater Good) with a $p = .039$, and means of -.001 for males and .004 for females. The 76 women appear more interested in business decisions associated with the greater good than 71 men. Men appear less likely to perceive business decisions concerning knowing "right from wrong" and "terminating 20 percent of the workforce" as being unethical. Let us now discuss our findings in relation to the business ethics literature on college student perceptions.

DISCUSSION

Contribution to Business Ethics Theory

Given the ethical and legal lapses that occurred in the early 2000s in the United States, it is increasingly important to know the ethical perspectives of future business leaders so that their future behavior can be anticipated. Our study's findings do fill a gap in the literature concerning college students' perceptions and the strength of precepts on their perceptions. We now know some precepts do predict students' perceptions of the types of business decisions represented by four major schools of thought on ethics in western philosophy. For example, Factor (1) Above All, Do No Harm, Factor (2) David vs. Goliath, Factor (3) The Greater Good and Factor (4) Self-Righteousness can easily be identified with theories on ethics that Feinberg (1996) refers to in his edited book, Reason & Responsibility: Reading in Some Basic Problems of Philosophy.

Now that we know which hypothetical statements (components) loaded onto which of the four derived factors, we labeled and defined our four factors in the following ways:

> Factor 1: Above All, Do No Harm appears consistent with Decision Theory: "The theory of rational choices aimed at achieving an optimal outcome where the amount of information available to the agent is limited" (Feinberg, 1996, p. 640).
>
> Factor 2: David vs. Goliath appears consistent with Deontology: "A type of moral theory stating that morality consists of doing one's duty, rather than in considering the probable consequences of one's actions, in cases where duty and the promotion of good consequences come into conflict" (Feinberg, 1996, p. 640) and Consequentialism: "A type of moral theory stating that to act morally we must base our actions on their probable results or consequences, rather than acting out of duty, in cases where duty and promoting good consequences come into conflict" (Feinberg, 1996, p. 639).
>
> Factor 3: The Greater Good appears consistent with Utilitarianism: "The moral theory stating that individuals should choose the act, among those available to the agent, that is likely to create the greatest amount of happiness and the least amount of pain" (Feinberg, 1996, p. 653).
>
> Factor 4: Self-righteousness appears consistent with Teleology: "The view that there is a purpose or goal to the universe. From the Greek telos (goal, end) and logos (theory, account)" and Utilitarian Theories of Punishment: "These theories

hold that punishment is at best a necessary evil, justifiable if and only if the good of its consequences (its social utility) outweigh its own immediate and intrinsic evil" (Feinberg, 1996, p. 652).

We named the factors based on our interpretations of language contained in the components loading on each of the factors. Naming the factors based on the aforementioned defined theories helps explain the factor loadings; for example, the language found in the five components loading on Factor 1 (S7, S10, S1, S2, and S4) combined seem to represent "Decision Theory".

Moreover, the language in the components loading on Factor 2 (S13, S11, and S12) combined seem to represent "Deontology and Consequentialism." Whistle blowers often sacrifice personal gain, their reputations, and sometimes their liberty and freedom for what they perceive to be the greater good. Personal sacrifice in whistle blower cases is among the most costly ethical choices. However, none of the predictor variables survived the stepwise regression on this factor, meaning, none of the 11 predictors were significant predictors of David vs. Goliath. This group of students would not likely be prone to blow the whistle.

Although students' perceptions remain a latent variable, the derived four factors, in a sense, represent four dimensions of the hypothetical construct: "students' perceptions of moral choice." The regression analyses used 11 predictor variables (precepts) that correlated significantly with students' perceptions (factors), but not so much with each other, that they can predict students' perceptions. Our study found that among the 11 predictor variables, four of the predictor variables (Upbringing, Profession, Certification, and Religious Affiliation) significantly predict business students' perceptions.

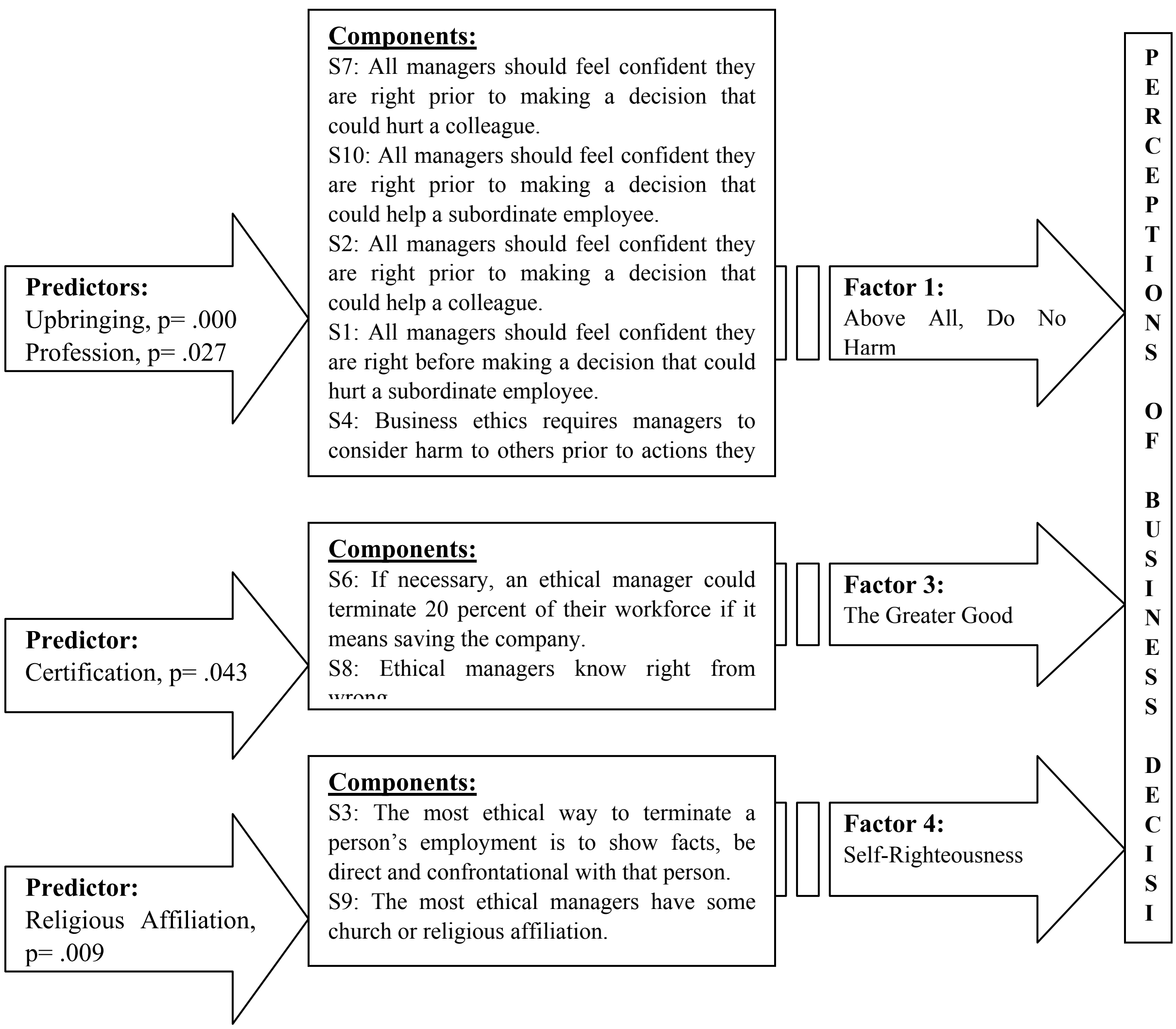
Among the 11 precept variables in the four stepwise regression analyses, Age, Income, Gender, Race, Education, College Major, and Professional License did not survive the stepwise regression in any of the four regression tests as independent predictor variables. Surprisingly, race and gender were not predictive of perceptions in any of the regression analyses.

Race and gender differences might somehow be trumped by the aspects of upbringing and religious affiliation common to everyone being socialized within the super-culture of the United States; there might be more shared understanding about basic problems of philosophy among these groups than conflicting views on ethicality as summarized in the aforementioned literature.

What this implies is that students' perceive the basic underpinnings of Decision Theory, Deontology and Consequentialism, Utilitarianism, and Teleology and Utilitarian Theories of Punishment are learned from parents or at church or through some affiliation with religion or through some professional code of ethics. The tougher choices requiring personal sacrifice for a greater good or the imposition of punishment which is inherently evil are also predicted by religious affiliation.

The predictor variables that survived the stepwise regression analyses in each of the four separate stepwise regression models and their levels of significance are included. In addition, language of the components loading on each factor is briefly described, along with the named factors. We present a condensed version of our findings in Exhibit 1.

Exhibit 1: Predictors with Levels of Significance, Component Loadings, and Factors



Notice the language in the two components loading on Factor 3 seems to point directly to the greater good, to utilitarian actions. A certified person terminating 20 percent of the workers means the act is an attempt to preserve jobs for the 80 percent of the remaining workers. Even more so, business students appear to perceive persons with religious affiliation to be more self-righteous, to always be looking out for the greater good, to be purpose driven and to be able to meter out just punishment if it means a better consequence in the future.

As stated at the beginning of this study, the recent scandals involving unethical decision making within organizations have received considerable publicity. Academics have responded with various studies involving student perceptions on ethics, methods of assessing students' beliefs on ethics, and contradictions in practice. However, the literature review did not find any studies that were conducted in rural universities that measured and compared mean differences on the strength of moral choices on students' perceptions of right and wrong business decisions.

The finding in our study that the variables "Profession" and "Upbringing" were significantly predictive of Factor 1, labeled "Above All, Do No Harm" is consistent with the findings of McCabe, Ingram, and Conway (2006). They found that ethicality and moral reasoning are profoundly affected by social, personal, individual and situational variables. We now know professional "Certification" to be predictive of "The Greater Good." We also found "Religious Affiliation" to be highly predictive of "Self-Righteousness."

The finding that women appeared more interested than men in business decisions associated with the greater good [item #6: If necessary, an ethical manager could terminate 20 percent of their workforce if it means saving the company.] is consistent with several studies. Albaum and Peterson (2006) reported on a survey of undergraduate business students regarding certain general ethics-related attitudes and the degree of ethicality these students possessed. The findings revealed that female survey participants were slightly but significantly more ethically inclined than male survey participants. When comparing the ethical attitudes of females and males in our study, our findings were consistent with the findings of Albaum and Peterson. Rawwas, Swaidan, and Al-Khatib (2006) found that young, male, relativistic, and opportunist students in a Japanese religious university tended to behave less ethically than did older, female, and idealistic students. In terms of gender, our study concurred with the Rawwas, Swaidan, and Al-Khatib study.

In addition, a study by Chen and Tang (2006) examined the relationship between student attitudes on unethical behavior and the propensity to engage in unethical behavior. The researchers found relationships concerning the propensity to act unethically predictive by gender and by attitudes about ethical deeds. Results suggested that male students had stronger unethical attitudes and had higher propensity to engage in unethical behavior than female students. The results of our study were also consistent with the Chen and Tang study.

LIMITATIONS AND FUTURE RESEARCH

This study was limited to one rural university in the Midwest. The research project should have surveyed more students across all grade levels and across multiple university campuses; freshmen and graduate students were under represented; in addition, homogeneity of rural business students at the rural campus surveyed precludes us from making generalizations to any other population of college business students. A much more heterogeneous population of business students should be sampled.

Future studies could compare longitudinal data from baseline information gathered from students with the same information gathered from alumni as they progress throughout their careers. Possibly the effects of age, work experience, education, and gender could be analyzed. According to McCabe, Ingram, and Conway (2006), the understanding of the similarities and differences between men and women with regard to ethical perceptions becomes better informed by measuring gender as a complex, multidimensional construct.

Therefore, it would be interesting to know what rural vis-à-vis urban vis-à-vis suburban vis-à-vis students at historically black colleges and universities think about business ethics, and how they differ on the moral choice items. Data should be collected across three or four heterogeneous (diverse enrollment) large population schools of business to get a better understanding of the predictive power of religion, profession, upbringing, and certification on moral choice variables associated with students' perceptions of ethical decision making in business. With a larger representative sample drawn from a heterogeneous population of business students, the findings could be used to further guide the unit and lesson planning in many of the college level business ethics courses.

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AN ANALYSIS OF MARKETING AND ACCOUNTING EDUCATORS ETHICS PREFERENCES

Philip H. Siegel, Augusta State University
Pamela Z. Jackson, Augusta State University

ABSTRACT

To assist academic institutions and professional educator associations in accounting and marketing to develop and implement an ethical code, we compared university faculties' perceptions of 142 types of behaviors for teaching, research and service. The research used the Integrated Social Contracts Theory (ISCT) to compare norms of ethically acceptable/unacceptable behaviors of accounting and marketing educators. The findings can assist decision makers, university administrators, ethics committees in clarifying differences in ethical values between functional areas in business.

INTRODUCTION

Disclosure of business and government executives' misbehavior and fraud over the past several decades has eroded public trust in corporations and government to unprecedented levels (Gao et al. 2008). Some studies have commented that the repeated malfeasance of business executives and government officials can be linked to a shortcoming of ethical training by universities, particularly business schools. Further, it is important to consider if there are any differences in functional areas regarding ethical training since accounting and marketing functions are often viewed as being silent partners of corporate misconduct (Peterson and Ferrell, 2005; Swanson and Frederick, 2003).

In response to these concerns, we conducted a study directed at marketing as well as accounting educators in their various roles as teachers, researchers, administrators, consultants, professional colleagues, and college professors at large. The research is designed to measure the level of acceptability of certain behaviors in those various roles. Based on this data, the study explores the question that while both marketing and accounting educators may feel certain behaviors are perfectly acceptable, they may disagree about others. Consequently, educators in each functional area may have different interpretations of ethical behavior. This provides implications for the promulgation of a single code of ethics within a school of business.

BACKGROUND

A survey is designed to capture and compare norms of ethically unacceptable behaviors in marketing and accounting academe. This particular measure is based on a business ethics model published in the Journal of Business Ethics (Sirgy, 1999; Sirgy et al., 2005) that conceptualizes ethical and professional conduct of marketing educators in terms of two key constructs, each having several dimensions. The first construct involves social responsibilities in relation to certain publics such as: treating others with respect and dignity, upholding justice and practicing the principle of nondiscrimination, providing information to others about matters that may significantly affect their well being, among others. The other construct addresses social responsibilities in relation to certain actions such as: avoiding conflict of interest, conducting oneself with the highest standards of intellectual honesty, among others.

We build on prior research by Sherrell, Hair, and Griffin (1989), Mason, Bearden, and Richardson (1990), Sirgy (1999), Malhotra (1999), Ferrell (1999) and Sirgy et al. (2005) that deals with issues of codes of conduct of marketing and accounting educators. Specifically, we focus on the work of Sirgy (1999) and use this work to identify a list of possible behaviors that ethicists view as having possible ethical ramifications. We use this list to develop a survey questionnaire directed to both marketing and accounting educators. The focus of the survey questionnaire is to compare respondents' perceptions of the acceptability of certain behaviors in an academic setting between marketing and accounting faculty.

CONCEPTUAL MODEL GUIDING THE STUDY

We use integrated social contract theory and specifically the theoretical notions developed by Donaldson and Dunfee (i.e. Donaldson, 1992; Donaldson and Dunfee, 1999; Donaldson and Dunfee, 1994; Dunfee, 1991) to guide our descriptive study. Donaldson and Dunfee indicate that the rules of business ethics should be based on norms determined by local communities. Communities determine what is appropriate or not, bounded by time and space. In other words, what is appropriate for one community in a certain time and space may be different for other communities bounded by a different time and space. Therefore, local communities establish what are defined as ethical norms. In the context of ethical norms related to the conduct of marketing and accounting educators, the local community may involve any one or combination of stakeholders such as students, the business community, and faculty. That is, the behavior of faculty not only affects students (through teaching and research), the business community (through research and consulting), but also themselves--faculty (mostly through decisions and actions related to promotion and tenure as well as scholarly work).

Donaldson and Dunfee (1999) address the concept of ethical norms developed by the local community in terms of hypernorms which are considered highly legitimate and obligatory. They are considered to be second-order moral concepts because they represent norms sufficiently fundamental to serve as a source of evaluation and criticism of community-generated norms (Donaldson and Dunfee, 1999, p. 50). According to Donaldson and Dunfee, evidence of hypernorms comes from at least 11 sources of norms (Donaldson and Dunfee, 1999, p. 60). These are:

- Norms that are universally accepted by the stakeholders,
- Norms that are part of a well-known global industry standard,
- Norms that are supported by prominent nongovernmental organizations,
- Norms that are supported by regional government organizations,
- Norms that are consistently referred to as a global ethical standard by international media,
- Norms that are consistent with the precepts of major religions,
- Norms that are supported by global business organizations,
- Norms that are known to be consistent with precepts of major philosophies,
- Norms that are generally supported by a relevant international community of professionals,
- Norms that are known to be consistent with findings concerning universal human values, and
- Norms that are supported by the laws of many different countries.

Guided by Donaldson and Dunfee's notion of sources of evidence of hypernorms, we believe that evidence for hypernorms related to marketing and accounting educators can be established from a variety of sources. Examples include:

1 Widespread consensus among marketing and accounting educators as to what constitutes acceptable and unacceptable behavior of marketing and accounting educators,
2 Widespread consensus among marketing and accounting students as to what constitutes acceptable and unacceptable behavior of marketing and accounting educators,
3 Widespread consensus among marketing and accounting professionals (practitioners) as to what constitutes acceptable and unacceptable behavior of marketing and accounting educators,
4 Codes of ethics from professional associations such as that of the AAUP (American Association of University Professors), AIPCA (American Institute of Certified Public Accountants, AMA (American Marketing Association).

Our study focuses on establishing evidence for hypernorms related to marketing and accounting educators by identifying unethical behaviors believed to be universally accepted by the educator community as ethical violations. A survey of marketing and accounting educators asking respondents to rate the degree of acceptability of a variety of potentially unethical behaviors should allow us to identify evidence of hypernorms within this community. Thus, for the purpose of our study, we define marketing and accounting educators' hypernorms as unethical behaviors by faculty widely accepted as unacceptable by the vast majority of marketing and accounting educators.

RESEARCH METHOD

A mail survey was conducted which was directed toward marketing educators. The sampling frame was the directory of current members of the Academy of Marketing Science (AMS). The AMS directory had approximately 1,600 current members. Three hundred and twenty (320) questionnaires were completed and returned. Five (5) of these were not usable and were therefore discarded. The response rate was 20%. Sirgy (1999) considered this response rate to be satisfactory given a survey questionnaire that is lengthy (7 pages involving 151 questions in small print).

An incentive was provided to encourage survey recipients to complete and return the questionnaire. This incentive was in the form of offering to share a statistical summary of the results. For purposes of this study, the 238 North American responses were utilized (out of the original 315 usable responses).

Table 1A – Marketing Educator Respondents - Demographic Profile

Titles		**Tenure Status**		**Degree**		**Gender**		**University Emphasis**	
Associate/Full	34.50%	Tenured	59.30%	Doctorate	87.20%	Male	73.00%	Teaching	23.80%
Assistant/ Instructor	65.50%	Untenured	40.70%	Non-Terminal	12.80%	Female	27.00%	Research	14.00%
								Teaching/ Research	59.10%

Average Teaching Experience – 15 years
Average Age – 47.8 years
n = 238

Table 1B – Accounting Educator Respondents - Demographic Profile

Titles		**Tenure Status**		**Degree**		**Gender**		**University Emphasis**	
Associate/Full	30.40%	Tenured	77.60%	Doctorate	87.40%	Male	64.40%	Teaching	32.80%
Assistant/ Instructor	69.60%	Untenured	22.40%	Non-terminal	12.60%	Female	35.60%	Research	10.40%
								Teaching/ Research	56.70%

Average Teaching Experience – 15.3 years
Average Age – 45.6 years
n = 135

A similar mail survey was sent to accounting educators. The sampling frame was the Hasselback Directory of current faculty members of U. S. and international colleges and universities. One thousand (N = 1,000) names were randomly selected and questionnaires were mailed to these educators. Out of the 1,000 sent, 312 questionnaires were completed and returned, and 161 of these were not usable and therefore discarded. The final response rate was estimated to be around 15%. As discussed previously, Sirgy (1999) considered this response rate to be satisfactory given the length of the questionnaire. Once again, an incentive was provided to encourage survey recipients to complete and return the questionnaire. This incentive was in the form of offering to share a statistical summary of the results. Of the one hundred and fifty-one usable responses, the 135 responses from the North American faculty (N=135) were used in the statistical analysis.

A Chi-square test between marketing and accounting samples in relation to each of the demographic variables was performed in order to determine if there were any significant differences in the composition of the marketing and accounting faculty samples.

With respect to differences between the marketing versus the accounting samples, a Chi-square revealed that the marketing sample had significantly more non-tenured individuals than the accounting faculty sample (Chi-square=11.93 with Yates correction; p = .001; Table 2B). The data tests also indicated that the composition of the marketing sample was significantly younger than the accounting faculty sample (Chi-square=14.54 with Yates correction; p = .000; Table 2F).

A significantly higher percentage of the marketing faculty identified their universities' mission as emphasizing research. In contrast, the accounting faculty identified teaching as the primary mission with less emphasis on research (Table 2G). This result may provide additional insight into previous findings that the educational expectations may be different between the accounting and marketing faculty in terms of the quantitative preparation associated with their degrees (Kochunny, et al., 1992).

Table 2A: What is your academic position or title?

	Senior	Junior	Total
Marketing	82	156	238
% between Position	34.50%	65.50%	100.00%
% between Group	66.70%	62.40%	63.80%
Accounting	41	94	135
% between Position	30.40%	69.60%	100.00%
% between Group	33.30%	37.60%	36.20%
Total	123	250	373
% between Position	33.00%	67.00%	100.00%
% between Group	100.00%	100.00%	100.00%

Chi-Square Tests

	Value	df	Asymp. Sig. (2-sided)	Exact Sig. (2-sided)	Exact Sig. (1-sided)
Pearson Chi-Square	.650 [b]	1	0.42		
Continuity Correction [a]	0.478	1	0.489		
Likelihood Ratio	0.654	1	0.419		
Fisher's Exact Test				0.492	0.245
Linear-by-Linear Association	0.648	1	0.421		
N of Valid Cases	373				

[a] Computed only for a 2x2 table
[b] 0 cells (.0%) have expected count less than 5. The minimum expected count is 44.52.

Table 2B: Are you tenured?					
			Yes	No	Total
Marketing			140	96	236
% between Answer			59.30%	40.70%	100.00%
% between Group			57.40%	76.20%	63.80%
Accounting			104	30	134
% between Answer			77.60%	22.40%	100.00%
% between Group			42.60%	23.80%	36.20%
Total			244	126	370
% between Answer			65.90%	34.10%	100.00%
% between Group			100.00%	100.00%	100.00%
Chi-Square Tests					
	Value	df	Asymp. Sig (2-sided)	Exact Sig. (2-sided)	Exact Sig. (1-sided)
Pearson Chi-Square	12.732b	1	0		
Continuity Correction [a]	11.93	1	0.001		
Likelihood Ratio	13.201	1	0		
Fisher's Exact Test				0	0
Linear-by-Linear Association	12.697	1	0		
N of Valid Cases	370				

[a] Computed only for a 2x2 table
[b] 0 cells (.0%) have expected count less than 5. The minimum expected count is 45.63.

Table 2C: Do you have a doctoral degree?					
			Yes	No	Total
Marketing			205	30	235
% between Answer			87.20%	12.80%	100.00%
% between Group			63.50%	63.80%	63.50%
Accounting			118	17	135
% between Answer			87.40%	12.60%	100.00%
% between Group			36.50%	36.20%	36.50%
Total			323	47	370
% between Answer			87.30%	12.70%	100.00%
% between Group			100.00%	100.00%	100.00%
Chi-Square Tests					
	Value	df	Asymp. Sig. (2-sided)	Exact Sig. (2-sided)	Exact Sig. (1-sided)
Pearson Chi-Square	.002 [b]	1	0.962		
Continuity Correction [a]	0	1	1		
Likelihood Ratio	0.002	1	0.962		
Fisher's Exact Test				1	0.55
Linear-by-Linear Association	0.002	1	0.962		
N of Valid Cases	370				

[a] Computed only for a 2x2 table
[b] 0 cells (.0%) have expected count less than 5. The minimum expected count is 17.15.

Table 2D: How many years have you taught in academic institutions of higher education?			
	Low	High	Total
Marketing	108	129	237
% between Experience	45.60%	54.40%	100.00%
% between Group	66.70%	62.00%	64.10%
Accounting	54	79	133
% between Experience	40.60%	59.40%	100.00%
% between Group	33.30%	38.00%	35.90%
Total	162	208	370
% between Experience	43.80%	56.20%	100.00%
% between Group	100.00%	100.00%	100.00%

Chi-Square Tests					
	Value	df	Asymp. Sig. (2-sided)	Exact Sig. (2-sided)	Exact Sig. (1-sided)
Pearson Chi-Square	.854 [b]	1	0.355		
Continuity Correction [a]	0.664	1	0.415		
Likelihood Ratio	0.857	1	0.355		
Fisher's Exact Test				0.383	0.208
Linear-by-Linear Association	0.852	1	0.356		
N of Valid Cases	370				

[a] Computed only for a 2x2 table
[b] 0 cells (.0%) have expected count less than 5. The minimum expected count is 58.23.

Table 2E: What is your gender?			
	Male	Female	Total
Marketing	173	64	237
% between Gender	73.00%	27.00%	100.00%
% between Group	66.50%	57.10%	63.70%
Accounting	87	48	135
% between Gender	64.40%	35.60%	100.00%
% between Group	33.50%	42.90%	36.30%
Total	260	112	372
% between Gender	69.90%	30.10%	100.00%
% between Group	100.00%	100.00%	100.00%

Chi-Square Tests					
	Value	df	Asymp. Sig. (2-sided)	Exact Sig. (2-sided)	Exact Sig. (1-sided)
Pearson Chi-Square	2.989 [b]	1	0.084		
Continuity Correction [a]	2.596	1	0.107		
Likelihood Ratio	2.953	1	0.086		
Fisher's Exact Test				0.1	0.054
Linear-by-Linear Association	2.981	1	0.084		
N of Valid Cases	372				

[a] Computed only for a 2x2 table
[b] 0 cells (.0%) have expected count less than 5. The minimum expected count is 40.65.

Table 2F: What is your age?					
			Young	Old	Total
Marketing			103	132	235
% between Age			43.80%	56.20%	100.00%
% between Group			80.50%	60.00%	67.50%
Accounting			25	88	113
% between Age			22.10%	77.90%	100.00%
% between Group			19.50%	40.00%	32.50%
Total			128	220	348
% between Age			36.80%	63.20%	100.00%
% between Group			100.00%	100.00%	100.00%
Chi-Square Tests					
	Value	df	Asymp. Sig. (2-sided)	Exact Sig. (2-sided)	Exact Sig. (1-sided)
Pearson Chi-Square	15.461 [b]	1	0		
Continuity Correction [a]	14.542	1	0		
Likelihood Ratio	16.191	1	0		
Fisher's Exact Test				0	0
Linear-by-Linear Association	15.417	1	0		
N of Valid Cases	348				

[a] Computed only for a 2x2 table
[b] 0 cells (.0%) have expected count less than 5. The minimum expected count is 41.56.

Table 2G: Are you employed in an academic institution that is: (University Emphasizes)					
	Education	Research	Both	Other	Total
Marketing	56	33	139	7	235
% between Answer	23.80%	14.00%	59.10%	3.00%	100.00%
% between Group	56.00%	70.20%	64.70%	100.00%	63.70%
Accounting	44	14	76		134
% between Answer	32.80%	10.40%	56.70%		100.00%
% between Group	44.00%	29.80%	35.30%		36.30%
Total	100	47	215	7	369
% between Answer	27.10%	12.70%	58.30%	1.90%	100.00%
% between Group	100.00%	100.00%	100.00%	100.00%	100.00%
Chi-Square Tests					
			Value	df	Asymp. Sig. (2-sided)
Pearson Chi-Square			7.498 [a]	3	0.058
Likelihood Ratio			9.786	3	0.02
Linear-by-Linear Association			3.19	1	0.074
N of Valid Cases			369		

[a] 2 cells (25.0%) have expected count less than 5. The minimum expected count is 2.54.

MEASURES AND QUESTIONNAIRE DESIGN

The questionnaire was divided in seven sections following the instructions. The first six sections contained items reflecting certain behaviors assumed within certain roles. Marketing and accounting educators play the role of teachers (Section I), researchers (Section II), administrators (Section III), management consultants (Section IV), professional colleagues (Section V), and college professors (Section VI). All the items in the first six sections of the questionnaire were accompanied with 5-point rating scales [I believe this IS very acceptable (1), I believe this MAY be acceptable (2), I believe this may be Unacceptable (3), I believe this IS Unacceptable (4), and I believe this IS VERY Unacceptable (5)]. See Tables 3A and 3B. Section VII contained demographic items (academic position; tenured; doctoral degree; years of experience in academe; gender; age; employed in an institution which emphasizes research, teaching, or both; and country of the college/university).

The 142 behaviors included in Sections I-VI of the questionnaire were derived from several sources. One source was the discussion document of the code of ethics as proposed by Sirgy (1999) and the commentaries by Ferrell (1999), Malhotra and Miller (1999), and Kurtz (1999). A second source involved past studies. For example, we used the conceptual dimensions of unethical behaviors uncovered by Coe and Coe (1976), Ferrell and Skinner (1988), Mason, Bearden, and Richardson (1990), and Sherrell, Hair, and Griffin (1989). A third data source involved in-depth interviews with seven senior marketing educators who have done much research in business ethics. These interviews revealed many conceptual dimensions from which we developed measures. Finally, we used the codes of ethics of the American Marketing Association (AMA), the American Psychological Association (APA), the American Sociological Association (ASA), the Marketing Research Association (MRA), Council of American Survey Research Organizations (CASRO), Qualitative Research Consultants Association (QRCA), American Association for Public Opinion Research (AAPOR), the Direct Marketing Association (DMA) and the American Institute of Certified Public Accountants (AICPA).

The questionnaire was pre-tested using the same seven senior marketing educators to ensure face validity and to eliminate redundant items. This effort resulted in fine tuning the measures and questionnaire overall.

The survey questionnaire was accompanied with a cover letter signed by one of the authors underscoring the importance of this survey in the development of a code of ethics for marketing or accounting educators, accordingly. The instructions at the beginning of the questionnaire are included in Appendix A.

RESULTS

MANOVA analysis was conducted to compare the responses to the ethics variables of marketing versus accounting educators. The variables that had significant differences between

Table 3A: North American Marketing Mean > North American Accounting Mean (MANOVA Results)						
1 = Very acceptable; 2 = May be acceptable; 3 = May be unacceptable; 4 = Unacceptable; 5 = Very unacceptable						
	DATA					
	Marketing		Accounting			
	N	Mean	N	Mean	F-value	Sig
I. Marketing Educators in Their Role as Teachers						
Failing to make available (possibly through the college library) classroom materials that are costly and unaffordable to the average student.	238	2.676	135	2.411	5.205	0.023
Accepting as students in one's class relatives.	238	2.593	135	2.296	6.221	0.013
Submitting a graduate student paper to a journal for the only purpose of getting a review and then passing on the review to the student without acknowledging the source.	238	4.578	135	4.395	4.917	0.027
II. Marketing Educators in their Role as Researchers						
Submitting a paper to different journals at the same time.	238	4.164	135	3.64	23.56	0
V. Marketing Educators in their Role as Professional Colleagues						
Failing to provide a constructive review that is intended to help the author.	238	4.017	135	3.837	4.068	0.044

Table 3B: North American Marketing Mean < North American Accounting Mean (MANOVA Results)						
1 = Very acceptable; 2 = May be acceptable; 3 = May be unacceptable; 4 = Unacceptable; 5 = Very unacceptable						
	DATA					
	Marketing		Accounting			
	N	Mean	N	Mean	F-value	Sig
I. Marketing Educators in Their Role as Teachers						
Having a romantic relationship with a student in one’s class.	238	4.702	135	4.852	4.654	0.032
Treating students in class more favorably based on their gender, religion, ethnicity, race, nationality, age, sexual orientation, or physical/mental disability.	238	4.676	135	4.843	6.018	0.015
Disclosing students' grades with students’ identity to other classmates.	238	4.456	135	4.748	11.567	0.001
Grading students inconsistently.	238	4.298	135	4.499	7.078	0.008
II. Marketing Educators in their Role as Researchers						
Misleading research subjects about the amount of time needed to complete their task in the study.	238	3.966	135	4.193	6.577	0.011
Failing to acknowledge the contribution of the research sponsor in research publications based on the sponsored research.	238	4.143	135	4.348	5.934	0.015
Exaggerating and misrepresenting one's expertise and competence in a specific area of research to secure a research contract.	238	4.194	135	4.378	4.554	0.033
Misrepresenting aspects of the research to ensure a positive peer review.	238	4.647	135	4.774	4.619	0.032
Listing as a co-author a colleague who did not contribute substantively to the development of the paper.	238	3.399	135	3.644	4.712	0.031
III. Marketing Educators in their Role as Administrators In Relation to Faculty						
Having a romantic relationship with a faculty member.	238	2.827	135	3.371	13.613	0
Failing to acknowledge significant contributions of a faculty member in departmental/college publications.	238	4.009	135	4.203	3.986	0.047
In Relation to Graduate Students						
Having a romantic relationship with a graduate student.	238	4.329	135	4.541	3.995	0.046

Table 3B: North American Marketing Mean < North American Accounting Mean (MANOVA Results)						
1 = Very acceptable; 2 = May be acceptable; 3 = May be unacceptable; 4 = Unacceptable; 5 = Very unacceptable						
	DATA					
	Marketing		Accounting			
	N	Mean	N	Mean	F-value	Sig
IV. Marketing Educators in Their Role as Management Consultants						
Running a business consultancy or other business that requires a great deal of time while being a full-time employee of an academic institution.	238	3.595	135	3.924	7.064	0.008
V. Marketing Educators in their Role as Professional Colleagues						
Criticizing other faculty in front of students or staff.	238	4.084	135	4.411	11.89	0.001
Unjustly bad mouthing a colleague who has applied for a position at some other institution when people from that institution call for a reference check, thus ruining the colleague's chances of getting the position.	238	3.267	135	3.542	3.974	0.047

the expressed opinions of marketing and accounting respondents are listed below in separate groups. In one group are variables where the means of the marketing sample are significantly greater than those of the accounting sample. This implies that the marketing sample consider the variables/behavior significantly more unacceptable than the accounting sample. In the second group variables/behaviors are listed which the accounting sample consider significantly more unacceptable than the marketing sample.

MARKETING AND ACCOUNTING EDUCATORS IN THEIR ROLE AS TEACHERS

Some significant differences exist between the marketing and accounting faculty attitudes towards ethical behavior in academics in their role as teachers. The marketing faculties consider the following behaviors to be significantly more unacceptable than the accounting faculty:

- *Failing to make available (possibly through the college library) classroom materials that are costly and unaffordable to the average student.*
- *Accepting relatives as students in one's class.*
- *Submitting a graduate student paper to a journal solely for the purpose of getting a review and then passing on the review to the student without acknowledging the source.*

On the other hand, in their role as teachers the accounting faculty consider it significantly more unacceptable than the marketing faculty to engage in the following behaviors:

- *Having a romantic relationship with a student in one’s class.*
- *Treating students in class more favorably based on their gender, religion, ethnicity, race, nationality, age, sexual orientation, or physical/mental disability.*

- *Disclosing students' grades with students' identity to other classmates.*
- *Grading students inconsistently.*
- **Marketing and Accounting Educators in their Role as Researchers*

Significant differences exist between the marketing and accounting faculty attitudes towards ethical behavior in academics in their role as researchers. The marketing faculty considers it significantly more unacceptable than the accounting faculty to:

- *Submit a paper to different journals at the same time.*

However, the accounting faculty considers several other behaviors to be significantly more unacceptable than did the marketing faculty, namely:

- *Misleading research subjects about the amount of time needed to complete their task in the study.*
- *Failing to acknowledge the contribution of the research sponsor in research publications based on the sponsored research.*
- *Exaggerating and misrepresenting one's expertise and competence in a specific area of research to secure a research contract.*
- *Misrepresenting aspects of the research to ensure a positive peer review.*
- *Listing as a co-author a colleague who did not contribute substantively to the development of the paper.*

MARKETING AND ACCOUNTING EDUCATORS IN THEIR ROLE AS ADMINISTRATORS

Significant differences also exist between the marketing and accounting faculty attitudes towards ethical behavior in academics in their role as administrators. The accounting faculty considers the following behaviors to be significantly more unacceptable than the marketing faculty:

In Relation to Faculty

- *Having a romantic relationship with a faculty member.*
- *Failing to acknowledge significant contributions of a faculty member in departmental/college publications.*

In Relation to Graduate Students

- *Having a romantic relationship with a graduate student.*

MARKETING AND ACCOUNTING EDUCATORS IN **THEIR ROLE AS MANAGEMENT CONSULTANTS**

Significant differences exist between the marketing and accounting faculty attitudes towards ethical behavior in academics in their role as Management Consultants in only one area. The accounting faculty considers:

- *Running a business consultancy or other business that requires a great deal of time while being a full-time employee of an academic institution*

to be significantly more unacceptable than did the marketing faculty.

MARKETING AND ACCOUNTING EDUCATORS IN THEIR ROLE AS PROFESSIONAL COLLEAGUES

Significant differences exist between the marketing and accounting faculty attitudes towards ethical behavior in their role as Professional Colleagues. The marketing faculty considers the following behavior to be significantly more unacceptable than the accounting faculty:

- *Failing to provide a constructive review that is intended to help the author.*

The accounting faculty found it significantly more unacceptable than the marketing faculty to:

- *Criticize other faculty in front of students or staff.*
- *Unjustly bad mouth a colleague who has applied for a position at some other institution when people from that institution call for a reference check, thus ruining the colleague's chances of getting the position.*

MARKETING AND ACCOUNTING EDUCATORS IN THEIR ROLE AS COLLEGE PROFESSORS

Finally, in their role as College Professors, there was no significance difference between marketing faculty and accounting faculty regarding their attitudes toward any of the ethical behaviors surveyed.

DISCUSSION

The results of the two surveys of accounting and marketing educators, respectively, indicate that there is general agreement among the two disciplines regarding unacceptable behaviors in academe. These findings suggest that there is a common set of hypernorms that exists among accounting and marketing faculty. Gao et al. (2008) provides a list of hypernorms that surfaced in a similar survey of management faculty. While most of the same types of hypernorms in our study were not items of disagreement between marketing and accounting faculty, it is interesting to note that some significant differences did surface.

According to Gao et al. (2008) one method that can be used to identify a hypernorm is the sumscore method. Using this method, an unacceptable behavior with a mean score of 4 or above indicates identification of a hypernorm. Our data analysis reveals that some significant differences do exist between accounting and marketing faculty in their perceptions of unacceptable behaviors in academe. These differences occurred in behaviors that were scored as hypernorms as well as in behaviors that did not surface as hypernorms.

In their roles as teachers, accounting and marketing educators were significantly different in their responses to the unacceptability of seven behaviors included in the survey. Of these seven, five scored as hypernorms (mean > 4) in both groups; two did not. Interestingly, accounting educators felt more strongly about the unacceptability of four of the five hypernorms. Perhaps not surprisingly, the theme of the behaviors that accountants viewed as more unacceptable reflects the accounting profession's obsession with independence, confidentiality, and objectivity (See Table 3B-I). These characteristics of the profession's conduct have been key topics of discussion, debate, and concern both historically and recently, given the public trust associated with accounting activities. Two of the three behaviors that marketing educators felt were more significantly unacceptable did not meet the sumscore criteria for hypernorm (See Table 3A-I). One of these behaviors (failing to make costly classroom materials available to students) was unique to the academic environment with no comparable parallel to the business community.

Given the demographics of the accounting educators vs. the marketing educators, these findings suggest that accounting educators may be bringing more professional experience into the classroom. Accounting educators in the survey were significantly older than marketing educators (See Table 2F) but had not been in the classroom a significantly longer period of time (See Table 2D). Therefore, it's reasonable to conclude that more accounting educators may be in professional practice prior to the career shift to academe and are bringing the ethical code of the profession into the classroom. Evidence of the impact of more professional experience prior to teaching may also be reflected in the significant difference that was measured between accountants and marketing faculty in the area of management consulting (Table 3B-IV-item 4).

One interesting finding is that the most significant difference (p = .001) between the two groups lies in grade disclosure (Table 3B-I-item 13). This may reflect the accounting profession's sensitivity to grades since a strong GPA is generally of grave importance for new graduates seeking employment in public accounting. Thus, accounting professors are perhaps more guarded about student performance as well as cautious in grade assignment (Table 3B-I-item 18), the next lowest p-value.

In their role as researchers, the accounting group again places significantly more emphasis on unacceptable behaviors that both groups scored as hypernorms. Perhaps behaviors phrased as those that are "misleading" or "misrepresenting" cued the accountants' stronger responses since these buzzwords define the traditional focus of the profession as well as the recent issues that currently plague it.

The most significant difference revealed (p = 0.00) was between the educators' perceptions of the unacceptability of submitting a paper to different journals at the same time. While the marketing group viewed this as a hypernorm in terms of unacceptable research behavior, the accounting group mean wavered between "may be unacceptable" and "unacceptable." This finding was very surprising given the accountants' seeming hypersensitivity to misrepresentation and integrity in other areas of their roles as researchers. Given that this seems so contradictory, further exploration into this question would be of interest.

Marketing educators did not perceive any of the described unacceptable behaviors in their roles as administrators, management consultants, or college professors to be significantly more unacceptable than did the accountants. However, the most significant difference between the two groups in which the accountants felt more strongly than the marketing faculty was in the role of an administrator having a romantic relationship with a faculty member (Table 3B-III-item 6). In fact, romance triggered a significant difference between the two groups in the roles of teacher, administrator in relation to the faculty, and administrator in relation to graduate students – all indicating that the accounting faculty perceived these behaviors to be significantly more unacceptable than did the marketing group. Yet neither group scored the administrator-faculty romantic relationship as a hypernorm while both groups scored romantic relationships with students as hypernorms; the accounting group simply felt stronger about such relationships.

Both groups expressed differences in unacceptable behaviors as professional colleagues. Accounting faculty felt much more strongly that behaviors threatening a colleague's professional reputation were unacceptable (Table 3B-V-items 1 and 3) and marketing faculty viewed a failure to provide constructive feedback when appropriate as more unacceptable than did accounting faculty. (Table 3A-V)

There were no significant differences between the two groups in their perceptions of unacceptable behaviors in their roles as college professors. This suggests that a general widespread consensus of hypernorms may exist for the campus community. This lends support to the idea that a general code of conduct exists across campus communities even though the there may gradations of differences within sub population groups.

LIMITATIONS AND FUTURE RESEARCH

The results of this study suggest that while hypernorms may be agreed upon by two disciplines within the school of business, the degree of importance of specific misbehaviors will vary across disciplines. Thus, in developing a code of conduct for a college of business, it may be prudent to consider designing a code of ethics that is discipline specific, or, at the very least, takes differences in functional areas into consideration. As indicated earlier, this study applies social contract theory in developing the premise for identifying hypernorms related to academe by surveying marketing and accounting educators as to what constitutes acceptable and unacceptable behavior in their various roles in academe. Nevertheless, a code of ethics cannot be solely developed based on applying social contract theory to survey data. Rather those responsible for code development should use numerous other sources of input such as students, professional associations, and employers. Additionally, our study compared only two functional areas of business. Future studies would want to consider comparing other fields of business such as finance, information systems, or business law.

Our research suggests that sensitivity to the professional code of conduct and the specialized expectations of separate business functional areas may provide good guidelines for business schools in developing a code of ethics. At least in the area of accounting, these variables appear to have an influence on the educator's response to ethical questions. Whether the profession's expectations are reflected in the accounting professors' attitudes because of their personal experience as accounting professionals or whether they are emulated as a result of studying the expectations of the profession, there do seem to be elements of the professional code of conduct present in the framework from which accounting professors distinguish themselves from marketing educators.

Future research is needed to determine the impact of existing codes of conduct within the disciplines and the professional experience of the educator on their tolerance for acceptable and unacceptable behaviors in academe. Only by analyzing what underlies the differences across business disciplines regarding their perceptions of unethical behavior will it be possible to ascertain the reasonableness of applying similar guidelines to their academic roles.

CONCLUSION

We realize that an ethical code cannot be constructed based solely on comparing academic fields using the social contract theory. However, we argue that business school educators can benefit from this comparison study. First as noted in the text, there are numerous behaviors that educators from different functional areas agree to be examples of unethical conduct. By examining the few behaviors for which there is a significant difference in perceived degree of unacceptability between two functional areas, we recognize that a code of ethics that means to apply to an entire academic unit, namely a college of business, must take into consideration certain ethical norms that may be discipline specific. We feel that our identification of both common and different hypernorms can be used both by academic departments (such as accountings and marketing) as well as college wide (school of business) to enhance current approaches to code development. With the hypernorms as a starting point, this study introduces a systematic way of determining additional behaviors that may need to be customized into the development of an ethical code.

22%. Even with the reduced degrees of freedom, smaller companies are more likely to disclose the necessary restatement and older CEOs are more likely to be the prompter. The revenue recognition variable, however, is no longer significant in the model.

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APPENDIX A

Instructions for Questionnaire Participants

This is a survey directed to marketing (accounting) educators in their various roles as teachers, researchers, administrators, consultants, professional colleagues, and college professors at large. The survey is designed to measure the level of acceptability of certain behaviors in those various roles. Some marketing (accounting) educators may feel certain behaviors are perfectly acceptable, while others may disagree. Hence, the survey is designed to identify norms of many marketing (accounting) educators' behaviors in their various roles. You should note that not all marketing (accounting) educators assume the roles of teacher, researcher, administrator, and consultant. For example, some marketing (accounting) educators in teaching-oriented institutions do not conduct research because their academic institutions reward them based on their teaching and service performance, not research and publications. Some educators have never assumed administrative roles. Some educators do not engage in business consulting. Nevertheless, we would like you to indicate the level of acceptability of the behaviors indicated in this survey even though you never had a chance to assume the roles in questions. Whether you have or have not assumed the various roles in questions, it is very likely that you have certain beliefs about the acceptability of certain behavior in those roles. Therefore, we ask you to assume the various roles in questions (even though you may have never had past experience in these roles) and respond with those roles in mind. Of course, there is no right or wrong answer, and all responses will be treated with the utmost level of confidentiality. Please be assured that all respondents will not be identified in any way, shape, or form. In other words, we guarantee total anonymity.

CORPORATE CHARACTERISTICS AND THE DISCLOSURE OF EARNINGS RESTATEMENTS

Linda M. Lovata, Southern Illinois University Edwardsville
Timothy S. Schoenecker, Southern Illinois University Edwardsville
Michael L. Costigan, Southern Illinois University Edwardsville

ABSTRACT

According to a recent GAO report, accounting restatements have increased 145% from 1997 to 2002. The report states that this "raises questions about the credibility of accounting practices and the quality of corporate financial disclosures and oversight in the United States" (pg. 1). In some cases, management is the first to disclose the problems that result in these restatements, while in others, an external source, such as the SEC, is the first to investigate. This study will examine the differences in management and firm characteristics based on who disclosed the accounting irregularity resulting in an accounting restatement (the prompter).

Daboub, et. al. (1995) provide a comprehensive model of top management team characteristics and corporate illegal activity. Based on this model, we anticipate that a more ethical CEO will disclose problems to the public first, while less ethical CEOs will wait for the SEC, auditor, or some other regulator to find and disclose accounting issues.

Logistic regression results indicate that older CEOs tend to self-report accounting restatements. In addition, there is evidence that being the prompter of a restatement is associated with smaller companies. Finally, firms are less likely to be the first to report revenue recognition problems to the public. These findings support the management and ethics models in that CEO characteristics are associated with the reporting of accounting irregularities resulting in restatements.

INTRODUCTION

Although accounting frauds have taken center stage in accounts of the unethical behavior by some managers, a more prevalent and equally disconcerting management activity results in accounting restatements. Accounting irregularities requiring restatements are sometimes initially reported by management; while other times the SEC or other regulators intervene to bring the problem to light. Using models of corporate corruption and unethical behavior developed in the management literature, we anticipate differences in company and CEO characteristics between companies that disclose accounting irregularities to the public first and those that rely on regulators to find and disclose accounting issues.

The unprecedented increase in restatements prompted Congress to commission the GAO to analyze these accounting practices. The *Wall Street Journal* noted that the most visible indicator of improper accounting was the growing number of restated financial reports (Schroeder, 2001). In a speech to the Financial Executives Institute in 2006, the Acting Chief Accountant of the SEC, Scott Taub, discussed the lack of information regarding who discovered and reported the problem (the prompter) and noted that:

> *Unfortunately, about half of the restatement disclosures did not report any information on this point. As it strikes me that market participants would likely be interested in this information, I wonder whether something should be done to encourage its disclosure.*

This indicates a belief that knowing the prompter of a restatement may provide important signals to market participants. Therefore, the investigation of the prompter of an accounting restatement is a current issue where new disclosure regulations may become necessary. Accordingly, this study will investigate the differences in management and firm characteristics associated with the prompter of an accounting restatement.

It is important to regulators and other stakeholders to be able to predict the types of management and organizations that are prone to accounting irregularities. This research will add to the literature by contrasting the management and financial characteristics of companies that disclosed restatements with companies that required an external source, such as the SEC, to act as the prompter. The next two sections of this paper will review the prior literature, beginning with the management literature on corporate corruption, followed by the accounting literature on restatements. The GAO report that provides the initial sample for the study will then be described. The hypotheses are developed and the model explained. Finally, the results are presented followed by the implications of the study.

PRIOR RESEARCH ON CORPORATE CORRUPTION

The vast literature on the causes and outcomes associated with corporate corruption dates back over a century. As Hill, et. al., (1992) state, most of the work in this area used learning theory (Sutherland, 1949; Bandura, 1977; Szwajkowski, 1985) as the underlying conceptual framework. At its crux, learning theory posits that managers will approach corporate corruption in a way that reflects the norms within their company, industry, and profession. To the extent that unethical and possibly illegal acts are not deemed unacceptable by a significant number of executives, newer executives may be prone to accept those norms as their own. Similarly, the norms communicated during the education that executives receive could also impact what is perceived to be reasonable behavior.

Daboub, et. al. (1995) (referred to as the Daboub model for the remainder of the paper) provide one of the most comprehensive reviews of the conceptual and empirical literature on top management team (TMT) characteristics and corporate illegal activity. Their key findings are summarized as:

- The size of the company, which usually leads to taller hierarchies, increased complexity, and increased specialization, can facilitate the commission of illegal acts (Vaughan, 1982; Baucus and Near, 1991);
- The degree to which corporate illegal activities occur varies across industries (Baucus and Near, 1991; Baumol, 1991);
- The environmental scarcity is often posited to cause firms to be more likely to commit illegal acts (Staw and Szwajkowski, 1975; Simpson, 1986);
- The level of the organization involved in committing the illegal act depends on the nature of the violation, thus, the TMT may not be directly involved in some types of illegal acts like pollution or worker safety violations (Clinard and Yeager, 1980; Vaughan, 1982).

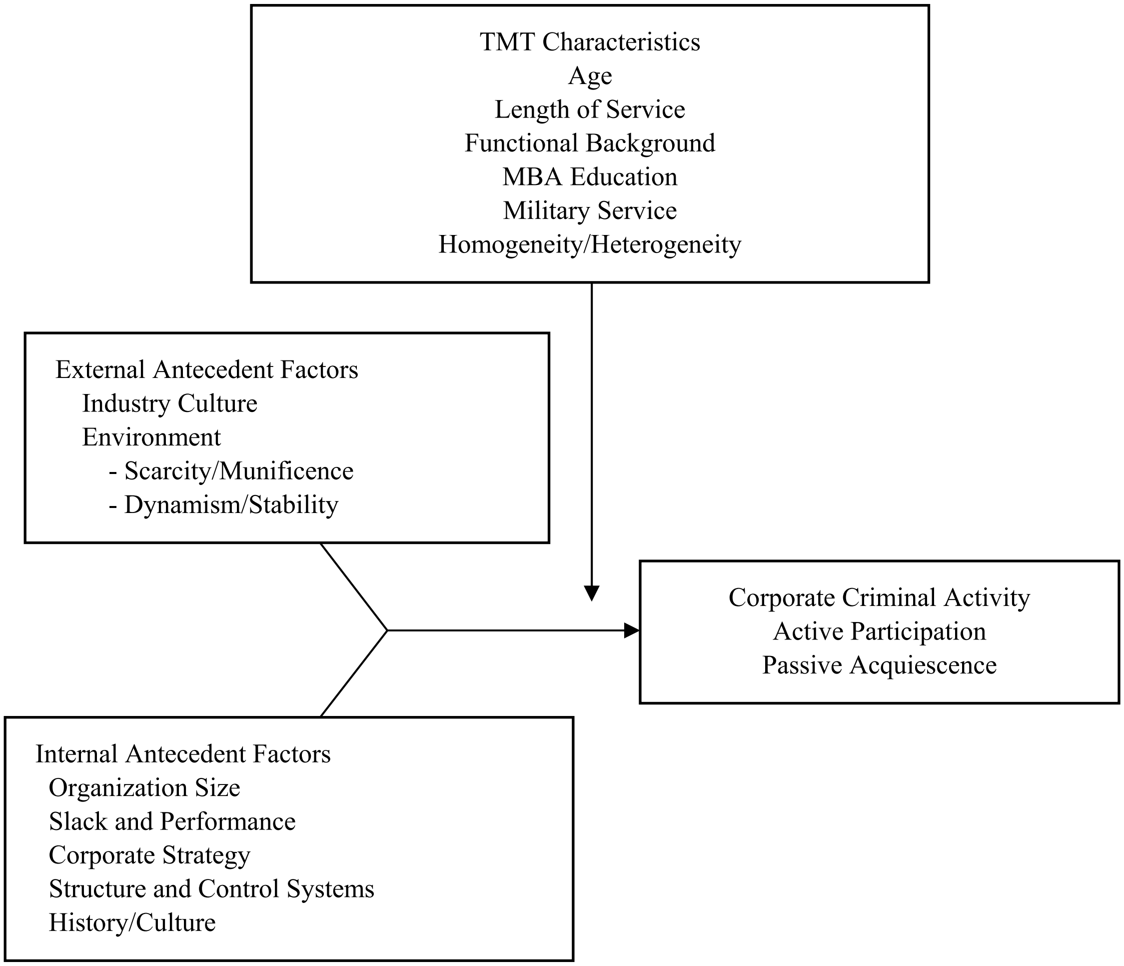
In summary, the Daboub model predicts that TMT characteristics moderate the relationship between many of the firm level antecedents and corrupt activities.

Unfortunately, the evidence on the effects of the environmental and industry antecedents of corporate corruption is, at best, mixed. For example, in the study by Hill, et. al. (1992) of OSHA and EPA violations among Fortune 500 manufacturers, only one of the six hypotheses in the study was supported; the degree to which top management focused on divisional financial performance was positively associated with the number of citations received by the company. On the other hand, no relationship was found between corporate corruption and firm size, financial strain, diversification, decentralization, or incentive compensation schemes. These findings, or lack thereof, are not atypical of this literature.

Williams, et. al. (2000) also collected data on the number of OSHA and EPA citations levied against a sample of Fortune 500 firms. These data were regressed against a host of firm-level variables, including the proportion of the firm's top management team that held MBAs. Other variables, such as firm size, firm performance, level of diversification, and the degree to which the firm's TMTs had prior military experience were also included in the analyses. While the analyses did not uncover a direct relationship between MBA education and the number of citations, there was support for the authors' hypothesis that a higher proportion of TMT members holding MBA degrees strengthened the association between increased firm size and the number of citations received by the firm.

In summary, there is still much to be learned regarding the variables relating to unethical corporate behavior. As Pinto, et. al. (2008) state: "The corruption literature, taken as a whole, is rife with inconsistencies and inconclusive empirical results" (p. 685).

Figure 1
TMT Characteristics and Corporate Criminal Activity
Daboub, Rasheed, Priem, and Gray (1995)



PRIOR RESEARCH ON ACCOUNTING RESTATEMENTS

With respect to accounting restatements, several studies have examined the managerial penalties resulting from restatements. Early studies found limited consequences for the top management team when violating accounting rules (Beneish, 1999; Agrawal, et. al., 1999). However, more recently, Desai, et. al. (2006) found that CEO and CFO turnover increases and prospects for new employment declines after earnings restatements are required. Cheng and Farber (2008) determined that CEO compensation following a restatement declines. CEOs, therefore, have motives to avoid reporting these improprieties. In addition, Thompson and

McCoy (2008) found auditor changes occur subsequent to restatements. Therefore, auditors have disincentives to report irregularities that may result in restatements.

Finally, a paper by Aier, et. al. (2005) examined the association between the financial expertise of CFOs and earnings restatements. They found that earnings restatements are negatively associated with a CFO's financial expertise. In other words, CFOs with more experience in this role who are MBAs and/or CPAs tend not to be involved in accounting restatements.

PURPOSE OF THIS STUDY

This study will extend prior research by looking at the characteristics of the CEO. More significantly, rather than contrasting companies that restated with those that did not, it will examine who disclosed the accounting irregularity (the prompter). Using the Daboub model as a context for the investigation, we suggest that more ethical CEOs will be more likely to disclose an irregularity rather than waiting for a regulator or other external source to intervene. The independent variables will include CEO characteristics as well as internal antecedents.

THE GAO REPORT ON RESTATEMENTS (DATA)

In 2002, Congress passed the Sarbanes-Oxley Act, which was designed to enhance shareholder confidence in the markets. The focus on accounting frauds also brought to light what was believed to be a significant increase in accounting restatements. In order to verify the anecdotal evidence of this increase, Congress commissioned a study by the General Accounting Office (GAO, 2002) to review financial restatements. In its final report, *Financial Statement Restatements: Trends, Market Impacts, Regulatory Responses, and Remaining Challenges,* the GAO concluded that the number of companies restating prior financial results had grown significantly, with about 10% of the publicly traded companies requiring at least one restatement from 1997-2002. In addition, the size of the restatements had grown during this period. They feared this contributed to a decrease in investor confidence.

The GAO also provided a list of the restatements of publicly held companies that filed with the SEC from 1997-2002. While there are routine types of restatements, this list was limited to those resulting from:

> *Accounting irregularities to include so-called "aggressive" accounting practices, intentional and unintentional misuse of facts applied to financial statements, oversight or misinterpretation of accounting rules, and fraud. (pg. 76)*

The report identified the name of the company, the category of the restatement (i.e., restatement of revenue or expenses), and the prompter, which is who first discovered and reported the irregularity. This list of 919 cases provided the initial sample for our research. In addition to that information, we needed CEO biographical information as well as data on the internal antecedents. Data on the internal antecedents were obtained from the Compustat database. CEO data were gathered from ExecuComp which was heavily supplemented with a manual search of the Dun & Bradstreet's *Reference Book of Corporate Managements* and examination of proxy statements. The resulting sample was 147 restatements with complete data.

HYPOTHESES AND MODEL

This research combines the Daboub model of corporate corruption with the accounting literature on earnings restatements. The literature finds a significant penalty for unethical activities by management, so it is suggested that the managers of companies less prone to criminal activities will be more likely to disclose accounting irregularities. From the accounting perspective, companies that disclose problems voluntarily may also have better controls and corporate governance such that the irregularities come to light before external entities such as the SEC get involved.

Hypotheses are developed to explain the relationship between the prompter of the disclosure of an irregularity and the characteristics of the CEO and the internal antecedents defined by the Daboub model. The variables used to measure components of the model are discussed below. We did not measure external antecedents explicitly, but controlled for these factors through the cross-sectional analyses. As shown in Table 1, our sample encompasses a variety of industries, with no one industry being over-represented. In addition, the years of the restatements vary to control for environmental differences over time.

The internal antecedents in the Daboub model include organizational size, slack and performance, corporate strategy, structure and control systems, and history and culture. We use the natural log of assets to proxy for size. The model suggests that larger firms are more likely to engage in unethical behaviors, therefore, we hypothesize that smaller firms will be more likely to be the prompter for accounting restatements. Corporate performance is measured by return on assets. More successful companies are hypothesized to be the prompter. Corporate strategy, structure, and control systems are combined and measured using the Herfindahl Index, which is a commonly used method of measuring the extent of a firm's diversification strategy (Berry, 1975; Chatterjee and Blocher, 1992). This index is one minus the sum of the squared percent of sales of each business segment. A score of zero on the index indicates there is only one business segment; the higher the score, the more diversified the company. The Daboub model suggests that corporate corruption is more likely in more diverse companies as the level of control diminishes. Accordingly, we hypothesize that a lower Herfindahl Index will be associated with the company being the prompter.

Table 1						
Distribution by Industry and Year						
Panel A - Industry						
			Prompter = 0		Prompter = 1	
SIC Code	N	Percent	N	Percent	N	Percent
0-1999	10	6.8%	8	8.8%	2	3.6%
2000 - 2999	20	13.6%	14	15.4%	6	10.7%
3000 - 3999	51	34.7%	30	33.0%	21	37.5%
4000 - 4999	10	6.8%	3	3.3%	7	12.5%
5000 - 5999	25	17.0%	14	15.4%	11	19.6%
6000 - 6999	14	9.5%	11	12.1%	3	5.4%
7000 - 7999	11	7.5%	6	6.6%	5	8.9%
8000 - 8999	2	1.4%	2	2.2%	0	0.0%
9000	4	2.7%	3	3.3%	1	1.8%
Total	147		91		56	
Panel B – Year restated						
			Prompter = 0		Prompter = 1	
Year	N	Percent	N	Percent	N	Percent
1997	4	2.7%	3	3.2%	1	1.9%
1998	15	10.2%	8	8.6%	7	13.0%
1999	29	19.7%	20	21.5%	9	16.7%
2000	35	23.8%	18	19.4%	17	31.5%
2001	44	29.9%	32	34.4%	12	22.2%
2002	20	13.6%	12	12.9%	8	14.8%
Total	147		93		54	

Like the external antecedents, the history and culture are controlled for through the cross-sectional analyses. As shown in table 1, the industries are varied with the largest concentration being in manufacturing (3000s). More importantly, the distribution across industries is similar for both prompter groups, so cultural norms accepted in specific industries should not impact differences between the two groups.

The top management team (TMT) characteristics in the model include age, length of service, functional background, education, military service, and homogeneity of the TMT as potential moderating variables. Our study limits the TMT to the CEO of the company. We use the CEO age and length of time in the position of CEO as measures of the first two constructs. For education, we coded a 1 if the CEO had an MBA degree. We did not measure military service because that is not routinely disclosed in proxy statements. Since we are focusing on only one member of the management team, homogeneity is not relevant. Instead we examined if the CEO was also Chairman of the Board since this should give him/her more power within the company. We hypothesize that CEO age, CEO tenure and CEO/Chairman duality will be positively related to the likelihood that the firm will serve as the prompter for the restatement.

A number of studies suggest that moral and ethical reasoning develop as a person matures (Kohlberg, 1969; Trevino, 1986). In the business literature, Dawson (1997) found that ethical behavior among sales professionals increased with age. Similarly, Peterson, et. al. (2001) surveyed business professionals and found that older respondents reported a higher level of ethical beliefs. Therefore, we expect firms with older CEOs to be more likely to serve as the prompter.

With respect to CEO tenure, both Clinard and Yeager (1980) and Daboub, et. al. (1995) suggest that it is unlikely that longer tenured executives will actively resort to illegal activities. In part, this may be due to organizational inertia and/or managerial entrenchment. Executives with shorter tenures may feel excessive pressure to demonstrate their worth by reporting improved performance and, therefore, be more susceptible to taking ethical shortcuts to enable them to do so. Managerial entrenchment also suggests that longer-tenured executives have less to fear from a restatement event (Zhang and Rajagopalan, 2004; Arthaud-Day, et. al., 2006). Similarly, CEOs that also serve a board chair have increased power within the organization and are more entrenched. While there is some evidence to the contrary regarding the tenure-ethics relationship (Williams, et. al., 2005), we expect that both CEO tenure and duality will be positively related to the likelihood that the firm will serve as the prompter.

Finally, with respect to CEO education, there has been a stream of articles criticizing business education, and MBA programs in particular, for excessively promoting the importance of profit maximization and increasing shareholder wealth (Ghoshal, 2005; Podolny, 2009). However, the evidence to support this assertion has been limited to studies that have shown a greater likelihood of MBA students to cheat relative to other graduate students (McCabe, et. al., 2006) and the study by Williams, et. al. (2000) that links larger firms led by a higher proportion of MBAs to increased safety and pollution violations at the plant level. Conversely, Aier, et. al. (2005) found that companies with CFOs that have MBAs are significantly less likely to restate earnings. Thus, we do not have a specific prediction regarding this relationship.

A final variable is added to the analyses to control for the type of irregularity reported. The GAO report classified the irregularities into several different categories. In general, abuse of revenue recognition rules is the most egregious type of violation and is done to improve reported earnings. This tends to be used to deceive others, and it is hard to imagine how this type of irregularity could be outside the control of the CEO. Therefore, we also include a variable coded as a 1 if the restatement is for a revenue recognition violation and zero otherwise. We suggest that the company will be less likely to be the prompter for revenue recognition violations.

To test these differences, we used the following logistic regression model:

$$Prompter = \alpha + \beta_1 Assets + \beta_2 ROA + \beta_3 DI + \beta_4 CEOAge + \beta_5 CEOTenure + \beta_6 CEOMBA + \beta_7 COB + \beta_8 RevRecog$$

Where:

- Prompter = Coded as 1 if the company disclosed the irregularity to the public; zero otherwise
- Assets = Natural log of assets for the year prior to the restated year
- ROA = Return on assets for the year prior to the restated year
- DI = Herfindahl Index for diversification ($1 - \Sigma r^2$), where r is the percent of sales of a segment
- CEOAge = Age of the CEO when the irregularity occurred
- CEOTenure = How long the CEO was in that position when the irregularity occurred
- CEOMBA = Coded as 1 if the CEO had an MBA; zero otherwise
- COB = Coded as 1 if the CEO was Chairman of the Board; zero otherwise
- RevRecog = Coded as 1 if the restatement was for a revenue recognition issue; zero otherwise

RESULTS

The means of the variables are shown in Table 2. Where we hypothesized a direction and the results conform to that direction, one-tailed p-values are reported. Using univariate tests, the age of the CEO is significantly different with companies initially disclosing the restatement

Table 2

Means by group

		Prompter		Expected		
	Overall	Internal	External	Sign	ttest	p-value
Assets	**7.5498**	**7.2784**	**7.7074**	**--**	**-1.3582**	**0.0883**
ROA	2.9248	2.6845	3.0644	+	-0.2918	0.7709
DI	0.3936	0.4463	0.3629	--	1.4845	0.1399
CEO Age	**54.4898**	**56.6296**	**53.2473**	+	**2.6273**	**0.0048**
CEO Tenure	**8.0272**	**9.5556**	**7.1398**	+	**1.5867**	**0.0574**
CEO MBA	0.2857	0.2963	0.2796	?	0.2150	0.8301
COB	0.6259	0.6667	0.6022	+	0.7756	0.2196
RevRecog	**0.4422**	**0.3519**	**0.4946**	**--**	**-1.6850**	**0.0471**
N	147	54	93			

having older CEOs. As hypothesized, revenue recognition issues are less likely to be disclosed by the company. Two variables are marginally significant. More entrenched CEOs are associated with the firm being the prompter (significant at the .06 level). Finally from this univariate test, there is marginal evidence that smaller companies are more likely to be the prompter (significant at the .09 level).

Before logistic regression is run, we must verify that the independent variables are not highly correlated. The correlations are shown in Table 3. There are not any correlations that would prevent all the variables from being used in the model.

Table 3

Pearson Correlations

Variable	Assets	ROA	DI	CEO Age	CEO Tenure	CEO MBA	COB
ROA	-0.0037	1.0000					
DI	0.2427	-0.1139	1.0000				
CEO Age	0.1663	0.0831	0.1887	1.0000			
CEO Tenure	-0.0795	-0.0146	-0.0211	0.3762	1.0000		
CEO MBA	0.1006	-0.0768	-0.0410	-0.0405	0.0403	1.0000	
COB	0.2507	0.0596	0.0926	0.2774	0.2515	0.0222	1.0000
RevRecog	-0.0181	0.2760	-0.0781	0.0576	0.1187	-0.0476	-0.1042

The results of the logistic regression are reported in Table 4. The model is significant (p=.04) and the maximum rescaled R-squared is 14%. Again, one-tailed p-values are reported for variables with a hypothesized direction where the results match that direction. Firm size is significantly negative at the .02 level and CEO age is significantly positive at the .01 level. Finally, the revenue recognition dummy variable is significantly negative at the .03 level. These results support the hypotheses that smaller companies are more likely to report the accounting irregularity. In addition, older CEOs report the problem rather than waiting for external regulators. Lastly, the company is less likely to be the prompter for revenue recognition errors.

A large number of restatements in the GAO report did not specifically identify the prompter. This was the issue of concern stated by Mr. Taub earlier. In the prior analysis, the prompter was coded as a 1 if the report specifically identified the company as the prompter, so the unidentified prompters are combined with external sources. The issue of how to handle the unspecified prompters will be examined in the next logistic regression. In our sample, the GAO report identified 54 companies as the prompter, 38 restatements with external prompters, and 55 were unknown. For the next test we eliminated the unknowns and examined only the instances where the GAO report specifically identified the prompter as internal or external. (In addition, probit analysis was run with three dependent variables, prompter as company, external, or unknown. The results were similar to those reported.)

Table 4					
Logistic Regression					
Dependent Variable = 1 if the company is designated as the prompter					
					N
Company as prompter					54
0 otherwise					93
Variable	Expected Sign	Estimate	StdErr	WaldChiSq	p-value
Intercept		-2.5143	1.5241	2.7217	0.0990
Assets	**--**	**-0.2260**	**0.1095**	**4.2566**	**0.0195**
ROA	+	0.0077	0.0261	0.0872	0.3839
DI	--	0.8495	0.5936	2.0482	0.1524
CEO Age	+	**0.0618**	**0.0281**	**4.8293**	**0.0140**
CEO Tenure	+	0.0141	0.0227	0.3878	0.2667
CEO MBA	**?**	0.2182	0.4033	0.2927	0.5885
COB	+	0.0483	0.4197	0.0133	0.4542
RevRecog	**--**	**-0.7341**	**0.4034**	**3.3128**	**0.0344**
Chi-Square				DF	p-value
Likelihood ratio			16.7745	8	0.0325
Score			15.8844	8	0.0441
Wald			14.2882	8	0.0746
Percent Concordant					72%
Max-rescaled R-Squared					14.74%

Table 5 presents the results when only the companies where the prompter was specifically identified are included. The model is significant and the max rescaled R-squared is 22%. Even with the reduced degrees of freedom, smaller companies are more likely to disclose the necessary restatement and older CEOs are more likely to be the prompter. The revenue recognition variable, however, is no longer significant in the model.

Table 5					
Logistic Regression					
Dependent Variable = 1 if the company is designated as the prompter					
zero if external source designated as the prompter					
					N
Company as prompter					54
External source as prompter					38
Variable	Expected Sign	Estimate	StdErr	WaldChiSq	p-value
Intercept		-4.5999	2.0602	4.9851	0.0256
Assets	**--**	**-0.2615**	**0.1520**	**2.9595**	**0.0427**
ROA	+	0.0024	0.0366	0.0043	0.4740
DI	--	0.8041	0.7606	1.1177	0.2904
CEO Age	**+**	**0.1201**	**0.0395**	**9.2449**	**0.0012**
CEO Tenure	+	0.0157	0.0299	0.2766	0.2995
CEO MBA	?	0.5989	0.5483	1.1933	0.2747
COB	+	-0.3956	0.5563	0.5057	0.2385
RevRecog	--	0.1438	0.5324	0.0730	0.3935
Chi-Square			DF	p-value	
Likelihood ratio		16.3948	8	0.0371	
Score		14.5902	8	0.0676	
Wald		12.1941	8	0.1427	
Percent Concordant					74%
Max-rescaled R-Squared					21.99%

CONCLUSIONS AND IMPLICATIONS

The number and magnitude of accounting restatements have increased in recent years. It is management's legal, ethical, and moral responsibility to assure that financial statements are prepared correctly when the reports are initially issued. In addition, there are consequences to reporting problems with the financial statements. Therefore, this study tested the association between factors known to relate to the ethical decision making of a company's top management team and the disclosure of accounting restatements.

The Daboub model provides insights into the reporting of accounting irregularities in corporations. CEO age is consistently related to the disclosure as predicted by the corruption model. Companies with older CEOs tend to be the prompter of the restatement. This confirms prior research in the management area on the link between age and ethical behavior. In addition, as posited by the model, smaller companies tend to be the prompters. Finally, there is some evidence that companies are less likely to be the prompter with respect to revenue recognition violations.

Two of the insignificant results also deserve mention. First, poor financial performance was not found to pressure firms into hiding restatements. This is contrary to past findings that have linked poor performance to unethical or corrupt actions. Similarly, CEOs possessing MBAs appear no more likely to have their company's restatements prompted by an outside agency than CEOs that do not hold the MBA degree. That runs counter to much of the current sentiment expressed in the business press that links business education to a "performance at all costs" mentality.

This research is important in both the ethics and regulatory literature. From the ethics standpoint, the tone at the top does relate to the actions of the company, with more senior CEOs being more likely to "do the right thing". From a regulator's perspective, being able to identify the characteristics of companies that discover and report their own problems versus those that require regulatory intervention can help efficiently allocate resources to investigate potential accounting irregularities.

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PROTECTING RELIGION IN THE WORKPLACE? WHAT EMPLOYEES THINK

Patricia Borstorff, Jacksonville State University
Kimber Arlington, Dallas, TX

ABSTRACT

Religion plays an important role in the values that people hold. The increase in the number of religious discrimination lawsuits filed with the EEOC indicates that employees believe employers are not proactive enough in meeting their religious needs. Today's workforce is becoming more diversified in ethnicity, culture, language, and religion. Many people would prefer that religion had no place in the workplace. However, factors influencing the presence of religion include the workplace becoming a primary source of community, the increase in immigration, and the change in the role of work in the lives of individuals. We investigated the perceptions of employees concerning religious accommodation. We found that 65% of respondents worked at a company with an official diversity policy; however only 55% felt that their employer has a clear method of communicating this policy. Companies allowed religious activities but only 49% of companies incorporate faiths different from Christianity or Judaism. Fifty-six percent of respondents felt their company had a policy allowing attire accommodation if an employee's religious practice conflicts with the dress code. Employers need to look for ways to avoid future accommodation suits by being prepared to deal with religious issues in the workplace.

INTRODUCTION

There are approximately 310 million people in the United States (www.census.gov, Nov. 2009). According to a national Gallup Poll, 95 percent of the national population says that they believe in God or a universal spirit, and 90 percent say that religion is important (Ball & Haque, 2003; Henle & Hogler, 2004). For most individuals, because work dominates such a large part of one's life, it is difficult, if not impossible, to separate one's religious beliefs from the workplace. Over the last twenty years, it has become common practice to express one's personal views about religious and spiritual topics and to seek religious accommodation in the workplace (Morgan, 2004). This increased desire to express one's self religiously has caused some complicated issues for managers today. Consequently religious diversity is emerging as a significant issue. Because it is driven by demographic trends, religion looms large as a future diversity issue. The laws governing religious diversity are unclear, making it difficult for employers and employees to know where the boundaries are. It is imperative that focus is given to how businesses deal with religious accommodation and the conflict that arises when a compromise cannot be found.

Data compiled by the U.S. Equal Employment Opportunity Commission (EEOC) indicates the religious discrimination claims against employers have increased from 1,811 in Fiscal Year 1999 to 3,386 in Fiscal Year 2009 with monetary awards rising from $3.1 million to $7.6 million. The monetary rewards did not include monetary benefits obtained through litigation. In 1999, 2,188 were resolved (some cases forwarded from previous year) while in 2009, 2,958 cases were resolved (www.eeoc.gov/stats/religion).

"The latest data tell us that, as the first decade of the 21st century comes to a close, the Commission's work is far from finished," said EEOC Acting Chairman Stuart J. Ishimaru. "Equal employment opportunity remains elusive for far too many workers and the Commission will continue to fight for their rights. Employers must step up their efforts to foster discrimination-free and inclusive workplaces, or risk enforcement and litigation by the EEOC". (www.eeoc.gov)

IMMIGRANT INFLUX

The increase of immigrants into the U.S has exacerbated the problems with religion accommodation. More than 1,800 immigrants enter the country daily (Pace & Padgham, 2000). The Center for Immigration Studies estimates that the number of immigrants from the Middle East has grown eight times from 1970 to 2001 and is expected to double again by 2010. Almost 75% of these immigrants were of the Muslim faith with Islam being the fastest growing religion in the United States. The American Religious Identification Survey found that the number of people in the United States that claimed to be Christian fell from 86% in 1990 to 77% in 2001. Because most companies structure their holidays around the Judeo-Christian observances, the shift to other religious characterizations has caused an increase in the amount of requests for time off to observe alternative religious holidays (Estreicher & Gray, 2006).

The majority of immigrants have been from non-European countries. From 1994 to 1996, the number of immigrants from traditionally Christian countries decreased 8%, while the number of immigrants from traditionally non-Christian countries, such as Asia and Africa, increased 13% ("Religious Diversity: A Handle", 2000). The inflow of immigrants has augmented the number of religious denominations represented in the U.S. workplace. Currently there are approximately 1,500 primary religions in the United States consisting of Christian, Hindu, and Buddhist denominations (Atkinson, 2000). Faiths that were virtually unknown in the United States several years ago are thriving and growing today. Increased religious diversity means that employers must make more accommodation.

After the events of September 11, 2001, complaints of religious discrimination from Muslim and Middle Eastern employees have significantly increased (www.eeoc.gov). A survey performed of 675 workers from major cities in 47 states found that Muslim feel the most vulnerable to religious discrimination (Brotherton, 2001). According to the 2005 edition of the World Christian Encyclopedia, there are 4.3 million Muslims living in the United States (www.adherents.com, 2005). Experts predict that Islam will surpass Judaism as the second most practiced religion in the United States (Coplan, 2005).

RELIGIOUS RIGHTS

Today's workforce is better educated about their civil rights in the workplace than previous generations (Atkinson, 2000). As a result, today's worker is more likely to stand up for his workplace rights, religious or otherwise. According to Michael Wolf, a Washington D.C. lawyer and arbitrator, "Charges of . . . all forms of discrimination have been increasing as employees become more aware of their rights . . . employees who might have had legitimate claims in past years under Title VII [of the 1964 Civil Rights Act] often didn't realize they had rights. Now they do" (Atkinson, 2000).

IGNORANCE

Over the last twenty years, it has become common practice to express one's personal views about religious and spiritual topics and to seek religious accommodation in the workplace (Morgan, 2004). This increased desire to express one's self religiously has caused some complicated issues for managers today. A survey performed by Public Agenda revealed that most Americans are ignorant of religions other than their own. Twenty-eight percent of the approximately 2,600 polled stated that they "understood Christianity very well", 17% "understood Judaism very well" and 7% "understood Islam very well" (Brotherton, 2001). Many employers have inadvertently discriminated against employees due to lack of understanding of the employee's religious beliefs and needs ("The Gods", 2000). As a result, the Equal Employment Opportunity Commission reports that religious discrimination complaints almost doubled from 1992 to 2002, while sexual harassment cases only increased a very small amount (Morgan, 2004). The laws governing religious diversity are unclear, making it difficult for employers and employees to know where the boundaries are. We hypothesize that employers have religious diversity policies; however we hypothesize that communicating these to employees and customers has not been widely accomplished.

LEGALITIES SURROUNDING ACCOMMODATION

Even though the First Amendment gives protections through the free exercise clause, most employees and employers rely on the Civil Rights Act of 1964 and its amendments to protect religious freedoms (Ball & Haque, 2003). Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex and national origin. It prohibits employers from discriminating against individuals because of their religion in hiring, firing, and other terms and conditions of employment. Employers may not treat employees or applicants more or less favorably because of their religious beliefs or practices. Employees cannot be forced to participate -- or not participate -- in a religious activity as a condition of employment. Employers must reasonably accommodate employees' sincerely held religious practices unless doing so would impose an undue hardship on the employer.

An employer is not required to accommodate an employee's religious beliefs and practices if doing so would impose an undue hardship on the employers' legitimate business interests. Employers must permit employees to engage in religious expression, unless the religious expression would impose an undue hardship on the employer. Generally, an employer may not place more restrictions on religious expression than on other forms of expression that have a comparable effect on workplace efficiency. Employers must take steps to prevent religious harassment of their employees. An employer can reduce the chance that employees will engage unlawful religious harassment by implementing an anti-harassment policy and having an effective procedure for reporting, investigating and correcting harassing conduct. It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on religion (http://www.access.gpo.gov/nara/cfr/waisidx_00/29cfr1605_00.html).

The EEOC states that religion is not only observances and guidelines of a particular religious body or sect, but also defines it as any moral or ethical belief as to what is right or wrong sincerely held with the strength of traditional religious views by a person. Atheists are also protected since belief or no belief is said to also be held under Title VII (Cosgel & Minkler, 2004). It is very difficult for courts to distinguish belief, no belief, or whether it is just religious practice. However, US courts will tend to narrow the focus to whether discrimination has occurred or reasonable accommodations have been made.

The EEOC defines a reasonable religious accommodation as "any adjustment to the work environment that will allow the employee to practice his religion." Employers can accommodate employees by allowing: flexible scheduling, voluntary shift changes, lateral transfers or job reassignments, modification of dress code and grooming requirements, and other modifications of workplace policies. When there are numerous means of accommodation, the employer must try to offer the alternative that least disadvantages the employee. Employees and managers should seek the most reasonable balance between workplace policies and religious need. Employees should help assist employers in finding and implementing accommodation (Wolkinson & Nichol, 2008). Yet, the employer does not have to accept an accommodation suggested by the employee (Ball & Haque, 2003; Edgell, Gerteis, and Hartmann, 2006).

Title VII requires employers to accommodate all types of religious diversity, observances, practices, and beliefs unless it causes an "undue hardship." An employer can show undue hardship if accommodating an employee's religious practices requires more than ordinary administrative costs, diminishes efficiency in other jobs, infringes on other employees' job rights or benefits, impairs workplace safety, causes co-workers to carry the accommodated employee's share of work, or if the proposed accommodation conflicts with another law or regulation (www.eeoc.gov/stats/religion.html).

HARRASSMENT

There are no set EEOC guidelines to define religious harassment, so individual courts have set their own standards for quid pro quo and hostile work environment relating to religious harassment. Quid Pro Quo in the religious context occurs when an employee assumes or relinquishes religious activities in return for a position. Hostile work environments could include racial slurs, abuse, derogatory comments, and even offensive emails (Ball & Haque, 2003). Many employers use accommodation as a management tool to boost employee morale, productivity, and loyalty. The common approaches used in accommodation are flexible schedules, voluntary shift-swaps, lateral transfers, and changes of assignment.

Religious accommodation claims are not as difficult to prove. The only requirement of the plaintiff is to make the employer aware that a situation conflicts with his religious beliefs (Morgan, 2004). There have been a variety of cases that have been used to interpret Title VII. The first example was in *Rangel v. Red Robins Gourmet Burgers*. The restaurant demanded that Rangel comply with their new dress code and cover his tattoos, but Rangel stated that this would be considered a sin by his religion of Kemetic Orthodoxy, a religion dating back to ancient Egypt. Rangel had been working for the restaurant for six months and he had been up front with supervisors about his tattoos and their meaning. However, when they adopted a new dress code, Rangel was told to cover the tattoos or be fired even though this request was hypocritical, because it would be in violation of the no jewelry policy. Despite Rangel's arguments, he was fired for failure to adhere to the dress code. He sued the employer and was later awarded $150,000, and the company agreed to train managers on the new discrimination, harassment, and retaliation policy.

In a similar case, Kimberly Cloutier refused to cover her piercings with Band-Aids while working at Costco stating that it would infringe upon her membership in the Church of Body Modification. Costco fired her, and US district court said that Costco's willingness to allow her to cover the piercing instead of demanding that she remove them was a sufficient attempt to accommodate the employee. These court cases emphasize the broad interpretation of Title VII, and the difficulty employers have with knowing how to define the fine line between religious freedom and religious discrimination (Liberman, 2007).

Another aspect of religious accommodation involves time off for prayer or other religious observances. Islam is the fastest growing religion in the United States. Muslims filed about one-fourth of the religious discrimination claims made with the EEOC in 2004. To avoid EEOC suits, employers cannot afford to ignore the specialized needs of the growing Muslim population. For example, Muslim employees need accommodation for daily prayers, celebration of Ramadan and Eid, and for Friday worship (Morgan, 2004). Muslims are required to have prayer five times a day at certain times during the day. The prayer time lasts from seven to ten minutes, and they must bow regardless of where they are at the time of the prayer. Muslims are also required to attend prayer services on Friday afternoons (Ball & Haque, 2003). Accommodating this amount of time off can be very difficult for employers as seen in the case of Farah v. Whirlpool. In this case, the court said that to allow forty Muslim workers to leave the production line at the same time would cause undue hardship for Whirlpool (Estreicher & Gray, 2006). However, in *EEOC v. Ilona of Hungary, Inc.* another court stated that no undue hardship existed for a beauty salon that refused to allow two Jewish employees time off to observe Yom Kippur, even though it was the busiest time of the work week (Morgan, 2004). The opposing conclusions of these two cases prove that the religious accommodation laws make it difficult for employers to know what is and what is not acceptable (Wolkinson & Nichol, 2008).

RESEARCH METHODOLOOGY

Our research is based on data collected by an online survey of 141 individuals. The only requirement for participation was employment. Participation was voluntary and responses were confidential. Qualified volunteers were sent a seven page survey. Participants were localized in the southeastern section of the U.S. The different locations offered a variety of workplace cultures and practices. Participants vary in age, profession, ethnicity, religion, and gender. The respondents' companies were varied in size and industrial sector. Businesses ranged from 40 employees to over 250. Six different categories were investigated in this study: official policy, holidays/time-off, dress code, food, affinity networks, and office space decorations.

The sample consisted of 141 individuals, 78 percent (110) were female and 22 percent (31) male. Participants ranged in age from 21-40. Fifty-six percent (79) of participants were between the ages of 21-26. Thirty-four percent (48) of participants were between the ages of 27-37, and 11 percent (15) were 38 or over. Seventy-eight percent (110) of participants were white/Caucasian and 22 percent (31) black/African American.

Eighty-three percent (117) were Christians, 11 percent (15) were undecided, and five (7) percent atheist. Sixty-seven percent (94) of participants were single, and 33 percent (46) were married. Seventy-eight percent (110) work between 40-45 hours a week. Seventeen percent (24) work between 50-55 hours a week and five percent (7) work 60 or more hours a week. Forty-four percent (58) work in professional positions, 33 percent (46) in clerical, 11 percent (15) in managerial positions, and 11 percent (15) in technical positions.

Measures used in the survey included the following areas with sample questions given. Holidays and Time-off accommodations were tested with five questions. A Likert scale ranging from 1 (strongly agree) to 6 (strongly disagree) was used. No option for 'neither agree nor disagree' was given. Questions used were: "My Company has a definite policy regarding religious holiday leave and an avenue of communication between employees and management to address scheduling difficulties resulting from religious need." "Management takes into account employees various religious holidays when planning meetings, workshops, trips, dinners, etc…" "My company holds holiday events, and takes into account different faiths of the employees when planning these events."

Dress Code accommodation was assessed with three questions. A Likert scale ranging from 1 (strongly agree) to 6 (strongly disagree) was used. No option for 'neither agree nor disagree' was given. The questions were: "My Company has a dress code and policies in place to deal with religious attire accommodations." "Employees are aware of what avenues to take for communicating special religious attire needs."

Food and accommodation was measured with four questions. A Likert scale ranging from 1 (strongly agree) to 6 (strongly disagree) was used. No option for 'neither agree nor disagree' was given. "My company provides food for the employees (cafeteria, vending machine, etc…)" "My Company holds special events involving food and/or drink (banquets, dinner meetings, cocktail parties, etc…)" "These meals accommodate religious and ethical needs of employees (kosher, halal, vegetarian)".

Affinity Networks and accommodation was measured with three questions. A Likert scale ranging from 1 (strongly agree) to 6 (strongly disagree) was used. No option for 'neither agree nor disagree' was given. Included were: "My Company allows the formation of on-site affinity groups, or religious based affinity groups." "There is a clear policy that is communicated to all employees regarding these groups and their relationship to the company as a whole."

Office Space Decoration accommodation was measured with five questions with same Likert scale as other questions. Questions included: "There is a policy regarding decoration of personal work space, including religious decoration." "My Company allows special decoration of office space for holidays, and they accommodate the needs of religious and cultural diversity." "There are avenues to communicate responses about such decorations."

For surveying the presence of a policy, questions included: "Does your Company have a policy?" and "Is the policy clearly stated and available for every employee?"

RESULTS

For surveying 'Holidays/Time off', the percentage of each response option was totaled. Eighty-four percent of participants work for companies that have a religious holiday leave policy, while 17 percent work for companies that do not. Seventy-seven percent of participants agree that their companies offer avenues of accommodation to address scheduling difficulties resulting from religious need, and can find coworkers who can cover or switch shifts. Twenty-two percent of participants did not feel that their companies offer these avenues of accommodation for religious leave. Only fifty-five percent of respondents feel that management at their company takes religious holidays into account when planning meeting, workshops, trips, dinners, or other official company meetings. Almost half (45 percent) felt that their management did not take other religious holidays or observances into account when planning functions.

Eighty-nine percent of the companies participants work for holds holiday related events. Yet, participants suggest that only 49 percent of the management that plan these events actually take different faiths into account when making the preparations. That means that over half of the participants feel that their companies do not take into consideration the various religions of their employees.

For 'Dress Code', the percentage of each response option was totaled. Eighty-four percent of participants work for companies that have an official company dress code, while 16 percent of the companies do not. Fifty-six percent of respondents feel their company has policies in place regarding attire accommodations if an employee's religious practice conflicts with the dress code. However, 44 percent of respondents disagree that their company has attire accommodation policies in place. Although 72 percent of participants know what avenues are available for communicating special religious attire needs with management, 28 percent do not.

For 'Food', the percentage of each response option was totaled. Over half, 67 percent, of participants' companies provide food for employees through a cafeteria, vending machine, or office discount program. Yet, participants feel that only 37 percent of these meals accommodate unique religious and ethical needs of employees (kosher, halal, etc…). Adding to these results, 72 percent of participants' companies hold special events involving food and/or drink, such as banquets, dinner meetings, and cocktail parties. However, just slightly more than half (55 percent) of these meals also accommodate unique religious and ethical needs of employees.

For 'Affinity Networks', the percentage of each response option was totaled. Seventy-three percent of participants agree that their companies allow the formation of on-site affinity groups. Of these 61 percent of participants agreed that their companies allow the formation of religion based on-site affinity groups, while 39 percent of participants disagree. However, only 44 percent of respondents agree that their companies clearly communicate the policy regarding these groups and their relationship to the company as a whole whether through the employee handbook or other information packets.

For 'Office Space Decorations,' the percentage of each response option was totaled. Slightly over half (56 percent) of participants agree that their company has a policy regarding decoration of personal work space within one's office or cubicle, on walls in public areas, and in the employee lounge. Yet, only 39 percent of these policies address religious decoration. That means that more than 60 percent of participants' companies do not address any type of religious office decoration. An astounding 99 percent of participants agree that their company allows special decoration of office space for holidays, and only 27 percent of these decorations do not accommodate the needs of a religiously and culturally diverse employee base. In addition, 72 percent of participants' companies offer avenues to communicate reactions to these decorations.

For 'Official Policy', sixty-five percent of respondents agree that their company has an official diversity policy. 55 percent of these respondents feel that their employer has a clear method of communicating this policy to employees and the public whether it is through the employee handbook, information packets, or other forms containing information.

In summary, less than 20 percent of companies do not have an official religious holiday observance policy. Only 16 percent of companies did not have a dress code. Only 56 percent have policies in place regarding attire accommodations if employee's religious practice conflicts with the dress code. Less than half (44 percent) of participants have companies that clearly communicate affinity group network policies. A little over half (56 percent) have a policy regarding decoration of personal work space, yet only 39 percent of these policies include religious decoration.

ANALYSIS

The study revealed that at least 65 percent of respondents' workplaces are attempting to protect themselves by ensuring that they have at least a minimal diversity policy. One participant commented, "I work for the Department of Defense so things are pretty politically correct…I agree with most all of the regulations they have in place." A concern was that 55% felt that the communicating of the policy was not clear. A policy is worth little if employees are unaware of its presence and importance. Eighty-four percent of the companies have taken care to include policies on religious observance leave/time off and dress codes. Some companies have expanded their avenues of communication to be able to better communicate policies and accommodations for employees. However, many of the participants felt that more could be done. As is often the case, managers believe that they are good communicators and employees report never being 'in the loop.' Posting the policy on bulletin boards and online along with training sessions could assist in improving the lack of understanding the diversity policies in an organization.

Only fifty-six percent of respondents felt their company had a policy allowing attire accommodation if an employee's religious practice conflicts with the dress code. Managers need to consider allowing or accommodating dress policies that are not safety hazards. If a safety mask or particular clothing is necessary, a company is within its rights of requiring this. However, in a regular office set-up, allowing clothing unique to a person's religion can lead to better motivated and more loyal employees.

It is mandatory for management to create a religious discrimination and harassment policy. Good areas to include in that would be a definition of religion to help supervisors and employees better understand the broad definition that is used by the courts and the EEOC. In addition, include the requirements and the limitations of the employer to accommodate the religious requests of the employees. A final provision should mention the possible conflicts that may arise between employees when accommodations are made. The most appropriate stance of the employer is to seek to be reasonable in these situations (Cash & Gray, 2000). It might also be beneficial to provide examples of how management will act reasonably to balance accommodation and harassment claims.

Employers could consider properly training managers and other employees on religious diversity and how to handle requests for religious accommodation. It is often beneficial to educate employees on a variety of religious beliefs. Education is the key to religious accommodation, especially of minority religions. For example, Jehovah's Witnesses do not celebrate birthdays or other holidays, and Paganist worship male and female gods instead of Satan. These are common practices that are often unknown by the average person. This type of education will help employees to be more open-minded and understanding about the views of others. When training managers, help them understand the religious discrimination and harassment policy that has been developed. The understanding of this policy will help managers to handle religious accommodation requests. Managers need to be sensitive to each request regardless of how foreign it may seem. A Wiccan may request to have Halloween day off and most managers may find this absurd; however, if this is a serious request, they need to know how to handle the situation appropriately (Atkinson, 2004). It is not required that all requests be met, but the employer is obligated to accommodate any request that will not produce undue hardship (Morgan, 2004).

Ninety percent or more of participants' companies hold holiday related events and allow holiday decorations. However, more than half of the participant's feel that their companies are not considering different faiths when planning for these parties and allowing decorations to be displayed. Another blunder seems to be the lack luster appeal of accommodating meals and food for different and unique religious preparation. Less than 40 percent of participants' companies accommodate meals and unique food preparation in every day supplied meals, but also in special events involving food.

Managers or the human resource department need to understand the food requirements of various religions. Accommodating some religious food preferences can be very simple. In planning parties, be careful of having a specific religious theme. Better would be a seasonal theme, such as 'winter festival party. If parties are focused on Christian and Judaism faiths, invariably other religious groups will feel left out.

Since there were a high percentage of female participants (78%), data could be skewed to a female perception. There may not be enough respondents to gain an accurate male perspective. Also this study has low external validity in that its geographic location is localized to the southeastern U.S. The views expressed may not be relevant elsewhere. The states represented are rural southern states and may not include the diversity found in states such as New York, California, and Florida. The companies are varied, but we would recommend further research to identify differences between public and private sector religious diversity. Research with additional diversity in ethnicity and religion would be helpful since Christianity was the major religion of participants in this survey.

CONCLUSIONS

Religion plays an important role in the values people hold. These values determine the way people dress, eat, act, and even the way they perform their job (Tilson & Venkateswaran, 2004). People expect the basic rights to practice religion in the way they like, but at the same time they expect being protected from others imposing religion on them. Legislation attempts to find a reasonable balance. Employers have such legislation as a guideline for operation. Employers have to use care with religious diversity. Employers must be able to accommodate the few without excluding the rights of others. Reasonable accommodations should be made so that employees can follow their beliefs, yet the accommodation should not create a significant expense. However, employers must take care when denying a religious accommodation, because litigation can sometimes outweigh the cost of accommodating . Businesses should set religious diversity guidelines and include them in employee policies and training. These policies should be frequently communicated and strictly enforced. Adhering to this advice should allow businesses to be successful in dealing with religion in the workplace.

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THE COST OF ARBITRATION: A DEFENSE TO THE ENFORCEABILITY OF ARBITRATION AGREEMENTS?

Debra D. Burke, Western Carolina University
Devon M. Green, Western Carolina University

ABSTRACT

Arbitration clauses in contractual arrangements are fairly standard today. By agreeing to arbitrate, the parties to a contract waive their rights to seek redress of their claims in a court in favor of an arbitration tribunal. While litigation is criticized as being expensive and time-consuming, costs associated with arbitration are far from inconsequential. If the parties have waived their right to go to court, even in situations in which fees and costs may be awarded to the prevailing party, and if arbitration costs are cost-prohibitive, could there be a defense to the arbitration contract based upon unconcionability? This paper explores situations in which such an argument could be successful, and suggests ways to make arbitration clauses less susceptible to such a challenge.

INTRODUCTION

The Federal Arbitration Act (FAA) provides for the enforceability of a written arbitration provision in any maritime transaction or contract involving interstate commerce, and declares that such agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract" (9 U.S.C. § 2, 2007). Supreme Court precedent sanctions arbitration as a dispute resolution mechanism, as well (Carrington, 2002). Commercial business, consumer, and employment disputes are arbitrated by organizations such as the National Arbitration Forum (NAF) and the American Arbitration Association (AAA).

Initially, arbitration was touted as a cheaper and more efficient alternative to litigation. Additionally, advantages to arbitration over the primary alternative (civil litigation) presumably include control, confidentiality, cost and time savings, finality, and more predictability for managing risk than litigation (Leasure, 2009). Some studies suggest that the time period from the commencement of the dispute to its resolution is shorter in arbitration than litigation (Rutledge, 2008). Others suggest that whether or not arbitration is cheaper than litigation or more expensive, or which forum provides greater access to justice, may be dependent upon the type of dispute (Drahozal, 2008). Nevertheless, many disputants today are disenchanted with arbitration as a means of resolving disputes, and complain that the complex process shares many of the characteristics of litigation (Stipanowich, 2010). Arbitration has become more formal, and arbitrators follow traditional rules of procedure and evidence, resulting in the arbitration process looking and costing about the same as litigation (Sternlight, 2000). Arbitration as a means of dispute resolution now can be quite expensive as well, particularly since attorneys' should be included in the calculation of costs (Rutledge, 2008).

The American Arbitration Association charges a filing fee per case that ranges anywhere from $125-$7,000 depending upon the amount of the claim. The AAA also requires a hearing fee that can be as much as $250 per party, per case. Public Citizen's statistics in 2002 revealed that an $80,000 consumer claim brought to the Circuit Court of Cook County, Illinois carried a forum fee of $221. However, the same claim brought to the National Arbitration Forum would cost approximately $11,625, and if brought to the American Arbitration Association would result in estimated payments in excess of $6,600. Additionally, many costs associated with arbitration, such as the administrative fees as well as the compensation of the arbitrators, must be paid up-front, which can be a substantial financial burden, making it less likely that some disputants will be able to proceed in that forum (Alleyne, 2003). Comparatively, court costs are relatively insignificant to the cost of arbitration proceedings, many expenses associated with litigation need not be paid in advance, and the salary of the judges are paid by the government in the civil justice system.

In addition to filing and hearing fees, the arbitrator(s) who hear the case charge their own individual service fees. In the state of North Carolina, the average compensation for an AAA arbitrator is $1,225.00 per day (Tillman v. Commercial Credit Loans, Inc., 2008). If a panel of three arbitrators is specified in the arbitration clause, as under AAA complex commercial rules, then that amount is trebled. Arguably, contingent fee contracts provide a mechanism for overcoming possible liquidity and risk aversion problems caused by arbitration costs (Drahozal, 2006). However, if the transaction costs of hiring arbitrators become astronomical in protracted proceedings, and that likelihood is foreseeable, then the contingency arrangement is meaningless as an incentive.

Moreover, contingency arrangements, while lucrative and enticing in tort actions, are not a sufficient incentive in the relatively small recovery world of consumer complaints. In these cases the statutory recovery of attorneys' fees and or mandatory treble damages, such as in some deceptive trade practices statutes, provides the impetus for representation. While these fees and damages presumably can be awarded by arbitrators, arbitrators are not strictly bound by precedent, and any failure to order the appropriate relief, is not reviewable on appeal. Thus, not only must litigants pay substantial sums for the process of arbitration, they usually must pay for representation in that forum as well, since the normal mechanism for inciting attorneys to take cases in the civil justice system does not necessarily transfer to the arbitral forum.

The AAA has a fee waiver procedure, in which fees may be waived in whole or in part, on the basis of a claimant's financial situation; yet there is a general lack of standards governing the granting of fee waivers under its rules and policies, and often substantial funds have been expended before the decision is reached (Budnitz, 2004). The AAA does not provide formal standards for granting hardship, and its accounting department actually determines who is afforded "extreme hardship" status (Camacho v. Holiday Homes, Inc., 2001). While arbitrators can shift fees to one party in their discretion (Rutledge, 2008), such a remote possibility would not necessarily inspire an attorney to take the case, or a party to pursue the claim on a gamble that fees ultimately will be paid.

Since arbitration clauses foreclose litigation as an option, they effectively force the parties to settle their dispute through arbitration. Therefore, if the cost of arbitration is prohibitively high, some litigants effectively may be denied an opportunity to pursue any remedy at all. “The purpose of arbitration is not to preclude a person from bringing claims but to provide an alternate forum for redress” (Hutchens, 619, 2002). Yet in reality, the party in the superior bargaining position consciously may include an arbitration clause “to deter individuals from filing claims, to prevent them from securing legal representation, and to decrease their chance of securing significant relief if they do bring claims” (Sternlight, 838, 2002). While such a strategy may deter frivolous claims (Gregg v. Hay-Adams Hotel, 1996), valid claims also are deterred, and whether or not a claim is valid or invalid cannot be discerned until the case is heard. Often times this strategy forecloses class action litigation, as well in an attempt to stifle the pursuit of legal remedies (Sternlight & Jensen, 2004). To enforce an arbitration clause to the exclusion of the right to seek redress in the court system in certain contexts arguably raises constitutional concerns (Sternlight, 1997).

The existence of an arbitration agreement is a matter of contract between the parties, which identifies a way to resolve those disputes that the parties have agreed to submit to arbitration (Avedon Engineering, Inc. v. Seatex, 1997). Therefore, while the FAA provides that mandatory arbitration contracts are enforceable, certain contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening that statute (Doctor's Assocs., Inc. v. Casarotto, 1996; Plourde, 2003). In fact, over the period from 1990 through 2008, not only did the annual number of unconscionability claims in mandatory arbitration contract cases show a consistent increase beginning in 1997, their relative rate of success also increased over the first years of the new century (Knapp, 2009).

Most employees and consumers do not enter into these clauses voluntarily (Sternlight, 2002). This reality, coupled with the substantial fees associated with arbitration, could make arbitration agreements subject to challenges of substantive unconscionability. Procedural unconscionability can be an issue as well, for example, by printing a mandatory arbitration clause inconspicuously on the back of the contract (Rollins v. Foster, 1998). Most state law requires proof of both elements, procedural and substantive unconscionability, in order to invalidate an agreement (Tillman v. Commercial Credit Loans, Inc., 2008). This paper will discuss arbitration clauses in employment, consumer and franchise contracts in which courts and commentators have examined if the *cost* of arbitration could render the clause unconscionable and unenforceable. It also will present options to make such clauses less subject to that challenge.

FEDERAL LAW

Federal statutory and case law supports alternate dispute resolution forums, such as arbitration. The FAA provides that "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract" (9 U.S.C. § 2 (2009). The Supreme Court acknowledges that the purpose of the statute is "to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts" (Gilmer v. Interstate/Johnson Lane Corp., 24, 1991). As passed in 1925, the FAA was viewed as being applicable primarily to contract disputes between business entities, and initially interpreted as not being relevant to state law or federal statutory claims designed to protect consumers, employees, investors, and other such disputants, unless the parties agreed to arbitrate after their dispute arose (Wilson, 2004).

Today, however, the policy favoring arbitration has been interpreted as being applicable to a variety of state and federal claims for which pre-dispute agreements provide for mandatory arbitration. Federal statutory claims, such as those involving securities law and consumers, can be resolved through arbitration (Shearson/American Express Inc. v. McMahon, 1987). In determining whether or not federal statutory claims may be arbitrated, courts must first examine if the parties agreed to submit their claims to arbitration, and then decide if Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue (Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 1985). In addition to permitting the arbitration of federal statutory claims, the Court also recognizes that the FAA's liberal policy favoring arbitration withstands any state substantive or procedural policies to the contrary (Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 1983).

While the Supreme Court as a matter of policy favors the enforceability of mandatory arbitration clauses in contracts, it has not directly confronted the issue of costs. In *Green Tree Financial Services Corp. v. Randolph* (2000) a consumer challenged the arbitration clause in a financing agreement for the purchase of a mobile home, contending that it was unenforceable due to potentially prohibitive costs. The consumer argued that the arbitration agreement's silence with respect to costs and fees created a risk of prohibitively high arbitration costs which would result in the inevitable abandonment of any right to assert her statutory rights. The Court determined that, while the existence of substantially arbitration costs could preclude litigants from effectively vindicating federal statutory rights under the Truth in Lending Act (TILA) in the arbitral forum, the record in the case failed to show the amount of such costs. The Court suggested that the party seeking to avoid arbitration bears the burden of establishing that arbitration would be prohibitively expensive, as well as the likelihood of incurring such costs, dicta that is at least applicable to the arbitration of federal statutory claims.

However, the standard for establishing prohibitively excessive fees remains unspecified. Most federal and state courts adopt a case-by-case determination that focuses on a combination of factors such as the claimant's ability to pay, the difference between the costs of litigation and those of arbitration, and the likelihood that the cost of arbitration will deter the bringing of claims (Randall, 2004). For example, the Fourth Circuit examines “the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims" (Bradford v. Rockwell Semiconductor Systems, Inc., 556, 2001). A state court, in deciding whether or not an arbitration agreement is unconscionable, considered factors such as the filing fees for arbitration compared to the filing fees in state district courts, as well as the amount of the arbitrators' fees (Barrett v. McDonald Investments, Inc., 2005).

In a case involving a mortgage loan transaction brought under the federal Truth in Lending Act (TILA), *Phillips v. Associated Home Equity Services* (2001), the borrower contended that the arbitral forum was prohibitively expensive, and provided evidence that she could not pay the costs of arbitration, which appeared to be at least twelve times what it would cost to file a case in federal court. The federal district court concluded that the borrower had carried her burden of proving that the costs associated with arbitration would effectively preclude her from vindicating her federal statutory rights, and denied the lender's motion to compel arbitration. So although there is precedent in state and federal courts for invalidating arbitration agreements on the grounds of costs, the standard is neither uniform nor certain, and the procedure for evaluating the merits of the argument adds yet another hurdle to the process for vindicating substantive claims (DeBenedetti, 2004). In sum, while federal law preempts state law, and while the FAA endorses arbitration as a means of resolving disputes, both state and federal courts will not necessarily compel arbitration under circumstances that would be considered unconscionable under state contract law (Stempel, 2004).

CONSUMERS

Since the federal judicial policy favors arbitration as per Supreme Court precedents, the initial response of courts is to enforce arbitration clauses in consumer contracts. For example, court have held that consumer claims under the Magnuson-Moss Warranty Act, a federal law which requires written warranties of consumer products to disclose, fully and conspicuously, in simple and readily understood language, the terms and conditions of the warranty, may be submitted to arbitration pursuant to a contract’s arbitration provision. In *Hill v. Gateway 2000, Inc.* (1997) computer purchasers, who were dissatisfied product’s performance, filed suit alleging various claims, including a violation of the Magnusson Moss Act. The computer suppliers sought enforcement of the arbitration agreement contained in the materials they shipped to the customers as part of the packaged product. The appeals court held that a contract did not have to be read in order for it to become effective, and that the terms inside a box of software were binding on a consumer, including the arbitration clause.

Most consumer agreements are contracts of adhesion, which are written by business and presented to the consumer on a take it or leave it basis (Scarpino, 2002; Hilverda, 2007). Arbitration provisions are an accepted reality in consumer contracts, and exist in a myriad of contexts including credit card agreements, retail sales contracts and the provision of cell phone service (Schmitz, 2008). In the credit card context, arbitration clauses are not mutually beneficial in that they allow credit card issuers to go to court for collection purposes (but do not provide similarly for consumers), favor creditors (including the limiting of discovery and the inability to prosecute class actions), and provide a dispute resolution forum that is often inconvenient for consumers (Smith, 2009). Pre-dispute binding arbitration agreements are becoming common even in nursing home admission contracts, thrust upon vulnerable senior citizens at one of the weakest times in their lives, when they are sick or injured and have no alternative housing or care facility (Tripp, 2009).

In light of the actual lack of meaningful choice, the state law doctrine of unconscionability is often summoned as an argument for striking down mandatory pre-dispute arbitration agreements (Bruhl, 2008). The fact that such clauses are thrust upon consumers repeatedly on a take-it-or-leave-it basis, along with the relatively small amounts of money typically involved in consumer disputes, could make mandatory pre-dispute arbitration clauses subject to a challenge of procedural and substantive unconscionability (Gavin, 2006). Substantive unconscionability may focus on the fee arrangement of the clause, if it makes arbitration cost-prohibitive and is imposed unilaterally in the absence of any real bargaining.

For example, in *Rollins v. Foster* (1998), the consumer signed an extermination services contract for a term of two years. She challenged the arbitration clause based on costs, and while the district court made no finding of fact with respect to her ability to pay, it acknowledged "that there may actually be circumstances in which such an argument would preclude a court from enforcing an arbitration clause against a low-income consumer." Likewise, in *Tillman v. Commercial Credit Loans*, the North Carolina Supreme court struck down an arbitration clause in a loan agreement, which was intertwined with a life insurance policy as collateral, in light of evidence that the agreement not only made resolution financially inaccessible, but historical evidence suggested this deterrent effect was successful.

Similarly, the enforceability of mandatory arbitration clauses, and the resulting costs associated with their enforcement, has arisen in the context of mobile home sales and financing agreements. In *Mendez v. Palm Harbor Homes, Inc.* (2002), a Washington state appeals court allowed a legal defense when the party opposing arbitration reasonably established that prohibitive costs were likely to render the arbitral forum inaccessible. On the facts of the case, the court concluded that purchaser met the burden of showing that the anticipated filing and administrative costs of the arbitration ($2000 for the three person arbitration panel required by the agreement) would be prohibitively high, noting that the purchaser was poorly educated, had a large family, worked two jobs, and had very little money.

Also, in *Camacho v. Holiday Homes, Inc*. (2001), the purchaser executed a retail installment contract with the seller for the installment purchase of a new manufactured home, which contained an arbitration clause. The purchaser argued that the arbitration provision was unconscionable because excessive fees prohibited her from accessing the arbitral forum. The court agreed, and concluded that the purchaser's limited income afforded no margin for expenses of the magnitude required to pay an arbitrator to consider her claim. According to the terms, the commercial rules of the AAA applied, and those rules specified a $2000 start-up fee, which could not be recovered unless she ultimately prevailed on her claim, and as a practical matter, could not be paid by the purchaser anyway. The court noted that, even if the administrative fees were waived or deferred, the purchaser demonstrated that the additional costs of the arbitration process itself amounted to an insurmountable financial barrier, as she would be responsible for paying one-half of the anticipated fee and expenses of the arbitrator, who likely would have to travel to adjudicate the dispute. Thus, the arbitration clause prevented her from effectively vindicating the rights afforded her under federal law, although the court noted that, if the retailer agreed to bear the costs associated with the arbitration, it would entertain a motion to reconsider its ruling on that basis.

In a different context, in *Ting v. AT&T* (2003), the Ninth Circuit examined whether or not California law would allow AT&T to impose an arbitration agreement upon its customers. AT&T's Consumer Services Agreement (CSA) required consumers to split the arbitration fees with AT&T for any claim brought against the company. The district court found that "while the majority of complainants would be handled satisfactorily either by customer service representatives or subsidized arbitration, some complainants would hypothetically face prohibitive arbitration costs, effectively deterring them from vindicating their statutory rights" (Ting v. AT&T, 1151, 2003). In reviewing the case, the court held that "parties that agree to arbitrate statutory claims still are entitled to basic procedural and remedial protections so that they can effectively realize their statutory rights, and found the legal remedies provisions unenforceable and unconscionable under California law." Although a step in the right direction, *Ting* still does not grant the consumer the choice of whether or not to arbitrate, does not cut the cost of the arbitration, barely speeds up the arbitration process, and allows the inclusion of binding arbitration provisions in future consumer service agreements (Weiner, 2002).

In *Brower v. Gateway 200, Inc.,* consumers who purchased computers and software products from Gateway through a direct-sales system, sought damages for warranty, breach of contract, false advertising and deceptive sales practices based upon their alleged inability to access the around-the-clock free technical support promised. An arbitration clause in the sales contract required the arbitration of any "dispute or controversy arising out of or relating" to the agreement in Chicago before the International Chamber of Commerce (ICC). The ICC's rules required advance fees of $4,000, including a $ 2,000 nonrefundable registration fee payable even if the consumer prevailed. The court concluded that, while the possible inconvenience of the chosen site alone did not rise to the level of unconscionability, the "excessive cost factor that is necessarily entailed in arbitrating before the ICC is unreasonable and surely serves to deter the individual consumer from invoking the process" (Brower v. Gateway 200, Inc., 574, 2001). As a result, the court vacated that portion of the arbitration agreement that required arbitration before the ICC, and remanded the case to determine an appropriate substitution of an arbitrator pursuant to the FAA.

Another area in which consumer disputes develop over arbitration clauses is the landlord/tenant relationship. In *Omni v. Apartment Investment & Management Company* (2003), tenants filed a class action lawsuit challenging landlord's practice of charging late fees on overdue rent payments. The landlord moved to compel arbitration pursuant to the lease, and the tenants sought to invalidate the arbitration agreement on the grounds of unconscionability. The tenants challenged the arbitration agreement on four grounds: 1) it was hidden within the fine print, 2) it required the tenants to arbitrate all claims, no matter the amount of the claim, while the landlord was only required to arbitrate certain claims, 3) it required tenants to pay one-half of the arbitrator's fees and bear their own costs of arbitration, and 4) it provided that the arbitrators had no authority to award punitive, exemplary, consequential, special, indirect or incidental damages or attorneys' fees. While the trial court instinctively enforced the agreement to arbitrate as acceptable policy, the appeals court remanded the case to more completely evaluate all of the facts before rendering a judgment to compel arbitration.

Still, many courts customarily enforce arbitration clauses give the public policy that supports alternate dispute resolution. In *James v. McDonald's Corp.* (2005) a consumer alleged that the company induced her to purchase food products by a contest when it knew that the odds of winning were less than represented, and that it wrongfully refused to honor her winning game card. According to contest rules, the customer, presumably by participating in the game, agreed to arbitrate disputes arising under the contest. The consumer contended that the arbitration clause should not be enforced because the high up-front costs of arbitration, estimated by consumer to be between $38,000 to $ 80,000 in fees and service costs, would prohibit her from pursuing a remedy. The court, however, determined that the consumer failed to establish that the expenses that she necessarily and definitely would incur would make arbitration prohibitive, and failed to provide any evidence concerning the comparative expense of litigating her claims.

Typically consumer complaints involve small sums of money, and potentially can be costly for the other party to litigate on a mass scale; the temptation to discourage such litigation by businesses is comprehensible. However, our civil justice system recognizes claims for small sums, and that recognition is an important mechanism for enforcing public policy (Bingham, 2004). Blocking such access to justice by a formidable arbitration clause is indefensible, particularly since the risk businesses face by such suits can be shifted in part through insurance, and the expense of premiums passed along to consumers in an equitable fashion without precluding the adjudication of tort or contract claims through pre-dispute mandatory arbitration clauses. While arbitration clauses are valid in consumer contracts, it arguably is advisable for the business to pay the costs of the procedure in order to ensure that consumers are not precluded from vindicating their claims (Scarpino, 2002).

EMPLOYMENT

In *Gilmer v. Interstate/Johnson Lane Corp* (1991) the Supreme Court upheld, in the employment context, a pre-dispute arbitration agreement signed by a non-union employee as a condition of employment, eve when a federal statutory employment claim, the Age Discrimination in Employment Act, was at issue. Although the holding in *Gilmer* expressly applied only to claims brought under the ADEA, lower federal courts have compelled arbitration of employment claims arising under other federal employment statutes, as well as state employment statutes and common law doctrines. Nevertheless, the Equal Employment Opportunity Commission (EEOC) has the independent statutory authority to pursue in court a discrimination claim against an employer, even if the employee signed an arbitration agreement (EEOC v. Waffle House, Inc., 2002).

Admittedly, the allocation of arbitration costs certainly can be a factor in determining the enforceability of such clauses in the employment context. Given that precedent permits employment related dispute to be submitted to mandatory arbitration, can such an agreement be modified or stricken because of excessive costs? Courts seem to be open to that argument. In considering a dispute resolution agreement, which required the employee to split the arbitrator's fees with the employer, the Ninth Circuit concluded that the fee allocation scheme alone would render the arbitration agreement unenforceable. (Circuit City Stores, Inc. v. Adams, 2001).

Additionally, in a case that was decided before Supreme Court's decision in *Green Tree*, *Cole v. Burns International Security Services* (1997), an employee filed suit against his employer for wrongful termination. The employer moved to compel arbitration, and the appeals court found that, while the agreement to arbitrate was valid, the cost distribution required by the arbitration agreement was not fair to the employee, and required the employer to pay all of the arbitrator's fees and expenses. In dicta, the court indicated that an employee could not be required to agree to arbitrate his statutory claims as a condition of employment if the arbitration agreement required him to pay all or part of the arbitrator's fees and expenses. Subsequently, in *Brown v. Wheat First Sec., Inc.*, the same appeals court limited its pro-employee disposition in *Cole* to statutory claims. Other courts also have refused to permit fee splitting arrangements when statutory claims were at issue (Morrison v. Circuit City Stores, Inc., 2003; Shankle v. B-G Maintenance Management of Colorado, Inc., 1999). One federal district court, applying a "likelihood" of incurring prohibitive arbitration costs standard, recognized that an employee had satisfied that burden and could not compelled to arbitrate her federal statutory claims (Ball v. SFX Broad., Inc., 2001). On the other hand, some federal circuit courts of appeal have rejected employee cost challenges to arbitration clauses, while others take a case-by-case approach (LeRoy & Feuille, 2002).

Scholars have conducted several research projects on employment and mandatory arbitration. One study found that courts were most likely to enforce cost-allocation clauses against high-income employees and less likely to enforce such clauses against low-income employees, and that courts were willing to order arbitration for plaintiffs who seem able to afford forum fees, even if they were expensive (LeRoy & Feuille, 2002). Certainly a shared fee arrangement avoids the potential for arbitrator bias associated with a unilaterally imposed employer-paid fee, which almost invariably generates an appearance of partiality (Alleyne, 2003). However, another empirical study suggested that arbitrators are biased in favor of employers because they are repeat players in an arbitration system that they subsidize, while employees are only one-time players (Bingham, 1997). Evidence also suggests that "some employers have used their superior bargaining power to impose on employees lopsided agreements that make it all but impossible for employees to pursue valid claims and that deter many employees from even trying to do so" (Bales, 394, 2006).

FRANCHISES

Arbitration clauses remain fairly standard in franchise agreements with respect to the resolution of disputes between the franchisor and franchisee (Drahozal& Wittrock, 2008). Yet, in addition to consumers and employees, franchisees have questioned the fairness of agreements to arbitrate, as well. In *Ticknor v. Choice Hotels International, Inc*. (2001), an arbitration clause in an EconoLodge franchise agreement stated that every dispute that arose between the parties, which was related to the agreement, would be resolved by binding arbitration at the chain's headquarters in Maryland. In response to a motion to compel the arbitration of a dispute that arose, the franchisee raised the state law defense of unconscionability. The appeals court concluded that "an unconscionable arbitration clause in an adhesion contract is unenforceable in Montana as a matter of public policy" (Ticknor v. Choice Hotels International, Inc., 939, 2001).

On the other hand, some courts are less willing to strike mandatory arbitration clauses in franchise contracts. In *Wasserman v. We the People Forms & Services Centers USA, Inc*. (2007), the claimants alleged that the franchisor failed to satisfy its contractual obligations, and argued that the arbitration provision was substantively and procedurally unconscionable. The district court disagreed and highlighted the disclosure made in the arbitration provision, to wit, that arbitration will be binding under the rules of the AAA, that each party was to bear its own costs and expenses in preparing for and participating in the arbitration, and that the parties would split the costs of the arbitrators' fees. The court also noted that claimants could access a complete list of the AAA's commercial arbitration rules, including the specific costs, on the association's website. As such, the court compelled arbitration of the dispute.

Similarly, in *Singh v. Choice Hotel International, Inc.* (2007), the franchisee alleged breach of contract and violations of deceptive trade practices legislation, and asserted that the arbitration provision was void as unconscionable. Although Choice Hotels did not dispute that the arbitration costs could exceed $ 30,000, the court held that the franchisee did not meet his burden of proving that the fees for arbitration were excessive when compared with potential litigation costs, because the evidence presented did not contain a real cost-differential analysis. While franchisees are typically small business owners and in a bargaining position similar to consumers and employees, courts tend to assume that these business disputants in the franchise context are on equal footing, notwithstanding the prevalence of a form contract and the domination of the relationship by the franchisor.

One justification of arbitration as a means of dispute resolution is an economic one that focuses on the concern for the allegedly high cost of litigation in courts. However, the results of one study suggest that deterrence factors outweigh concerns about litigation costs in the design of dispute resolution in franchise agreements, and that the probability of arbitration is significantly higher when the parties relied on implicit contract terms for governance, and compliance with those terms was difficult to ensure (Drahozal & Hylton, 2003). Further, franchising parties most concerned about the risk of excessive damages in court, who also included provisions in their contracts limiting damages, were highly likely to opt for arbitration over litigation (Drahozal & Hylton, 2003). That deterrent affect arguably is designed to discourage a vindication of franchisee rights, more than anything else, and to insure a pro-franchisor interpretation of the implicit contract terms in the arbitral forum, if accessible.

RECOMMENDATIONS

There is no evidence, neither empirical nor anecdotal, to suggest that mandatory arbitration of consumer, employment and some business disputes, is fair; the fact that it is imposed in contracts of adhesion tends to suggest that fairness is anything but the motivating factor for its selection as a forum (Schwartz, 2009). While imposing arbitration is more justifiable in business-to-business dealings in order to control costs, that goal is less justified in consumer-business relationships, given the reality that costs serve to foreclose avenues for dispute resolution all together for consumers (Satz, 2007). Arbitration provisions rarely are favorable to the consumer, employee or franchisee, frequently necessitating travel, involving excessive costs, and continuing the cycle of bias and prejudice towards minorities and low-income individuals; commensurately, arbitration provisions should be limited to those parties who are on equal footing and mutually consent to its application (Larson, 2003).

Legislation exempting consumer and employment disputes from arbitration is a possible solution, as "there is little opposition today to arbitration between sophisticated commercial parties" (Bruhl, 1489, 2008). The FAA could be amended to overturn the pre-arbitration decisions of the Supreme Court by removing consumer and employee contracts from the coverage of the statute and by providing that pre-dispute arbitration agreements in such contracts will not be enforced (Schwartz, 2007). Another suggested legislative reform of the system is to eliminate the problems inherent in pre-dispute mandatory arbitration clauses in consumer transactions by amending the FAA to permit mandatory arbitration agreements only after a dispute arises so the disputants may assess its viability in a more informed manner (Alderman, 2001). Pre-dispute arbitration provisions inherently disadvantage the consumer, and fail to consider all possible alternatives, such as litigation (Weiner, 2002). As one observer notes, …decisions about our system of justice should be made by our legislature, and not by individual companies…we should consider what kind of dispute resolution is desirable within the broader context of how laws are enforced in the United States" (Sternlight, 863, 2002).

The Arbitration Fairness Act of 2009 (S. 931/H.R. 1020), originally introduced in 2007 and subsequent sessions of Congress, would amend the FAA such that "no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of (1) an employment, consumer, or franchise dispute; or (2) a dispute arising under any statute intended to protect civil rights." The act, if passed, would transform the process from one that businesses can impose upon consumers, employees, and franchisees, to one that parties must voluntarily agree to after the dispute arises (Mandelbaum, 2009). If only post-dispute arbitration clauses were valid, then businesses would bear the burden of persuading consumers, and others, that it was in their best interest to arbitrate rather than litigate (Budnitz, 2004). Predictably, consumers would be less likely to choose arbitration if costs had to be paid up-front, if they were disclosed and viewed as being substantial, particularly if attorneys for the prevailing party could recover statutory fees and/or court costs in litigation.

Another proposed solution is a post-dispute opt-out provision, which recognizes the presumptive validity of a pre-dispute arbitration agreement, but only one that specifically permits a party to opt out of arbitration once the dispute arises, such as the arrangement utilized in some court-annexed ADR programs (Bingham & Wood, 2008). Along these lines, Professor Noyes (2007) suggests that litigation should be re-made by contract into arbitration's image through the enforcement of ex ante contracts to modify the rules of litigation, within acceptable limits, through forum selection clauses, waiver of due process rights to notice and a hearing, waiver of the Seventh Amendment right to jury trial, and choice of law clauses. Modified litigation can be superior to arbitration by providing a neutral decision-maker who is free of bias and free from the repeat-player syndrome of arbitration's judges-for-hire, while the parties also retain their right to full appellate review and the disputes remain in the public.

While most courts follow the Supreme Court's lead in *Green Tree Financial Services Corp. v. Randolph* for both state and federal claims, and require the party challenging the enforceability of the arbitration clause to prove that utilizing such a forum is cost prohibitive, another solution it might be to place that burden of proof on the party who had control over the dispute-system design (Bingham, 2004). Such a subtle shift could have a positive impact on access to justice. Allowing the parties to proceed to arbitration by severing a prohibitive cost allocation provision at the time of the motion to compel and imposing costs on the party that mandated the arbitration agreement is another proposal (O'Hearn, 2007; Burton, 2006). Alternatively, Congress or state legislatures could create a regulatory scheme, which requires the agreement to specify one or more certified service providers for the arbitration of disputes pursuant to their rules, in conjunction with an independent organization that regulates those providers, including their costs (Budnitz, 2004).

Another remedial alternative is the creation of more *business courts*, a division of a larger court with its jurisdiction limited to certain kinds of business disputes, presided over by specialist judges, with an emphasis on aggressive case management and use of alternative dispute resolution, for example, the Delaware Court of Chancery (Drahozal, 2009). "The creation of business courts incorporates some of the preferred characteristics of arbitration (in particular, expert decision making and expedited case management) into litigation, making litigation a more effective competitor to arbitration" (Drahozal, 507, 2009). Such a remedy, of course, requires legislative action at the state and federal level.

For now, there are some risk management strategies and ethical considerations that require no legislative or judicial intervention to employ. Parties to a contract should carefully examine the potential risks involved if the contract is breached, and make a conscious decision as to whether or not arbitration is an appropriate remedy (Stipanowich, 2010). Although the typical mantra for business is to insert an arbitration clause, for a small business, it may not be wise. Entrepreneurs and small business owners should do a risk assessment that evaluates their most significant exposures to potential litigation, whether it is with suppliers, customers, or sub-contractors, and then ascertain if there is a fee-shifting statute favorable to their likely position in the dispute before automatically assuming that arbitration is the better route.

Attorneys representing companies in drafting or enforcing consumer arbitration clauses should remain committed to justice and ethical considerations that assess the real risks and impacts of onerous arbitration provisions, and refuse to draft provisions that squelch consumers' procedural and substantive rights (Schmitz, 2008). Drafters of arbitration clauses should thoughtfully consider best practices regarding such important issues as how to notify individuals of arbitration provisions, the location and identity of arbitration forums, forum rules, arbitration fees, and the availability of discovery and appeals to ensure that it continues to be available alternative to litigation that benefits individuals and businesses (Mogilnicki & Jensen, 2003). In the absence of voluntary compliance with an ethical obligation to provide relevant information, legislative bodies should mandate a comprehensive set of disclosures about the arbitration agreement, thereby establishing a framework for informed decisions (Mandelbaum, 2009).

As a practical suggestion, there are three generic problems with pre-dispute mandatory arbitration clauses: no choice, no notice, and no money to prosecute a claim. These three issues can be addressed in a more ethical manner, while concurrently fostering the inclusion of an arbitration clause. First, consumers, employees and franchisees can be afforded a choice. The agreement could allow for the selection of *binding arbitration*, in which the party seeking to include the provision pays all costs and fees, exclusive of attorneys' fees, or alternatively *non-binding arbitration* in which the parties split the modest fees. The non-binding arbitration rules of the AAA provide parties with streamlined procedures for arbitrations that result in an advisory award rendered by an arbitrator after a brief hearing. The abbreviated process, as well as the advisory award resulting from the process, may aid parties at arriving at settlement of their case through further negotiation or mediation. Fees are relatively modest in contemplation of a streamlined, one-day (or less) telephonic or in-person hearing, or a documents-only hearing.

If binding arbitration is selected, then the contract should make it clear that attorneys' fees, costs and exemplary damages may be awarded by the arbitrator(s) in accordance with applicable statutory law. A pre-dispute mandatory arbitration clause should not be included with any other limitation of remedy. It should be sufficient that appeal is precluded, available only the narrow grounds of fraud, collusion or a lack of jurisdiction over the claim, and that fact should be recited in the agreement as well.

If the costs are not to be born by the party drafting the agreement, then the agreement also should allow for the parties to opt either for a panel of three arbitrators or alternatively for a single arbitrator, notwithstanding what the rules of the AAA or other service provider specify according to the amount in dispute. Reducing the number of arbitrators from three to one in binding arbitration will reduce costs substantially. The current fee schedule and the administrative costs should be listed in the contract, as well, along with adequate notice that these fees and costs may not be incurred in litigation. If consumers, employees and franchisees can be given some choice, along with sufficient information so as to make an informed choice, then pre-dispute mandatory arbitration becomes less unconscionable.

CONCLUSION

In sum, arbitration clauses are favored under federal and state law. However, in certain circumstances, such as those in which they are incorporated into contracts of adhesion, and in which the relative cost of arbitration is disproportionately related to the amount of money in dispute so as to foreclose the adjudication of the claim, the clause operates as a complete deterrent to seeking a redress of claims. Such an effect could result in courts declaring the arbitration agreement unconscionable and unenforceable. Therefore, in drafting such clauses for employment, consumer and some business agreements, careful attention should be paid to the allocation of costs for the arbitration proceeding and to the overall fairness of the agreement to arbitrate.

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CHANGES IN ENFORCEMENT FOCUS COMING TO THE U. S. DEPARTMENT OF LABOR: POLICY AND PRACTICE ISSUES FOR EMPLOYERS

Gerald E. Calvasina, Southern Utah University
Richard V. Calvasina, University of West Florida
Eugene J. Calvasina, Southern University

ABSTRACT

With the election of a new president and a new majority in the legislative branch, employers subject to laws and regulations administered by the United States Department of Labor (DOL) should be preparing for a number of changes. In June of 2009, new U.S. Secretary of Labor Hilda Solis, addressing a National Policy Forum in Washington, D.C. stated that under her watch, "enforcement of our labor laws will be intensified" (Gurchiek, 2009). While vowing to not completely eliminate voluntary compliance programs initiated by her predecessor, the main focus of the DOL will turn from voluntary compliance programs to enforcement (Leonard, 2009). The purpose of this paper is to identify aspects of DOL's enforcement efforts that employers can expect to see in the near term and policy and practice suggestions to facilitate compliance.

INTRODUCTION

Business decision makers in the United States (U.S.) over time have learned that the changing of the guard in the Executive and Legislative branches of the Federal Government can lead to pronounced changes in a number of policy areas. With respect to U.S. Labor Policy, and specifically the enforcement focus of the U.S. Department of Labor, the changes in policy often create apprehension for business decision makers with respect to their internal compliance efforts and possible increases in their exposure to litigation. With the election of President Obama and an initial "super majority" for Democrats in both houses of Congress, employers subject to laws and regulations administered by the United States Department of Labor (DOL) should be preparing for a number of changes. While the election of Republican Scott Brown in Massachusetts ended the Democrat's super majority in the Senate, with the confirmation of President Obama's appointment of Hilda Solis as the new U.S. Secretary of Labor, the enforcement focus of the U.S. DOL under her watch has been made clear - "enforcement of our labor laws will be intensified" (Gurchiek, 2009). While vowing to not completely eliminate voluntary compliance programs initiated by her predecessor, the main focus of the DOL will turn from voluntary compliance programs to enforcement (Leonard, 2009). The purpose of this paper is to identify aspects of DOL's enforcement efforts that employers can expect to see in the near term and policy and practice suggestions to facilitate compliance.

THE U.S. DEPARTMENT OF LABOR (DOL)

The U.S. Department of Labor (DOL) administers and enforces more than 180 federal laws. These mandates and the regulations that implement them cover a wide variety of workplace activities and cover about 10 million employers and 125 million workers. The DOL administers a variety of Federal labor laws including those that guarantee workers' rights to safe and healthful working conditions; a minimum hourly wage and overtime pay; freedom from employment discrimination; unemployment insurance; and other income support (DOL, 2010). There are a number of different agencies that come under the supervision of the U.S. DOL.

Table 1
Major Laws and Executive Orders Enforced of the U.S. DOL
Fair Labor Standards Act (FLSA) – Prescribes standards for wages and overtime pay.
Occupational Safety and Health (OSH) Act – Regulates safety and health conditions in most private industries.
Employee Retirement Income Security Act (ERISA) – regulates employers who offer pension or welfare benefit plans.
Labor-Management Reporting & Disclosure Act (LMRDA) – Landrum-Griffin Act
Uniformed Services Employment and Reemployment Rights Act – reemployment rights for military veterans
Employee Polygraph Protection Act – bars most employers from using lie detectors on employees.
Consumer Credit Protection Act (CPCA) – regulates garnishment of employee wages by employers.
Family and Medical Leave Act (FMLA) – requires employers of 50 or more employees to provide up to 12 weeks of unpaid job-protected leave.
Worker Adjustment and Retraining Notification Act (WARN) – Requires early warning of impending layoffs or plant closings.
Executive Order 11246 – Affirmative Action Requirements for Government Contractors.
Source: Summary of the Major Laws of the Department of Labor (DOL, 2010).

DOL CHANGE AGENDA

The change in focus at the DOL was made clear early on in President Obama's tenure. The appointment of U.S. House of Representative Hilda Solis, described as "a long time advocate of progressive labor policies", to lead the U.S. DOL should have served as a wakeup call to decision makers of what lies ahead (Meneghello, 2010). In the President's DOL budget proposal for fiscal year 2010 he stated that "for the past eight years, the departments labor law enforcement agencies have struggled with growing workloads and shrinking staff" and he promised increased funding for three key agencies: Occupational Safety and Health Administration, the Wage and Hour Division, and the Office of Federal Contract Compliance Programs (OFCCP) (Smith, 2009). Secretary of Labor Hilda Solis has made it clear since assuming leadership of the DOL that the focus of the agency will be on enforcement. In a June 2009 speech to the National Policy Forum in Washington, D.C. Solis stated that she "wants to restore some of the things that have been taken away" in the past eight years and "let me be clear: under my watch, enforcement of our labor laws will be intensified so we can provide an effective deterrent to employers who may unnecessarily put their workers' lives and employment at risk" (Gurchiek, 2009). In a HRMagazine interview with Senior Writer Bill Leonard, Solis again reiterated a goal of the DOL under her watch was "to make sure we step up enforcement of worker safety and health standards, increase protections for workers' pay and benefits, including promoting equal pay, expand paid leave and raise the minimum wage" (Leonard, 2009). In December of 2009, Secretary Solis when further describing her vision of the mission of the DOL stated that "the department will seek to enact an array of 90 rules and regulations in 2010 aimed at ensuring that workers are paid a fair wage, have a voice in the workplace, are provided a safe workplace and have a secure retirement" (Maurer, 2009 C).

Table 2 **Major Agencies Utilized to Enforce Major Laws and Orders Enforced by the U.S. DOL**
Wage and Hour Division
The Occupational Safety and Health Administration (OSHA)
The Office of Federal Contract Compliance Programs (OFCCP)
The Employment and Training Administration
Office of Labor Management Standards
Employee Benefits Security Administration (EBSA)
Veterans Employment and Training Services (VETS)
Source: Summary of the Major Laws of the Department of Labor (DOL, 2010).

Statements by other key DOL leaders including Assistant Secretary of Labor Phyllis Borzi also make it clear that the new administration viewed the Bush Administration as weak on enforcement of the country's labor laws. In a speech at the American Society of Pension Professionals and Actuaries/DOL Speaks conference in September of 2009, Borzi presented an ambitious enforcement plan and stated "there's a new sheriff in town" and that "the previous administration focused on compliance assistance , but that's only good if it is combined with strong enforcement" (Maurer, 2009 A).

Compliance with DOL regulations regarding wage and hour issues has been an especially difficult task for employers in recent years. Research by the Center for Urban Economic Development, the National Employment Law Project, and the UCLA Institute for Research on Labor and Employment concluded that many employment and labor laws are regularly and systematically violated and that a large percentage of workers in the United States are underpaid and otherwise mistreated at work (CORT, 2009). The study found that the most frequent violations involved minimum wage, overtime, "off-the-clock" violations, meal break, pay stub and illegal deduction violations (CORT, 2009). In another report, the Seyfarth Shaw LLP law firm's sixth annual Workplace Class Action Litigation Report found that "wage and hour litigation continued to out-pace all other types of workplace class actions" (Seyfarth Shaw LLP, 2010). Additionally, the report noted that "collective actions pursued in federal court under FLSA outnumbered all other types of private class actions in employment-related cases (Seyfarth Shaw LLP, 2010).

DOL ENFORCEMENT INITIATIVES

In addition to increased funding of enforcement activities, the DOL has also embarked on an ambitious hiring plan. In a November press release, Secretary Solis reported that she had hired 250 new wage and hour investigators, "a staff increase of more than one third, to ensure that we promptly respond to complaints and can undertake more targeted enforcement" (WHD News Release, 2009). In that same press release, Solis noted that "in the past three months alone, the department has had several significant enforcement cases, including collecting nearly $2 million in back wages for more than 500 workers" (WHD News Release, 2009). Solis when on to note that:

In early 2010, the department will launch a national public awareness campaign titled "We Can Help" to inform workers about their rights. The department will work closely with advocacy groups and other stakeholders to ensure that the material developed for the campaign reach the workers who need them. We will not rest until the law is followed by every employer, and each worker is treated and compensated fairly (WHD News Release, 2009).

The U.S. Occupational Safety and Health Administration (OSHA) also announced its regulatory priorities for 2010. OSHA's announced "ambitious" agenda for 2010 "includes 29 regulatory items and projects, two requests for Information, seven Notices of Proposed Rulemaking and six final standards" (Maurer, 2009 B). Projects to be initiated in 2010 involve airborne infectious diseases, musculoskeletal disorders, developing final rules on cranes and derricks, rulemaking involving combustible dust, fall hazards, and hazard communication and rules dealing with crystalline silica and exposure to beryllium (Maurer, 2009 B). OSHA also plans to step up enforcement of existing safety and health standards and whistleblower discrimination investigations. To those ends, in its FY 2010 Congressional Budget Justification, OSHA requested the hiring of an additional 130 compliance safety and health officers and 25 whistleblower discrimination investigators (FY 2010 Congressional Budget Justification, 2009). In its congressional budget request, OSHA also announced it was developing a new program, the Severe Violators Inspection Program (SVIP) that will target enforcement action to those employers that have excessive violations, fail to correct hazards, or have fatalities with serious violations associated with an accident (FY 2010 Congressional Budget Justification, 2009).

At the DOL's Employee Benefits Security Administration (EBSA), planned enforcement activities include a "contributory plan criminal project" designed to prosecute violators that fail to forward participant contributions to employee benefit plans (Maurer, 2009 A). EBSA also plans to target employers that delay remittance of contributions, multiple-employer welfare arrangements (MEWAs), and health care fraud (Maurer, 2009 A).

The Office of Federal Contract Compliance Programs (OFCCP), the DOL agency charged with enforcing Executive Order 11246's affirmative action regulations for federal government contractors also has announced plans to strengthen enforcement of its regulations. In a December 2009 web chat, OFCCP Director Patricia Shiu reported that the agency is "hard at work on three rules that will benefit the American worker:

Strengthening affirmative action requirements by requiring federal contractors and subcontractors to conduct more substantive analysis and monitoring of their recruitment and placement efforts targeted to individuals with disabilities.

Revising provisions in the regulations to strengthen compliance with affirmative action requirements, including the establishment of outreach, recruitment and placement goals for the employment and advancement of covered veterans.

Revising the regulations implementing the affirmative action requirements of Executive Order 11246 that are applicable to federal and federally assisted construction contractors. The initiative would update regulatory provisions that set forth the actions construction contractors are required to take to implement their affirmative action obligations, according to the agenda (Maurer, 2009 A).

At the Wage and Hour Division, in addition to increasing overall enforcement of the division's regulations, the WHD also announced that it plans to update its child labor regulations, review the implementation of the new military family leave amendments, and to update its recordkeeping regulations that will be designed to "foster more openness and transparency by demonstrating employers' compliance with minimum wage and overtime requirements to workers" (Maurer, 2009 A). Recordkeeping issues have been a perennial problem for employers over the years and hopefully the proposed updating will facilitate employer efforts in this area.

The 2011 budget request contain additional request for funding to affirm what Secretary Solis said is "this administration's commitment to vigorous enforcement" (Maurer, 2010). The budget requests includes funding to hire 358 employees including 177 investigators and other enforcement staff, which will bring the total proposed DOL workforce to nearly 18,000 (Maurer, 2010). The budget request also includes plans to conduct more OSHA inspections in FY2011 with 25 additional inspectors and the movement of 35 employees from compliance assistance to enforcement (Maurer, 2010).

OTHER ISSUES FOR HR DECISIONMAKERS

In addition to the previously detailed changes and enforcement initiatives announced by the DOL, employers should also be aware of new labor and employment laws that were enacted in 2009. The list of new statutes plus additional proposals in the pipe line is contained in Table 3. As new regulations and guidance on compliance are finalized and tested in court it will take time for the impact of these regulations on human resource decision making to become more apparent.

Table 3
2009 New Labor and Employment Laws Enacted and Proposed
Lilly Ledbetter Fair Pay Act
Genetic Information Nondiscrimination Act (GINA)
FMLA Military Leave - amended by the National Defense Authorization Act for Fiscal Year 2010
Federal Minimum Wage increased to $7.25 per hour effective July 24
COBRA Subsidy – American Recovery and Reinvestment Act of 2009 (Olmsted
New Leave Laws Expected in 2010
Healthy Families Act
Family leave Insurance Act
Family and Medical Leave Enhancement Act
Amendments to the Domestic Violence Act
Military Family Leave Act (HR Hero, 2009)
Additional Legislative Proposals Employers should be following:
Employee Free Choice Act
Health Care Reform
Data Accountability and Trust Act

One final important enforcement item for employers to keep track of outside of the DOL is the Federal Government's enforcement strategy with respect to immigration. The Obama administration, through the Department of Homeland Security has changed the focus of its enforcement strategy and will be directing more attention to employers. According to Hawk and Cook, "the goals of the new strategy are to penalize employers who knowingly hire illegal workers, deter employers who are tempted to hire illegal workers, and encourage all employers to take advantage of compliance tools" (Hawk and Cook, 2009). Employers can "expect an increase in 1-9 audits, employer recordkeeping audits, unannounced site visits, and a big push for E-Verify for use by employers in 2010" (Hawk and Cook, 2009). John Morton, Department of Homeland Security Assistant Secretary for Immigration and Customs Enforcement (ICE) reiterated the Obama administration's get tough on employer compliance focus by stating that

"ICE is focused on finding and penalizing employers who believe they can unfairly get ahead by cultivating illegal workplaces" (Hawk and Cook, 2009).

RECOMMENDATIONS FOR EMPLOYERS

With the ever increasing regulatory burden that employers of all types and sizes are required to bare, the need for additional resources to facilitate compliance efforts will be substantial. Given the ever increasing cost associated with not complying with laws enforced by the DOL and other laws impacting human resource decision making, failure to support compliance efforts is not an option. Further, failure to take a proactive approach to support effective compliance decision making can cause employers to sustain financial and employee relations losses. This may threaten their survival as American businesses attempt to emerge from lingering economic difficulties. Economic downturns and high unemployment have often been cited as causes of the increasing number of wage and hour complaints, discrimination, and wrongful discharge allegations showing up in government agency reports and litigation studies. The standard advice for employers that want to reduce their exposure to these types of allegations and litigation is to find and fix problems with the employers' compliance efforts before an employee's attorney or a government agency gets involved. Preventive audits can go a long way to help employers reduce their exposure. Whether to examine policy manuals, payroll practices, or I-9 documentation, employers should conduct at least an annual audit of their human resource decision making and legal compliance efforts. In addition to on-going audits, employers must continually train individuals involved in human resource decision making as new regulations and guidance affecting their organizations is available. The title of a recent HR Daily Advisor Tip reporting on the results of a recent study dealing with wage and hour violations should get the attention of all employers: "DOL, EEOC, and Your Employees' Attorneys are Reading this Report" (CORT, 2009). Government agencies have for years required employers to prominently post notices regarding employees' rights in the workplace. With the taboo on attorney marketing efforts on TV, the internet, and roadside billboards all but abandoned, especially by members of the plaintiffs' bar, more and more employees are aware of potential problems with respect to how their employer's human resource policies and practices may not be consistent with government regulations. With the notoriety that large damage awards against employers can generate and the general unfavorable light that many businesses have been held in during the country's difficult economic times the recipe for even more challenges to human resource decision maker decisions is present. Employers that allocate resources to monitor government agencies' initiatives, support training of decision makers and preventive audits of their compliance efforts will be in a better position to meet challenges created by the changes in enforcement focus that are clearly coming with new leadership in our nation's capital.

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OUT WITH THE OLD; THE TERMINATION OF THE MIXED MOTIVE CASE UNDER THE ADEA

Brian P. Winrow Winona State University
Kevin Johnson Emporia State University

ABSTRACT

The purpose of the article is to provide practitioners and scholars with a working knowledge of the US. Supreme Courts recent holdings in Gross v. FBL Financial and Smith v. City of Jackson*, and to identify a trend whereby the U.S. Supreme Court has enhanced the defenses available to employers accused of age discrimination while eliminating the availability of a mixed motive cause of action under the Age Discrimination in Employment Act (ADEA).*

This article examines reported cases pertaining to the Age Discrimination in Employment Act. The focus of this article was on cases and literature pertaining to recent court holdings addressing both disparate impact and disparate treatment forms of discrimination under the ADEA. Published cases underwent a comprehensive case review using the Westlaw database research system. Relevant cases were shepardized.

In 2009, the U.S. Supreme Court issued a holding preventing mixed motive cases under the ADEA, in favor of requiring employees to satisfy the heightened requirement that age was a determinant factor leading to the adverse employment decision as opposed to a mere motivating factor.

This article incorporates recent U.S. Supreme Court cases in what has become a rapidly changing legal landscape.

INTRODUCTION

The labor force within the United States has been experiencing a trend whereby the average age is drastically increasing. As it currently stands, over 48% of the U.S. workforce is comprised of employees that are at least 40 years of age (The Aging Workforce, 2008). This number is expected to increase to 51% within the next few years (The Aging Workforce, 2008). While an experienced employee brings a wealth of knowledge and valuable experience, there is often a positive correlation with higher wages. Though many businesses capitalize upon the seasoned employee's experience, others find the higher costs overly inhibitive on already financially stressed corporations struggling to meet investor demands. In order to increase net income, a business can either increase revenue and/or decrease costs. As a result, employers, in an effort to minimize costs, have an incentive to reorganize the organizational structure of the business. A common strategy is to eliminate costly positions and to reassign the responsibilities to other positions. As a result, employers may be tempted to target higher wage earners in order to reduce costs.

In order to curve discrimination aimed at seasoned workers, Congress enacted the Age Discrimination in Employment Act (ADEA) to preclude discrimination based upon the employees' age (ADEA, *29 USCA,* 621 (a), 2006). The protections permeate through the entire realm of the employment process, beginning in the recruiting phase and extending through promotion and termination decisions (*U.S. Equal Employment Opportunity Commission, 2008)*. According to the Act, an employer is prohibited from failing or refusing to hire or to discharge "any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age" (ADEA, *29 USCA,* 623 (a), 2006). Much of this terminology mirrors the language used in other antidiscrimination acts, namely Title VII of the Civil Rights Act (Van Ostrand, 2009). As a result, the two Acts were often construed consistently (Van Ostrand, 2009). This included prohibiting employers from taking into consideration impermissible factors when making an employment decision, such as the employees' age, if at least 40, or the race of the employee.

Over the last four years, however, the U.S. Supreme Court has issued two holdings which have significantly altered the standards by which the employers' actions are scrutinized under the ADEA. In the first holding, Smith v. City of Jackson (2005), the Court, while recognizing the availability of disparate impact claims under the ADEA, expressly permitted employers to escape liability if they base their employment decision upon a reasonable factor other than age. In the second holding, Gross v. Financial (2009), the Court held that the employee must proffer sufficient evidence to satisfy the "but-for test". The but-for test requires the employee to establish that age was a determinant factor leading to the adverse employment decision. This new analysis eliminates the availability of a mixed motive case under the ADEA (Gross, 2009). In other words, the court held that age can be a factor in employment decisions, as long as it is not a determinate factor. As a result of these two holdings, employers have expansive latitude in making employment decisions which adversely affect the protections afforded to older workers.

The purpose of this article is to discuss the viability of the ADEA as a protective mechanism for aging employees after the Gross and Smith holdings. Part II of this article will provide an overview of the ADEA, including the bona fide occupational qualifications (BFOQ) exception which permits employers to discriminate against a protected class, in limited situations. Part III will discuss both the disparate impact and disparate treatment forms of discrimination, as well as discussing the Smith case under the disparate impact section. Part IV will provide an analysis of the Gross case which changes the traditional judicial scrutiny afforded to disparate treatment claims. Part V will then focus on the practical applications of the two recent cases.

HISTORY OF THE ADEA

The ADEA was passed by Congress in 1967 in order to remedy inequities in the treatment of older workers, covering the entire continuum of the employment process (Johnson, 2000). The legislative intent of the ADEA was designed to help displaced older workers regain employment as well as to prohibit employers from taking adverse action against an older employee, based upon age, in an effort to help older workers retain their jobs (ADEA, *29 USCA,* 621, 2006). In order to accomplish this objective, all employers, both private and public who have at least 20 or more employees are prohibited from failing or refusing to hire or to discharge "any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age" (ADEA, *29 USCA,* 621 (a), 2006). While the ADEA protects employees and applicants throughout the entire employment process, there is a common misconception that the ADEA prohibits an employer from asking an applicant's age or date of birth. The ADEA does not expressly proscribe such inquiries, though most employers do not seek information that will reveal an applicant's age unless it based upon a necessary factor in measuring a person's actual job qualifications (BFOQ), as such inquiries can lead to disparate impact discrimination (U.S. Equal Employment Opportunity Commission, 2008).

While the ADEA prohibits discrimination based upon age, there is an exception to the general rule. An employer can incorporate discriminatory measures against an employee or candidate based upon age, if the employer can show that age is a bona fide occupational qualification (BFOQ) (ADEA, *29 USCA,* 623 (f), 2006). A BFOQ is a limited permissive reason allowing the employer to make an employment decision or to take an employment action that would otherwise amount to unlawful discrimination (ADEA, *29 USCA,* 623 (f), 2006). In other words, a BFOQ relevant to the ADEA is a legitimate job qualification that necessarily results in an adverse employment decision or action against employees who are 40 years old or older and which favors employees under 40 years of age. Courts scrutinize any claimed BFOQ closely and are not quick to declare a job qualification as being legitimate, or bona fide (Kimel v. Florida Bd. of Regents, 2000). Age based BFOQs are most often based on statutory requirements relevant to a particular occupation, such as mandatory retirement ages in specific occupations regulated by federal or state law.

ESSENTIAL FUNCTION OF THE ADEA

The essential purpose of the ADEA is to protect individuals who are 40 years of age or older from employment discrimination based on age (ADEA, *29 USCA,* 631 (a), 2006). The Act applies to job applicants as well as to employees (ADEA, 2006). Moreover, the scope of the ADEA extends to former employees receiving post-employment benefits, shielding the former employee from discrimination based on age (*U.S. Equal Employment Opportunity Commission, 2008)*.

The scope of the ADEA is far reaching, governing many aspects of the employment function. One such provision relates to permissible information contained within employment announcements (*U.S. Equal Employment Opportunity Commission, 2008)*. It is generally unlawful to include age related preferences or specifications as the age predilection can serve as a deterrent to older applicants *(*ADEA*, 29 USCA,* 623 (e), 2006). In addition to governing job notices, the Older Workers Benefit Protection Act of 1990 (OWBPA) amends the ADEA to specifically prohibit employers from denying benefits to older employees (*U.S. Equal Employment Opportunity Commission, 2008)*. With that said, Congress recognized the heightened cost associated with offering older workers benefits could deter some employers from offering benefits to any employees. As a result, employers may reduce benefits based on age to the extent that the reduced benefits to older employees is the same as the cost of providing benefits to younger employees (*U.S. Equal Employment Opportunity Commission, 2008)*.

While the ADEA was designed to protect employees from discriminatory practices based upon age, the employee/applicant retains the authority to waive the ADEA protections in limited situations *(*ADEA*, 29 USCA,* 625 (f), 2006). The waiver provision only permits employees to waive their protections as part of a severance package or other employment termination program *(*ADEA*, 29 USCA,* 625 (f), 2006). Moreover, the waiver must comply with the following requirements: (a) be in writing and be understandable; (b) specifically refer to ADEA rights or claims; (c) not waive rights or claims that may arise in the future; (d) be in exchange for valuable consideration; (e) advise the individual in writing to consult an attorney before signing the waiver; and, (f) provide the employee at least 21 days to consider the agreement and at least seven days to revoke the agreement after signing it (*U.S. Equal Employment Opportunity Commission, 2008)*.

ELEMENTS OF AN ADEA CLAIM

Employees who believe they have been the victim of age-based discrimination have the burden of proving their claim against the employer. In order to satisfy this burden, the plaintiff must proffer evidence of age discrimination. Table 1 contains the requisite elements that must be established to prevail on an ADEA claim.

During any ADEA case, it is necessary for the employee to address the purpose of the act, which is “to promote the employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; (and) to help employers and workers find ways of meeting problems arising from the impact of age on employment” (Macellare v. Goldman, 1980). Moreover, as illustrated in table 1, the employee must have suffered some form of discriminatory action. The discriminatory actions can be segmented into three generic classifications; actual termination, constructive termination, other forms of adverse employment actions.

Table 1 **Elements of Discrimination**
Employee must be at least 40 years of age
Employee must have been terminated from their job or suffered some other adverse employment action
Employee must have been qualified for the position
Job performance was at least adequate at the time of termination or other adverse employment action
Employee was either replaced by a person younger than age 40 years or, when termination is not the adverse action complained of, employees younger than age 40 years have not been treated in the same manner.

Actual termination simply connotes that the employee has been laid off or fired. In material contrast, constructive termination occurs when an employee resigns due to an intolerable working environment, whereby a reasonable person in the same environment would have felt compelled to resign (Cronk v. Nationwide Mut. Ins. Co., 2005). Finally, an adverse action occurs when there is a materially adverse change in the terms or conditions of employment (Bogues v. Town of Trumbull, 2005). This can include either a demotion in rank or salary, or other adverse consequences such as a material loss in benefits or responsibilities (Bogues, 2005).

Proof of each of these five factors illustrated in table 1 establishes that the employee *may* be the victim of age discrimination, but not that they necessarily *are* the victim of age discrimination. As described below, the employee must also prove that "but- for" their age, they would not have suffered the complained of adverse action. This is a difficult test to meet as illustrated by recent U.S. Supreme Court rulings.

FORMS OF DISCRIMINATORY BEHAVIOR

Under the ADEA, there are two distinct types of prohibited discriminatory behavior. They are comprised of disparate impact and disparate treatment actions. Each form of discrimination is discussed below.

Disparate impact

A claim of disparate impact refers to an employer's practice or policy which is facially neutral and lacking discriminatory intent, but disproportionately affects a protected class of employees (Johnson, 2000). This form of unintentional discriminatory action is most commonly recognized under Title VII. Under Title VII, the employer is prohibited from implementing business decisions that adversely affect a protected class (Johnson, 2000). For example, an employer would be prohibited from requiring employment or promotion exams that unintentionally result in the exclusion of candidates of a protected class, such as race or gender (Ricci et al. vs. DeStefano et al, 2009).

While liability for disparate impact claims are well recognized under Title VII, courts have been slow in clarifying whether a cause of action exists for employees protected under the ADEA (Benjes, 2005). In 1993, the U.S. Supreme Court held that disparate treatment captures the essence of what Congress sought to prohibit in the ADEA, which is elimination of biased stereotypes (Sturgeon, 2007). The Court held that “it is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age” (Hazen Paper Co. v. Biggins, 1993). The Court reasoned, however, that these inaccurate stereotypes disappear when an employer's decision is based on factors other than age (Hazen Paper Co., 1993). The court further held, however, that the Hazen Paper holding should not be construed as foreclosing upon the possibility of prevailing upon a disparate impact case, as that specific issue fell outside the scope of the decision (Hazen Paper Co., 1993). As a result, lower courts were split on whether employees could challenge employment practices that had a disparate impact on workers protected under the ADEA.

In order to clarify, the U.S. Supreme Court addressed the issue in Smith v. City of Jackson (2005). In this case, the City of Jackson implemented a new compensation structure to ensure that salaries of entry-level officers were competitive with the average market wage for similar positions within the region. The new cost structure segmented employees into five sectors, and then provided for salary increases tailored to each area, with varying increases dependent upon the employees division. The lowest sectors, corresponding with entry level positions, received the highest raises, while the sectors containing senior officers received the lower raises. As a result, existing employees over the age of 40 filed a suit claiming disparate impact.

In a split holding, the U.S. Supreme Court held that an employee can bring a cause of action for disparate treatment under the ADEA. While this appears to be a victory for employees at first blush, the U.S. Supreme Court qualified their holding. In the holding, the Court recognized the reasonable factor other than age defense, which serves as an important exception to a claim of disparate impact under the ADEA. Under the reasonable factor other than age defense, employers are immune from liability if they base their employment decision on a factor other than age, even if the factor has adverse and disproportional affects on employees who fall under the purview of the protections afforded by the ADEA. Moreover, the Court emphasized that the reasonableness test, unlike the business necessity test, does not inquire into whether the employer could achieve its goals in another manner with less adverse impact on older employees (Benjes, 2005). As a result of the expansive holding, employers are shielded from liability arising under disparate impact claims as long as the employer basis their decision on a factor other than age, even if the same objective could be reached with less intrusive or discriminatory means.

DISPARATE TREATMENT

While a disparate impact case arises from unintentional discrimination, a disparate treatment case is an intentional form of discrimination (Smith, 2005). Disparate treatment occurs when an employer takes adverse action against an employee based upon the employee's age (Ricci, 2009). Under the ADEA, an employer is expressly prohibited from taking adverse action against "any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age" *(*ADEA*, 29 USCA,* 623 (a), 2006). The term "because" has made the clause ambiguous, thus requiring judicial interpretation to represent the legislative intent of the Act.

Traditionally, the term "because" was construed to mean that age could not be a motivating factor in employment decisions. As a result, employers could consider the applicant/employees age when making an employment decision, but had to base the decision on a primary factor other than for age (Bible, & Sanders , 2009). If age was a motivating factor, even if other factors substantiated the decision, the employer would be deemed to have violated the ADEA (Gross 2009). This statutory construction was consistent with the interpretation of Title VII under its original version (Van Ostrand, 2009). In 2009, however, the U.S. Supreme Court issued a holding in Gross versus FBL Financial Group, Inc overruling existing precedence thus changing the standard by which employers are held when alleged to have violated the ADEA.

GROSS VERSUS FBL FINANCIAL GROUP, INC.

In Gross v. FBL Financial (2009), Gross, had been employed by FBL Financial Group, Inc. (FBL) since 1971, at the age of 32. In 2001, Gross was promoted to the position of claims administrator. Gross held this position for two years before being reassigned to the position of claims project coordinator. Gross was 54 years old at the time of the reassignment. During the time of the reassignment, FBL created a new position, claims administrator manager, encompassing many of Gross's former responsibilities. That position was given to Lisa Kneeskern, who had previously been supervised by Gross and who was then in her early 40's. While Gross and Kneeskern received the same level of compensation, Gross perceived the reassignment as a demotion. As a result, Gross filed a lawsuit against FBL under the ADEA (Gross, 2009).

At the conclusion of the trial, the District Court instructed the jury to return a verdict for Gross if he established that FBL demoted him to claims project coordinator and that his "age was a motivating factor" in FBL's decision to demote him. " The jury was further instructed that age would qualify as a motivating factor if it played a part in FBL's decision to demote him. In addition, the court instructed the jury that they must return a verdict for FBL if it established that Gross would have been demoted regardless of his age. After deliberating, the jury returned with a verdict for Gross, awarding him approximately $47,000 in lost compensation (Gross, 2009).

FBL appealed the decision based upon the jury instructions which placed an affirmative duty on FBL to justify its hiring practice in a mixed motive case, where age was alleged to be a motivating factor. The Court of Appeals held that Gross needed to present direct evidence that an illegitimate criterion actually motivated the adverse employment action, in order to support a decision claiming FBL violated the ADEA. According to the Court of Appeals, direct evidence is the only reliable nexus between the alleged act and the decision. Once the employee provides direct evidence, the burden then shifts to the employer. At that point, the employer must establish that the same employment decision would have occurred absent the consideration of the unpermitted factors. As a result, the Court of Appeals reversed the district court on the basis that the district court permitted any evidence, as opposed to direct evidence, in order to trigger the burden shifting mechanism (Gross, 2009).

The U.S. Supreme Court agreed to hear the case in order to decide whether the plaintiff (employee) is required to present direct evidence in mixed motive cases under the ADEA. The U.S. Supreme Court held that the burden of persuasion does not shift to the defendant (employer) under the ADEA. As a result, the U.S. Supreme Court then addressed the issue as to whether a mixed motive case was even permitted under the ADEA, given that the ADEA does not possess the burden shifting mechanism used in Title VII mixed motive cases (Gross, 2009).

The central focus of the examination centered on the statement within the ADEA which provides that "it shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age" (ADEA, 623(a)). The analysis focused on the degree of the term "because" (Gross, 2009). Under the original Title VII Act, containing the same "because" language as found within the ADEA, the term was interpreted to mean a motivating factor (Gross, 2009). In Gross, however, the U.S. Supreme Court held that while there are many parallels between Title VII and the ADEA, the ADEA does not possess the same burden shifting mechanism that the ADEA possesses. Moreover, even though the two Acts possessed identical language at the times the Courts addressed the burden switching mechanism, the Court concluded that it is imperative not incorporate frameworks from one Act to another without careful analysis. The Court further held that absent the burden shifting mechanism, an employee could not sustain a mixed motive case against an employer. As a result, the U.S. Supreme Court expressly rejected the viability of a mixed motive cause of action under the ADEA, and replaced it with the new but-for analysis.

Under the but-for analysis, the employee bears the burden of proving that age played a determinant factor in the adverse employment decision, not a mere motivating factor (Gross, 2009).

APPLICATION

The Gross holding has the potential of having long reaching implications for human resources managers as well as the aging labor force. First, under the Gross holding, employers can consider the age of the applicant in making the employment decision, as long as age is not a determinant factor in making the employment decision. In other words, the employer must apply the but-for test. Moreover, in order for the employee to prevail upon a claim of disparate treatment based upon age, the employee bears the burden of establishing that the employee's age was a determinant factor in the adverse employment decision. In addition, the employer is no longer required to provide alternative defenses for the action once direct evidence is provided. In addition, the issue as to what is classified as a permissible means in which to base employment decisions has taken on heightened importance as employers may now make employment decisions as long as age is not a determinant factor in the decision making process. When considering both the Smith and Gross cases, it becomes evident that Courts are continuing to augment the employer's right to make relevant business decisions in regard to both disparate impact and disparate treatment cases.

A cursory review of prior holdings pertaining to the ADEA reveals the expansive latitude afforded to employers when making employment decisions. One of the primary factors for which an employer can take action is based upon cost. Courts have consistently upheld decisions based upon cost restructuring as a permissible business decision, even though there is a positive correlation between age and employee salaries (Meachum v. Knolls Atomic Power Laboratory, 1980; Bialasv. Greyhound Lines, Inc.,1995). For example, in Meachum v. Knolls Atomic Power Laboratory (1980), the Court emphasized the stringent burden that Smith placed on ADEA plaintiffs claiming disparate impact discrimination, and accentuated that there are reasonable and permissible employment criteria that correlate with age. The Court concluded by stating "It is therefore hard to see how an ADEA plaintiff can expect to prevail on a showing of disparate impact based on a factor that correlates with age without also demonstrating that the factor is unreasonable" (Meachum, 1980).

In Bialas v. Greyhound Lines, Inc. (1995) the Court held that the mere fact that salaries of terminated employees were greater than their replacements' salaries does not necessarily support an inference of age discrimination." The Court further held that "We are not unmindful that the image of some newly minted whippersnapper MBA who tries to increase corporate profits--and his or her own compensation--by across-the-board layoffs is not a pretty one. . . . . Congress . . . . [never] intended the age discrimination laws to inhibit the very process by which a free market economy . . . . [creates] real jobs and wealth . . .." (Bialas, 1995).

CONCLUSION

Any employment statute sets a minimum standard that must be followed in order to avoid liability under that statute. This minimum standard can be viewed as a line drawn that separates lawful from unlawful employment practices. Lawyers typically advise employers to have employment practices in place that do not test precisely where this line is drawn by the law. The idea is that useful and productive employment practices can be developed and implemented that never even approach the line across which awaits legal problems. It is not usually much of a problem to avoid this line. However, there are situations where concern over just where the line is becomes an important part of decision making. The prudent employer does not want to cross the line, but is sometimes frustrated when trying to determine the exact location of this line. Fortunately for the employer, the Gross case moves this line, wherever it may actually fall, farther away from likely trouble. In effect, it gives the employer more room for error. Since most employers are not going to take action against an employee solely because the employee is getting older, relatively few cases will satisfy the but-for test.

The mixed-motive standard applicable in a Title VII case presents a great deal of risk to an employer. Even when an employer tries to avoid making a discriminatory decision, a case may satisfy the mixed-motive standard when the same set of facts could not satisfy the but-for test. This means there can be a judgment against an employer in a mixed-motive case that otherwise would not have been successful for the employee in a but-for case. While it is, nevertheless, difficult for an employee to prove an employer's mixed-motive in an employment decision, the existence of the mixed-motive test allows more room for doubt and for a jury to find sympathy for the plight of the employee.

The Gross ruling lowers an employer's level of risk of having to deal with age discrimination; however, legal advice given to an employer on avoiding age discrimination probably will not change just because of this case. Lawyers will still advise employers to base all decisions on legitimate business and employment factors. The relevance in this case may not be so much in how employers should make employment decisions, but rather in the clear expansion of the realm of defense possibilities for an employer who has been accused of age discrimination. A disparate impact case can be successfully defended by describing how the adverse employment decision was made and that it was based on legitimate factors.

An employer will still be held accountable for actual age discrimination in violation of the ADEA. Actual age discrimination, however, means an adverse employment action that would not have happened but for the employer's decision to discriminate. This must be a decision that is not justified by a legitimate employment or business factor, as any such justification would mean the decision did not happen 'but for' age discrimination. A legitimate employment decision might be composed of any number of factors and considerations, but as long as the decision is legitimate then any resulting disparate treatment on the basis of age will not be unlawful discrimination. This ruling lowers an employer's level of risk when dealing with age discrimination.

There remains a question as to how far reaching the Gross case will extend, based upon how lower courts interpret this very recent holding, and whether Congress takes action to revise the ADEA as it did after judicial scrutiny of Title VII. As a result, future research should be conducted to ascertain how lower courts are applying the Gross and Smith cases after some established precedence becomes available. In addition, this research should address whether Congress pursues legislative action to circumvent the Gross holding. Additional research should also be conducted to determine whether the same judicial construction afforded to the ADEA should be applied to the Fair Labor Standards Act (FLSA) as well as the Americans With Disabilities Act (ADA), both of which contain the same "because" language. Finally, there is also an opportunity for future empirical research to determine how the Gross and Smith holdings have changed employer's efforts to restructure their businesses.

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STUDENT ASSESSMENTS OF INFORMATION SYSTEMS RELATED ETHICAL SITUATIONS: DO GENDER AND CLASS LEVEL MATTER?

James Morgan, Northern Arizona University
Gregory Neal, Northern Arizona University

ABSTRACT

Over the past decade a number of high profile ethics scandals in the business community have led to increased focus on business ethics and the responsibility of university business programs to place more emphasis on ethics education. Moreover, information systems (IS) technology has given rise to new and challenging ethical issues. In this study, a set of university students is presented with a number of scenarios in which an individual has engaged in an activity relating to the use of IS which involves some degree of ethical breach. The students' are asked to assess the behavior in each scenario, then these responses are pooled for each student to provide an overall measure how seriously the student views such breaches. The survey data allow us to compare freshman level students in an introductory level IS course to MIS students in a junior/senior level MIS course. Results suggest that students in the higher-level course tend to judge the set of ethical breaches presented to be somewhat more serious than the introductory students. Also, we hypothesize that male students may enter university education at a lower level of ethical maturity than female students. Our empirical results suggest that this is true and further indicate that male students' ethical judgments tend to change more across age during college years and class level than their female counterparts.

INTRODUCTION

This study examines student perceptions of ethically questionable behavior relating to the acquisition and use of information systems (IS) resources. A perceived ethical breach level (PEBL) variable is created from responses to a set of 10 scenarios posing IS related ethical issues. Perceptions of students at different stages of their business college studies are collected, thus allowing for the evaluation of the effects of ethics-related instruction at the university on student perceptions. Based upon evidence from a number of prior studies presented below, we hypothesize that male and female students will differ in their evaluations of ethical breaches and that the two sexes may differ in how their ethical views change with age and ethics instruction.

By the time students enter their university education, they have all been exposed to differing sets of conditions and influences that can be expected to lead to substantially varied ethical backgrounds. To capture this variation, a set of questions designed to identify the tendency of individuals to deny responsibility for their actions is used, and responses to these questions are combined into a Denial of Responsibility (DR) variable. The behavior of this DR variable across age, gender and class level is of interest in its own right and will be examined. In addition, the DR variable is used in models predicting the ethical perceptions of students in order to better isolate the effects of ethics education at the university from differences due to student backgrounds.

In the next section, a review of related literature providing the basis for this study and the proposed hypotheses is presented. Following that discussion, the survey instrument and methodology are described, the models used to test the hypothesized relationships are presented, followed by the empirical results and finally conclusions.

REVIEW OF RELATED LITERATURE

The ethical challenges posed by IS and the need for ethics instruction has long been recognized. Couger described and studied the effects of an ethics instruction program he used in the late 1980s (Couger [1989]). His study includes results comparing student responses to ethical issues to those of a panel of professionals. No statistical test of the comparative results was presented although students did tend to judge actions exploiting a system vulnerability somewhat less harshly than the professional panel. Recent scandals in the business community have caused increased focus on the teaching of business ethics. While the AASCB accrediting body for business schools has long insisted that its member schools require ethics instruction, a 2005 survey found that over 80 percent of AACSB Business school deans at least somewhat agree that business schools should place more emphasis on ethics education (Evans and Mercal [2005]). The internet era has lead to substantially expanded opportunities for, and increasing financial consequences of, IS-related ethical breaches like, software and media piracy, identity theft, and the introduction of malicious software (malware). Thus, issues involving IS ethics are an attractive area of investigation and are of interest not just to IS majors, but to all business majors.

Varied survey methods have been used over the years to assess ethical beliefs and behaviors in IS related scenarios. An early study of ethical attitudes of upper-division undergraduate MIS and other business majors by Paradice ([1990]) presented a set of 12 ethical "situations" (scenarios) relating to the development and use of computer-based systems. In each scenario some third-party actor engaged in behavior that might be considered unethical. Student respondents were asked to rate the behavior as unacceptable, questionable or acceptable. Few significant differences between MIS and non-MIS students were found, but responses indicated that the actor's intent had a major influence on judgments of the acceptability of the behavior. Students found copying for convenience to be substantially less unethical than retaining an illegal copy after the actor was in violation of copyright. While Paradice's study looked only at students, Athey ([1993]) compared MIS majors' views of a number of IT profession-related ethical situations with the views of industry experts. She found that the students tended to be less concerned about a variety of ethical breaches and suggested that this was likely due to their having very limited understanding of the many ethical situations they would face as professionals.

Although software piracy received attention in the literature as early as 1991 (Christensen and Eining [1991]), it has become an increasing focus of attention in recent years. A number of studies have focused specifically upon software and/or music piracy and several of them have examined the link between perceptions about the ethics of software piracy and their actual piracy behavior (Limayem, Kahlifa, and Chin [2004], Gupta, Gould and Pola [2004], Chiou, Huang and Lee [2005], Chen, Pan and Pan [2009], and Shang, Chen, and Chen [2007).

The ethics measures used here are based upon the third party, scenario-based, approach used by Paradice. However, they have been adapted to focus in a substantial way on software piracy issues and on issues that can reasonably be understood by general business students. These scenarios are used to develop the PEBL measure defined below.

Susan Harrington's study of the effects of codes of ethics on ethical judgments of IS professionals (Harrington [1996]) incorporated DR measure in order to isolate the effects of organizational codes of ethics from individual variations in attitudes and behavior. This trait was measured using an instrument developed by Schwartz ([1968]) which is further described below. Harrington suggested that this DR instrument provided a "rather stable measure" of individuals' personal ethical beliefs. The mean score from this instrument was included in regression models designed to explain differences of responses to a variety of types of computer abuse. In her study, a high DR was found to lead to significantly less ethical judgments and intentions across all categories of computer abuses. Results for codes of ethics were less encouraging. Generic codes of ethics were not found to have a significant effect in any of the categories and IS specific codes of ethics were found to have significance only when intentions were to engage in computer sabotage. Harrington's DR measure was adapted from a 24 item survey developed by Shalom Schwartz ([1968]) as a measure of the tendency to ascribe responsibility for social behavior to the self as opposed to denying responsibility. Schwartz suggested that this measure is conceptually related to measures of locus of control with an internal locus of control being associated with ascription of responsibility to the self and an external locus of control being linked to denial of responsibility. Using a different measure, Trevino and Youngblood ([1990]) found internal locus of control to lead to significantly more ethical behavior in business-oriented ethical decisions.

These studies suggest that broad elements of personality which are likely to be well established by the time students enter the university affect their ethical judgments. Accounting for these differences should allow a study to better focus on the effects of ethics instruction on ethical judgments. A variant adapted from the measure used by Harrington will be included as a measure of DR in this study. Additionally, we will look to see whether ethics instruction and demographics of the respondent have systematic effects on the DR measure itself.

Numerous studies of ethical perceptions and behavior have looked for age and gender-related differences. Many of the studies that have used college student respondents have found women to be less tolerant of ethically questionable behavior than men. Kreie and Cronan ([1998]) found significant gender differences in responses to IT related ethical issues among business students in IS classes with female students being less tolerant of ethical breaches. In a follow-up study both male and female student respondents were found to behave more ethically when the ethical issue was perceived to be important rather than unimportant. Gender remained a significant factor, with females having more ethical intended behaviors across both the scenarios posing more important and less important ethical issues (Cronan, Leonard and Kreie [2005]). Chen and Teng ([2006]) surveyed student attitudes toward and propensity to engage in unethical behavior in business settings involving 5 categories of unethical behavior. They found significant differences by gender with males being more accepting of unethical behavior in 3 of 5 categories and having a higher propensity to engage in such behavior in 4 of the 5 categories. This study also compared business majors with psychology majors and found no significant differences in their evaluations, although another study comparing business students with education students did find the business students to be significantly more "morally disengaged" than the education students (Baker, Detert and Trevino [2006]).

Studies of adult populations provide a greater age range over which to identify age differences. They have generally found that tolerance for breaches of ethics declines with age, but have rarely found gender differences. Prior, Rogerson and Fairweather ([2002]) surveyed IT professionals' responses to a number of ethically questionable behaviors and found younger employees to be less critical of several of these behaviors although they did not test for statistical significance of these differences. A study posing ethical dilemmas involving computer technology to an adult population (Gattiker and Kelley [1999]), found that older respondents and female respondents were less permissive with respect to the ethics of using an illegal game, but these age and gender differences were not found in two other dilemmas posed. Schminke [1997] looked for age and gender differences in ethical frameworks used for the evaluation of choices in business-related ethical dilemmas posed to a set of adults. He found no gender differences in either the type of ethical framework used or the evaluations of ethical choices by a third-party actor. However, older subjects were found to use a significantly more formalistic ethical framework - actions are moral or not moral independent of their outcomes - compared to younger respondents. A study of the ethical perceptions of adult consumers (Muncy and Vitell [1992]), found evaluations of questionable behaviors to become less lenient with age across 26 of 27 survey questions, but found virtually no significant gender differences. Strutton, Pelton, and Ferrell ([1997]) conducted a study of consumers' willingness to condone switching the price tag on a clothing item under various mitigating circumstances. They found that young adults aged 18 to 35 were more willing to condone the behavior under these types of mitigating circumstances than older respondents and attributed this difference to a generation gap. They also noted that these differences might reflect the tendency for older individuals to be formalistic in their value judgments while young individuals tend to use a more utilitarian framework. In contrast, Emerson and Conroy (2004) found that students in 2001 were often less accepting of ethically questionable actions than students in 1985. The same 15 scenarios were posed to both sets of students and the 2001 group was significantly less accepting of questionable behavior in seven of them while the 1985 group was significantly less accepting for only one of them.

The results above indicate that age is an important factor in individual's ethical judgments. In addition, they show that gender generally plays a less important role in determining the ethical judgments of adults which suggests that female students may reach ethical maturity at an earlier age than males, with males playing catch-up during college-age years. Caluzzo and Cante ([2004]) for example, examined responses to a set of questions asking about ethically questionable uses of computer software and found no gender differences overall, but did find that male graduate students judged many of these actions more harshly than male undergraduates, while this was not true for female graduate students versus female undergraduates.

Studies from outside the business discipline are generally somewhat supportive of the idea that women reach maturity along many dimensions more rapidly than men. A pair of studies (Luzzo [1995] and Patton and Creed [2001]) found young women to be more mature than their male counterparts with respect to understanding and making career decisions. Further, a meta analysis of empirical studies of personality development in the psychology literature found rather consistent gender differences with females showing higher levels of development through the high school years with studies of college freshmen showing smaller, but still significant differences while studies beyond the sophomore year of college and in adults tended to show no gender differences (Cohn [1991]). In a study rather closely related to the issue of ethical maturity,

Walker ([1984]) performed a meta-analysis of studies of the development of moral reasoning from a review of the psychology literature. He found that significant differences by gender were rare (less than 20 percent of studies), but where significant differences were found, females were likely to show higher levels of moral reasoning in studies of children and young adolescence, differences in both directions were found for late adolescents through young adults, and males were found to have higher levels of moral reasoning than females in the few studies of adults showing a significant difference.

Taken together, the studies above indicate that female students are likely to enter their college years with more mature ethical views than their male counterparts, and that the ethical views of males may change more rapidly with age during their student years.

Relatively few studies have empirically evaluated the impact of ethics education on business students. The Couger ([1989]) paper discussed earlier, described an IS ethics education effort, but did not provide control data which could be used to assess its effectiveness. A study comparing freshman and senior level business students' ethical perceptions of business-related scenarios involving deceit, fraud, self-interest, influence dealing and coercion found that the senior-level students (who all had an ethics course and ethics coverage in their business core) were significantly less tolerant of unethical behavior in three of the five categories. Age and gender were also found to be significant factors for 4 of the 5 categories with older students and females being less tolerant of abuses in each case (Lopez, Rechner, and Olson-Buchanan [2005]). A small-sample study by Ritter ([2006]) found that ethics instruction in a junior-level operations research class significantly increased the ethical awareness of female students but did not have a significant effect on the male students. Rather different results were found by Luthar and Karri ([2005]) who surveyed freshmen, seniors and MBA students at an AACSB accredited school. Respondents were considered to have "exposure to business ethics" if they had taken an ethics course and could recall being exposed to ethics as an "important topic" in another course. Female students were found to have significantly higher expectations about how ethical behavior should affect business outcomes. Exposure to business ethics was also found to significantly increase expectation about how ethical behavior should affect business outcomes and to narrow the gender gap. That is, exposure had more impact on male students' views than on the females. Outside of the business discipline, a meta-analysis of educational programs designed to stimulate moral judgment found that such programs frequently do produce modest but significant improvements and that the effect sizes tend to be larger in adults than in young students (Schlaefli, Rest, and Thoma [1985]).

Overall, assessment of the literature suggests that gender and age are important demographic factors that should be included in any assessment of ethical views. Only a handful of studies have tried to measure the impact of university level ethics education on the ethical views of students. These studies are generally supportive of the idea that ethics education has some influence on ethical views, but have not shown uniformly significant effects. Conflicting results have been found with respect to how the effects of ethics education are affected by gender. In addition, only one of these studies has controlled for the age of the, although in each case it would be reasonable to expect that age was positively correlated with the measure of university ethics education that was utilized. In this study, we control for age in order to better isolate the effects of the ethics education provided.

SURVEY INSTRUMENT AND METHODS

The survey instrument for this study presented respondents with: 1. a brief set of demographic questions to identify the respondent’s age, gender, major and class level, 2. a set of questions designed to measure the degree to which the respondent tends toward denial of responsibility (DR) and 3. a set of questions posing IS related ethical issues and measuring each respondent’s perceptions of the degree to which an ethical breach occurred (PEBL). The survey was administered to students in several sections of an introductory IS course and to several sections of an upper-division MIS course. The survey was conducted on-line using popular course management software that allowed extra-credit to be awarded for completion without compromising the anonymity of the respondent. Given the extra-credit opportunity offered, a high response rate of over 85 percent was achieved.

A central element of this study involves contrasting ethical perceptions of a group of students who have not received ethics instruction at the school with a group which has received such education. Thus, it is necessary to describe the ethics instruction which the school provides. Ethics education elements required at the college surveyed, we believe, are rather typical of the requirements for AACSB accredited schools. These requirements include: 1. completion of an ethics-oriented liberal studies course which can be selected from a list of courses primarily taught by the philosophy department, 2. a minimum of one week of coverage of ethical issues and models in a required lower-division business law course, 3. a week of IS ethics in the junior-level MIS course, and 4. varying amounts of coverage of ethics components or chapters across the remaining classes in the lower-division and upper-division business core. Element 1 has been completed by almost all students in the upper division MIS course, but has been completed by virtually none of the students in the Intro course. Element 2 has been completed by all students in the MIS course, but by few to none of the Intro students. Element 3 had been completed in the MIS course before the students were surveyed. The intensity of Element 4 does vary substantially depending on particular sections of classes each student has taken and instructor differences. A typical MIS student would be likely to have encountered 2 to 4 weeks of ethics-oriented instruction in these classes, while Intro students typically have completed none of this work.

Respondents to the survey include 212 introductory IS students and 98 students in the upper-division MIS course. The sample is nearly equally distributed by gender with 53 percent male and 47 percent female respondents. The average age of respondents is just over 21 years. While most students were between 18 to 22 years old, 21 respondents in the intro class and 20 students in the MIS class were over the age of 25. As might be expected, the MIS students are on average older, but the correlation between age and class level is a relatively modest .3 suggesting that multicollinearity is not an issue.

The set of questions used to measure DR was adapted from a sub-set of questions in the ascription of responsibility instrument created by Schwartz ([1969]). For this study a set of 10 questions was used and Likert-scale responses were collected and averaged to produce a quasi-continuous measure which can reasonably be treated as cardinal in nature. The set of questions used is presented in Appendix A below.

The questions used to measure respondents' perceptions about IS related ethical breaches each presented a brief scenario in which a third party actor engaged in behavior that was, at least arguably, unethical. The set of scenarios used takes scenarios presented by Paradice ([1990]) as a starting point, but modifies them to reflect newer technologies and related issues and to exclude or modify those that would be difficult for non-technical students to understand. Two scenarios relating to software piracy, two relating to malware issues, and one relating to use of false log-in credentials are presented. In addition two versions of each scenario are presented, one where the actor has relatively benign motivations and one where the actor is motivated by greed or malice. Thus a total of 10 scenarios was presented with Likert-scale responses again being collected. As with the DR related questions above, the set of responses for each student was averaged to produce a quasi-continuous variable which we PEBL and which can be treated as reasonably cardinal in nature. The set of scenarios used is presented in Appendix B below.

As a test of whether these questions can appropriately be combined, we compute the Cronbach's alpha statistic (Cronbach [1951]) for each measure. The alpha score for the PEBL measure was a .78 while the alpha score for the DR measure was .64. A level of .70 or above is commonly used as a standard for combining a set of items into a scale variable. However, Cortina notes that even very low correlations among individual items will lead to an alpha greater than .7 when the number of items being combined is large and suggest that alphas "must be interpreted with the number of items in mind" (Cortina [1993]). A similar evaluation by another researcher included the conclusion that "in some cases, measures with low levels of alpha may still be quite useful (Schmitt [1996]). Still, the relatively low alpha score for DR suggests that results for this measure should be interpreted cautiously and results for regressions predicting PEBL without this variable, as well as with it, will be presented.

THE REGRESSION MODELS

Based on the discussion above, a set of regression models is presented which are designed to test the effects of demographic factors (age and gender), as well as the student's major (business versus non-business) and their class level on both our measure of DR and our measure of the student's perception of the mean level of PEBL across the set of IS scenarios presented.

In model 1 the effects of demographic variables on a respondent's tendency to deny responsibility for actions is examined. In addition, we include the dummy variable upper-division course (UDCourse) to measure the impact, if any, of ethics instruction received by students in the upper-division MIS course. We hypothesize that the DR level of older students will be lower than that of younger students and that female students will tend to have lower DR scores than males. The DR measure is designed to address deep attributes of personality. Arguably, these characteristics may be very difficult to address through ethics instruction at the college level. At the same time, the university experience, in a broad sense, should be expected to encourage students to take more responsibility for their actions which ought to reduce their DR scores. Given these contrasting arguments no hypothesis about the effect of the UDCourse variable is made, but the results for this coefficient will be of interest. The final independent variable in model 1 is BusMajor, which is a dummy variable set to 1 when a student is a business major or is planning to be a business major and set to 0 otherwise. All of the students in the upper-division course are business majors while the introductory level course is open to all majors and can be taken for liberal arts credit. We do not expect to find differences across majors here, but include this variable for completeness.

1. $DR = a + b_1 \text{ UDCourse} + b_2 \text{ Female} + b_3 \text{ Age} + b_4 \text{ BusMajor} + e$

Hypothesis 1: The DR level will decrease as age increases.
Hypothesis 2: The DR level will be lower for females than for males.

Models 2 and 3 both address determinants of a respondent's ethical judgments as reflected in the PEBL measure. They differ only in that model 3 includes the respondent's DR score as a control variable while model 2 does not. Once again BusMajor is included only for completeness and is not expected to have a significant effect. Based upon the literature that was reviewed, we expect the PEBL score to increase with age and to be significantly higher for female versus male respondents. In addition, we do hypothesize that the ethics instruction received by the students in the upper-division course will have an impact, so that, the coefficient for UDCourse will be positive and significant. Finally, in model 3, we expect that DR will be inversely related to PEBL. Respondents with a greater tendency to deny responsibility will also tend to be more lenient in their perceptions of ethical breaches.

It must be recognized that there is a potential bias when assessing the effects of ethics instruction since some students completing the freshman level introductory IS course will drop out prior to reaching the upper-division curriculum, and the likelihood of dropping out may be correlated with the target PEBL variable. Inclusion of the DR variable in model 3 should help to attenuate any such bias.

2. $PEBL = a + b_1 \text{ UDCourse} + b_2 \text{ Female} + b_3 \text{ Age} + b_4 \text{ BusMajor} + e$

3. $PEBL = a + b_1 \text{ UDCourse} + b_2 \text{ Female} + b_3 \text{ Age} + b_4 \text{ BusMajor} + b_5 \text{ DR} + e$

Hypothesis 3: The PEBL will increase as Age increases.
Hypothesis 4: The PEBL will be higher for Females students.
Hypothesis 5: The PEBL will be higher for UDCourse students.
Hypothesis 6: The PEBL will increases as the DR level decreases.

In order to more fully explore the interaction of gender with other explanatory variables, separate regression models for each gender will also be presented. Male and female respondents will be separated and a pair of equations generated for models 1 through 3 above, with the exception that the gender dummy variable will necessarily be removed. These models are exploratory in nature and focus on identifying differences in age and ethics instruction on male versus female students. Evidence from prior studies is much more limited here, but does suggest that males reach ethical maturity later than females. Thus, we hypothesize that DR level will decrease more rapidly with age for males than for females and that the PEBL will increase more rapidly with age among males than among females. Gender differences in the effects of ethics education (as measured by UDCourse) are also of obvious interest, but there is little basis to formulate a hypothesis with respect to cross-gender differences for this variable.

Hypothesis 7: DR level will decrease more sharply with age for male respondents.
Hypothesis 8: PEBL will increase more sharply with age for male respondents.

EMPIRICAL RESULTS

Table 1 presents results for model 1 whose dependent variable is DR. The adjusted R-Square value of just under .1 indicates that the explanatory power of this model is rather weak. However, hypotheses 1 and 2 are fully supported here. Female respondents are shown to be significantly less inclined to deny responsibility than males. Also, the tendency to deny responsibility does decline significantly with age suggesting that maturity in this dimension is not yet fully realized in this age group. The coefficient on UDCourse is negative in this model as would be consistent with ethics education reducing DR, but is not statistically significant. The BusMajor independent variable also is insignificant at the .05 level.

Table 1
Factors Affecting the Denial of Responsibility Index Score of Students

Explanatory Variable	Parameter Estimate
Intercept	2.9782*
	(.1311)
UDCourse	-.1003
	(.0649)
Female	-.2256*
	(.0489)
Age	.0158*
	(.0056)
BusMajor	0.0595
	(.0590)
Adjusted R-Square	*.0992*

NOTE: Mean Square error shown in parentheses below each parameter estimate.
* Indicates coefficient was significant at .05 level

Table 2 presents results for models 2 and 3 whose dependent variable is the respondent's evaluation of ethical breaches or PEBL. Recall that these models differ only by the inclusion of DR as an explanatory variable in model 3. The adjusted R-Square results in this table suggest that inclusion of the DR variable does substantially improve the explanatory power of the model. Hypotheses 3 through 5 are fully supported in both models. Female respondents are significantly less tolerant of ethical breaches than males. Also, students become significantly less tolerant of ethical breaches with increased age. Finally, and most encouragingly, students in the upper-division course who have had exposure to ethics instruction as a part of their university education are significantly less tolerant of ethical breaches than introductory students. Hypothesis 6 is also supported in the results for Model 3. The DR score does substantially and significantly affect PEBL with the expected inverse relationship. That is, respondents with a high tendency to deny responsibility tend to be more tolerant of IS related ethical breaches. Inclusion of DR as an explanatory variable does attenuate the magnitude of the coefficients for gender, age and class level, but all remain statistically significant.

Table 2
Factors Affecting Student IS Ethical Breach Assessments

MODEL	(2)	(3)
Explanatory	Parameter	Parameter
Variable	Estimate	Estimate
Intercept	3.6745*	5.9126*
	(.2198)	*(.3230)*
Course Level Jr.+	0.3508*	.2755*
	(.1088)	*(.0978)*
Female Gender	0.4257*	0.2562*
	(.0820)	*(.0759)*
Age	0.0317*	0.0199*
	(.0095)	*(.0088)*
Business Major	0.0598	0.1046
	(.0990)	*(.0888)*
Denial of Responsibility	-	-.7515*
Score		*(.0860)*
Adjusted R-Square	*.1678*	*.3328*

NOTE: Mean Square error shown in parentheses below each parameter estimate.
* Indicates coefficient was significant at .05 level

Tables 3 and 4 present results where each gender was treated separately. Rather striking is the very low explanatory power of models 1 and 2 for female respondents and the fact that only the intercept value is statistically significant for these models. The results for male respondents in Table 3 do indicate that their tendency to deny responsibility tends to decline with age. The difference between the coefficient on age for males and that for females also is statistically significant. Thus hypothesis 7 is confirmed.

Table 3
Factors Affecting the Denial of Responsibility Index Score of Students by Gender

GENDER	Female	Male
Explanatory Variable	Parameter Estimate	Parameter Estimate
Intercept	2.4582*	3.2182*
	-0.1973	*-0.1738*
Course Level Jr.+	-0.0436	-0.1277
	-0.0991	*-0.0861*
Age	-0.0066	-.0247*
	-0.0081	*-0.0079*
Business Major	-0.0011	0.1099
	-0.0873	*-0.0808*
Adjusted R-Square	-0.012	*0.0858*

NOTE: Mean Square error shown in parentheses below each parameter estimate.
* Indicates coefficient was significant at .05 level

Table 4 results indicate that male respondents' tolerance of ethical breaches declines significantly as age increases. The age coefficient is also positive for female students, but is not statistically significant in either model. However, the coefficient value is nearly the same for the two sexes under model 2, and the difference between the coefficients across genders is not significant in either model. Thus, Hypothesis 8 is not fully supported. We conclude that increased age reduces the tolerance of male students for ethical breaches, but that it cannot be shown to have affected the ethical perceptions of females. The coefficients for UD Course are also statistically significant for male respondents in both models and not statistically significant for females in either model. Once again, however, the differences between the two genders are not significant for this coefficient in either model 2 or model 3. We conclude that ethics education reduced the tolerance of male students toward ethical breaches, but it cannot be shown to have impacted female respondents. Finally, the primacy of the DR variable in explaining the ethical perceptions of female respondents is quite striking with the results suggesting that this variable explains the response of our female respondents to the exclusion of all other variables that were measured.

Table 4
Factors Affecting Student IS Ethical Breach Assessments

MODEL	(2)		(3)	
GENDER	Female	Male	Female	Male
Explanatory Variable	Parameter Estimate	Parameter Estimate	Parameter Estimate	Parameter Estimate
Intercept	4.5733*	3.2984*	6.4191*	5.6508*
	(.3238)	*(.2976)*	*(.4158)*	*(.4818)*
UD Course	0.2235	0.4307*	0.1908	0.3373*
	(.1626)	*(.1474)*	*(.1453)*	*(.1347)*
Age	0.0188	0.0199*	0.0138	.02581*
	(.0133)	*(.0088)*	*(.0119)*	*(.0126)*
Business Major	0.1343	0.0103	0.1334	.0906
	(.1432)	*(.1083)*	*(.1278)*	*(.1262)*
Denial of Responsibility	-	-	-.7509*	-.7310*
Score			*(.1216)*	*(1240)*
Adjusted R-Square	*.0481*	*.1589*	*.2421*	*.3077*
NOTE: Mean Square error shown in parentheses below each parameter estimate.* Indicates coefficient was significant at .05 level				

CONCLUSIONS

Two measures were used to evaluate the ethical framework for students making decisions relating to ethically questionable behavior. These were denial of responsibility (DR) and perceived ethical breach level (PEBL). DR was a measure similar to that used by Schwarz [1968] and Harrington [1996] to capture the existing ethical value system on which decisions were evaluated as developed from the students past experiences and environment. PEBL was a measure of ethical breaches perceived by the student when presented with different IS scenarios first used by Paradice [1990]. These two measures were inversely related as hypothesized. A student that denies responsibility, resulting in a high DR, will have a low PEBL representing permissiveness in identifying ethical breaches.

The respondents major had no impact on either the DR or PEBL. Business majors had perceptions of ethics scenarios that were similar to those of other majors.

Gender was shown to have a significant effect on DR and ethical decision making at the age levels of the students in the sample. Findings support the case that females are more sensitive to ethical breaches than males and have less tolerance to questionable ethical situations as well as a lower DR. This result for the ethics perceptions is in line with the findings of Kreie and Cronan [1998], Chen and Teng [2006], and Cronan, Leonard, and Kreie [2005].

As the age of a student increases they become less tolerant of ethical violations, and this difference is statistically significant for the ages in the sample which were predominantly 18 to 22. As age increases the PEBL increases, representing less tolerance to questionable ethics situations. This agrees with the findings of Prior, Rogerson and Fairweather [2002] and Gattiker and Kelly [1999], although these studies had a sample of working professionals with much older participants.

When applying the models to male and female data separately, age changes for females were insignificant, but were significant for males, indicating that male perceptions of ethical values were becoming less tolerant and their tendency to deny responsibility for action was reduced during their college years. Male ethical value systems evolved or at least the ability to perceive ethics breaches increased over this time.

The effects of ethics instruction at the university appear to be significant. The effect of the variable UDCcourse, which places the student as a junior or senior in the MIS course, was significant, indicating that ethics coverage in the curriculum has a positive effect making the student more critical to ethical breaches. When splitting the data between male and female, the ethics training had a significant effect on ethics perceptions only for males. This would suggest that females already have achieved greater ethical responsibility or sensitivity and training has a smaller impact, however the male students benefit from the education, either by developing their ethical value systems or at least being trained to recognize ethical situations in business.

The gender differentials that were found in this study must be interpreted cautiously, since the differences between the coefficients for males and females were not statistically significant in most cases. However, these differences do suggest areas for further research, such as, over what age ranges do differences in response by gender exist and do males and females respond differently to different forms of ethics instruction.

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APPENDIX A:
SURVEY QUESTIONS FOR THE DENIAL OF REPONSIBILITY INDEX

You can't blame basically good people who are forced by circumstances to do something harmful to others

Being upset or preoccupied does not excuse a person for doing anything he or she would normally avoid.*

Having authorization from a parent, boss, or instructor does not excuse you for behavior that you would normally consider inappropriate.*

A person can't really be blamed for going along with the group when a group of friends gets a little out of hand in their behavior.

It is important to treat everyone fairly, even if they are rude and unpleasant toward you.*

It is important to obey traffic laws even if there is no one else on the road that will be affected by your actions.*

It is okay to keep an item that you have found if it is of small value and it would be hard to find the owner.

Once rules have been defined and agreed to, they should be followed even if violating them would not harm any of the people involved.*

It is wrong to use someone else's property without their permission even if you are careful to ensure that their property is unharmed by your use.*

A person really shouldn't be blamed for violating an agreement if their action does not harm the other party.

NOTE: Respondents indicate whether they: Strongly Agree, Agree, Neither Agree nor Disagree, Disagree, or Strongly Disagree with each statement. Results were recorded as values 1 through 5 with 5 corresponding to Strongly Disagree for the starred questions and 5 corresponding to Strongly Agree for the non-starred questions.

APPENDIX B:
ETHICAL BREACH SCENARIOS PRESENTED

A student legally obtained a copy of a popular word processing software package at a very low, educational price. The software license agreement allowed use "for educational purposes only" and required the student to remove the software from her computer once she was no longer a student. She kept the word processing software on her computer after graduation and used it for personal correspondence and job search activities. Her Behavior was:

A student legally obtained a copy of a popular word processing software package at a very low, educational price. The software license agreement allowed use "for educational purposes only" and required the student to remove the software from her computer once she was no longer a student. She kept the word processing software on her computer after graduation and used it in support of a for-profit business services company that she developed. Her behavior was:

A computer hacker develops a set of programs that allow her to find vulnerable computers on the internet and install "bots" on them. These bots allow her to control each infected computer. Her bots cause no damage to the infected systems and never operate when there ar not idle resources. She uses these bots to take over the infected PCs when they are not in use and use these computing resources to help her calculate the value of PI to 8 billion decimal places. Her behavior is:

A computer hacker develops a set of programs that allow her to find vulnerable computers on the internet and install "bots" on them. These bots allow her to control each infected computer. Her bots cause no damage to the infected systems and never operate when there ar not idle resources. Because she has received poor service from an online business named XYZCo, she uses these bots to interfere with XYZCo's web site for several hours by flooding it with messages. Her behavior is:

Susan develops a software tool that can be used to diagnose security risks on a computer network, but can also be used to hack into and damage systems that are not well protected. She advertises this software tool through a magazine for network administrators, but makes no other effort to ensure that purchasers of her software are network administrators and not hackers. Susan's behavior in selling this software tool in this way is:

Susan develops a software tool that can be used to diagnose security risks on a computer network, but can also be used to hack into and damage systems that are not well protected. She calls this software tool Hack Attack 2100 and offers it for sale through a leading web site for hackers. Susan's behavior in selling this software tool in this way is:

A friend of Andy's has a legal copy of a graphics software package that Andy likes very much but cannot afford to purchase. The friend allows Andy to make an illegal copy of this software. Andy uses the software for his own pleasure and occasionally use it complete school assignments. Andy's behavior is:

A friend of Andy's has a legal copy of a graphics software package that Andy likes very much. The friend allows Andy to make an illegal copy of this software. Andy uses the software to create graphic images that he sells through an on-line marketplace. Andy's behavior is:

A student suspected and found a loophole in the university computer's security system that allowed him to access other students' records. As soon as he had accessed enough records to be sure that he had found a serious security breach, he told the system administrator about the loophole and did not access any further records. His actions in searching for the loophole were:

A student suspected and found a loophole in the university computer's security system that allowed him to access other students' records. He did not tell the system administrator about the loophole, but continued to browse the private records of his classmates for his own entertainment. His actions were:

NOTE: Respondents indicate whether the actors behavior is: Very Ethical, Ethical, Somewhat Ethical, Questionable, Somewhat unethical, Unethical, and Highly Unethical in each scenario. Results were recorded as values 1 through 7 with 7 corresponding to Highly Unethical.

FLSA AND THE MINIMUM WAGE: EMPLOYEE FRIEND OR FOE

Laura Sullivan, Sam Houston State University
Tommy j. Robertson, Sam Houston State University
Diana B. Brown, Thompson, Coe, Cousins, & Irons

ABSTRACT

While the FLSA and the minimum wage requirements it brings may have been passed with the best of intentions, many minimum wage workers are learning these requirements may be an additional barrier to finding or maintaining employment.

This paper takes a look at the unintended consequences of the FLSA requirements regarding minimum wage workers and how companies struggling to survive in our failing economy are being forced to show these employees the door.

INTRODUCTION TO FLSA

The Fair Labor Standards Act ("FLSA" or "The Act), which is referred to as the "wage and hour law," establishes the federal minimum wage and hour standards for covered employees (29 U.S.C. § 201 et seq). The FLSA requires that employers pay employees at least the hourly minimum wage, which is currently $7.25 per hour (The Wall Street Journal, 2009). In addition to minimum wage standards The Act addresses several other employment issues such as overtime pay of one-and-one-half the rate of regular pay for hours worked in excess of 40 hours in a workweek (29 U.S.C.). Most jobs are governed by the FLSA, but some are not. In addition to jobs specifically excluded by the FLSA, such as many agricultural employees, there are many jobs covered by other specific labor laws such as railway workers being covered by the Railway Labor Act and truck drivers being covered by the Motor Carriers Act (29 U.S.C. § 213(a) (6)).

Although the FLSA was put in place to help workers, the protections it attempts to provide are limited and flawed. In addition to the large number of employees not covered by the FLSA an employee that the FLSA classifies as "exempt" has virtually no rights at all under the FLSA overtime rules. About all that an exempt employee is entitled to under the FLSA is to receive the full amount of base salary for any work period during which the employee performs "any" work. Nothing in the FLSA prohibits an employer from requiring an exempt employee from clocking in and out or to work a particular schedule or to make up time lost to absences. The FLSA also does not limit the amount of work time an employer may require or expect from an employee on any schedule. In addition the coverage of the FLSA can be confusing to workers and employers alike. This statute, however, is the subject of a voluminous amount of litigation, including large class-action lawsuits. Needless to say, these lawsuits are costly to businesses. It is vitally important for employers to grasp the rules provided by the FLSA and to correctly classify its employees when these classifications are not easy or intuitive. Many employers are finding that having a good human resources professional and/or inside or outside counsel versed in the FLSA is an expense worth having in the long run.

According to the U.S. Department of Labor, "All employees of certain enterprises having workers engaged in interstate commerce, producing goods for interstate commerce, or handling, selling, or otherwise working on goods or materials that have been moved in or produced for such commerce by any person are covered by FLSA." (Vance, 2006). Despite this the FLSA is not all-inclusive and does still permit employers and employees to negotiate when it comes to many elements of their employment agreement. The FLSA does not regulate time off for vacations, holidays, or breaks for meals (Vance, 2006). The Act also does not control sick pay, extra pay for holidays and weekends, pay raises or benefits (Vance, 2006). The Act does not even attempt to regulate how many hours a day or days a week an employer can require his employees to work, yet for some reason Congress has decided through the act to set an artificial floor on the value of labor (Vance, 2006).

Although the FLSA addresses additional issues such as overtime pay, its key function is to control the minimum wage. The Act has been amended several times to increase the minimum wage with the most recent changes passing in 2007 when the federal minimum wage stood at $5.15 (Filion, 2009). The 2007 amendments provided for a three-tiered increase in the minimum wage with the final bump raising the minimum rate from $6.55 to $7.25 per hour on July 24, 2009 (Filion, 2009). While these amendments were proposed in an effort to aid workers on the lower rungs of the employment ladder, the timing could not have been worse for business or employees. The new minimum wage provided workers with an additional $1.6 billion in annual wages with the cost being absorbed by their employers (Filion, 2009). In the months following the implementation of the new minimum wage the United States would slip into a recession not seen since the big one, and many of the workers who found themselves enjoying a higher wage have since been laid off by businesses struggling to survive.

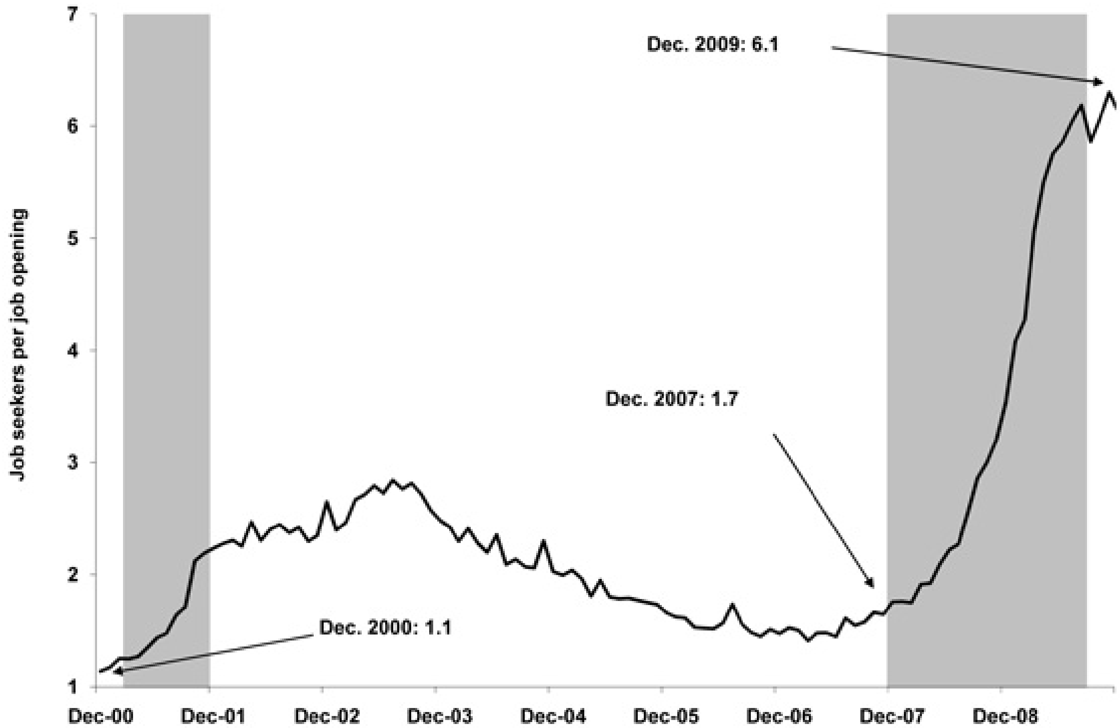
Even as they were being passed there was a great deal of controversy over the new minimum wage standards. At the time of passage supporters argued that it would boost consumer spending (Green & Siegel, 2009). The Economic Policy Institute in Washington, D.C. indicated that the increase would actually stimulate the economy due to the increased spending by those making the higher minimum wage (Bartlett, 2009). The industry argued that raising the minimum wage was certain to put money in the pockets of those who would turn around and spend it (Irvin, 2009). Many felt it was important to raise the minimum wage in order to improve the overall lives of poor workers (Garfield, 1996). Unfortunately these supporters of the wage increase failed to anticipate that in the current economy there would be lower spending by many of these same individuals who received a boost in July of 2009 due to unemployment (Bartlett, 2009). Additionally employees at all levels are holding on to their money rather than spending as they wait to see whether or not the recession will get worse (Casey, 2009). Critics argued that the increase would harm businesses (Neumark, 2009). Some argued that the increase could cost as many as 300,000 jobs (The Wall Street Journal, 2009). Many others pointed out the importance of the entry level jobs and observed that the loss of these jobs would have a negative impact on the development of a good work ethic in young workers (Irvin, 2009).

When the final incremental increase took place in July of 2009 the nation was already deep in the midst of a crisis with the national unemployment rate hovering at 9.5% (Bartlett, 2009). Regardless of the arguments made before the passage of the minimum wage amendments, times have changed drastically. Many argue that America is on the edge of a precipice, and if we fail to act swiftly and decisively we could fail as a country. While our President and Congress struggle to gain a foothold in this sliding economy recent efforts to correct our unemployment woes have focused on government spending programs. The facts are that these programs have so far proven to be ineffective, and the current deficit will limit any truly meaningful legislation.

It would be difficult to contemplate a worse environment for a raise in the minimum wage. Before the current recession began in 2007 there was an average of 4.6 million job openings, but at the end of 2009 there were only 2.5 million for a reduction of almost 50% of the available jobs in just two years (Mishel, 2010). The overall unemployment rate is over 10% and is the highest it has been since 1983 (Fairchild, 2009). The September 2009 unemployment rate for teens was the highest it has been since World War II (The Wall Street Journal, 2009). Proportionally more teens have lost jobs in this recession than were lost in the entire country during the Great Depression (Maas, 2010).

Businesses have seen their costs rise and are struggling to cut their overhead. Unfortunately a frequent target of these cuts is the cost of labor. Additionally many businesses believe their employees deserve more than the minimum wage, but they cannot afford to pay them the higher rate without raising prices – which puts them at a disadvantage when competing for limited consumer dollars (Bartlett, 2009). Salaried workers across the nation have accepted pay cuts in an effort to help businesses avoid layoffs (Franks, 2009). When adjusted for inflation pay for production and other workers not in a supervisory position is 9% lower than it was in 1973 (Coy, Conlin, & Herbst, 2010). Due to the minimum wage requirements workers at the minimum wage level do not have this option. Since these businesses are prohibited from cutting wages at this level of employment often there is no other choice than reducing the number of employees. Despite the passage of the $787 Economic Stimulus Plan there has been no significant improvement in the U.S. jobs situation (EconomicCrisis.US, 2010).

On February 9, 2010, the Bureau of Labor Statistics released a report indicating there were almost 13 million more unemployed workers than job openings, or over 6 unemployed or underemployed Americans for each available job (Mishel, 2010).



Note: Shaded areas denote recessions

Source: Author's analysis of data from the Job Openings and Labor Turnover Survey and the Current Population Survey

There are almost 15 million unemployed Americans and 2.5 million underemployed who want to work but have given up looking (Mishel, 2010). Americans are desperate for jobs. Higher skilled workers are forced to take lower paying jobs, and a growing number of workers are willing to work long stints at unpaid internships to try to get a break (Eaton, 2010). Although the Department of Labor has recently adopted very strict rules that make many of these internships illegal, due to current economic conditions both businesses and interns are willing to take the risk (Marte, 2010).

Those struggling to find work are willing to risk more than a disagreement with the department of Labor. Despite fighting two wars 2009 marked the best recruiting year for the military services since 1973 (New York Times, 2009). Not only did the military meet all recruiting and retention goals they were able to fill the service ranks with individuals generally better educated than those in years past (New York Times, 2009). Bill Carr, the Pentagon's personnel chief, attributed these successes in part to the fact that there is a shortage of civilian jobs due to the current economic crisis (New York Times, 2009).

Although workers are certainly hurting, businesses are not immune. Already concerned about the economy business owners are having to shoulder the uncertainty about what looms on the horizon as relates to healthcare and the new costs employers will be likely be expected to cover (Posner, 2009). Even if business were willing to borrow banks are reluctant to lend and have adopted much tighter credit standards (Posner, 2009). With banks reluctant to lend and business reluctant to take on debt economic activity has continued to slow (Posner, 2009). In January 2010 an additional 486 mass layoff events, or job cuts involving at least 50 workers from a single employer, cost over 182,000 workers their jobs (Reuters, 2010). Since December 2007 the U.S. economy has lost 8.4 million jobs (Reuters, 2010).

Some economists believe that the U.S. is in a situation where employment cannot recover in the current environment because it is feeding on itself (Posner, 2009). As workers lose their jobs credit defaults increased, causing banks to tighten their lending standards which causes more workers to be laid off which caused more defaults (Posner, 2009). This cycle causes businesses, especially small business to suffer, and when small businesses suffer, unemployment will undoubtedly increase (Posner, 2009). The minimum wage is exacerbating this problem in part because it has priced unskilled workers out of the market, and businesses are being forced to do with fewer overall employees (Vance, 2006). There is something that can be done that will have an immediate impact on the number of available jobs. The time has come to abolish the minimum wage.

THE MINIMUM WAGE COSTS JOBS AND SHOULD BE ABOLISHED

The overwhelming majority of economists agree that the FLSA's minimum wage requirements cost the economy thousands of jobs (Messerli, 2009). Economists for the Federal Reserve reviewed over 100 academic studies on the impact of the minimum wage and found overwhelming evidence that lower skilled and young workers have increased rates of unemployment when there is a higher minimum wage (The Wall Street Journal, 2009). The current job market coupled with a federal minimum wage hurts workers at all ends of the salary spectrum. Experienced workers further up the pay scale cannot be hired because employers are required to pay more than the value workers at the lower end add to the business, but young and lower skilled workers are hurt in several ways. As we have seen many of these younger workers are laid off as their employer finds that the employee's labor is not worth the required wage, but additionally employers are filling these jobs with higher skilled labor (Garfield, 1996). Employers have been able to find these higher skilled workers willing to work for lower wages due to the larger labor market created when these workers were forced from their previous employment (Garfield, 1996). It is a vicious cycle, and despite arguments that workers won't work for less, competition for these lower compensated a jobs is stiff. As we have seen from statistics on military recruiting, workers are quite literally willing to put their life on the line for a job.

Perhaps one of the intriguing aspects of minimum wage laws is why people feel they are needed in the first place. The federal minimum wage can safely be abolished since there are far more effective programs currently in existence. One of the more effective is the Earned Income

Tax Credit or EITC. The EITC allows workers at the bottom end of the pay scale to earn tax credits which can be refunded directly to the worker (Bartlett, 2009). In 2006 the EITC allowed these workers to recover $39 billion dollars (Bartlett, 2009). Currently a worker earning just $12,570 with two children can receive a credit of $5,028 (Bartlett, 2009). The maximum income for a worker with two children to qualify for the program is just over $40,000 (Bartlett, 2009). The EITC currently raises the income of qualifying workers somewhere between 34% and 45% and the hourly income for a worker at minimum wage is increased around $3.37 (Bartlett, 2009). Research indicates that the EITC is much more effective at targeting aid to those at the bottom of the income scale who truly need assistance (PBS, 1996). The effectiveness of the EITC has not been lost on the President of the United States. President Obama has promised to triple its benefits to those who currently earn the minimum wage (The Washington Times, 2008).

Before the amendments to the FLSA increased the minimum wage and greatly increased the scope of coverage overall unemployment rates for teenagers was less than 10% and for black teenage males the rate was lower than that for white teenage males (Bartlett, 2009). By the time the final minimum wage increase took place in 2009 employees had received what amounts to a 40% increase over the $5.25 minimum wage which was in place when the three tiered increases began (Posner, 2009). As soon as the increases took place in July the numbers began to confirm that jobs, specifically those minimum wage jobs held primarily by teenagers began to disappear (The Wall Street Journal, 2009). By September of 2009 the overall unemployment rate for teens had climbed to 25.9% with over 330,000 jobs disappearing between July and September (The Wall Street Journal, 2009). By then the unemployment rate for white teenage males was 26.5%, and the rate for black teenage males had climbed to 50% (Bartlett, 2009). In July the unemployment rate had been 39.2% (The Wall Street Journal, 2009). Labor is not exempt from the basic concept of supply and demand, and most experts believe that it reacts to market forces no differently than other commodities (PBS, 1996). These experts also believe that as with these other commodities it is best to leave labor to adjust with the market free from government interference (PBS, 1996). As the wage for any particular job rises fewer employers are willing to pay that wage, so the supply of available workers (the unemployed) goes up. As that wage goes down many more employers can justify that expense so more people are hired and the available labor goes down.

Critics and proponents of the minimum wage agree that employees cannot support a family with a single job paying the minimum wage (Messerli, 2009). Luckily few even are forced to try. In 2008 just over 1% of Americans working full time (at least 40 hours a week) earned the minimum wage (The Wall Street Journal, 2009). Minimum wage workers are mostly young people (Bartlett, 2009). Statistics say that two–thirds of the workers making the minimum wage are teenagers, with more than 50% being younger than 24, only 25% of minimum wage workers are married, and almost 60% are only part-time workers (Bartlett, 2009). Many supporters of the minimum wage argue that abolishing the minimum wage would allow teenagers to take jobs from heads of households. It is particularly interesting that 80% of minimum wage workers are women, and many if not most have working husbands, so their earnings are only a portion of the family income or standard of living (Bartlett, 2009). As we can see minimum wage earners for the most part are not people trying to support themselves or families on this wage, and experts argue that for these limited cases targeted assistance, such as the EITC, would be more effective and efficient than a mandatory minimum wage (Bartlett, 2009).

When profits begin to fall a business must rely on some combination of increased productivity, reduced expenses, or raising prices (Vance, 2006). In our current recession the availability of available consumer dollars has dried up. As we have seen millions are unemployed, and the uncertain economic future has caused those with jobs to hold on to the money they have (Vance, 2006). That leaves struggling business with the choices of lowering costs or increasing productivity. Unfortunately either option will cost employees their jobs.

Many large companies will be able to shift priorities and weather a lengthy recession, but this is not always true for small businesses. While many are quick to dismiss smaller businesses, they make up 99.7 percent of all businesses, and employ over half of all workers in the private sector (SBA Office of Advocacy, 2009). In 2006 over 21 million workers were employed at a business with less than 20 employees. The increase in the minimum wage has caused many of these small businesses to raise their prices just to cover costs (Messerli, 2009). Eventually prices get so high that consumers, already holding tightly to their money, finally decide that the higher prices cannot be justified and the small business is forced to close (Messerli, 2009). It is hard to estimate just how many small businesses have been forced to go out of business during the current recession, but defaults on Small Business Administration Loans which were at 2.4% in 2004 were up to 12% in 2008 (Shane, 2009). If a business were to post a help wanted ad promising to pay $100 per hour many, many people would apply, whereas if you only offered $1 per hour very few, if any, people would apply. Additionally if an employer were forced to pay a minimum of $7 per hour, the employer may decide that the janitor position is not worth $7 per hour to the business, and would instead choose to have the other staff cover those janitorial duties and at that point at least one job would have been lost to that $7 minimum wage (Messerli, 2009). These examples can be seen throughout businesses around the country. At $4 per hour a restaurant may hire a couple of busboys, at $7 per hour for busboys waitresses may be bussing the tables in addition to their other duties and at least two would-be busboys are looking for employment elsewhere (Messerli, 2009). The tuna workers had reason to worry since they compete with other countries whose workers are paid far less. Tuna workers in Thailand for example are paid the equivalent of $0.60 per hour (Maas, 2010).

One fundamental way to increase demand for any product or service is to reduce the price. A fall in price would allow the labor market to equalize until demand for labor, and unemployment, fall back to normal levels (Posner, 2009). Another way to reduce unemployment is to reduce its cost to employers (Posner, 2009). Abolishing the minimum wage accomplishes both of these goals immediately. In addition to laying off workers, employers' minimum wages set above the value of labor provide incentives for business to move to automation or self service at the cost of even more jobs (Schiff, 2010). Manufacturing jobs should help with job recovery. In the current economic climate these manufacturers have decided it will be cheaper in the long run to automate tasks normally performed by low skill workers (Messerli, 2009). The increased minimum wage has made these upfront expenses seem much more worthwhile to industries that rely heavily on low wage labor(Messerli, 2009). We are all familiar with self service stations and automated phone answering services; these are functions that were once performed by employees (Blair, undated). You might also remember shoeshine stands. You may see them occasionally, but they are not as prevalent as they once were. Have people stopped shining shoes? Certainly not, but this function has been replaced by mechanized buffers or some other “do it yourself” alternative (Blair, undated). Some of the largest consumers of minimum wage labor have begun to heavily pursue automation in cost cutting efforts. McDonalds, a major employer of workers at the lower end of the scale, has recently begun to redesign and automate its restaurants in part to reduce the demand for employees (Irvin, 2009). Wal-Mart continues to add automated checkout lanes to its stores negating the need for many checkers (Messerli, 2009).

The minimum wage requirements under the FLSA interfere with the natural ebb and flow of the law of supply and demand. Economists agree that the most significant impact of the recent increases in the minimum wage is that it destroyed jobs (The Wall Street Journal, 2009). One shining example of the impacts has recently devastated the economy of American Samoa. In the past tuna canners Starkist and Chicken of the Sea had enjoyed a mutually beneficial employment relationship with workers in Samoa. Workers were paid a meager \$3.76 per hour (Maas, 2010). Although this was significantly less than the federal minimum wage, when it was coupled with the low cost of living on the island the wages were sufficient to provide the tuna workers with a standard of living above those of their neighbors (Schiff, 2010). Since the workers were not covered by the minimum wage the Labor Department would engage in an extensive economic study of conditions on the island and set wage rates every two years (Furchtgott-Roth, 2009). When the most recent amendments to the federal minimum wage included the Samoan tuna workers the Samoan member of the U.S House of Representatives asked for an exception for the islands arguing that the law would destroy the islands tuna industry (Schiff, 2010). The representative argued that raising the minimum wage would raise costs above the level at which the canneries could profit and the canneries would leave the islands (Schiff, 2010). Research by the Department of labor indicated that closure of the tuna canneries would cause the loss of 45.6% of the islands’ total employment (Schiff, 2010).

Although congress received warnings from multiple independent sources Samoa was included in the increase in the minimum wage (Schiff, 2010). In September 2009 Chicken of the Sea closed its plant and moved it to Georgia, but not on a job for job basis. As part of the move Chicken of the Sea replaced the labor intensive plans in Samoa with a more automated plant in Georgia requiring fewer employees (Schiff, 2010). Since the first tuna company left, things have continued to deteriorate on the island. Starkist has laid off employees and is now threatening to follow its rival in leaving the island entirely (Schiff, 2010). In addition to the jobs lost at the canneries the economy will also suffer from a domino effect where jobs relying on those displaced workers and their tuna canning incomes will begin to fail, and jobs dependant on those will fail, and so on.

What happened in Samoa is happening on the mainland as well. Politicians have decided it is better to have workers unemployed at $7.25 per hour than to have them working at a lower wage established by the market.

ARGUMENTS AGAINST ABOLISHING THE MINIMUM WAGE

Critics of this proposal may say that abolishing the minimum wage is too harsh – that there are less drastic options. Many have suggested that we pay workers to hire employees by giving these employers a tax credits (Posner, 2009). Unfortunately as a country we are already dealing with previously unimaginable deficits, and the reality is that at some point we as a nation have to stop spending. Among its various goals the recent stimulus bill spent approximately $1.5 billion dollars in programs to promote employment programs for young workers as well as job training, yet as we have seen unemployment continues to rise (The Wall Street Journal, 2009). We simply cannot afford to buy jobs.

Abolishing the minimum wage doesn't mean companies can pay whatever they want and still find people to work at that price. Why don’t attorneys make minimum wage? Because lawyers will not work for the minimum wage and the market determines what they will earn. What would happen to new associates if the government mandated a minimum wage of $200 per hour for anyone with a law license? Would more lawyers be employed or would fewer lawyers be employed? Common sense tells us that many firms would decide they could live with fewer attorneys, and there is no reason for us to put workers at the lower end of the pay scale at that disadvantage (Messerli, 2009). Even the most desperate workers are unlikely to work a dishwashing job that paid 25 cents per hour. If the employer raised the wage to $6 per hour, they might be able to hire someone. Eventually wages would find their balance, and we should let them.

If raising the minimum wage truly helps the employees paid at that level without harming business why do we only pay $7.25 per hour? Why not raise it to $15 or $30 per hour. Why did we not adopt the $12.50 per hour minimum wage propped by the Green Party as early as the 2000 elections (Vance, 2006)? When the minimum wage goes up, the number of people unemployed goes up. Abolishing the minimum wage would make the numbers for those unemployed go down. The minimum wage only applies to those who can actually maintain their jobs. There is nothing moral about taking a worker who was employed at $6.00 per hour and making them unemployed at $7.25 per hour.

WHO SUPPORTS A FEDERAL MINIMUM WAGE

In light of all of the evidence that the minimum wage costs jobs in good times, much less in our struggling economy, where does this policy draw its support? Although the vast majority of the current research suggests that unemployment increases along with the minimum wage, there are some studies that dispute these findings. Many supporters of a minimum wage often rely on a study performed by David Card and Alan Kruger of Princeton University (PBS, 1996). This study indicated that when the state of New Jersey raised the minimum wage in 1992 fast food restaurants added jobs (PBS, 1996). Since the study was completed researchers as well as the Federal Reserve Board have been quick to point out serious flaws in the methodologies used (PBS, 1996). Critics point out that the study relied heavily on information provided by telephone surveys, and subsequent evaluations using more reliable methods including payroll data have found that New Jersey actually lost jobs with the wage increase (PBS, 1996). Despite the fact this research has been thoroughly discredited supporters of the minimum wage continue to rely on the study by Card and Krueger (Garfield, 1996). Additionally supporters like to cite research showing that 80% of Americans support a higher minimum wage, yet they fail to report that in that same study on 46% indicated they would support a higher minimum if it cost Americans jobs (Garfield, 1996). Interestingly enough, despite its flaws the Princeton study itself indicates that the minimum wage does not adequately target those that need help the most. The research by Card and Krueger found that of the jobs added according to their study 37.4% were in families in the top half of the income distribution (PBS, 1996).

There are those that say it is morally wrong to force someone to live and support a family on such a small amount (Dreier & Candaele, 2004). It is true that someone working a 40 hour week for the minimum wage of $7.25 would only make about $1200 and month and rent in an area with a high cost of living could take most of that. It is easy to see how someone might question how someone could make a living on less than the current minimum wage. The truth is that statistics show that almost no one lives on the minimum wage. Out of a total workforce of about 155 million only 95,000 people worked at a full time job for minimum wage in 2008 (Bartlett, 2009). Additionally the minimum wage is supported by those on the next few rungs of the employment ladder, those who make just above minimum wage, who hope their employers will give keep them at a higher wage as well to distinguish them from the minimum wage workers (Bartlett, 2009). Unions ware also big supporters of a high minimum wage even though their members all make well above the minimum wage in part because it discourages efforts to de-unionize (Bartlett, 2009). A large business that operates in several states my favor a higher federal minimum wage since some states have a minimum wage requirement higher than that of the FLSA (Bartlett, 2009). These businesses are at a disadvantage when they compete against others who are bound by a lower federal minimum wage, so if they support a higher federal minimum wage to negate that disadvantage (Bartlett, 2009).

Perhaps the best reason to abolish the minimum wage is the knowledge that Wal-Mart supported the last increase. It might seem strange that a discount provider like Wal-Mart would support higher wages, but to begin understanding it is important to note that Wal-Mart typically pays higher than the federal minimum wage (Rockwell, 2005). Pushing a higher minimum wage harms Wal-Mart's competition. One of the ways companies can compete with giants like Wal-Mart who are able to reduce costs through the economies of scale, is to pay lower wages. If Wal-Mart can push lawmakers to remove this option, many of those businesses would be forced to close their doors (Rockwell, 2005).

ADDITIONAL REPERCUSSIONS OF MINIMUM WAGE LAWS

Certainly this action is not a cure all for our nation's high unemployment. In fact it may not have any immediate impact in at least ten states with a minimum wage requirement higher than the required federal rate (The Wall Street Journal, 2009). It is however a positive move forward and workers need assistance now. Though many have lost their jobs and many more fear that they may, this is not the only negative result of the minimum wage. Prior to the current recession workers were already feeling the effects of automation, reduced benefits and jobs being moved overseas – all situations which have been accelerated in the current economy (Coy, Conlin & Herbst, 2010). In addition to layoffs employers are trying to cut all fixed costs (Coy, Conlin & Herbst, 2010). One of the only areas of growth in employment is that of temporary workers (Coy, Conlin & Herbst, 2010).

Studies also show that with a minimum wage increase can come a reduction in benefits (McKenzie, 2007). Workers may have a few more dollars in their pockets, but at a cost many would rather not pay. Workers who have managed to keep their jobs have been forced to deal with reductions in pay and hours worked (Attard, 2009). The move towards a temporary work force made of independent workers with no benefits is gaining momentum as employers discover this may be an effective way to have a temporary, quickly disposable workforce. In order to get a true understanding of the current status of our job market in addition to the numbers for unemployment one must consider the numbers who are underemployed or those workers who do not have as much work as they would like (Price, 2009). This group includes those Americans who have had to accept part time work as well as those who have become frustrated and stopped looking or work all together (Price, 2009). As of January 2010 the percentage of individuals unemployed or underemployed was 17 percent (Economiccrisis.us, 2010). Almost one in 5 Americans cannot find a full time job.

Mandatory minimum wages encourages businesses to seek cheaper labor options. Americans have long struggled with outsourcing jobs to foreign workers in an effort to cut costs (Messerli, 2009). A minimum wage makes it tougher on struggling businesses and provides incentives for them to outsource labor to foreign workers (Messerli, 2009). Some companies we think of as uniquely American are already big advocates of moving jobs overseas. At the end of

2008 71% of IBM's workforce was outside of the United States (Coy, Conlin & Herbst, 2010). Between 2001 and 2008 2.4 million American jobs have been sent to China alone (Haimowitz, 2010). The best way to keep jobs in America is to provide an environment where companies can make a profit. Abolishing the minimum wage would help.

Unfortunately one lost job can be the beginning of a chain reaction. When tuna canners began to abandon Samoa, jobs that relied on the tune workers and their incomes also failed (Furchtgott-Roth, 2009). When workers lose their jobs or have their hours and benefits cut disposable income dries up the impact is felt by the grocery stores, markets, and stores that serve these workers. When a business closes the companies that provide supplies and services to those businesses suffer as well. This cycle can be stopped, or at a minimum slowed, by creating jobs through the abolishment of the minimum wage.

Research indicates that increasing the minimum wage limits the availability of some individuals to get off of Welfare. Researchers for the Institute for Research on Poverty found that increasing the minimum wage keeps mothers on welfare 44% longer than in areas where it was not raised (Garfield, 1996). Having a job gives people hope, and when denied this opportunity many decide it is easier to just stop looking that to face the repeated rejections.

BENEFITS OF NO MINIMUM WAGE

It is imperative that in this time of recession we place priority on saving existing jobs and creating new jobs rather than on maintaining pay raises for those who need it least. Perhaps there are other options down the road. Lawmakers should look at reinstitution of programs similar to the Civil Works Administration project, employing the unemployed and rebuilding America's infrastructure at the same time (Maas, 2010). Tax cuts and other programs may take some time before they raise investments and jobs. In light of our current economy we must act quickly and decisively. Abolishing the minimum wage is a great start on the road to recovery. While the amount of layoffs has slowed the more immediate issue is a lack of job creation, and a reduction in the minimum wage would make it more affordable for employers to hire additional employees (Posner, 2009). We have already seen that few heads of households hold these minimum wage jobs. Many people are willing to take these jobs for less than minimum wage for a variety of reasons including that they are a second source of income for the family, or they provide an opportunity for experience that will allow the individual to advance in their career (Messerli, 2009). Additionally, two out of every three minimum wage workers gets a raise within the first year on the job (The Wall Street Journal,2009).

The minimum wage limits the opportunities of teenagers, college students, interns, part-time workers and new employees needing training to advance (Messerli, 2009). Over 95 percent of minimum wage jobs are taken by this group of employees (Messerli, 2009). If as a society we are unable to answer the call and abolish the minimum wage, at a minimum a "starter wage" or separate rate for teenage workers should be created to pay young workers $4 to $5 dollars (The

Wall Street Journal, 2009). Although this option does not free up the same amount of business resources we would see by abolishing the minimum wage it would free up a small amount of capital while providing additional entry level opportunities for young workers to have a positive start to their careers. Research indicating unemployment increases with an increased minimum wage has also shown that the negative consequences can be minimized by having a teen starter wage well below the federal minimum (The Wall Street Journal, 2009). Some might argue this would encourage employers to hire teenagers at this lower wage rather than hire heads of households at the federal minimum, but we have already seen that there are few heads of households that work for minimum wage.

Having a paying job when you are young can prove to be invaluable to someone's future. It teaches young workers values and instills a good work ethic that will benefit them throughout their careers (Messerli, 2009). Repeated studies have shown how teenage employment leads to long-term benefits (The Wall Street Journal, 2009). A study by Stanford indicates that even after teen years of employment individuals who do not work as teenagers have lower long term wages and have a lower rate of employability that those who do work as teens (The Wall Street Journal, 2009). In the current economy the 2009 minimum wage increases have had a catastrophic effect on these starter jobs. By abolishing the minimum wage we would maximize the percentage of our young citizens learning values and work ethic through jobs at the lower end of the pay scale as well as freeing up funds in a business to employ higher paid workers the business cannot currently afford to employ (Messerli, 2009).

CONCLUSION

President Obama has threatened to raise the minimum wage to as high as \$9.50. Statistics show that this would destroy businesses and kill jobs. Employers who are not making a profit do not hire employees (Furchtgott-Roth, 2009). As economist Murray Rothbard reminds us the minimum wage does not create any jobs, what it does is outlaw jobs whose value is less than the federal minimum (Vance, 2006). Prior to the latest increases in the federal minimum wage there were a significant number of workers earning less than the current minimum of \$7.25 per hour. Now that these workers are no longer free to contract with employers for their compensation many of them are unemployed. Additionally because many companies are labor intensive and are forced to hire large numbers of workers at the bottom of the pay scale, there is little money left for those in middle management or supervisory positions. Today if an unemployed worker finds a job paying \$6.00 per hour he is prevented by law from taking that job (Maas, 2010). Experts have been quick to point out that this is no way to restart our struggling economy (Maas, 2010).

To get out of the current recession will likely require most workers to accept lower pay (Coy, Conlin, & Herbst, 2010). This is not possible for a large percentage of the workforce unless we repeal the mandatory minimum wage. It also does not seem that these conditions will change any time soon. Predictions for the next five to ten years is that we will continue to see small advances in pay, worsening working conditions, and little to no job security (Coy, Conlin, & Herbst, 2010). Employers are learning to be more efficient, and after the recession unemployment is likely to remain high. Even after we claw our way out of this recession the current trends of sending jobs offshore and automating jobs is likely to continue (Coy, Conlin, & Herbst, 2010). Some economists have predicted that in the next two decades almost 30% of all jobs in the U.S. may be sent offshore (Coy, Conlin, & Herbst, 2010).

Through the minimum wage law our politicians have decided that unemployed Americans are incapable of negotiating a fair wage. In doing so they are ignoring not only the needs of those workers, but the needs of our economy. Americans need jobs. Repealing the minimum wage would provide both more lower-end jobs and free up funds to hire those higher up the pay scale. The current handling of the job crisis should not come as a surprise to anyone familiar with the economics of Medicare, Social Security, or the U.S. Post Office.

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